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GENERAL
OF THE ARMY

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OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 18

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Judge Advocate General's Department

# BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XVIII

including

CM 230678 to CM 232160

(1943)

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Specification 6: In that Second Lieutenant Harry G. Leeper, Third Armored Regiment, did, at Phenix City, Alabama, on or about November 19, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Sam Freeman, a certain check in words and figures as follows, to wit:

COLUMBUS, GA. Nov. 19, 1942

THE FIRST NATIONAL BANK 64-58

Pay To The
Order Of Cash ---------- $ 25.00
COUNTER CHECK
Twenty-five oo/loo---------- DOLLARS

Lieut. H. G. Leeper,
0-395364

Harland-Atlanta

and by means thereof did fraudulently obtain from Sam Freeman the sum of Twenty-five Dollars ($25.00), he, the said Second Lieutenant Harry G. Leeper, then well knowing that he did not have and not intending that he should have sufficient funds with The First National Bank of Columbus, Georgia, for the payment of said check.

Specification 7: (Finding of not guilty.)

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

Specification 1: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, (formerly of the 37th Armored Regiment) being indebted to the Fentiman Trunk Company of San Antonio, Texas in the sum of $38.95 for merchandise purchased and services rendered, which amount became due and payable on or about February 19, 1942, did, at Brooks Field, Texas, Pine Camp, New York, and at Fort Benning, Georgia, from March 10, 1942, to December 15, 1942, dishonorably fail and neglect to pay the said debt.

Specification 2: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, (formerly of the 37th Armored Regiment) being indebted to Lauterstein's of

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



SPJGK
CM 230678

27 Mar. 1943

| | |
|---|---|
| UNITED STATES | 10th ARMORED DIVISION |
| v. | Trial by G.C.M., convened at Fort Benning, Georgia, January 19 and 20, 1943. Dismissal |
| Second Lieutenant HARRY G. LEEPER (0-395384), Cavalry. | |

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OPINION of the BOARD of REVIEW
COPP, HILL, and ANDREWS,
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. 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 Harry G. Leeper, Cavalry, Third Armored Regiment, did, at Phenix City, Alabama, on or about August 25, 1942, with intent to defraud, wrongfully and unlawfully make and utter to H. L. Freeman, a certain check, in words and figures as follows, to wit:

COLUMBUS, GA. Aug. 25, 1942 No. --------

FIRST NATIONAL BANK 64-58/6

Pay To The Order Of Cash---------- $ 5.00

Five 00/100 ---------- DOLLARS

For* Lieut. H. G. Leeper
3 A.R. 10 A.D.

and by means thereof did fraudulently obtain from H. L. Freman the sum of Five Dollars ($5.00), he, the said Second Lieutenant Harry G. Leeper, then well knowing that he did not have and not intending that he should have sufficient funds with the First National Bank of Columbus, Georgia, for the payment of said check.

Specification 3: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, did, at Columbus, Georgia, on or about September 26, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The Eight-Thirty Grill, a certain check, in words and figures as follows, to wit:

COLUMBUS, GA. Sept. 26, 19 42 No.--------

FIRST NATIONAL BANK 64-58
6

Pay To The
Order Of Cash ----------$ 15.00

Fifteen 00/100 ---------- DOLLARS

For* Lieut. H. G. Leeper
0-395384

and by means thereof did fraudulently obtain from The Eight-Thirty Grill the sum of Fifteen Dollars ($15.00), he, the said Second Lieutenant Harry G. Leeper, then well knowing that he did not have and not intending that he should have sufficient funds with The First National Bank of Columbus, Georgia, for the payment of said check.

Specification 4: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, did, at Columbus, Georgia, on or about September 26, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The Eight-Thirty Grill, a certain check, in words and figures, as follows to wit:

COLUMBUS, GA. Sept. 26 , 19 42 No. -------

FIRST NATIONAL BANK 64-58
6

Pay To The
Order of Cash ---------- $ 10.00

Ten 00/100---------- DOLLARS

For* Lieut. H. G. Leeper
0-395384

and by means thereof did fraudulently obtain from The Eight-Thirty Grill the sum of Ten Dollars ($10.00), he, the said Second Lieutenant Harry G. Leeper, then well knowing that he did not have and not intending that he should have sufficient funds with The First National Bank of Columbus, Georgia, for the payment of said check.

Specification 5: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, did, at Phenix City, Alabama, on or about November 19, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Sam Freeman, a certain check, in words and figures as follows, to wit:

COLUMBUS, GA. Nov. 19. 1942

THE FIRST NATIONAL BANK 64-58

Pay To The
Order of Cash---------- $ 15.00
COUNTER CHECK

Fifteen 00/100----------DOLLARS

Lieut. H. G. Leeper
0-395364

Harland-Atlanta

and by means thereof did fraudulently obtain from Sam Freeman the sum of Fifteen Dollars ($15.00), he the said Second Lieutenant Harry G. Leeper, then well knowing that he did not have, and not intending to have sufficient funds with The First National Bank of Columbus, Georgia, for the payment of said check.

Specification 6: In that Second Lieutenant Harry G. Leeper, Third Armored Regiment, did, at Phenix City, Alabama, on or about November 19, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Sam Freeman, a certain check in words and figures as follows, to wit:

COLUMBUS, GA. Nov. 19, 1942

THE FIRST NATIONAL BANK 64-58

Pay To The
Order Of Cash ---------- $ 25.00
COUNTER CHECK
Twenty-five 00/100---------- DOLLARS

Lieut. H. G. Leeper,
0-395364

Harland-Atlanta

and by means thereof did fraudulently obtain from Sam Freeman the sum of Twenty-five Dollars ($25.00), he, the said Second Lieutenant Harry G. Leeper, then well knowing that he did not have and not intending that he should have sufficient funds with The First National Bank of Columbus, Georgia, for the payment of said check.

Specification 7: (Finding of not guilty.)

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

Specification 1: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, (formerly of the 37th Armored Regiment) being indebted to the Fentiman Trunk Company of San Antonio, Texas in the sum of $38.95 for merchandise purchased and services rendered, which amount became due and payable on or about February 19, 1942, did, at Brooks Field, Texas, Pine Camp, New York, and at Fort Benning, Georgia, from March 10, 1942, to December 15, 1942, dishonorably fail and neglect to pay the said debt.

Specification 2: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, (formerly of the 37th Armored Regiment) being indebted to Lauterstein's of

San Antonio, Texas, in the sum of $27.70 for merchandise purchased and services rendered, which amount became due and payable on or about January 31, 1942, did, at Brooks Field, Texas, Pine Camp, New York and Fort Benning, Georgia, from March 1, 1942, to December 15, 1942, dishonorably fail and neglect to pay the said debt.

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

Specification 5: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, did, at Columbus, Georgia, on or about November 10, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Peacock Liquor Store, Columbus, Georgia, a certain check in words and figures as follows, to wit:

COLUMBUS, GA. Nov. 10 1942 No. ---------

FIRST NATIONAL BANK 64-58
6

Pay To The
Order Of Cash----------$ 10.00

Ten 00/100---------- DOLLARS

FOR Lieut. H. G. Leeper
0-395384.

and by means thereof did fraudulently obtain from Peacock Liquor Store the sum of Ten Dollars ($10.00), he, the said Second Lieutenant Harry G. Leeper, then well knowing that he did not have and not intending that he should have sufficient funds with the First National Bank of Columbus, Georgia, for the payment of said check.

Specification 6: (Finding of not guilty.)

Specification 7: In that Second Lieutenant Harry G. Leeper, Cavalry, Third Armored Regiment, (formerly of the 6th Armored Infantry Regiment and of the 37th Armored Regiment) being indebted to Levy Bros., Ind. of Louisville, Kentucky

in the sum of $48.45, more or less, for merchandise purchased, which amount was due and payable on or about July 12, 1941, did, at Fort Knox, Kentucky, Pine Camp, New York, Brooks Field, Texas, and Fort Benning, Georgia, from July 12, 1941 to December 14, 1942, dishonorably fail and neglect to pay the said debt.

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

Specification: In that Second Lieutenant Harry G. Leeper, 3rd Armored Regiment, having been duly placed in arrest at Fort Benning, Georgia, on or about December 31st, 1942, did, at Fort Benning, Georgia, on or about December 31st, 1942, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and Specifications 2,3,4,5 and 6 thereunder, of Charge II and Specifications 1,2,5, and 7 thereunder, and of Charge III and its Specification. He was found not guilty of Specifications 1 and 7, Charge I, and of Specifications 3,4 and 6, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For convenience the evidence relating to those Specifications of Charge I and II of which accused was found guilty will be divided into seven transactions.

First transaction: (Specification 7, Charge II). On October 28, 1940 and December 19, 1940, respectively, accused purchased civilian clothing including, but not limited to, a civilian tuxedo suit, two civilian suits and two overcoats from Levy Brothers Inc. of Louisville, Kentucky, for the aggregate price of $182.95 (R. 50). At the time of this purchase accused was on active duty at Fort Knox, Kentucky (R. 19; S.O. 209 Hq. 7th C.A., August 29, 1940, 201 File), where he remained until about August 20, 1941, when he was relieved from that assignment and duty at Fort Knox, and stationed at various posts outside of the state of Kentucky (201 file). He made the following payments only on this account:

| | |
|---|---|
| December 4, 1940 | $44.50 |
| July 2, 1941 | 25.00 |
| November 3, 1941 | 35.00 |
| May 13, 1942 | 10.00 |

| | |
|---|---|
| June 6, 1942 | $10.00 |
| October 8, 1942 | 10.00 |
| January 14, 1943 | 48.45 |
| TOTAL | $182.95 (R. 50) |

When this indebtedness was incurred accused was unmarried and receiving pay and allownaces of approximately $183.00 per month (Pay Adjustment Act of June 10, 1922, 42 Stat. 625). This pay was increased to about $252 per month as of the 1st day of June, 1942 (Pay Readjustment Act of June 16, 1942, Pub. Law. 607, 77th Cong.)

The creditor made several attempts to bring this indebtedness to the attention of accused by monthly statements and eight personal letters (R. 50). Accused "neither verbally or in writing expressed any intention or willingness on his part to pay this indebtedness" (R. 50).

Second Transaction: (Specification 2, Charge II) On January 29, 1942, accused purchased at Lauterstein's of San Antonio, Texas, certain items of military uniform including a trench coat, officer's dress cap, shoes, hose and belt, for the aggregate sum of $52.70 (R. 54, 55). The following payments only were made on this account:

| | | |
|---|---|---|
| June 20, 1942 | $15.00 | |
| October 8, 1942 | 10.00 | |
| January 14, 1943 | 27.70 | (R. 55). |
| TOTAL | 52.70 | |

It was stipulated that if Maude Woodard, bookkeeper and credit manager of the creditor, were present in court she would testify,

> "We have mailed him several statements and letters dated March 11, 1942, April 13, 1942, July 18, 1942, September 18, 1942, November 18, 1942. Between June 1942 and December 15, 1942, we received one check in the amount of $10.00." (R. 55)

At the time of the purchase accused's bank account showed a balance of $.08 but on the 9th day of February, following a deposit of $225.60, the balance was increased to $213.85. The bank account of the accused showed balances during the remainder of the month of February, 1942, on the 10th, $203.85, 11th, $203.60, 12th,

$198.60, 13th, $183.60, 17th, $163.16, 18th, $98.36, 19th, $59.55, 20th, $49.55, 21st, $34.55 and $9.24, 28th, $178.99 (Pros. Ex. 9). It was during this month of February, 1942, that accused was married (R. 90).

Third Transaction: (Specification 1, Charge II). In the month of February, 1942, accused purchased of Fentiman Trunk Company of San Antonio, Texas,

| | | |
|---|---|---|
| 1 fitted zipper bag, | $35.00 | |
| 1 bill fold | 3.95 | |
| TOTAL | $38.95 | (R. 49). |

Accused paid nothing on the purchase price at that time and carried the merchandise away (R. 49). Nothing was paid on the account thereafter until January 15, 1943, when the account was paid in full (R. 50). It was stipulated that Terry A. Randall, credit manager of creditor, if personally present, would testify that six statements and four letters were mailed to accused regarding the account (R. 49). "Lt. Leeper has never expressed, either verbally or in writing, any intention or willingness to pay the amount of this account". (R. 49) Accused had a commercial bank account, which showed a balance to his credit that varied from a high on February 9, 1942 of $213.85 to a low of $9.24 just before February 28, 1942, on which date it was increased to $178.99 (Pros. Ex. 9).

On or about March 1, 1942 (R. 56), Brigadier General Albert Cowper Smith, 14th Armored Division, then colonel, commanding 37th Armored Regiment, of which accused was at that time a member, called accused to his headquarters and discussed with him the indebtedness which accused had contracted principally in San Antonio, Texas, and Fort Knox, Kentucky, and about which General Smith had received numerous complaining letters from the creditors (R. 55). It was stipulated that if General Smith were present he would testify,

> "At that time, he (accused) seemed amazed that he owed so much and was very desirous of satisfying his creditors. Lt. Leeper stated that he would do anything I suggested to get out of debt. He acknowledged all of the indebtedness that I had on file and later brought in additional unpaid bills to a total amount of about $800.00. He stated that he thought he had enough money on deposit to cover his outstanding checks". (R. 55)

After consulting the Division Judge Advocate and with the consent of accused, arrangements were made for accused to turn over one-half of his pay each month to the regimental adjutant who undertook to prorate the amount to accused's various creditors (R. 56). This arrangement was carried into effect and continued for four months. By the prorated payments made under that plan the aggregate indebted-

ness was reduced from about $800.00 to about $400.00 (R. 56). Witness further testfied:

> "I do not believe that Lieutenant Leeper made an honest effort to settle these bills. Also, he seemed unable to do so at the time. He seemed to be unable to handle his own finances at that time. I took the action that I did out of consideration for Lieutenant Leeper's youth and his apparent financial irresponsibility hoping that by the time his finances were in shape, he would have learned his lesson." (R. 56)

At the end of four months of prorating one-half of accused's pay, he was notified by General Smith on or about June 1, 1942, that accused would take over his own finances in the future as the reduced amount of indebtedness was deemed within accused's ability to pay (R. 56). It was arranged that accused should sell his automobile and apply the proceeds of sale on his debts (R. 56).

Fourth Transaction: (Specification 2, Charge I). On August 25, 1942, accused made and delivered to H. L. Freeman, at Phenix City, Alabama, his check for $5.00 payable to cash drawn on the First National Bank, Columbus, Georgia, and received five dollars in cash for it from H. L. Freeman (R. 27, 28, 29). At the time of the negotiation of this check accused's account with the drawee bank was closed, and the balance was zero (R. 61). There had been a balance of $21.25 to accused's credit in the account three days before the making of this check, but that balance had been extinguished by accused's withdrawal check of August 22, 1942, in the sum of $21.25 (R. 62; Pros. Ex. 9). The check was presented to the drawee bank on August 28, 1942 (Pros. Ex 3; R. 61), but was dishonored (R. 27, 28; Pros. Ex. 3) and returned to H. L. Freeman with the attached notation "Returned by First National Bank, Columbus, Georgia, Reason checked. Account Closed * * *". (R. 61; Pros. Ex. 3) H. L. Freeman did not contact accused as he did not have accused's address or know how to reach him (R. 27). He was reimbursed by payment of $5.00 on January 13, 1943 (R. 28).

Fifth Transaction: (Specifications 3 and 4, Charge I)

On September 26, 1942, accused cashed at the "Eight-Thirty Grill", Columbus, Georgia, two checks for $15 and $10, respectively, drawn by him upon the First National Bank, Columbus, Georgia, for which he received from the "Eight-Thirty Grill" the aggregate sum of $25 (R. 40, 41, 42). These checks when presented to the drawee

bank, were dishonored and returned to the "Eight-Thirty Grill" with the notation attached to each: "Returned by First National Bank, Columbus, Georgia. Reason checked * * * Not sufficient Funds * * *". (R. 42, Pros. Ex. 6, 7) At the time accused cashed the checks, his balance with the First National Bank, Columbus, Georgia, was $21.75, but on September 28, it was reduced to $1.00 by the clearance of two checks totaling $20.75, and was not increased thereafter until September 30, 1942 (R. 64; Pros. Ex. 9). The proprietors of the "Eight-Thirty Grill" made vain efforts to contact accused (R. 40) and were finally reimbursed in full on January 15, 1943 (R. 42).

Colonel Thomas M. Brinkley, 3rd Armored Regiment, accused's regimental commander received in August or September some official communications as to accused's indebtedness and called him to his headquarters to discuss the matter with him. Accused furnished Colonel Brinkley with a list of creditors, which corresponded with the communications he had received. (R. 16). A plan was arranged and agreed to by which accused would deliver $50 per month of his pay to the adjutant to be distributed in installments of $10 each per month to five of accused's creditors. (R. 16, 17). These creditors were Saul Frank of Houston Street, San Antonio, Texas, Mission Jewelers, San Antonio, Texas, Lauterstein's Inc., San Antonio, Texas, Levy Bros. Inc., Louisville, Kentucky, and Albach Jewelry Company, San Antonio, Texas (R. 19). The adjutant wrote letters to these creditors in which he outlined the plan of liquidating their respective claims (R. 16). Accused deposited with the adjutant on October 1, 1942, the sum of $50 for October distribution under the plan and the same was remitted by money orders to the firms involved (R. 16, 18). Accused promised to deliver to the adjutant $50 each month for like distribution and application (R. 17), but the record indicated no further contributions by accused or installments to the creditors to apply on their accounts after the October payment (R. 54, 50, 16). Col. Brinkley, as a further aid to the accused, granted him a leave of absence so that he could take his family home, give up the house maintained in Columbus, and save the added expenses involved (R. 17).

Sixth Transaction: (Specification 5, Charge II). On November 10, 1942, accused cashed a check for $10, payable to cash, drawn upon the First National Bank, Columbus, Georgia, at the Peacock Liquor Store, Columbus, Georgia, and received $10 in cash for it (R. 30). At the time of cashing the check accused said to David Raab, manager of the store that the check was good (R. 31). The check was presented to and dishonored by the drawee bank on

November 12, 1942, (R. 31, Pros. Ex. 4). The check was returned by the bank to Peacock Liquor Store with notice of dishonor attached, reading "Returned by First National Bank, Columbus, Ga. Reason checked * * * Not Sufficient Funds * * *". David Raab testified that he called the accused three or four times about the check (R. 32) but accused said "I'll see you next week or I'll have a check sent to you the following day. Other times he was out." (R. 32) This account was paid in full about January 14, 1943 (R. 31). At the time accused made and cashed this check he had an overdraft at the bank, which overdraft had existed continuously since October 5, 1942, and continued until December 30, 1942, when the overdraft was paid in the exact amount thereof, $19.74. At that time the account was closed and was not at any time thereafter reopened or a deposit made therein (R. 62; Pros Ex. 9).

Seventh Transaction: (Specifications 5 and 6, Charge I). On November 19, 1942, at which time his account was overdrawn (R. 61; Pros. Ex. 9), accused drew two checks on The First National Bank, Columbus, Georgia, for the sums of $15 and $25, respectively, dated November 19, 1942, payable to cash, and cashed them with and received $40 from Club Matag of Phenix City, Alabama (R. 24). On November 20, 1942, these checks were presented to the drawee bank for payment, and were dishonored, payment was refused and notice of reason for dishonor attached to the returned checks indicating "not sufficient funds" (R. 25, 61; Pros. Ex. 1, 2).

On December 31, 1942, at 5:30 p.m. Colonel Thomas M. Brinkley "called Lieutenant Leeper in and placed him officially in arrest" (R. 14, 20). Accused previously had been placed in arrest on November 1, 1942, but had been released later in the month to allow him to leave Fort Benning (R. 20). Colonel Brinkley testfied, "I explained very thoroughly the limits of his arrest and Lieutenant Leeper told me that he fully understood his status" (R. 14, 20). Those limits were "the quarters in which he lived, his Company area, and wherever his duty carried him" (R. 19). The post exchange was off limits (R. 20), and if it was necessary for him to go beyond the limits of his arrest, he was required to report to the adjutant for permission (R. 20). Colonel Brinkley saw accused dancing at the officers' mess of the 10th Armored Division between 10 p.m. and midnight December 31, 1942 (R. 14). Second Lieutenant Howard A. Vanderbogart, 10th Armored Division, saw accused at the 10th Armored Division Officers' Mess at 2 a.m., January 1, 1943 (R. 57). First Lieutenant William A. Hendrickson, Jr., 3rd Armored Regiment, 10th Armored Division, was with accused on December 31, 1942, at 11 p.m., at bachelor officers' quarters and from midnight to 1 a.m. January 1, 1943, at the Division Officers' Mess Club (R. 58, 59), and accompanied accused back to his quarters after that (R. 59).

On behalf of the accused, First Lieutenant Robert C. Tilson, 3rd Armored Regiment, testified that he was with accused December 31, 1942, from 8:30 to 11 p.m., in quarters, building 3203 (R. 80, 82) and from 11 p.m. to 2 a.m., at the 10th Armored Division Officers' Club where accused indicated by his actions and talk that he was under the influence of liquor (R. 81). The witness testified accused was drinking "either hard liquor or bourbon or some other whiskey" (R. 81) and had consumed three or four drinks before midnight, but that he knew where he was going when he went to the club (R. 81, 82).

The accused elected to be sworn as a witness and testified:

"I was originally in debt in the sum of $850 and to go even further back I admit the guilt to the extent that I did let myself run into debt and I attribute that fact to the fact that I came right out of school on active duty not knowing the value of a dollar and I did get in debt, but not with any intent whatsoever of fraud or anything dishonorable, or no intention of not paying it. The climax of this condition came about as verified by General Smith of the 37th Armored Regiment of March of the past year. I was so much in debt that I couldn't handle it so General Smith called me in and helped me make arrangements to pay my debts which I was more than happy to do. Everything went along fine. I paid off half of the sum total of what I owed, $850, and brought it down to $400, and at that time I was married in February, and this was in March these things came about. My wife became ill and has been ill the last eight or nine months due to pregnancy. I have a four and one-half week old baby. The doctor bills and hospital bills for actual childbirth, plus the bills prior to that for examination, etc., has been the prime reason why I have not been able to pay. I have evidence here showing that my wife had a baby on December 17th. I have to go through the whole thing as it was all in sequence. I have never lived with my step-father and mother. I have a grandfather who is ill and is in a hospital in Wadsworth, Kansas. He was a West Point graduate and a commissioned officer. I am bringing this out to show conditions. He has informed me that he is suffering from a heart disease with decomposition and it is not curable. It gets worse. This leaves my grandmother by herself and it is winter up north and I have sent her money. They have an income, a pension, retired pay, but it is not in abundance enough to pay an exceptional sum. I had no place to get the money to pay the bills with the exception of my mother and

> step-father and it is through pride that all of this came about. Because, if I had gone ahead and got the money from them I would have received it and these bills would have been paid and would never have come before the court. But I hesitated to do that cause I had never got along with them. In desperation I did this and that is where I got the money to pay these bills. After October 24th, that was the time I was confined the first time by Colonel Brinkley, I performed duties but was restricted to quarters after hours from October 24th until about the middle of November. I was then released from confinement because the charges were sent back and he deemed it not necessary to hold me in confinement but I got an emergency furlough to go home to Texas to my wife and when I returned I was again verbally placed in arrest pending new charges and on December 31, 1942, New Year's Eve afternoon, Colonel Brinkley put me in arrest in quarters and that is the only day and night I did not perform duty. That made three months under charges; with the worry on all fronts, I was getting pretty disappointed. I became intoxicated on the night of the 31st and I went to the Club with no forethought and returned at two o'clock and went to my room. In none of these bills has there been any intent to defraud. They have all been paid and made good with the exception of the Federal Services Finance account." (R. 90,91).

He testified further that he instructed the Finance Office to send his pay checks to the bank at Columbus, Georgia, where they were regularly deposited to his credit on the 2nd or 3rd of the month (R. 91).

> "In regard to these checks, I will take them in chronological order. These checks were written by me. There is no doubt about that. But the charges read that there was not money or intention of money being in the bank when these checks were written and when they were returned marked insufficient funds there was money in the bank when I wrote them or money shortly thereafter. I do admit very poor management in every respect. I am guilty of getting myself in debt and I am guilty of mismanaging my banking account but I did not make any attempt to defraud or any attempt at dishonesty. I would like

> to make one final statement before I am through and that is, regardless of the outcome of the trial, I don't want to bedeprived of the right to fight for my country. I don't think I have done anything to warrant that." (R. 92)

He testified that he made no payment on account to the Fentiman Trunk Co. (R. 94) but did to the other creditors (R. 94). He promised Colonel Smith that he would make monthly payments on his accounts until they were paid up (R. 94). He made one such payment after having discussed the matter with Colonel Brinkley and after having made the promise to him (R. 94). When Colonel Smith released him from his obligation to deposit with the adjutant one-half of his pay for distribution to his creditors he expected to pay the remainder of his debts from the proceeds of the sale of his automobile and from other sources (R. 95). He promised to pay David Raab of Peacock Liquor Store as soon as he could get money, but did not get the money and did not pay him until "recently" (R. 95). He tried to pay the checks out of his pay after notice of dishonor but could not do so. Consequently he wired his mother and stepfather for the money (R. 95). He made only one payment between June 1942, and January 15, 1943, and that was after receipt of his September, 1942 pay (R. 95). He discontinued sending his pay checks to the bank after October, 1942. On October 3 he withdrew his bank balance of $64.06 to pay the expenses of taking his wife home (R.96). He made no deposits in the bank between September 30, 1942, and December 30, 1942 (R. 97). During that period, on November 19, 1942, he cashed two checks at the Matag Club (R. 97). He testified,

> "Sir the whole truth is that I was intoxicated. Those checks were written at the Matag Club. I am guilty of doing it. There was no forethought. In fact, I didn't think at all. It was a question of despondency, gambling, drinking and the writing of these checks." (R. 97)

It was stipulated that K. P. Richardson, Superintendent of Fort Benning branch of the United States Post Office at Columbus, Georgia would testify that the following United States money orders were purchased by accused on January 13, 1943 (R. 97):

| | | | |
|---|---|---|---|
| 354705 | to | Levy Brothers of Louisville, Kentucky, | $48.45 |
| 354706 | to | Peacock Liquor Store | 10.00 |
| 354707 | to | H. Albach | 90.09 |
| 354708 | to | Lauderstein Clothing Co. | 27.70 |
| 354709 | to | Fentiman Trunk Co., San Antonio, Texas | 38.95 |
| 354710 | to | Sam Freeman, Phenix City | 40.00 |

| | | | |
|---|---|---|---|
| 354711 | to | Eight-thirty Grill | $25.00 |
| 354712 | to | H. L. Freeman, Phenix City | 5.00 |
| 354713 | to | Tenth Armored Division Officers' Mess Club | 8.00 |
| | | Total | 293.19 |

4. The evidence clearly establishes that at the times and places specified in Specifications 1, 2 and 7, Charge II, accused purchased and carried away the merchandise described and prior to the preferring of the charges, failed and neglected to pay for it to the extent alleged therein. At the times of those purchases accused had the unquestioned ability to pay for the goods out of his salary as an officer of the Army of the United States, and from the bank account to which his monthly pay checks were credited.

The evidence is clear and convincing and practically without conflict that at the times and places, and for the considerations alleged in Specifications 2, 3, 4, 5 and 6, Charge I and Specification 5 Charge II, accused made and uttered the checks described therein all of which were dishonored because accused's account was overdrawn, closed or without sufficient funds. That accused was aware of the conditions of his bank account is indicated by the fact that he deliberately closed his account on two occasions shortly prior to uttering worthless checks and at other times had notice of his overdrafts and previous check dishonors.

When transferred away from Fort Knox, in disregard of a creditor's rights he left unpaid and without provision for its liquidation a substantial debt contracted at Louisville, Kentucky. Until the preferring of these charges he ignored the repeated monthly statements, letters and personal communications from his creditors, one of whom testified that accused "neither verbally or in writing expressed any intention or willingness on his part to pay this indebtedness." His creditors reacted to accused's utter indifference to his obligations by communicating with and complaining to his regimental commander. Brigadier General Smith's and Colonel Brinkley's kindly and helpful plans for liquidating these debts by monthly contributions from accused's pay were effective only so long as those officers continued to exercise control over distribution of payments to the creditors. No sooner was that pressure withdrawn than accused resorted to his former habits of financial irresponsibility and created new debts under dishonorable circumstances to the extent of partial nullification of the benefits derived from his supervised installment payments. General Smith, who was instrumental in aiding accused in reducing his aggregate indebtedness from $800 to $400 in four months, was actuated by accused's "youth and apparent financial irresponsibility". Even he was forced, regretfully, to conclude, "I do not believe that Lieutenant Leeper made an honest effort to settle these bills." Thus

were demonstrated accused's ability to pay his just debts by monthly installments and his unwillingness voluntarily to do so. These charges and specifications were preferred, verified, and referred to an investigating officer on January 12, 1943, were investigated and reported thereon by the investigating officer, on January 13, 1943, and referred to the trial judge advocate for trial by general court-martial and a copy thereof served on accused on January 14, 1943. It was in the midst of these proceedings that accused purchased nine United States postal money orders and paid his creditors in full.

Upon the evidence, the court was fully justified in concluding and finding that accused issued and negotiated the worthless checks in the manner as alleged in Specifications 2, 3, 4, 5, and 6, Charge I and Specification 5, Charge II, and his conduct in doing so was unbecoming an officer and a gentleman within the meaning of Article of War 95. The court was further justified in finding that the accused did in fact have financial resources with which to make payments on each of the debts described in Specifications 1, 2, and 7, Charge II, and that the circumstances were dishonorable under which he failed and neglected to pay prior to the preferring of these charges in violation of Article of War 96.

The court was warranted in finding the accused guilty of breach of arrest at the time and place as alleged in violation of the 69th Article of War.

5. War Department records show that accused is 24 years of age. He graduated from Excelsior Springs High School, Missouri, in 1937. He attended Chillicothe Business College, Missouri Valley College and William Jewell College for a total of two years but did not graduate from any of those institutions. He is a civilian pilot, C.A.A., commercial physical rating. He was appointed a second lieutenant, Infantry, Reserve, on June 6, 1940, and ordered to active duty on September 8, 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 and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Articles of War 96 and 69.

Andrew J. Copp Jr., Judge Advocate.

Wm Wannenwill, Judge Advocate.

Esther R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 7 1943 - 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 Harry G. Leeper (O-395384), Cavalry.

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 thereof. 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 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. to President
Incl. 3 - Form of Ex. action.

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(Sentence confirmed. G.C.M.O. 102, 12 May 1943)

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



SPJGH
CM 230692

MAR 16 1943

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| UNITED STATES | ) | 4TH SERVICE COMMAND |
| v. | ) | Trial by G.C.M., convened at Camp Wheeler, Georgia, January 18, 1943. Dismissal. |
| Second Lieutenant EUGENE R. LE CLERE (0-436917), Infantry. | ) | |

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, 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 93rd Article of War.

Specification: In that Second Lieutenant EUGENE R. LE CLERE, Infantry, Company "B" Sixth Training Battalion, Camp Wheeler, Georgia, did at Camp Wheeler, Georgia on or about November 9, 1942, feloniously take, steal, and carry away a billfold value about $2.50 and about $108.00 lawful money of the United States, the property of Second Lieutenant JOHN H. BAKER, JR., Infantry, Company "C" Sixth Training Battalion, Camp Wheeler, Georgia.

He pleaded not guilty to the Specification and to the Charge. He was found guilty of the Specification and of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, and forwarded the record of trial under the 48th Article of War.

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

On the evening of Saturday, November 7, 1942, Second Lieutenant John H. Baker, Jr. gave to his roommate, the accused, his wallet containing about $107 to hold while he took a shower. The accused returned the

billfold with the contents intact. On Sunday evening, November 8, when Baker went, after supper, to have his hair cut, he had $107.95 in his billfold, ten $10 bills, six $1 bills, and $1.95 in change. After Baker returned from the barber shop, Baker and accused were in their room continuously until Baker went to bed at about 11 o'clock. Several hours before going to bed he had, in the presence of accused, put his billfold, with the money in it, on the shelf of his trunk in their room. The trunk was unlocked, and the cover was up. On the morning of November 9, both were required to stand reveille. The accused called Baker, and left the room fully dressed. Before going to reveille, and again immediately after reveille, Baker looked for his billfold, but was unable to find it. He remembered leaving the billfold in his trunk, and, as the contents of the trunk were disarranged, he became alarmed. When he called the accused on the telephone, the accused denied having seen the billfold, but returned to the room on Baker's request to help search for it. The accused searched through the contents of the trunk and room, but did not find the billfold. The accused again denied having seen the billfold, and said that his own wallet containing one dollar also was missing. The accused had previously stated to Baker that he lacked funds to meet his bills, which were due on November 10. Baker next saw the billfold in the possession of Major Woodward in the battalion executive officer's room at about 9 o'clock on the morning of November 9, 1942. It then contained $1.95 in change and personal papers, but the $106 in bills was missing. The value of the billfold was shown to be about $1.50 (R. 6-11).

The accused went from his room to the latrine, asked the battalion executive officer, Major James C. Woodward, Jr., to whom a robbery should be reported, and stated that his pocketbook and that of Baker had been taken. At about 7:15 a.m., Baker and the accused went to battalion headquarters and described their losses to Major Woodward, who ordered a search of the area. At the corner of the battalion recreation hall two billfolds were found on the ground, which were identified, respectively by Baker and the accused as their property.

During the afternoon of November 9, the accused reported to his battalion commander, Lieutenant Colonel Thomas H. Tracey, that he was having financial difficulties due to the fact that he had lost his pocketbook, and had not learned that his pay check had been deposited in his bank in Iowa. He was advised that he must pay his mess, battalion club, and camp officers' club bills by the tenth of the month, but that his quartermaster bill could wait. The accused stated that he could pay all except the quartermaster's bill (R. 12-13).

In an investigation of the larceny, First Lieutenant Russel A. Freas, on November 11, 1942, read the 24th Article of War to the accused,

explained it to him, and informed him of the official nature of the investigation. The accused then stated that he took the money on the morning of November 9, and on the way to reveille threw the wallets outside the recreation hall in order to get rid of them. The accused turned over to Lieutenant Freas several sums of money aggregating about $86 (R 14-16).

4. The accused testified that he was born and reared in Manchester, Iowa, where he attended high school. He was graduated from Coe College, Cedar Rapids, and had entered the military service June 1, 1942. He was stationed at Fort Des Moines, Camp Wheeler, Fort Benning Motor Maintenance School for three months, and upon his graduation returned to Camp Wheeler. He and Lieutenant Baker had become quite intimate prior to November 8, 1942. He told Baker that he had overdrawn his bank account, and was unable to meet his outstanding bills. Baker complained of not being "any too flushed", but accused knew that he had some money and he had said that he was going to send most of it to his mother. On Sunday evening the accused and several others became intoxicated. After he and Baker had gone to bed about 11 o'clock he pondered in the dark over the irritation of his fiancé at his indecision over a definite date for their marriage. "Finance" was the biggest obstacle. He took several more drinks from the bottle beside his bed, thought of Baker's money, and concluded that it would be enough to cover some of his immediate financial difficulties. Following that line of reasoning, he reached out his hand, took Baker's pocketbook, placed the pocketbook in his bed, and went to sleep. The next morning he was confused, and was wondering how he was going to replace the money. After reveille Baker called him and he "did not have the guts" to tell Baker the truth when Baker asked about the wallet. Accused told Baker that his pocketbook was missing, in order to create the impression that the theft was committed by an outside party and to keep suspicion away from him until he could devise some plan to replace the wallet. He threw both wallets on the ground outside the recreation hall, with this idea in view. After searching the room with Baker, he spoke to Major Woodward in the latrine, and, as instructed, went to battalion headquarters with Baker to report their losses. Later they were both called to battalion headquarters to identify their pocketbooks. In the afternoon he told Colonel Tracey of his financial difficulties, and was advised to pay his bills. He went over to mess at noon on November 10, realized it was his last chance to pay the mess bill, "and without thinking, or thinking incorrectly, whatever the case may be", paid the bill with cash, after admitting the day before that he had no cash. He also paid his bill at the officers' club in cash. When Lieutenant Freas and Major Woodward interviewed him on November 11, he knew from their remarks and from their tone that he was under suspicion, and went up to his room with Lieutenant Freas and made a confession (R. 18-20).

Lieutenant Colonel Thomas H. Tracey, the battalion commander of accused, testified that he knew the family of the accused, had always lived in the same community with them, and had known the accused from boyhood. "The reputation of the family is very good." Colonel Tracey never knew of the accused being in any trouble there, and had never heard the reputation of the accused for truth and veracity questioned (R. 16-17).

5. The evidence shows that the billfold of Second Lieutenant John H. Baker, Jr., of a value of about $1.50, containing $106 in bills and $1.95 in change was removed from the tray of his trunk in the bedroom jointly occupied with accused, on the night of June 8, 1942. The accused knew that Baker had the money, was himself without funds, and was seriously pressed for money to pay maturing obligations at the mess, officers' clubs, as well as an indebtedness to the quartermaster. In addition to these financial claims upon him, he was anxious to get married, and his fiance was insisting upon an early determination of the date of their wedding. The accused had no cash before the larceny. The cash paid on his debts plus the amount returned to Lieutenant Freas is substantially the amount that was in the stolen billfold. The accused had confessed, and again admitted in his testimony the unauthorized taking of the billfold and money.

The proof clearly shows the taking and carrying away by trespass of the billfold and money, which he knew to be the property of his roommate, with the intent to deprive the owner permanently of the property therein.

After his confession, the accused returned all of the money, except about $20 which he had spent in the payment of his bills.

6. Careful consideration has been given to a letter to The Adjutant General from Representative Thomas E. Martin, inclosing a letter from the parents of accused, and to, a letter to the Acting Judge Advocate General from the mother of accused, inclosing a copy of a letter which she received from the accused.

7. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Infantry-Reserve from R.O.T.C., May 25, 1942; extended active duty June 1, 1942.

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 and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of the 93rd Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 230692 1st Ind.

War Department, J.A.G.O., MAR 19 1943 - 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 Eugene R. Le Clere (0-436917), 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 and the sentence, and to warrant confirmation of the sentence.

The accused stated that he took the money after thinking of certain bills which had to be paid at once, and reasoning that the hundred dollars added to the pay of a second lieutenant with a dependent would give him additional funds in case of an eventuality upon his marriage. Restitution was made except for about $20, which he used in paying certain bills.

In view of the moral turpitude involved in stealing money from his roommate, and in falsely stating that some money of his own was also stolen in order to divert suspicion from himself, I recommend that the sentence to dismissal be confirmed and ordered executed.

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 that recommendation.

Myron C. Cramer

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

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

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(Sentence confirmed. G.C.M.O. 77, 2 Apr 1943)

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



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:M 230708

FEB 19 1943

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| UNITED STATES | ) | ANTIAIRCRAFT ARTILLERY COMMAND<br>EASTERN DEFENSE COMMAND |
| v. | ) | Trial by G.C.M., convened at Portsmouth, Virginia, December 21, 1942. Dishonorable discharge (suspended), and confinement for six (6) months. Detention and Rehabilitation Center, Camp Pickett, Virginia. |
| Private NED J. ARGENBRIGHT (33045640), Battery E, 74th Coast Artillery (AA). | ) | |

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, 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 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 Sixty-first Article of War.

Specification: In that Private Ned J. Argenbright, Battery E, Seventy Fourth Coast Artillery (AA), A. P. Hill Military Reservation, Fredericksburg, Virginia, did, without proper leave, absent himself from his station at A. P. Hill Military Reservation, Fredericksburg, Virginia, from about 0700 December 1, 1942, to about 2350 December 4, 1942.

The accused pleaded not guilty to, and was found guilty of the Charge

and Specification. Evidence was introduced of four previous convictions. 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. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of dishonorable discharge, reduced the period of confinement to six months, and designated the Detention and Rehabilitation Center, Camp Pickett, Virginia, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 10, Headquarters Antiaircraft Artillery Command, Eastern Defense Command, January 31, 1943.

3. The evidence for the prosecution discloses that on the morning of December 1, 1942, the accused asked his battery commander, Captain William L. Farrar, Battery E, 74th Coast Artillery, for a pass, which request was refused. There was introduced in evidence an extract copy of the morning report of the organization of the accused showing the accused from duty to A.W.O.L. at 0700, December 1, 1942, and from A.W.O.L. to duty at 2350, December 4, 1942(R. 3, 4; Ex. "A").

4. The defense offered no evidence.

5. The foregoing evidence clearly establishes the unauthorized absence of the accused as alleged, and supports the findings of guilty.

6. The only question presented by the record of trial is the legality of the sentence as approved by the reviewing authority, to-wit: dishonorable discharge, total forfeitures, and confinement at hard labor for six months. It is evident that the court in adjudging the sentence, and the reviewing authority in his action, had in mind Executive Order No. 9267, November 9, 1942, wherein the President suspended until further order the maximum limitations of punishments for violation of Article of War 61. The Executive Order provides -

> "By virtue of the authority vested in me by Article of War 45, Chapter II, act of June 4, 1920, 41 Stat. 759, 796, and as President of the United States, I hereby suspend until further order, as to offenses committed <u>after the effective date of this order</u>, the limitations prescribed by the Table of Maximum Punishments, paragraph 104c of the Manual for Courts-Martial, United States Army, 1928, upon punishments for absence without leave in violation of Article of War 61.
>
> "This order shall become effective on December 1, 1942.
>
> Franklin D. Roosevelt.
>
> "The White House
> November 4, 1942."
>
> (underscoring supplied).

The above order is not applicable to offenses committed on or before the effective date of the Executive Order, December 1, 1942, but only to offenses committed after the effective date. The language of the order is clear and unmistakable. Moreover, Section III, Circular 9, War Department, January 5, 1943, expressly provides in part:

> "3. Executive Order No. 9267 applies to offenses committed after its effective date, December 1, 1942. Absence without leave is not a continuous offense, and in order to come within the application of the Executive Order, such absence without leave must originate on or subsequent to December 2, 1942".

The initial absence without leave in this case occurred on December 1, 1942, the day prior to the effective date of the Executive Order. It follows that the punishment in this case is limited by the tables of maximum punishments under which the maximum punishment for absence without leave for four days is confinement at hard labor for twelve days and forfeiture of eight days' pay (par. 104c, M.C.M., 1928). The approved sentence - forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months - is excessive and illegal.

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 of the Charge and the Specification thereunder, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for twelve days and forfeiture of $13.33 of his pay.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 230708 1st Ind.

War Department, J.A.G.O., FEB 22 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Ned J. Argenbright (33045640), Battery E, 74th Coast Artillery (AA).

2. I concur in the opinion of the Board of Review, and for the reasons stated therein, recommend that so much of the sentence as is in excess of confinement at hard labor for twelve days and forfeiture of $13.33 pay be vacated, and that all rights, privileges, and property of which accused has been deprived by virtue of that part of the sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinabove made, should it meet with your approval.

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

2 Incls.
Incl.1-Record of trial.
Incl.2-Form of action for sig.Sec.of War.

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(So much of sentence as in excess of confinement at hard labor for twelve days and forfeiture of $13.33 pay vacated, by order of the Secretary of War. G.C.M.O. 30, 10 Mar 1943)

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

SPJGK
CM 230736

MAR 1 9 1943

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| UNITED STATES | ) | PANAMA CANAL DEPARTMENT |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Fort Clayton, Canal Zone, January 18, 1943. Dismissal. |
| | ) | |
| First Lieutenant JAMES W. DELBROOK (O-399689), Ordnance Department. | ) | |

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OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates

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

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

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

Specification 1: In that First Lieutenant JAMES W. DELBROOK, Ordnance Department, did at the Post of Corozal, Canal Zone, during the months of April, May, and June, 1942, to the prejudice of good order and military discipline, borrow the sum of $470.00 from Technician 4th Grade Joseph J. Remus, Ordnance Department.

Specification 2: In that First Lieutenant JAMES W. DELBROOK, Ordnance Department, did at the post of Ft. Kobbe, Canal Zone, on or about September 7, 1942, to the prejudice of good order and military discipline, borrow the sum of $400.00 from Master Sergeant Martin L. Lefler, Ordnance Department.

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

Specification 1: In that First Lieutenant JAMES W. DELBROOK, Ordnance Department, being on or about May 7, 1942, indebted to Officers' Mess, 158th Infantry, in the sum of $52.65 as a balance due for mess bills for himself and for his guests, and having failed without due cause to liquidate said indebtedness, and having on or about October 19, 1942, promised in writing to the Panama Canal Department Ordnance Officer that such indebtedness would be liquidated by the fifteenth of next month, did, without due cause at Post of Corozal, Canal Zone, on or about November 15, 1942, dishonorably fail to keep said promise.

Specification 2: (Finding of not guilty.)

Specification 3: In that First Lieutenant JAMES W. DELBROOK, Ordnance Department, having during the months of April, May, and June, 1942, become indebted to Technician 4th Grade Joseph J. Remus, in the sum of $470.00 for money borrowed, and having failed without due cause to liquidate said indebtedness, and having on or about September 6, 1942, promised Major Charles L. Reed, Ordnance Department, Post of Corozal, Canal Zone, that he would pay on such indebtedness the sum of $25.00 for the first succeeding two months, and the sum of $50.00 per month thereafter until the indebtedness was liquidated, first payment to be made on October 1, 1942, did without due cause, at Post of Corozal, Canal Zone, on or about October 1, 1942, dishonorably fail to keep said promise.

Specification 4: In that First Lieutenant JAMES W. DELBROOK, Ordnance Department, having become indebted to various persons, organizations, and a firm in the approximate sum of $1,000.00 for money borrowed, a mess bill, and merchandise, and having failed without due cause to liquidate said indebtedness and having on or about November 5, 1942, orally promised the Commanding Officer, Post of Corozal, Canal Zone, that he would turn over to him the sum of $100.00 per month beginning December 1, 1942, for payment pro rata upon his indebtedness, until said indebtedness was paid in full, which

promise was reduced to writing on or about November 20, 1942, did without due cause at Post of Corozal, Canal Zone, on or about December 1, 1942, dishonorably fail to keep said promise.

Specification 5: (Finding of not guilty.)

Specification 6: In that First Lieutenant JAMES W. DELBROOK, Ordnance Department, did at Post of Corozal, Canal Zone, on or about October 14, 1942, with intent to deceive Major Herbert W. Wurtzler, Ordnance Department, who was then engaged in investigating the indebtedness of him, the said First Lieutenant James W. Delbrook, Ordnance Department, officially state to the said Major Herbert W. Wurtzler, Ordnance Department, "I have no further obligations except the current month's bills", or words to that effect, which statement was known by the said First Lieutenant James W. Delbrook, Ordnance Department, to be untrue.

Specification 7: In that First Lieutenant JAMES W. DELBROOK, Ordnance Department, did at Post of Corozal, Canal Zone, on or about October 20, 1942, with intent to deceive Major Charles K. Allen, Ordnance Department, who was then engaged in investigating the indebtedness of him, the said First Lieutenant James W. Delbrook, Ordnance Department, officially state to the said Major Charles K. Allen, Ordnance Department, "I have no other debts, only the ones previously mentioned", or words to that effect, which statement was known by the said First Lieutenant James W. Delbrook, Ordnance Department, to be untrue.

Specification 8: In that First Lieutenant JAMES W. DELBROOK, Ordnance Department, did at Post of Corozal, Canal Zone, on or about November 20, 1942, with intent to deceive the Commanding Officer, Post of Corozal, who was then engaged in investigating the indebtedness of him, the said First Lieutenant James W. Delbrook, Ordnance Department, officially state to the said Commanding Officer, Post of Corozal, "I do not have any other indebtedness", or words to that effect, which statement was known by the said First Lieutenant James W. Delbrook, Ordnance Department, to be untrue.

Specification 9: (Finding of not guilty.)

Specification 10: (Finding of not guilty.)

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specifications, guilty of Charge II and Specifications 1, 3, 4, 6, 7 and 8 thereunder, and not guilty of Specifications 2, 5, 9 and 10, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that accused was a First Lieutenant and, prior to March 21, 1942, was Motor Transport Officer of the 158th Infantry, at Fort Davis, Canal Zone; and that thereafter he was stationed at the Post of Corozal, Canal Zone, in the Ordnance Department, 176th Ordnance Battalion (R. 12, 14, 39, 44, 45; Exs. D & E).

Between June 1 and December 11, inclusive, 1941, accused became indebted to the 158th Infantry Officers' Mess, for mess bills for himself and guests, in the sum of $127.65. No payments were ever made, except that $50 was paid on March 7 and $25 on May 7, 1942. The balance owing on December 16, 1942, amounted to $52.65. Accused was billed for this indebtedness on numerous occasions and "on numerous occasions admitted the indebtedness" to the mess officer (R. 21, 22, 26; Ex. C).

During April, May and June, 1942, accused borrowed various sums of money, totaling $470, from Joseph J. Remus, Technician 4th Grade, Company B, 176th Ordnance Battalion, in Corozal, Canal Zone (R. 12). Accused was the shop superintendent where Remus was working, and commander of Remus' Company (R. 14, 16). About three weeks "after the loan", at the request of Remus, accused gave Remus his "I.O.U." (R. 13; Ex. A). No part of the loan was ever repaid (R. 14, 15).

Between July 13 and October 22, inclusive, 1942, accused became indebted to the Post Exchange at Fort Kobbe, Canal Zone, for merchandise and for laundry service in the sum of $168.06. Statements of the account were sent to the accused by mail at his address, the 176th Ordnance Battalion, monthly thereafter. Accused made no effort to get in contact with the exchange officer. Nothing was paid on account of the bill (R. 28-31; Ex. E).

On September 4, 1942, Major Charles L. Reed, Executive Officer

for the Ordnance Department Motor Transport Section, accused's supervising officer (R. 34), caused a letter to be written to accused directing that he make a certificate listing his entire personal indebtedness and his proposed method of liquidating same. Accused complied with this direction by 1st Indorsement received back about September 6, 1942, in which he stated that the total amount of his personal indebtedness was four hundred and seventy dollars which was owed to "Joseph J. Remus" and which would "be paid twenty-five dollars a month for two months and fifty dollars a month until the debt is liquidated" (R. 31-34; Ex. F).

Accused borrowed $400 from Sergeant Martin L. Lefler, a member of his company, at Fort Kobbe, Canal Zone, about September 7, 1942. He gave Lefler a written, signed acknowledgment of this indebtedness, a day or so later. The loan was never repaid, nor did accused ever make arrangements to repay it (R. 18-20; Ex. B).

On September 21 or 24, 1942 (R. 34, 38, 40), Major Herbert W. Wurtzler, Ordnance Department, Post of Corozal, Canal Zone, the accused's battalion commander, interviewed the accused in the office of Major Reed for the purpose of "investigating" into accused's "dealings with one of" Major Wurtzler's "non-commissioned Officers, and in an attempt to help him or straighten him out on other alleged debts" (R. 39, 40). At this interview Major Wurtzler inquired of the accused as to his debts, and in particular as to "the obligation that he had with Master Sergeant Lefler" (R. 40). At first, accused did not admit the debt to Sergeant Lefler (R. 40). Major Wurtzler then sent for Sergeant Lefler and asked the direct question: "Is Lieutenant Delbrook indebted to you in any certain sum?" He said: "I would rather Lieutenant Delbrook answered that question." Upon the question being repeated, accused said "Oh, hell, Sergeant! Go ahead and tell him." It then developed that the accused had owed Sergeant Lefler money prior to the beginning of September, and that that debt had been paid within the first few days of September but that at the date of the interview the accused was indebted to Sergeant Lefler (R. 41, 42). After some further discussion about a note on which officers of the 158th Infantry were co-signers, Major Wurtzler asked the accused "if, inasmuch as he had settled up that note, and he had made arrangements to settle the note with Private Remus, and he had made arrangements to pay Sergeant Lefler" if there were any other bill, "now", that accused owed, "such as the Post Exchange at Fort Kobbe", where accused was then stationed, "the commissary, the Officers' Club at Corozal, the Post Exchange at Fort Davis, or the Post Exchange, or the Officers' Club at Fort Clayton, or Albrook Field, or any other place" around there. The major specifically asked: "Are there any more of those bills, now, that are going to come in, hitting us with a letter or a dun, saying that you hadn't paid them?"

Accused answered: "Absolutely not. I don't owe another damned cent." Then he added: "Well, of course, I do owe perhaps a couple of dollars at the Post Exchange here at Corozal and maybe a couple of dollars up at the Officers' Club." The major further questioned the accused as to whether or not those were current bills. He asked "Are those just small items that you have incurred during this month, for instance?" Accused then replied: "Yes, that's what they are -- just current bills, like what I might owe for laundry, or a few drinks, or something like that, at the club." The "investigation" by Major Wurtzler into the indebtedness of accused was not directed by higher authority. It was conducted, according to Major Wurtzler, as "my duty, as I saw it, as his", accused's, commanding officer (R. 35, 43, 44, 47). In the interview with Major Wurtzler the accused "was not testifying under oath" (R. 47). Major Reed was present. Upon being asked as to whether Major Wurtzler informed the accused that any statement he made could be used against him, Major Reed answered: "I don't think he did" (R. 39). Major Wurtzler testified that he did advise the accused of his right not to answer any question and that any statement he might make could be used against him (R. 47, 48).

On or about September 28, 1942, Colonel R. N. Bodine, Department Ordnance Officer, sent to accused a bill for his unpaid account with the Officers' Mess, 158th Infantry, which account at that time amounted to $52.65. Colonel Bodine had received this bill together with a letter requesting that the matter of the bill and its payment be brought to accused's attention. The correspondence went to the accused with a Second Indorsement from Colonel Bodine asking if the bill was correct and when payment would be made. By Third Indorsement, dated October 19, 1942, accused replied to Colonel Bodine that the statement was correct and would be liquidated by the fifteenth of the next month (R. 26, 27; Ex. D). By November 15, 1942, nothing had been paid on the bill of $52.65 since May 7, 1942 (R. 21; Ex. C).

On October 20, 1942, Lieutenant Colonel Charles K. Allen conducted an official investigation to "ascertain the debts" of the accused (R. 61-62). This investigation was directed by Lieutenant Colonel George J. Dawe, then Post Commander at Corozal (R. 52, 60, 63). The accused was present, was notified of the official nature of the investigation, and was called as a witness and sworn to tell the truth (R. 62-64). The accused "admitted" owing the following debts: $470 to Technician 4th Grade Remus, $400 to Master Sergeant Lefler, $50 to the 158th Infantry Officers' Mess, and several debts to "commercial organizations in the

United States"(R. 63-65). These were the only debts mentioned during the investigation, and accused upon being asked "if there were any other debts in addition to those he had just mentioned" said: "No" (R. 63, 64, 65, 66). Accused did not mention his indebtedness to the Fort Kobbe Post Exchange (R. 66).

Between November 7 and 28, inclusive, 1942, accused incurred $36.55 in bills at Corozal Officers' Club (R. 70; Ex. G).

On November 5, 1942, Lieutenant Colonel George J. Dawe, then in command of the Post of Corozal(R.52), himself talked with the accused to see "if some arrangement could not be made whereby he could liquidate his indebtedness" and accused agreed to turn over to the Commanding Officer $100 a month on his debts (R. 52-54). On or about November 20, Colonel Dawe called the accused to his office and the agreement was written up and signed (R. 54, 61). It was stated in the first paragraph of the agreement that the accused would "turn over" $100 a month to the Commanding Officer of the Post of Corozal to liquidate "the following indebtedness" of the accused, and "right below" was listed all of his "known indebtedness" (R. 54, 61). The debts so listed were: $470 to Sergeant Remus, $400 to Sergeant Lefler, $30 to a Technician named Whitaker, around $50 to the 158th Infantry Officers' Mess, and approximately $50 to the Sol Frank Company (R. 54, 56, 57). The debt to the Post Exchange at Fort Kobbe was not mentioned nor included in the list (R. 57). When the agreement was made, accused stated, he owed no other debts (R. 57). Colonel Dawe testified that up until December 4, when he left the Post, no payment was made "according to this agreement" (R. 54).

For the accused, Colonel Elbert C. Monro, 150th Infantry, testified that he had known the accused for approximately two years; that "for quite a period" accused was transportation officer of the regiment of which he was executive officer; that he had been in a position to pass on the nature of accused's work and services; and that accused's work had always been very satisfactory (R. 78, 79). Lieutenant Colonel Franklin I. Pomeroy also testified for the accused. Colonel Pomeroy had known the accused for a few months before accused was ordered to active duty in 1940. For about six months in 1941, Colonel Pomeroy had been Executive Officer of the 158th Infantry, during which time accused had been its Motor Maintenance Officer. He had found accused to be an excellent Motor Maintenance Officer, quite often working all night, anxious to do anything he had to do (R. 80).

The accused did not testify. He made an unsworn statement to the court through his counsel. He pleaded - "extenuating circumstances". His wife

> "* * * had been ill for a period of eight months in Phoenix, Arizona; she had been operated on, and earnest requests for money with which to pay hospital bills and doctors' fees made it mandatory for him not to go through regular channels, but to try to get the money as best he could, so that his people back home could be in satisfactory and comfortable circumstances. * * *" (R. 81).

4. Specifications 1 and 2, Charge I, allege that the accused borrowed $470 and $400 from Technician 4th Grade Remus and Master Sergeant Lefler, respectively, to the prejudice of good order and military discipline, in violation of the 96th Article of War. The evidence shows that the borrowings occurred as alleged. Accused was superintendent of the shop in which Remus worked and was Company Commander of both Remus and Lefler in the 176th Ordnance Battalion, at the Post of Corozal, Canal Zone. Thus we have a combination of circumstances which individually have been condemned as improper for financial transactions between officer and enlisted man. The case of First Lieutenant Clark G. Turner, CM 221833, is recent authority for the proposition that an officer who borrows money from an enlisted man in the same troop violates the 96th Article of War. In that case the loan was repaid the month following its negotiation. A similar holding appears in CM 192128, Strickland, where the officer and the enlisted man were serving on the same post. The obligation that flows from indebtedness to a subordinate tends to weaken authority. It can become the cause of improper favor. It impairs the integrity of required relationships. Where there is an actual or possible duty relationship between officer and enlisted man arising from membership in the same command or from duty in the same station, camp or post, the negotiating of a loan by an officer from an enlisted man is prejudicial to good order and military discipline. The accused in this case properly was found guilty of Specifications 1 and 2, Charge I.

5. Specifications 1, 3 and 4, Charge II, allege dishonorable failure to keep promises to liquidate indebtedness. The proof shows that as alleged in Specification 1, Charge II, accused owed the Officers' Mess, 158th Infantry the sum of $52.65, as a balance due, on or about May 7, 1942; that the accused, having failed to pay thereafter anything on account of said debt, did on or about September 28, 1942, receive from Colonel Bodine, his commanding officer, an inquiry as to whether the amount

owing by accused was that shown on an attached bill, to wit: $52.65, and as to when payment would be made; and that accused replied in writing to Colonel Bodine that the bill was correct and would be liquidated by October 15, 1942; but that up until November 15, 1942, accused failed to keep his promise to Colonel Bodine. The evidence further shows, as alleged by Specification 3, Charge II, that the accused, having borrowed $470 from Technician 4th Grade Remus, and having failed to repay any part of the loan, did on or about September 6, 1942, promise Major Charles L. Reed, Ordnance Department, Post of Corozal, Canal Zone, the same department in which accused was on duty, that he would pay on this indebtedness the sum of $25 a month for two months and fifty dollars a month until the debt should be liquidated; and that the accused failed to keep this promise. With respect to Specification 4, Charge II, it appears from the evidence that accused being indebted on or about November 5, 1942, to various persons, organizations, and a firm in the approximate sum of $1000, did on or about that date orally promise the Commanding Officer, Post of Corozal, Canal Zone, that he would turn over to the Commanding Officer of that Post the sum of $100 per month beginning December 1, 1942, for payment pro rata upon his indebtedness; and that this promise was reduced to writing on or about November 20, 1942; and that accused failed to keep his promise.

Specification 4, Charge II, alleges that accused's failure to keep his promise was without cause. When accused made this promise he was fully aware of his circumstances and of his ability to perform. No change in accused's circumstances was shown. It is presumed that on November 4 and 20, when he made the promise, his condition was such that, if continued, he would be able to pay as agreed. No change in accused's circumstances, between the dates of these promises and December 1, was shown. The court, therefore, was justified in finding that accused's failure to keep his promise to pay the commanding officer $100 per month on account of his debts was without cause.

Each Specification, now under discussion, alleges that the failure to keep the promise mentioned specifically therein was dishonorable.

In determining whether this essential allegation was sustained, all the facts introduced may be considered. These facts show that with commutation and quarters, accused as a first lieutenant was receiving about three hundred dollars per month. His debts, with the exception of one small item, were contracted while on duty at the Canal Zone, during a year and a half. His borrowings and running bills, amounting to about $1000, were out of proportion to small exigencies which sometimes

occur. There was no testimony presented which showed emergent expenses. His bills at the Officers' Mess showed expenditures for liquor which constituted a substantial luxury for one not able to meet his "chits". Nothing was paid on any known debts, so far as the record shows, except trifling sums prior to May, 1942. Accused's neglect in this respect was unconscionable.

Winthrop, page 715 reprint, cites, as conduct unbecoming an officer and a gentleman: "dishonorable neglect to discharge pecuniary obligations".

From the entire picture, the conclusion is inevitable that accused's failure to keep the promise mentioned in each specification was dishonorable, because each failure was without excuse and because each promise so broken was in effect calculated to repair a situation fraught with dishonor.

The evidence justified the court in finding the accused guilty of Specifications 1, 3 and 4, Charge II.

6. The remaining Specifications, 6, 7 and 8, Charge II, allege separate false statements made by accused to his superior officers investigating accused's indebtedness. The proof shows that accused when asked about his indebtedness by these officers partially revealed and partially concealed his debts. Asked about specific debts, or having listed specific debts, and then asked whether he owed other debts, accused officially stated: "I have no debts other than those mentioned", or words to that effect. The evidence is clear and convincing that accused knew his official statements to be false.

The debts of an officer may become a matter of concern of his commanding officer. It may become the official duty of such commanding officer, as here, to inquire into such a situation. Whether the inquiry attains the stages of official formality because of the apparent gravity of the causative situation, or whether it is maintained on an informal basis, the duty of the officer is to be honest in his answers. His obligations as a gentleman require honesty if an answer is offered or given.

A false official statement is conduct unbecoming an officer and a gentleman (sec. 453, (18) Dig. Op. JAG 1912-40) (See also Winthrop Military Law and Precedents, reprint, page 71.)

The false statements made by the accused as alleged by Specifications 6, 7 and 8, Charge II, were proven and constituted violation of the 95th Article of War.

Question was raised as to whether the statements made by accused to the several investigating officers were properly admitted in evidence in the absence of proof that accused had been fully advised of his rights before making any statement. This question is unimportant. No statement of accused constituted a confession. The statements of the accused which were relevant to the inquiry and which became the basis of several specifications, constituted a promise or a denial, not an admission or confession.

7. War Department records disclose that the accused was born on July 28, 1913, at Indianapolis, Indiana. He is married and has two children. He entered service as second lieutenant, AUS, September 16, 1940. There was no prior service. As of the date of trial, his allotments to dependents amounted to $150 per month, his Government insurance deduction was $6.90 per month, and his Class A Pay Reservation was $18.75 per month.

A letter from accused's wife, addressed to the War Department, dated January 15, 1942, bearing a War Department notation, indicated that until January 1, 1942, accused had made no provision for his wife and children and that either before or shortly after the letter from his wife, accused made an allotment for his wife of $40 per month for 12 months, effective January 1, 1942.

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 and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Andrew J. Cappo Jr., Judge Advocate.

Wm Trammell, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAR 30 1943 -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 James W. Delbrook (0-399689), Ordnance Department.

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 thereof. Accused borrowed money from enlisted men of his command on two occasions. Thereafter he dishonorably failed and neglected to keep promises to pay those debts and other indebtednesses contracted by him although he had sufficient financial resources to make substantial payments. In the course of investigations conducted by his superior officers he made false official statements on three occasions regarding his indebtedness. He was sentenced to dismissal. Accused is deeply in debt and his attitude towards his debts convinces me that his usefulness as an officer is at an end. 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 such action meet with approval.

Myron C. Cramer

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

3 Incls.

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(Sentence confirmed. G.C.M.O. 96, 1 May 1943)

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



SPJGH
CM 230758

MAR 13 1943

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| UNITED STATES | CHESAPEAKE BAY SECTOR<br>NORTH ATLANTIC COASTAL FRONTIER |
| v. | Trial by G.C.M., convened at Fort Monroe, Virginia, January 20, 1943. Dismissal. |
| Second Lieutenant FRANCIS P. McGUIRE (0-1551910), 1065th Ordnance Company. | |

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, 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 95th Article of War.

Specification: In that 2nd Lt. Francis P. McGuire, 1065 Ord. Co., AVN (AB), 1st Service Group, Fort Dix, New Jersey, was at Phoebus, Virginia on or about January 9, 1943, in a public place, to wit, Frank's Restaurant, drunk and disorderly while in uniform.

He pleaded guilty to the Specification, but not guilty to the Charge, and was found guilty of both. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and withheld, pursuant to Article of War 50½, the order directing the execution of the sentence. The record is here considered as forwarded for action under the 48th Article of War.

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

At about 7 o'clock on Saturday night, January 9, 1943, the accused was in Frank's Restaurant in Phoebus, Virginia, at a table with a party composed of one other second lieutenant and two sergeants.

The restaurant had a bar and about ten booths and seven tables at which food was served. At that time there were about 25 persons--officers, enlisted men, and civilians--in the room. The accused made gestures, used vile and profane language, and was talking so loudly that his voice could be heard throughout the room. At times his head would rest on the table, and he then would again start talking loudly and profanely. When he left the table, he walked unsteadily, staggered, and fell over chairs. Staff Sergeant Joseph W. Harvey and his wife entered the restaurant and sat in a booth near the table of accused. Harvey objected to the loud, obscene language of the accused, unsuccessfully sought to find a police officer, and then directly asked the accused to stop that kind of talk. The accused continued his loud and profane language. Sergeant Harvey told the accused that, if the accused did not desist, he would call the police. The accused then cursed Sergeant Harvey with coarse and abusive language in a loud tone of voice, wanted to fight him, and threatened to beat him up. The accused followed Sergeant Harvey to his table and abused him in the presence of his wife. As his wife was crying, Sergeant Harvey thought it best to go home, and left an unfinished meal. Sergeant Harvey had had a beer or two, but was sober (R. 3-6, 6-8).

When the accused first entered the restaurant he was wearing his blouse. Later he put on the blouse of an enlisted man. At one time he wore a cap. Still later he was seated at the table without a blouse, and his own blouse was hanging on a nearby chair. The officer and enlisted men at the table with accused attempted without success to quiet the accused. Finally a policeman came in and ordered the accused to leave the restaurant. The accused refused to leave and continued his vile and profane language. By the use of some force, the policeman assisted the accused from the restaurant to a waiting police car. This was in the presence of a large crowd of civilians and enlisted men, and while it was in progress the accused continued cursing and abusing the police officer. On arrival at the police station, the accused assaulted the officer, forcing him to strike the accused in self-defense (R. 7-12).

Staff Sergeant Harvey expressed the opinion that the accused was drunk. One enlisted man stated that when accused walked his gait was unsteady and he rolled, when seated at the table his gestures were "wild and flamboyant", and his hat was "cocked way over on the side of his head". Another enlisted man stated that accused looked like he had a little bit too much to drink. The policeman who removed accused from the restaurant stated that accused was drunk enough to be mean (R. 5, 8, 9, 12).

4. For the defense, the accused testified that he started to drink in Newport News about 2 o'clock in the afternoon on Saturday, January 9, 1943, with a party of one other officer and two enlisted men. They planned

to go to Phoebus later. He drank steadily for about three hours. By 5 o'clock he was so intoxicated that he was unable to remember anything that happened thereafter until about 3 o'clock the following morning, when he was awakened in a cell of the city jail by the officer of the day. He was unable to remember what happened after 5 o'clock (R. 13).

The accused enlisted in the Field Artillery, June 28, 1938, was honorably discharged three years later, reenlisted December 26, 1941, in Aviation Ordnance, and was discharged December 11, 1942, to receive a commission. He served 3 years, 11 months, and 16 days as an enlisted man and attained the grade of staff sergeant. He was given a character rating of "excellent" on each discharge (R. 14).

The accused had used alcohol prior to January 9, 1943, and on occasions, to excess. For that reason he tried to be careful. Formerly he had been able to realize when he was reaching a stage of intoxication, but for some reason on this occasion he did not feel that condition until he had taken too much. He could not account for his failure to recognize that condition (R. 15).

5. The evidence shows that on Saturday evening, January 9, 1943, the accused was in Frank's Restaurant, Phoebus, Virginia, with many other persons, including officers, enlisted men, women, and civilians. The accused was very drunk. He was in full uniform when he entered. At times he wore his blouse unbuttoned, or wore no blouse, and once he wore the blouse of an enlisted man. His voice was loud, and his tone abusive. He used vile, profane, and obscene language within the hearing of those in the restaurant. He was unable to walk without staggering, and, when he attempted to walk, he fell over chairs. At times his head rested on the table. Without provocation, he approached the booth where Sergeant Harvey and wife were seated, cursed and abused Sergeant Harvey and offered to fight with him. The vile and abusive language of the accused to the policeman who sought to arrest him, attracted a large crowd of persons, including many enlisted men. The accused testified that he became so intoxicated that he lost consciousness and memory at about 5 p.m., January 9, 1943.

Winthrop cites as an instance of an offense cognizable under the 61st (95th) Article of War:

> "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused." (Winthrop's Military Law and Precedents, Reprint, p. 717).

The evidence shows that the accused was grossly drunk and conspicuously disorderly in uniform in a public place, and supports the findings of guilty in violation of the 95th Article of War.

6. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service June 30, 1938; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and extended active duty December 12, 1942.

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 reoord of the trial is legally sufficient to support the findings of guilty, and the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 230758 1st Ind.

War Department, J.A.G.O., MAY 20 1943 - 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 P. McGuire (0-1551910), 1065th Ordnance Company.

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 accused was grossly drunk and conspicuously disorderly in uniform in a restaurant in the presence of officers, enlisted men, civilians, and women. He used vile and abusive language to, and offered to fight with a sergeant who was accompanied by his wife, and to a policeman who arrested him. The accused testified that he became so intoxicated that he lost consciousness and memory before the hour when he in fact entered the restaurant. I recommend that the sentence be confirmed and carried into execution.

3. 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 carrying into effect the recommendation made above.

Myron C. Cramer

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

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

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(Sentence confirmed but execution suspended. G.C.M.O. 93, 30 Apr 1943)

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



SPJGN
CM 230784

MAR 31 1943

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| UNITED STATES | ) | FOURTH SERVICE COMMAND<br>ARMY SERVICE FORCES |
| v. | ) | Trial by G.C.M., convened at Camp Gordon, Georgia, January 5, 6, and 7, 1943. Dismissal. |
| First Lieutenant JOHN E. RIDENOUR (O-455555), Quartermaster Corps. | ) | |

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OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and COWLES, 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 61st Article of War.

Specification: In that First Lieutenant John E. Ridenour, Quartermaster Corps, did, without proper leave, absent himself from his organization and station at Camp Gordon, Georgia, from about September 24, 1942 to about October 19, 1942.

CHARGE II: Violation of the 93rd Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

CHARGE III: Violation of the 95th Article of War.
(Disapproved by reviewing authority.)

Specification 1: (Disapproved by reviewing authority.)

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification and of Charge III and Specification 1 thereunder, and not guilty of Charge II and the Specification thereunder, and of Specifications 2 and 3 under Charge III. He was sentenced to be dismissed the service, to be confined at hard labor for two and one-half months, and to forfeit $120 per month for a like period. The reviewing authority disapproved the findings of Specification 1, Charge III, and of Charge III, approved only so much of the sentence as provides for dismissal from the service, and forwarded the record for action under Article of War 48.

3. The evidence for the prosecution as to Charge I and the Specification thereunder, in brief, is as follows:

The prosecution introduced, without objection, an extract copy of the morning report of the 312th Quartermaster Sales Company with an entry thereon as of September 28, 1942, showing the accused from duty to absent without leave as of September 25, 1942, and as relieved of command while absent without leave. This report was signed by Captain Murray A. Clyburn, Assistant Adjutant, and identified by him. The original report was, however, certified by Second Lieutenant Frank M. Nocera, the commanding officer of the 312th Quartermaster Sales Company (R. 7; Ex. A).

The prosecution also introduced, without objection, a duly authorized extract copy of the morning report of the Casual Detachment, Station Complement, of October 2, 1942, showing the accused attached to the Casual Detachment, for administration purposes only, as of September 29, certified by Second Lieutenant Walter R. Gay, Commanding Officer (R. 76; Ex. E). The prosecution introduced, without objection, the deposition of Lieutenant Colonel Edward M. Salley, Jr., Post Adjutant which sets out that on September 25, 1942, the accused came to the office of Lieutenant Colonel Salley, Jr. asked for a leave and was told by

Lieutenant Colonel Salley leave could not be granted him but that he might submit a formal request to the commanding officer. No such request was, however, submitted (R. 10).

The organization of the accused had been placed on the alert prior to September 25, and he was told orders transferring it were expected momentarily. The prosecution introduced, without objection, the deposition of Captain Fred A. Borak, 300th Military Police Company, which set out that on October 19, 1943, he saw the accused on the corner of 13th and "F" Streets, Washington, D.C., sober and dressed in an officer's uniform. The accused offered no resistence to arrest but stated that if he was being arrested for an automobile deal it was wrong because that had been taken care of. The accused was advised, however, that he was being arrested for being absent without leave. The accused at that time stated he was driving his car back to Camp Gordon, Georgia. (R. 12-13; Ex. C)

On October 31, Lieutenant Ralph B. Willis, Post Investigator, went to Fort Meyer, Virginia, took charge of the accused and returned him in custody to the station hospital at Atlanta, Georgia (R. 52-53). On September 23 and 24, 1942, First Lieutenant Everette F. Whitmarsh was the commanding officer of the 57th Sales Company, directly across the street from the 312th Quartermaster Sales Company. He did not see the accused on September 24, and testified that he knew definitely the accused was not there on September 25, because Colonel Nickel wanted him and they could not find him. Lieutenant Whitmarsh sent a telegram to the home of the accused's parents in Blue Ridge Summit, Pennsylvania, but the message came back not accepted. Lieutenant Whitmarsh identified the morning report introduced as Exhibit A. He had assisted Lieutenant Nocera, who had been assigned by Major Byron, in making it. The accused was dropped as absent without leave on the 25th; he was absent on the 24th (R. 65-72).

4. The defense introduced Sergeant Theodore S. Talley, who testified that on September 23 and 24, his wife and the wife of the accused were packing their household belongings. On the 23rd Sergeant Talley told the accused to get back to his organization and the accused said he would, but if anything turned up to wire him (R. 82-85).

5. The accused, after his rights had been explained to him, was sworn and testified. Relative to the facts alleged in the Specification under Charge I, he stated that he last reported to his organization for duty on September 23, left on the morning of September 24, without securing

any kind of leave, was in Washington on September 25, arrived in his home town, Blue Ridge Summit, Pennsylvania, on September 26 and started back to Camp Gordon on October 16, 1942. He got as far as Washington where he was stopped by the flood; went back to his wife at Blue Ridge Summit, as he was worried over her condition for she was with child; was there on October 17; and later arrested in Washington. He pleaded not guilty to absence without leave, as advised, as he intended to go to Washington and get leave but knew he had to obtain a leave. The accused stated he knew of and had heard the Articles of War read and knew the 61st Article of War is about absence without leave (R. 98-123).

6. Although the evidence for the prosecution shows that the entry on the morning report was made on the basis of information furnished by the regimental adjutant to the commanding officer making the report, the accused, however, in his testimony clearly admits his initial unauthorized absence. It is clearly established, therefore, that the accused was absent without leave for 25 days, as alleged in the Specification, Charge I. He failed either to justify or to account satisfactorily for his unauthorized absence.

7. The accused is 25 years of age. The records of the Office of The Adjutant General show that he had five years and 5 months' service prior to entering the Quartermaster Officer Candidate School at Camp Lee, Virginia, on January 26, 1942. Upon graduation on April 25, 1942, he was appointed a second lieutenant, Army of the United States, and was promoted to first lieutenant on September 14, 1942.

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 and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of Article of War 61.

Chas. L. Dresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Millard B. Cowles, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 7 1943 - 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 John E. Ridenour (O-455555), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. The accused is an officer of considerable experience in the Army, and his offense, therefore, of absenting himself without leave for 25 days reveals a serious breach of duty and discipline. Furthermore, although the accused was acquitted of the charge of assault with intent to commit rape, as alleged in the Specification, Charge II, his own testimony admits that he endeavored to engage in illicit intercourse with the girl named in the Specification. In view of this fact, the testimony of the accused that he absented himself because he was worried over the illness of his wife appears to be a mockery of truth. The record shows that the accused is lacking in loyalty both to his wife, and to the service, and that he is unworthy to remain an officer. I recommend, therefore, that the sentence be confirmed and ordered executed.

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 foregoing recommendation 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 ltr for sig. Sec. of War
Incl 3 - Form of Executive action

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(Sentence confirmed. G.C.M.O. 103, 12 May 1943)

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

MAR 18 1943

(53)

PJGH
M 230826

FEB 24 1943

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| UNITED STATES | HEADQUARTERS, A. P. O. 939<br>Seattle, Washington |
| v. | Trial by G.C.M., convened at Fort Mears, Alaska, January 13, 1943. Dishonorable discharge (suspended) and confinement for twenty-five (25) years. Penitentiary. |
| Private ALEXANDER B. McGRATH (20233720), Headquarters Battery, 165th Field Artillery Battalion. | |

HOLDING by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Alexander B. McGrath, Headquarters Battery, 165th Field Artillery Battalion, did, at Camp Murray, Washington, on or about July 18, 1942, desert the Service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: embarkation for overseas duty in time of war, and did remain absent in desertion until he was apprehended at Newburgh, N.Y. on September 26, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for absence without leave in violation of Article of War 61, and of one subsequent conviction

for breach of restriction in violation of Article of War 96, 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 twenty-five years. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement, 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.

3. The evidence shows that accused was transferred to the Headquarters Battery, 165th Field Artillery Battalion, on July 1, 1942. This organization was stationed at Camp Murray, Washington, from July 1, 1942, to about July 19, 1942. Between July 1 and July 4, the battalion commander of accused assembled the battalion, and informed his men that the organization was to move overseas to Alaska, "and that absence without leave at that time would be regarded as desertion". Although he did not tell the men the probable date of departure, he informed them that "it would be soon". On several occasions between July 1 and July 17, at reveille, the first sergeant of the battery of accused informed the men in the battery that they were to embark for overseas duty and that they were going to Alaska (R. 3-5).

Accused absented himself without leave from his organization at Camp Murray, Washington, on July 18, 1942. His organization embarked for Alaska about July 19, 1942, and accused was not then present. Admitted in evidence was a statement on a form for use in cases where alleged deserters or men absent without leave are turned over to a guard sent from West Point, New York (U.S.M.A. 3-27-42-500). The statement was purportedly signed by Sergeant John Maher, Police Department, Newburgh, New York. It contained, in substance, recitals that on September 26, 1942, the accused was apprehended by Sergeant Maher while working in the Regional Markets in Newburgh, New York. He was not in uniform when apprehended. Accused stated to the civil authorities that "he was home on leave from Ft. Lewis Washington and while home on leave his organization sailed for overseas". When apprehended he was employed as a truck driver by one Abe Miller. Also contained in the statement is a notation purportedly signed by a noncommissioned officer, who was a member of the military police, West Point, New York, to the effect that at Newburgh, New York, he received accused on September 26, 1942. The defense stated that it had no objection to the introduction in evidence of the statement. Accused rejoined his organization on December 23, 1942. At no time was accused given a leave of absence during that period (R. 5-8; Exs. "3", "4").

4. No witnesses were presented by the defense. The accused elected to remain silent (R. 8).

5. The question presented for consideration is whether the evidence is legally sufficient to sustain the finding by the court that accused deserted the service with the intent to avoid the hazardous duty alleged. It was clearly established by the evidence that on July 18, 1942, accused absented himself without leave from his organization at Camp Murray, Washington. About July 19, 1942, the organization of accused embarked for Alaska, and accused was not then present. Between July 1 and July 4, the men of the battalion of accused were assembled and informed by their battalion commander that they were soon to go on overseas duty, that they were going to Alaska, and warned as to the seriousness at that time of the offense of absence without leave. On several occasions at reveille, between July 1 and July 17, the first sergeant of the battery of accused informed the men in the battery that they were going to Alaska. It was not, however, established in evidence that accused was actually present on any of these occasions, although it was proved that he was then a member of the battalion and the battery.

Admitted in evidence was a statement purportedly signed by a civil police officer, Sergeant John Maher, wherein it was recited that he apprehended accused on September 26, 1942, at Newburgh, New York, working in a civilian capacity, and that accused asserted that "he was home on leave from Ft. Lewis Washington and while home on leave his organization sailed for overseas". The defense stated that it had no objection to the introduction in evidence of the statement.

There is nothing in the evidence from which it may reasonably be inferred that accused knew that the embarkation of his organization for overseas duty was imminent, or that his absence would result in his avoiding embarkation. It was not established in the evidence that accused was present on any of the occasions when the members of his battalion and battery were informed that they were soon to embark for Alaska. The mere fact that accused was then a member of the organizations concerned, is not sufficient to provide a reasonable inference that he knew of the contemplated movement, nor was the fact that he absented himself approximately one day prior to the embarkation, considered either alone, or in the light of the information as to the movement previously received by members of his organization, sufficient to establish such an inference of knowledge of accused of the imminent embarkation.

The assertion by the defense that it did not object to the

introduction in evidence of the statement signed by Sergeant Maher constituted a waiver of proof of the genuineness of the proffered document (par. 116b, M.C.M., 1928, p. 120). Such a waiver, however, cannot be construed to authorize the admission in evidence of the contents of a document, which would otherwise be inadmissible in fact even if the document was genuine. The recitation of facts contained in the document was hearsay evidence, and therefore incompetent. It was highly prejudicial to the rights of accused because of his alleged statement contained therein to the effect that while he was absent on leave his organization sailed overseas. It is possible that accused learned of the departure of his organization after he absented himself, and that he was not aware of the intended movement when he left. The consideration of such a statement could not have failed to have had a decided effect upon the court when determining whether accused knew that his organization was about to embark for overseas duty when he absented himself without leave, and accordingly, whether at the time of his initial absence accused intended to avoid the hazardous duty alleged. Failure of the defense to object to incompetent evidence does not cure the error of receiving such testimony. A conviction based solely upon incompetent evidence cannot be sustained even though no objection was interposed to the introduction of such evidence (Dig. Ops. JAG, 1912-40, sec. 395(2); CM 178446). In view of the incompetent and prejudicial nature of the proffered statement, the announcement by the defense that it had no objection to its admission in evidence may be deemed to have been inadvisedly made, and considered not to amount to a waiver of objection thereto (sec. 1539, Dig. Ops. JAG, 1912-1930, p. 761).

There is no prejudice to accused, however, in the use of the recitals contained in the statement for the purpose of establishing the termination of the absence without leave of accused on September 26, 1942.

The record of trial contains no competent evidence to establish that accused knew that his organization was about to embark for overseas duty, and to prove that he deserted with the intent to avoid the hazardous duty alleged. When a specification alleges desertion with intent to avoid hazardous duty, the proof must show such an intent. If no such intent is shown, but rather an intent not to return to the service, there is a fatal variance between the allegation and the proof, and a finding of guilty of desertion based upon such proof cannot be approved (CM 224765, Butler).

6. The evidence does, however, show that the accused absented himself without leave from July 18, 1942, to September 26, 1942, and is legally sufficient, therefore, to support only so much of the find-

ings of guilty as involves the lesser included offense of absence without leave for two months and eight days in violation of Article of War 61. The maximum authorized sentence for absence without leave for more than sixty days is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months (par. 104c, M.C.M., 1928).

7. Evidence of one previous conviction for absence without leave from about February 1, 1942, to about February 20, 1942, in violation of Article of War 61, was properly considered by the court. There was also submitted a conviction for breach of restriction, in violation of Article of War 96. The date of this offense was "Dec 6 to Dec 8/42" (Ex. 5). Consideration by the court of this conviction was erroneous, as the offense of breach of restriction was committed subsequent to July 18, 1942, the date of the offense herein alleged. The Board of Review is, however, of the opinion that the erroneous consideration by the court of the conviction for breach of arrest did not influence the court in its sentence, and did not warrant the return of the record to the court to reconsider the sentence without regard to that conviction.

8. Accused is 22 years of age. The charge sheet shows that he enlisted April 29, 1940, with no prior service.

9. 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 of the Charge and Specification as involves findings that accused did, at Camp Murray, Washington, on July 18, 1942, absent himself without leave from his organization and did remain absent without leave until September 26, 1942, in violation of Article of War 61; 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 six months.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

MAR 1 0 1943

(58)

SPJGH
CM 230826 1st Ind.

War Department, J.A.G.O., MAR 3 1943 - To the Commanding General, Headquarters, A.P. O. 939, Seattle, Washington.

1. In the case of Private Alexander B. McGrath (20233720), Headquarters Battery, 165th Field Artillery Battalion, I concur in the foregoing holding by the Board of Review. I recommend, for the reasons therein stated, that only so much of the findings of guilty of the Charge and Specification be approved as involves findings that accused did, at Camp Murray, Washington, on July 18, 1942, absent himself without leave from his organization and did remain absent without leave until September 26, 1942, in violation of Article of War 61, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Thereupon you will have authority to order the execution of the sentence, provided a place other than a penitentiary, Federal reformatory, or correctional institution is designated as the place of confinement.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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 230826).

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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J. A. G. O.

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

SPJGH
CM 230827

MAR 2 1943

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| UNITED STATES<br><br>v.<br><br>Private GUY R. SHEFFLER, Jr. (13043179), Headquarters and Headquarters Company, Third Battalion, 58th Infantry. | HEADQUARTERS A.P.O. 939<br>SEATTLE, WASHINGTON<br>Trial by G.C.M., convened at Fort Mears, Alaska, January 12, 1943. Dishonorable discharge (suspended) and confinement for fourteen (14) years. Penitentiary. |

HOLDING by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Guy R. Sheffler Jr., Headquarters and Headquarters Company, Third Battalion, Fifty Eighth Infantry, did, at Fort Lewis, Washington, on or about July 14, 1942, desert the service of the United States in order to avoid overseas duty, and did remain absent in desertion until he was apprehended at or in the vicinity of Waynesboro, Pennsylvania, on or about October 31, 1942.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. 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 fourteen years. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement, designated the United States Penitentiary, McNeil Island, Washington,

as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence for the prosecution shows that on July 11, 1942, the accused arrived at Camp Murray, Washington, in a detachment of fifty soldiers, for assignment to the 58th Infantry, and that on that date the accused was assigned to Headquarters, Headquarters Company, Third Battalion, 58th Infantry. The accused was not present with his company at the roll call on the morning of July 14, 1942. His absence was noted and reported to the detachment commander by Acting First Sergeant Joseph W. Bradley, Jr., Headquarters Company, Third Battalion, 58th Infantry, A search was made for accused, but he was not found. On the afternoon of July 16, 1942, the organization proceeded from Camp Murray to the Seattle Port of Embarkation, boarded a United States Transport, and embarked on July 17, 1942, for Alaska. The accused was not present when the organization embarked. He was returned to military control on October 31, 1942, and to his organization at Fort Mears, Alaska, on or about December 23, 1942 (R. 4-7; Ex. 3).

At a formation of the Headquarters Company, Third Battalion, 58th Infantry, on or about July 3, 1942, one of the company officers announced that the organization was "bound for Alaska". Although the accused was not present when this announcement was made, and did not join the organization until a week thereafter, the announcement was the subject of much conversation, especially when it came close to sailing time. The detachment with which accused was transferred to the 58th Infantry was quartered and fed with Headquarters Company, Third Battalion (R. 6-9).

When Corporal Frank J. Costello, Headquarters Company, Third Battalion, 58th Infantry, asked the accused in the early part of January 1943, where he had been, the accused stated that he had spent the time at his home working in a mine (R. 10, 11).

4. For the defense, the accused testified that he enlisted in the Army on October 18, 1941, at which time he was 18 years of age. On July 11, 1942, while a member of 174th Infantry Service Company, stationed at Fort Lewis, Washington, he was placed in what was called an addenda group and was transferred to Camp Murray. On the evening of July 13, 1942, he left the organization and hitchhiked to his home in Waynesboro, Pennsylvania, arriving July 18 or 19, 1942. On August 17, 1942, he left his home with the intention of returning to his organization. His father gave him bus fare to Chicago. Accused expected to hitchhike the rest of the journey. He was unable to catch

a ride from Chicago to Fort Lewis, and having no funds with which to purchase transportation he hitchhiked back home, arriving about August 24, 1942. On his return home he accepted a job with a mining company in order to earn money for his transportation to Camp Murray. He was apprehended on October 31, 1942, at Waynesboro, Pennsylvania. He wore his uniform at all times except when working, and then he wore blue denims. The accused had never had a furlough, and he had only spent one day at home since his enlistment in October 1941. He had no reason for leaving his organization at this particular time except that "I just wanted to go home. I wasn't used to being away from home". He thought the 58th Infantry was going somewhere, but no one had told him, nor had he heard that his organization was going to Alaska, or overseas (R. 13-25).

5. Sergeant Joseph W. Bradley and Sergeant Amos J. Caldwell, both of Headquarters Company, Third Battalion, 58th Infantry, testified for the prosecution and defense, respectively, that the accused, since his return to the organization, had been an excellent soldier, frequently working overtime, and always uncomplainingly (R. 7, 26).

6. The evidence establishes that the accused absented himself without leave from his organization at Camp Murray on July 14, 1942, and that he remained absent until he was apprehended in Waynesboro, Pennsylvania, on October 31, 1942. It is likewise established that the organization to which accused had been assigned, departed for overseas duty on July 15, 1942, and that as a result of his absence the accused was not present and did not embark with his organization.

The Specification alleges that the offense was committed at Fort Lewis. The proof shows that the offense was committed at Camp Murray. Since the official records in the Office of the Chief of Engineers, United States Army, Washington, D.C., disclose that Camp Murray is adjacent to Fort Lewis, and at the time of the alleged desertion was under a lease to the United States Government, it cannot be said that this slight variance was prejudicial to the substantial rights of the accused. The place of desertion is not necessarily of the essence of the offense (CM 199270; CM 186501).

The question to be determined is whether the absence without leave was with intent to avoid important service within the meaning of Article of War 28.

The 28th Article of War states that -

"Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter".

The offense of desertion is defined as "* * * absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (M.C.M., 1928, par. 130). Thus it is obvious that the determining factor is the specific intent. The word "desert" is a broad inclusive term, and when used in its general sense may include any one of the intents of mind described in the definition of desertion, but when the word "desert" in a specification is limited or qualified, as in this case, by the phrase "* * * in order to avoid overseas duty", as was stated by the Board of Review in a recent case (CM 224765, Butler) -

"* * * its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata, and a finding of guilty of desertion based on such proof cannot be approved".

The Specification in this case alleges that the accused "* * * did, * * *, desert the service of the United States in order to avoid overseas duty, * * *" (underscoring supplied).

In order to sustain the findings of guilty under this Specification, it is necessary for the record to show that the accused knew that his organization was about to depart for overseas duty and that he absented himself with the specific intent to avoid this important duty (CM 224765, Butler; CM 225512, Herring; CM 226374, Collins; CM 228401, Webster). It is the opinion of the Board of Review that the evidence fails completely to establish either of these essential elements of the offense charged. The only evidence offered by the prosecution remotely bearing upon the vital question of knowledge on the part of the accused was the testimony of Acting First Sergeant Bradley to the effect that at a formation of Headquarters Company on or about July 3, 1942, a lieutenant of the company announced that the organization "was bound for Alaska", and that this announcement was the subject of much discussion (R. 7, 8).

This testimony as to the statement on July 3, 1942, is of no evidentiary value because the record conclusively shows that it was made at a time when the accused was not present with, or a member of, the company. The statement that the announcement was a subject of considerable discussion is of no probative value, since it was not shown that accused was present when these discussions took place. The accused testified that during the three days he was with the company no one told him, nor did he hear that the organization was going to Alaska or overseas. The proof, accordingly, fails to support the findings of guilty of desertion in order to avoid overseas duty as alleged, and under such an allegation proof of an intent not to return to the service will not support a finding of guilty of desertion.

The accused testified that he was assigned to the organization on July 11, 1942, that he left without authority on the evening of July 13, 1942, and that he was apprehended at Waynesboro, Pennsylvania, on October 31, 1942.

The evidence is undisputed that the accused absented himself without authority from his organization from July 14, 1942, and remained absent until he was apprehended at his home in Waynesboro, Pennsylvania, on October 31, 1942, but supports only so much of the findings of guilty as involves the lesser included offense of absence without leave for three months and seventeen days, in violation of Article of War 61. The maximum authorized punishment for absence without leave for more than sixty days is dishonorable discharge, total forfeitures, and confinement at hard labor for six months (par. 104c, M.C.M., 1928).

7. For the reasons stated, the Board holds that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and the Specification thereunder as involves findings that the accused, at Fort Murray, Washington, on July 14, 1942, absented himself without leave from his organization and remained absent without leave until apprehended in Waynesboro, Pennsylvania, on October 31, 1942, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for six months.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 230827 1st Ind.

War Department, J.A.G.O., MAR 10 1943 - To the Commanding General, Headquarters, A.P.O. 939, Seattle, Washington.

1. In the case of Private Guy R. Sheffler, Jr. (13043179), Headquarters and Headquarters Company, Third Battalion, 58th Infantry, I concur in the foregoing holding by the Board of Review. I recommend, for the reasons therein stated, that only so much of the findings of guilty of the Charge and the Specification thereunder be approved as involves findings that the accused, at Fort Murray, Washington, on July 14, 1942, absented himself without leave from his organization and remained absent without leave until apprehended in Waynesboro, Pennsylvania, on October 31, 1942, in violation of Article of War 61, and that only so much of the sentence be approved as involves dishonorable discharge, total forfeitures, and confinement at hard labor for six months. Thereupon you will have authority to order the execution of the sentence, provided a place other than a penitentiary, Federal reformatory, or correctional institution is designated as the place of confinement.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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 230827).

MAR 25 '43 PM

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

MAR 30 1943

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



SPJGK
CM 230829

MAY 25 1943

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| UNITED STATES | ) | WESTERN DEFENSE COMMAND |
| v. | ) | Trial by G.C.M., convened at Presidio of San Francisco, California, January 21, 22, 23, 1943. Dismissal, total forfeitures, and confinement for two (2) years. |
| Major BEN M. MAYERS (O-256243), Adjutant General's Department. | ) | |

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 1: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at the Presidio of San Francisco, California, on or about June 30, 1942, knowingly and wrongfully, cause the transfer and reassignment of Private Richard A. Sanchez, his brother-in-law, from the Corps Area Service Command Unit No. 1962, Station Hospital, Fort Ord, California, to Machine Records Unit, Western Defense Command and Fourth Army, and did at or about the same time and place cause the said Private Richard A. Sanchez, to be promoted to the grade of Staff Sergeant, well knowing that he did not possess the requisite experience and qualification for such grade.

Specification 2: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at Los Angeles, California, on or about June 7, 1942, wrongfully and unlawfully solicit and receive from Private, First Class, Alvin L. Stone, a donation of two quarts of whiskey, of a value in excess

of $5.00, the said officer then having superior official position to that of the said Private, First Class, Alvin L. Stone.

Specification 3: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at Blythe, California, on or about October 7, 1942, wrongfully and unlawfully solicit from Private, First Class, Alvin L. Stone, a donation of three cases of whiskey, of a value in excess of $200.00, the said officer then having superior official position to that of the said Private, First Class, Alvin L. Stone.

Specification 4: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at Los Angeles, California, on or about August 8, 1942, wrongfully and unlawfully receive from Private, First Class, Alvin L. Stone, a donation of several bottles of liquor, of a value in excess of $7.00, the said officer then having superior official position to that of the said Private, First Class, Alvin L. Stone.

Specification 5: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at Los Angeles, California, on or about September 17, 1942, wrongfully and unlawfully solicit from Private, First Class, Alvin L. Stone, a donation of twelve bottles more or less of liquor, of a value in excess of $50.00, the said officer then having superior official position to that of the said Private, First Class, Alvin L. Stone.

Specification 6: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at Blythe, California, on or about October 7, 1942, use insulting, abusive and threatening language toward Private, First Class, Alvin L. Stone, as follows:

> "You are an ungrateful son-of-a-bitch and not worth a goddamn -- if you open your mouth or complain to higher authority you will get a slug in your back",

or words to that effect.

Specification 7: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at the Presidio of San Francisco, California, on or about October 12, 1942, wrongfully and unlawfully attempt to procure Private Nathan B. Stone to give false testimony before an Inspector General detailed to conduct and who was then conducting an official investigation concerning the alleged wrongful obtention of liquor by the said Major Ben M. Mayers from the said Private Nathan B. Stone, by attempting to induce the said Private Nathan B. Stone to testify, in substance, that he, the said Major Ben M. Mayers, had paid for said liquor in cash, the said Major Ben M. Mayers and the said Private Nathan B. Stone well knowing that such testimony by the said Private Nathan B. Stone would be false and untrue, in that the said liquor had not then been paid for in cash, or otherwise.

Specification 8: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at San Francisco, California, on or about November 28, 1942, wrongfully and unlawfully attempt to procure Private Nathan B. Stone to give false testimony before an Inspector General detailed to conduct an official investigation concerning the alleged wrongful obtention of liquor by the said Major Ben M. Mayers from the said Private Nathan B. Stone, by attempting to induce the said Private Nathan B. Stone to change his testimony theretofore given before the said Inspector General by testifying, in substance, that the said liquor was received after 6:00 o'clock PM and that the said liquor had been paid for, the said Major Ben M. Mayers and the said Private Nathan B. Stone well knowing that such testimony would be false and untrue, in that the said liquor had not been received after 6:00 o'clock PM and that the said liquor had not then been paid for.

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

Specification 1: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at the Presidio of San Francisco, California, on or about December 12, 1942, in his testimony before Lieutenant Colonel Francis

B. Linehan, Inspector General's Department, an officer detailed to conduct an official investigation, testify under oath, in substance, that he had received liquor on three occasions from the Stone's Liquor Store, 4959 Hollywood Boulevard, Los Angeles, California, and that he had paid cash for all of said liquor except that received upon the last of said occasions, which testimony by the said Major Ben M. Mayers, was false and untrue and known by him to be false and untrue in that he, the said Major Ben M. Mayers, well knew that he had not paid in cash, or otherwise, for all or any part of said liquor.

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

Specification 3: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at Pasadena, California, on or about October 26, 1942, in his testimony before Lieutenant Colonel Hermann P. Meyer, Inspector General's Department, an officer detailed to conduct an official investigation, testify under oath, in substance, that he did not request Captain Jeremiah G. Staples to promote Technician Grade Five Jackson Mayers, brother of the said Major Ben M. Mayers, to the grade of sergeant, which testimony by the said Major Ben M. Mayers was false and untrue, and known by him to be false and untrue, in that he, the said Major Ben M. Mayers, well knew that he did, on or about June 30, 1942, request the said Captain Jeremiah G. Staples to promote Technician Grade Five Jackson Mayers, brother of the said Major Ben M. Mayers, to the grade of sergeant.

Specification 4: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at San Francisco, California, on or about December 20, 1942, in his testimony before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, an officer detailed to conduct an official investigation, testify under oath, in substance, that he had no knowledge of the existence of a duplicate receipt covering delivery of certain United States postage stamps, valued at $392.00, which stamps had been forwarded to the Los Angeles Machine Records Unit from the San Francisco Machine Records Unit, on or about September 22, 1942, which testimony by the said Major Ben M. Mayers was false and untrue and known by him to be false and untrue, in that he, the said Major Ben M. Mayers, well knew that a duplicate receipt had been prepared and executed covering the delivery of said United States postage stamps.

Specification 5: In that Major Ben M. Mayers, Adjutant General's Department, (AUS), Headquarters, Western Defense Command and Fourth Army, did, at San Francisco, California, on or about May 18, 1942, with intent to deceive, willfully and wrongfully, state to Major Ellis G. Piper, an Assistant Classification Officer detailed to prepare official classification records, and cause to be entered upon his official Classification Record, War Department, Adjutant General's Office, Form 66-1, that he, the said Major Ben M. Mayers, was born on July 14, 1903, and that he, the said Major Ben M. Mayers, had graduated with the degree of Doctor of Jurisprudence, from the University of Chicago, Chicago, Illinois, which statements and entries were false and untrue, and known by him to be false and untrue, in that he, the said Major Ben M. Mayers, well knew that he was born on October 7, 1906, and that he, the said Major Ben M. Mayers, had not received a degree of Doctor of Jurisprudence from said university.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority disapproved the finding of guilty of Specification 2, Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. Specification 1, Charge I.

Richard A. Sanchez was the husband of accused's sister (R.11, 12). After serving as an enlisted man at the Presidio of Monterey, he came to the Medical Detachment, Fort Ord, California, as a corporal, where he served for about 13 months (R.10,20). He held the rank of corporal for about three months (R.11) and was reduced to private (R.20). Major William H. Riley, Medical Corps, Commanding Officer, Medical Detachment, Fort Ord, from January 3, 1942, until September 18, 1942 (R.19), characterized Sanchez' services as "very unsatisfactory" and stated that Sanchez had "the lowest position of an enlisted man in the detachment" (R.20). During his service at Fort Ord, Sanchez was given 15 different assignments in an attempt to place him in a suitable position (R.20). About four of the assignments comprised clerical work (R.21). Sanchez was absent without leave from March 30, 1942, to April 6, 1942, and from May 17 to 26 of the same year. In each instance he was subjected to disciplinary action (R.21).

Accused was an officer in the Adjutant General's Department (R.197) and was War Department Inspector, Machine Records Units, Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California (R.67; Pros. Ex. H). Previously he apparently had been Officer in Charge, Machine Records Unit, San Francisco. About February 24, 1942, Captain Jeremiah G. Staples, Adjutant General's Department, reported to the Presidio of San Francisco as Assistant Officer in Charge, Machine Records Unit, "under" accused, then a captain (R.47). About March 10 Captain Staples became Officer in Charge. In addition to the unit at San Francisco there were submachine records units at Fort Lewis, Washington, Fort Douglas, Utah, and Los Angeles, California, all part of the Adjutant General's Section, Headquarters Western Defense Command and Fourth Army (R. 48; Pros. Ex. H). Captain Staples testified that there was "a little duplication" of supervisory control over the units and that no one seemed to know who was in control or what accused's duties were in connection with the unit (R.72). In the opinion of witness, accused was in a "command status" to him (R.67). Witness testified further that although in some instances accused would consult him before "enlisting" men for the Machine Records Unit, and in connection with changes and assignments therein, more often accused would act without such consultation (R.72,73). Recommendations for promotion within the unit ordinarily originated with Captain Staples (R.61) and all came to his attention before going to higher authority (R.70). From Captain Staples the recommendations went to accused's office (R.70,71,75), thence to the Adjutant General, Western Defense Command, who had issued instructions in the presence of accused that all requests for promotion be submitted to him (R. 29,32,36). After approval by the Adjutant General, promotions were issued by order of the Commanding Officer, Headquarters Special Troops (R.190-192). Captain Staples testified that he did not know whether any requests for promotion originated in accused's office (R.71). On June 29, 1942, Office Memorandum No. 7 was issued by Headquarters Western Defense Command, designating the various machine records units heretofore named as the "Machine Record Division of the Adjutant General's Section, Headquarters Western Defense Command and Fourth Army, under the direct supervision of Captain Jeremiah G. Staples ..." (Pros. Ex. H). By the same memorandum accused was assigned as coordinator of all machine records units within the command in addition to his duties as War Department Inspector. Captain Staples testified that "the situation" in the unit with reference to administration was no different after the issuance of this memorandum than before (R.75).

On or about June 20, 1942, accused called Captain Ralph H. Franklin, Assistant Officer in Charge, Machine Records Unit, Western Defense Command and Fourth Army, Fort Douglas, Utah. Accused told

Captain Franklin that "it was necessary that he arrange" to have Sanchez transferred to the Machine Records Unit, Western Defense Command and Fourth Army, and that Sanchez "was a competent man to fill the position that he wanted him for, and emphasized that it was a must request" (R.18,19; Pros. Ex. A). Captain Franklin "placed a request to the enlisted section, Ninth Service Command, requesting the transfer", and the transfer was duly ordered (R.19; Pros. Ex. B,C). Accordingly, Sanchez, a private at the time (R.11), proceeded on June 29, 1942, to the Machine Records Unit at San Francisco (R.12; Pros. Ex. C).

Major Riley testified that he had no inkling of the contemplated transfer until he received the order to transfer Sanchez (R. 21,22). Captain Staples testified that he was not consulted with reference to the assignment of Sanchez to the unit (R.48,49), and Colonel Burton Y. Read, Adjutant General, Western Defense Command and Fourth Army, stated that he was not aware of the matter until some time after the transfer had occurred (Pros. Ex. N). There was no record found in the Adjutant General's Office, Western Defense Command, of any request for the transfer of Sanchez (R.29), and no papers were found in the office of the "Headquarters Commandant" pertaining thereto (R.37).

Sanchez testified that prior to his transfer to the Presidio he had never met accused, that his wife was pregnant at the time and he lacked the financial ability to take care of her (R.11), that he knew nothing of any letter written by his wife to accused shortly before the transfer, and that he had no knowledge that his transfer was contemplated (R.12). Shortly after his arrival at the Presidio, Sanchez was informed by accused that he was "going to be given a chance to make good and stand on my own feet" (R.13,14); that he had to "prove" himself, and that accused hoped he would "make good" (R.16). Accused also informed Sanchez that the latter was to be accused's "confidential clerk" (R.16), that Sanchez' work was to be "strictly confidential" and was "not to be told to anyone" (R.42), and that the job called for a grade of staff sergeant (R.16). Accordingly, Sanchez became accused's confidential clerk, but his desk was "in the other room * * * where all the clerks were" (R.15).

The Machine Records Unit had no authorized table of organization at the time (R.27,33), but accused had set up a table of allotments of grades and ratings, and directed that this be adhered to (R.50). Almost immediately after Sanchez' arrival, accused told Captain Staples that he wanted Sanchez promoted (R.49,57). Captain Staples objected to

the promotion because it would reduce his allotment and because he had men in his organization whom he believed entitled to promotion (R.50, 57,61). He testified further that he had trustworthy men in his organization able to perform the type of work required by accused (R.66,67). He did not make known his objection to anyone except accused (R.69). He testified that in his opinion Sanchez was "not capable of the rank" (R.70). Nevertheless, on July 1, 1942, an order was issued by Headquarters, Special Troops, Fourth Army, appointing Sanchez a staff sergeant in Headquarters Company, Fourth Army (Pros. Ex. D). Not until the publication of this order did Captain Staples learn of the promotion (R.50). Colonel Read was not consulted with reference to the promotion (Pros. Ex.N), and there was no record in the Adjutant General's Office of any request therefor (R.29,33). Three other men were promoted by the same order and in each case the files contained the customary request (R.34,35), although the records did not show that Colonel Read had approved the promotions (R.36). Other than the order itself, there were no papers in the office of the "Headquarters Commandant" relating to Sanchez' promotion (R.37). Captain Staples testified that he kept a copy of any matter which "originated" in his office, that he did not find anything in his files relating to Sanchez' promotion, and that although he had destroyed some official records in his office, he would not have destroyed anything pertaining to Sanchez' promotion (R.76).

Sanchez' "soldier's qualification card", under the heading "Classification in Military Specialties" bore the legend "Clerk Genl.," and his "specification serial number" was "055". To the right of this appeared the letters "Satis.", and "5-19-41" as the date of classification. The date of enlistment appeared as December 9, 1939, and his "record of current service" showed that, among other duties, he had spent several months doing clerical work (Pros. Ex.E). Captain Staples testified that although the Machine Records Unit had some "055" men doing work as code clerks (R.64,65), the unit had never to his knowledge requested the transfer to it of enlisted men having that serial number (R.52). The men taken by the unit from the field had the serial number 272,400 or 401 (R.52,62). The first of these represented a key punch operator and the last two a tabulating machine operator (R.62). There were some men in the unit having serial numbers other than the above, but witness did not know the details of their assignment to the unit, and in any event the unit did not request men outside the three classifications stated (R.63). The unit did have some "general clerks", for which classification the serial number is 055. Some months after Sanchez' appointment, a table of organization was "set up". It provided for some 055 personnel (R.64).

While at the unit Sanchez did clerical work (R.10,25,30,51), including correspondence, typing, record keeping, and general administrative work (R.17,42,50). He testified that in his work for accused he had nothing to do with classified matter, although he "probably" typed some matters marked "Confidential" or "Secret", but did not remember very clearly (R.42).

Soon after Sanchez' promotion, accused asked Warrant Officer Stanley H. Rogers, Headquarters Western Defense Command, to help Sanchez find quarters, to do all he could for Sanchez, and to instruct him as far as possible. On several occasions accused asked Rogers about Sanchez' progress (R.27). Rogers testified that he saw some stencils cut by Sanchez, that the work was "just average", that he did not see Sanchez performing any other duties, and that the duty was "not adequate for a noncommissioned officer" (R.24,25,26) and could have been performed by any ordinary typist without previous training (R.25).

Major Eugene T. Adler, Adjutant General's Department, Assistant Adjutant General, Western Defense Command and Fourth Army (R.28), testified that in his opinion Sanchez was "not a competent clerk" (R.30). He formed this opinion as a result of several jobs of a clerical nature which Sanchez did for him (R.31). Witness added that since he had no exact knowledge of the duties which Sanchez was performing for accused (R.32), he was "not competent" to judge Sanchez' qualifications "in his duties in relation to" accused (R.31). Witness discussed with accused the question of placing Sanchez under the chief clerk, "so that he could get instructions as to form and how to write letters" (R.31). Finding that this arrangement "wasn't working" (R.31), witness again discussed the matter with accused, and they placed Sanchez under Master Sergeant Darrel Cook, Headquarters Company, Fourth Army (R.38), chief clerk of the enlisted men's division, "for coaching him and teaching him how to do the clerical work in the office" (R.31). Sergeant Cook testified that he had been in the service for 25 years (R.38) and had been an administrative clerk for over 20 years (R.39). Sanchez was under his immediate supervision for not over ten days (R.38). Witness tried Sanchez out on typing, correspondence, and cutting stencils (R.40,41). He testified that Sanchez "had no ability" in the performance of clerical duties (R.38) and was not trained as an administrative clerk (R.39). Although witness admitted that a person cannot become an administrative clerk in ten days, he assumed that since Sanchez was a staff sergeant he would be partially trained as an administrative clerk and would be able to perform his duties. Witness admitted that the mere fact that a man holds the grade of sergeant does not necessarily have any bearing on his qualifications as an administrative clerk, as line sergeants are often brought into headquarters and an attempt made to train them for administrative work (R.39). Witness further stated that he did not know what Sanchez' duties with accused were supposed to be (R.40). Major Adler stated that his last dealings with Sanchez, about a week before Sanchez left (R.31), which was early in October (R.55; Pros. Ex. G), "very definitely showed that he had reached no competency as a clerk" (R.31). However, witness admitted that with the tremendous expansion of the Army, the general

competency of clerks has become lowered due to the shortage of experienced trained men (R.32).

Sanchez testified that he had never operated "the International Business machine--for the machine records", and had never before worked in a machine records unit (R.17,18). However, he had studied typing in the "CCC", used all his fingers, and had a speed of "around 70", at which speed his work was "pretty accurate" (R.42).

Accused told Warrant Officer Rogers that Sanchez was his brother-in-law, but made Rogers promise not to divulge this fact (R.24). Captain Staples did not learn of the relationship until "during the investigation" (R.56).

As a result of accused's further efforts, Sanchez was transferred on October 13, 1942, to the 77th Machine Records Unit, Santa Ana, California (R.10, 17,53-56; Pros. Ex. F,G). He was placed in the administrative section and continued in the same type of clerical work (R.17). First Lieutenant Ralph Zimmerman, Officer in Charge, 77th Machine Records Unit (R.77), testified that Sanchez' work was poor and that he was not of "noncommissioned caliber" (R.77-79). Witness also stated that Sanchez had "little initiative" (R.81) and was not "competent" (R.80). Accused previously had told witness that Sanchez lacked experience but "would work out all right" (R.77).

Captain Staples testified that accused requested witness to send him Sanchez' service record and A.G.O. Form 20. Witness objected, as accused was "not within the command of the Machine Records Unit" and evidently not the proper custodian of the documents. Witness mentioned that "the man's service record wasn't satisfactory", and accused said "to tell no one about it". Thereupon witness forwarded the documents to accused (R.56). The testimony does not indicate whether this took place before or after Sanchez' promotion.

On or about October 20, 1942, accused appeared before Lieutenant Colonel Hermann P. Meyer, Inspector General's Department. Colonel Meyer asked accused whether he understood "his rights under the 24th Article of War", and either read the article of war to accused or handed him a copy. Accused said that he understood his rights (R. 44). Accused stated to Lieutenant Colonel Meyer that he "had been instrumental in arranging for the transfer of Private Sanchez, and having the man advanced to the grade of sergeant" (R.44). He stated further that he did so because he needed him "as a secretary or in some such capacity" (R.45) and believed him "capable" (R.44), but that the "primary" or "main" reason was that Sanchez was his brother-in-law (R.44,45).

Accused was sworn as a witness at his own request. He reiterated that Sanchez was his brother-in-law and that he had requested Sanchez' transfer (R.197). He testified that he had not been able to get satisfactory noncommissioned clerical help (R.197,198). A mobile machine records unit was being activated for shipment overseas and it was virtually impossible for accused to secure the services of a person whom he could trust "with the information involved in such movements" (R.198). Accused made some inquiry and learned that Sanchez had performed general clerical duties in the "CCC" and was qualified as a general clerk (R.198,201). He discovered that Sanchez had done clerical work as a corporal, knew how to cut stencils and run a mimeograph machine, and was honest, trustworthy, and conscientious (R.198). Accused called the medical unit to which Sanchez belonged, and talked to the sergeant on duty, whose name accused did not remember. The sergeant told accused that Sanchez had been absent without leave twice (R.201), that he had been tried out at various jobs, and that he was "maladjusted because of homesickness" (R.202). Accused did not call the commanding officer of the medical unit because he believed that speaking with the sergeant sufficed (R.202). Accused stated that Sanchez was separated from his wife and that she was pregnant. The separation seemingly had rendered Sanchez "incapable of adequately performing the duties of a clerk" (R.198,202).

Accused relied partially on Sanchez' gratefulness as an assurance that the latter would work out satisfactorily (R.198). He did not see or talk with Sanchez before the transfer (R.202), but upon Sanchez' arrival talked to him for some time and learned that in addition to his other qualifications Sanchez could type, was neat in appearance, close-mouthed, and trustworthy (R.198,202). Accused told Sanchez that if he did not "make good", accused would reduce him to private and return him to the field (R.198). Accused testified further that he had possession of and read Sanchez' service record (R.201,203), and did not remember holding it and failing to turn it over to the Headquarters Company until July (R.203). Accused further testified that he talked with Captain Staples the day after Sanchez' arrival, and that Captain Staples agreed to waive the staff sergeant allotment in the unit, made no objection to the proposed promotion, and himself initiated the "buck slip" requesting the promotion (R.198,199,203,204). The buck slip was processed in the ordinary manner through Headquarters Western Defense Command to Headquarters Special Troops, Fourth Army, which issued the promotion order (R.199,204; Pros. Ex. D). Accused did not bring the matter to the attention of Colonel Read or anyone else at Headquarters Western Defense Command (R.201).

Accused said further that Captain Staples, as Officer in Charge,

had "promotional jurisdiction" over enlisted personnel in the Machine Records Unit and that accused did not exercise command over Captain Staples in this respect and lacked the power to make Captain Staples "go through with it" had the captain objected (R.205). At the time of his activities in connection with the transfer and promotion, accused did not feel that he was doing anything harmful (R.199,201). He admitted having requested Warrant Officer Rogers not to disclose the relationship between Sanchez and himself (R.201).

As to Sanchez' duties while working for accused, the latter testified that Sanchez made out and organized reports, cut stencils, helped edit the Machine Records Bulletin, and mainly acted "as confidential clerk for the various movements of officers and men in the Machine Records" (R.200). Sanchez' work was "very satisfactory" (R.199,200). He was anxious to learn and to do a good job. He was close-mouthed. There were never any "leaks of information regarding shipments of men to units or units overseas" (R.199). When accused learned of the likelihood that all Inspectors, Machine Records Units, would be "pulled into" Washington, he felt that he should find a place for Sanchez and therefore recommended him "for the cadre which went down to Santa Ana" (R. 199).

b. Specifications 2,3,4,5,6, Charge I.

On the dates involved in these specifications Private Alvin Stone belonged to the Machine Records Unit, Los Angeles, California, to which he had been transferred in April, 1942, and in which he served as a chauffeur (R.92,106,110). On one occasion about three weeks after his arrival at Los Angeles, Stone drove accused and another officer to Camp Young (R.22). On the way back the party visited the Stone Liquor Store on Hollywood Boulevard (R.92,93). The store was owned by Harold Stone, Alvin's brother (R.92,148), and managed by Nathan Stone, another brother (R.135,149). Harold Stone testified that each member of the family had "a perfect right" to take liquor from the store (R.152). Upon the occasion of this visit, Alvin introduced accused to Harold (R.93,149).

On June 7, 1942 (Specification 2), accused was in Los Angeles and Private Alvin Stone was acting as his chauffeur (R.93,94). Private Stone testified that accused asked him about the possibility of getting a couple of bottles of liquor. He wanted it to give to Colonel Read's wife in order to keep "in good" with the colonel (R.93,113,131,132). He said that she liked Ballantine Scotch. He told witness that if witness "would be good to" accused, he "would be good" to witness and that in civilian life "if you are good to the boss", the boss will

be good to you" (R.93,113). Witness replied that he thought it possible to procure some liquor for accused (R.94,113). Nothing was said about purchasing the liquor, nor did witness offer to make a gift of it (R.114). Arrived at the store during the afternoon at a time variously estimated as between 2 and 4 o'clock (R.94,95,112,139), accused was introduced by Alvin Stone to his brother Nathan (R.94,135). Accused told Nathan that he understood that Nathan was interested in getting into the Army and that Nathan should let accused know when he received his draft questionnaire. Nathan said he would do so (R.94). Nathan Stone testified that accused then remarked about the stock of liquor on the shelves, mentioning Ballantine's and "the different prices". Witness told accused about them. Accused seemed to be "quite interested" in trying one or more bottles and witness asked accused if he wanted to try one. Accused said "Yes" and took a bottle of Ballantine's and two bottles of "Cutty Sark" (R.135). Alvin Stone's testimony corroborated Nathan's on the obtaining of the liquor (R.94). The liquor was carried out to the car (R.136). Nothing was said about paying for or charging the liquor, no payment was made or offered, and the liquor was not charged nor the transaction recorded on the books (R. 95,116,135,136,139,141,152). Nathan Stone testified that prior to this occasion Alvin had said nothing about making a gift of any liquor and that witness expected accused to pay for it (R.135), but did not ask for payment as he did not wish to embarrass his brother (R.136). So far as Nathan or Alvin knew, no payment was ever made (R.95,139). Nathan Stone testified that the market value of the three bottles of liquor was about $14 (R.140). After leaving the liquor store, Alvin drove accused to Clayborne Street, North Hollywood, to visit some friends (R.96).

On or about August 8, 1942 (Specification 4) accused was in Los Angeles again and asked Alvin Stone, who was driving, whether Alvin could obtain some more liquor for him (R.96,116). Alvin replied that he thought it could be arranged (R.96). Accused did not offer to purchase the liquor (R.116,117). Somewhere between 2 and 4 p.m. they went to the store (R.95,96,140). Nathan was there, and accused inquired again about his draft status and told Nathan that if the latter would like to come to San Francisco to enlist, accused "would arrange everything" (R.96,136). Accused also told Nathan that he would be back the following month and would again talk the matter over with Nathan and "see what he could do" (R.137). Accused made some remarks "about the matter of liquor" (R.136) and the testimony of Alvin and Nathan was, respectively, that accused mentioned that he "had to take care of people in headquarters, a certain colonel" (R.96) and that he wanted the liquor "to keep the Colonel in good spirits" (R.136). Nathan thought that accused named Colonel Read as the colonel referred

to (R.136). Thereupon three bottles of liquor were handed to accused. Alvin "took the liquor off the shelves", Nathan "put it in a bag", and Alvin and accused "took off" (R.96,97,117,137,140). The value of the three bottles of liquor was $14 or $15, according to Nathan Stone (R.140). As on the previous occasion, nothing was said about paying for or charging the liquor, no payment was made then or subsequently, and the liquor was not charged nor the transaction recorded on the books (R.97,117,139,141,152). After leaving the store, Alvin drove accused to the same place on Clayborne Street which accused had visited on June 7 (R.96).

Colonel Read, who, it will be recalled, was the Adjutant General, Western Defense Command, testified that on or about August 15, 1942, accused and his wife attended a dinner at witness' quarters. Accused presented Mrs. Read, the colonel's wife, with a bottle of Ballantine's Scotch whiskey, remarking that it was "for the purpose of ameliorating her suffering from a recent tooth extraction" (Pros. Ex. N).

On September 17, 1942 (Specification 5), accused again being in Los Angeles, Nathan Stone notified Alvin by telephone of the receipt of his draft questionnaire (R.97,98,138). Alvin informed accused, and as a result the two went to the liquor store that afternoon, arriving about 3 o'clock (R.97,98,138). En route to the store accused asked Alvin whether Alvin thought he could get accused some more liquor (R. 98,117), to which Alvin replied that he thought he could (R.98). Nothing was said about purchasing the liquor (R.117). Upon arrival at the store accused advised Nathan about the best means of getting a release from his draft board in order to enlist, told him whom to see at the draft board, and explained how to "go about enlisting" (R.99,138). He told Nathan "to say nothing to anybody about this" (R.138). The conversation then turned to liquor (R.138) and accused said it "would be nice if he could have some different bottles of liquor" (R.139). Grateful for accused's help in connection with his enlistment (R.138,140), Nathan said, "Certainly you can have it" (R.140). Accused then selected about eleven or twelve bottles of liquor, which were packed in accused's valise and taken to the car (R.98,99,100,139,140,141). Among them were some Ballantine's which accused said was for "the Colonel" (R.140), and the store's last bottle of "Cariocca Zombie" rum, which Nathan unsuccessfully "tried to talk him out of" (R.139). Nathan Stone testified that the value of the liquor taken was over $50 (R.140) and that when he had offered to give accused some liquor he had not expected accused to take such a large quantity (R.142). Nothing was said about paying for or charging the liquor, and it was not charged, nor was the transaction recorded in the books (R.100,139,140,141,152). Nathan Stone testified that he never received any money for the liquor (R.139).

Since Mrs. Stone, the mother of the boys, was feeling very upset about Nathan's being drafted, accused and Alvin drove out to see her at another liquor store owned by Harold Stone (R.92,93,96,100,141,148,149,150). There accused attempted to reassure Mrs. Stone and told her that he would see that Nathan "was well taken care of, that is, that he would be enlisted without any undue hardships" (R.150) and that accused would see that Nathan was enlisted in the Machine Records Unit in San Francisco (Pros. Ex. M). Mrs. Stone was so grateful that she gave accused a bottle of coffee liqueur (R.101,150; Pros. Ex. M). Thereupon Alvin drove accused to his friend's house in North Hollywood and left him there (R.96,101).

Nathan Stone testified that there were no other customers in the store during the three visits of accused (R.286-288) and Harold Stone testified that he was informed of the liquor given to accused on each occasion and that no money was paid by accused until the check dated December 20, 1942, hereinafter referred to (R.152).

Shortly after the middle of September accused aided Nathan Stone in connection with his enlistment and Nathan finally enlisted during the latter part of September (R.142,143; Pros. Ex. J).

On December 20, 1942, which was after the commencement of an official investigation of accused's activities, accused wrote a letter to Harold Stone, inclosing a check for $40. The letter stated that the check was in payment for liquor delivered at the store "the middle of September" and requested that an itemized statement be sent if there were "any other money" due (Pros. Ex. L).

On October 7, 1942 (Specifications 3,6), Alvin Stone drove accused and Captain Edward M. Richardson, Jr., Adjutant General's Department, Officer in Charge, 96th Machine Records Unit, Los Angeles (R.228), to Blythe, California (R.101). In the early afternoon and again around dinner time Alvin Stone saw accused take a drink, but accused was not intoxicated (R.121,123-125,126). After dinner, while Captain Richardson was in the lavatory at a gasoline station (R.101) and accused and Alvin Stone were sitting in the car waiting for him (R.102), accused asked whether Alvin could get him three cases of "Scotch", saying that he wanted to give one case each to Colonel Read and Captain Richardson and keep one for himself. Alvin testified that he told accused that three cases would cost a lot of money - at least $250, and that thereupon accused

> "* * * got burned up. He said 'You are an ungrateful s-of-a-b'. He says, 'You are also suspicioning my

> brother, Jackson Mayers, of stealing four hundred dollars worth of stamps'. I told him I didn't think he knew what he was talking about. He says 'If you don't close your mouth, or if you go to higher authority, I am going to have you transferred overseas, and then' he says, 'I am going to put a slug in your back'" (R.102).

He also told witness that witness "was not worth a God dam, or something to that effect" (R.103). Then Captain Richardson came out and before his arrival at the car accused told witness to "Shut your damn mouth" (R.102).

Alvin testified that prior to this occurrence his relations with accused had always been friendly (R.103).

That evening Alvin told his brother Harold about the incident and together they reported it to Frank Quigley, a friend of theirs and brother of "Colonel Quigley". Frank Quigley reported the matter to his brother the colonel (R.133,134,155,160). Shortly thereafter Alvin was called before "the Captain" and told his entire story (R.134).

Accused testified that prior to June, 1942, he was scheduled to make a trip to the Los Angeles unit and that "Colonel Quigley", Assistant Adjutant General "in this headquarters" asked accused "to say 'Hello' to Alvin Stone" (R.206). The colonel said that he knew the family (R.206). Prior to June accused made the trip (R.207), and accused delivered Colonel Quigley's message to Alvin, who seemed elated that the colonel remembered him. Alvin was the driver of the reconnaissance car in which accused rode (R.206). After accused had transacted some official business, Alvin, while driving accused to Glendale Station, told accused of his close connections with Colonel Quigley and the Quigley family. Alvin asked accused whether he would like to take "a couple of bottles of liquor" with him. Accused refused (R.207). Stone's Liquor Store was visited by accused on this occasion, but accused neither purchased nor received any liquor (R.208).

Around the tenth of June (Specification 2) accused was making another inspection trip in Los Angeles, and Alvin Stone again "made the offer of liquor" which accused again refused (R.208). Thereupon Alvin and accused agreed that accused should buy two bottles of liquor at the wholesale price (R.208). Alvin instructed accused to pay him rather than Nathan (R.209) and said he would turn the money over to Nathan (R.215). Alvin arranged with Nathan for the purchase of one or two bottles. Nathan was in the store at the time. No Scotch whiskey was involved (R.209,210). Accused paid Alvin in the store. Payment was made in bills and accused gave Alvin the exact amount due. Alvin put

the money in his pocket and did not ring it up on the cash register. Accused had no recollection of the amount (R.210). Apparently Nathan did not see accused make the payment (R.212). Other customers were in the store, and Nathan was waiting on them (R.211). Accused knew that Nathan was manager of the store. Accused did not "make known" to Nathan, Harold, or any other member of the Stone family the fact that he had paid Alvin (R.214). He denied having said that he was buying the liquor for Mrs. Read and testified that he mentioned neither her name nor Colonel Read's (R.210). He did not remember whether he was driven to North Hollywood to visit a friend after leaving the store (R.216).

On or about August 8, 1942 (Specification 4), accused was in Los Angeles again and visited the Stone Liquor Store, where he purchased some liquor (R.217). His recollection was that he bought a bottle of Ballantine's Scotch, wrapped as a gift, and that there "might have been another bottle" (R.218). As on the previous occasion he made payment in cash to Alvin (R.214,217), who put the money in his pocket (R.218). The payment was made in paper money, and, as in the previous transaction, he received no change, as the amount came out "just even" (R.218). Nathan was present in the store (R.214,217), but was busy with other customers (R.217). Accused "forgot about" paying the government tax and the 3% sales tax (R.218). Accused did not "make known" to Nathan, Harold, or any other member of the Stone family the fact that he had paid Alvin (R.214).

On or about September 17, 1942 (Specification 5), accused made another trip to Los Angeles (R.219). While they were at the Los Angeles Machine Records Unit, Alvin asked accused about getting some more liquor. Accused said that he wanted about six bottles, as he wished to give a party. He told Alvin that he did not have enough cash to pay for the liquor and asked whether it would be satisfactory if he paid for it "around the first of the month, or after the first of the month" (R. 219,223,224). Alvin said it would be all right (R.219,223). Accordingly, they stopped at the liquor store and accused bought eight or nine bottles of liquor (R.219). His recollection was that there was some Scotch, rum, and bourbon (R.220). He made no payment at the time (R.219). No list of the merchandise was made and no total computed (R.223). Alvin told accused that the liquor would cost between $35 and $40, but accused never received a bill for it (R.220,223). Accused corroborated the prosecution's testimony concerning the visit to Mrs. Stone at the other store (R.220). Accused did not pay for the liquor "around" the first of October because he was very busy and the matter slipped his mind (R. 221,225). Thereafter he delayed paying because he had learned of a contemplated investigation and felt that there might be some connection

between

> "the payment of the liquor and what was happening in Los Angeles; in other words, I felt if I paid this that I would be back-tracking on something that might have come up". (R.225).

He corroborated the prosecution's evidence about the December 20 payment by check (R.220; Pros. Ex. L). In his examination before the Inspector General, he said that the reason he did not pay at the time of the purchase was that he had no blank checks. He did not inquire whether the Stones had any blank checks (R.224).

Accused testified that he was certain that the visits to the liquor store were in the late afternoon, although not certain whether they were after six o'clock (R.220).

In his examination before the Inspector General, accused said that his liquor dealings had been with Nathan Stone and he denied having had any liquor dealings with Alvin Stone (R.215).

In connection with Specifications 3 and 6, Charge I, Captain Richardson testified for the defense. He testified that he and accused visited the Machine Records Unit at Los Angeles on or about October 7, 1942, and took a trip to the Desert Training Center, on which trip Alvin Stone was the driver (R.228,229). Witness believed that around 5:30 p.m. accused had a bottle of beer and witness stated that accused had no other liquor during the day and did not have a bottle in his possession shortly before dinner (R.229-234). When witness rejoined accused after coming out of the lavatory at the gas station, witness did not observe anything peculiar in accused's demeanor and did not smell alcohol on accused's breath or see a bottle in accused's possession (R.233-235). On cross-examination it developed that witness had told the Inspector General that he did not recall this particular evening (R.240).

Captain Lawrence L. Hill, Adjutant General's Department, Machine Records Unit, 2nd Armored Corps, San Jose, California, testified (by stipulation) that he saw accused at the Desert Training Center, California, on October 7, 1942, from 2 p.m. until about 4:30 p.m., and that accused "was not intoxicated and gave no evidence * * * of having partaken of any alcoholic beverage" (R.258; Def. Ex. 1).

Accused testified that he did not drink any alcoholic beverage except beer on the entire trip and had no liquor in his possession. He drank only two bottles of beer during the trip and one was after the arrival at Camp Young that night (R.247,248). While the party was at

the gas station, Captain Richardson was away from the others only three or four minutes (R.249). During that interval Alvin Stone asked accused his opinion of the future of the machine records units, to which accused responded that all able-bodied machine records officers and men would go overseas with mobile machine records units. Thereupon, Alvin asked accused whether accused thought it likely that Alvin would go. To this accused replied: "There are no exceptions. It is the general policy of sending as many able-bodied men as possible to combat duty" (R.249). During the conversation accused made no request upon Stone for any liquor and did not use the language alleged or any other insulting or abusive language (R.250).

c. Specifications 7 and 8, Charge I.

Private First Class Harrison Keith Laiken, Headquarters Company, 4th Army, was company clerk of Headquarters Company at the Presidio of San Francisco, on October 12, 1942. On or about that date he received a telephone call asking that he have Private Nathan Stone call accused. He gave the message to Nathan Stone (R.164). Nathan Stone testified that he thereupon called accused. Accused told witness that he had heard rumors of an investigation and that if witness were called upon by the Inspector General, "You had better tell the Inspector General that I paid for that liquor in cash" (R.145). Because he was afraid, witness said he would do so (R.145). However, when subsequently he was called before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, he told the truth (R.146).

On November 28, 1942, Sergeant Charles L. Fisher, Machine Records Unit, was sergeant of the guard at California Hall (R.162). Some time after 8 p.m. accused came to the building and asked for Nathan Stone. Nathan was located and accused said to him, "Come into the office, I want to talk to you" (R.163). They went into the office of "Captain Bruce" (R.146,163) and came out about 15 minutes later (R.163). Nathan Stone testified that accused took him into Captain Bruce's office and asked him what he had told the Inspector General. Witness "rather lied" to accused (R.146). Accused asked witness whether he had told the Inspector General that accused had paid for the liquor. Witness told accused that he had said so (R.146). Accused also asked witness whether witness had told the Inspector General "about the time" (R.148). Witness testified that according to his recollection he stated to accused that he had told the Inspector General that the transactions occurred after 6 o'clock. Witness testified that in fact they did not occur after 6 o'clock (R.148). Accused told witness to change his testimony before the Inspector General (R.146,287) and attempted to persuade him to change his statement regarding the time when accused came into the store and to say that accused had paid

for the liquor (R.287). Accused said to witness: "'You be sure to tell the Inspector General that the time was after six p.m.'" (R.146,288). Witness said he "would do that too" (R.146).

Accused testified that on or about October 12, 1942, he talked to Nathan Stone on the telephone (R.258,259). According to his recollection he asked Nathan how the latter was getting along. Nothing was said with reference to Nathan's prospective testimony before the Inspector General (R.259). In fact, at that time accused was not aware that any investigation about the liquor transactions was in progress nor that witnesses had been interviewed on the subject (R.260-264). He knew that there was some kind of an investigation which affected Nathan, but "didn't know how" (R.263).

On cross-examination accused admitted that about October 9, Colonel Read informed accused that the Chief of Staff, Southern California Sector, had requested an investigation of the Los Angeles Machine Records Unit, although accused also testified that he was not sure of the date and not sure whether his informant was Colonel Read (R.262). Accused also admitted having stated to the Inspector General that he had never made any telephone calls to Nathan Stone. He explained this by saying that he had called Nathan's company and left word for Nathan to call him (R.260). He was also confronted with a statement to the Inspector General that he did not remember whether he had ever talked with Nathan over the telephone from his office to California Hall. He explained this by saying that he had spoken to hundreds of men on the telephone and did not remember every conversation (R.261).

With reference to November 28, accused admitted having talked with Nathan Stone in the evening in Captain Bruce's office at California Hall (R.264,265). He may have said to Nathan, "May I speak to you?", or similar words (R.267). No one was present except accused and Nathan (R.265). Accused took Nathan into Captain Bruce's office instead of talking with him in the hall in front of the sergeant because he "thought it would be nicer" for Nathan to talk with accused in the office (R.268). They were in the office only a few minutes (R.268) and the conversation concerned how Nathan was getting along (R.265,270). Nathan also remarked that Alvin "was getting crazier every day" and "was running around in circles" (R.265,266). No mention was made of the investigation (R.221, 265) and there was no discussion regarding the liquor or whether the liquor had been obtained prior or subsequent to 6 p.m. (R.265,269-271). On November 28, accused knew that an investigation had begun into the facts surrounding his obtaining liquor from the Stones (R.266), and he testified that by that date the Inspector General "might have" told him the allegations against him, namely that on certain afternoons he had obtained liquor without paying for it (R.267). Accused explained his seeking out Nathan on November 28, by saying that even after the

investigation conducted on October 20, he was still concerned with Nathan's welfare and continued to talk with him despite the accusations made against accused by the Stone family. He testified, "I was still interested in this boy I had enlisted into the Army" (R.267). It was pointed out to accused that he had stated to the Inspector General that he had received the liquor on or about September 15 after 6 o'clock (R.221). Accused testified that he was certain that the visits were late in the afternoon but not certain that they were after 6 o'clock (R.220).

In rebuttal, Nathan Stone testified that he did not tell accused that Alvin "was getting crazier and crazier", and that Alvin's name was not even mentioned in the conversation (R.286,288).

d. Specifications 1,3,4,5, Charge II.

Accused's "A.G.O. No. 66-1" card, entitled "Officer's and Warrant Officer's Qualification Card" shows that accused was interviewed on May 18, 1942, by Major Ellis G. Piper, Adjutant General's Department (Pros. Ex. R) (Specification 5). It was stipulated that Major Piper would testify that he was the classification officer who interviewed accused and that he had no recollection of any of the statements made to him (Pros. Ex. T). The qualification card shows accused's date of birth as July 14, 1903, and shows a degree of "J.D." from the University of Chicago (Pros. Ex. R). It was stipulated that the official birth records of Cook County, Illinois, give October 7, 1906, as the day of accused's birth (Pros. Ex. S). It was further stipulated that E.C. Miller, Registrar of the Law School, University of Chicago, would testify that the records of the law school indicate that accused attended the school from 1930 to 1934, was dropped for poor work, subsequently reinstated, completed approximately three years of law work, but did not qualify for or receive a law degree (Pros. Ex. U).

Accused testified that on a previous occasion he had given July 14, 1903, as his date of birth in order to appear over 21 years of age and thus be eligible for the Enlisted Reserve Corps without the permission of his parents (R.278). His correct date of birth was October 7, 1906. He explained all this to Major Piper, who asked whether he wanted to put down the correct date rather than the one appearing in Army records. Accused said that he did not wish to put down the correct date (R.277). Major Piper then said, "Well, if you want it that way, we will just leave it" (R.278,279), and it was so entered (R.278).

Accused admittedly told Major Piper to "put down" that accused had received a J.D. degree. This was an inadvertence. Accused's intention was merely to record that he had spent three years in law school.

Although he did not graduate, three years in law school entitled him to take the Illinois Bar examination. He testified: "It was merely to record on the card I had law experience, and without any attempt to defraud anybody" (R.278). He actually attended law school for three years, - one prior to graduation from college and two thereafter (R.278). Accused understood that when he signed the card he was making an official statement (R.279).

During the early part of June, 1942 (Specification 3), Jackson Mayers, accused's brother (R.275), was on duty in the Los Angeles office of the Machine Records Division (R.84) and was a technician grade five (R.195,196). Captain Staples testified that accused telephoned him and informed him that he wanted Jackson Mayers promoted (R.83,86,89,90). Captain Staples told accused that such a promotion should be approved by Jackson Mayers' commanding officer in Los Angeles (R.84,85) and at the request of accused, witness twice telephoned Jackson Mayers' commanding officer, who, according to witness, disapproved the contemplated promotion. Accused reiterated his desire that his brother be promoted, and witness continued to insist that any such action should be taken through Jackson Mayers' commanding officer (R.85, 86). On June 25, 1943, an order was issued from Headquarters Special Troops, Fourth Army, promoting Jackson Mayers to sergeant (Pros. Ex.I). Captain Staples did not believe that the promotion "cleared through" him (R.86). Jackson Mayers' name was not on the letter of June 20, 1942, written by the Officer in Charge, Machine Records Unit, Los Angeles, recommending a number of enlisted men for promotion (Pros. Ex. Q). However, the initials of the Commandant, Headquarters Special Troops, were apparently on the promotion order (R.187,188,192). All names on the promotion order except four, one of them Jackson Mayers, were substantiated by check slips or letters requesting the promotion (R.179,186). In a statement under oath, made at San Francisco to Lieutenant Colonel Herman P. Meyer, Inspector General's Department, on October 20, 1942, in connection with an official investigation, accused denied having requested Captain Staples to promote Jackson Mayers to sergeant (R.82,83). Before making the statement accused was handed a card containing a copy of Article of War 24, which he studied. He told Lieutenant Colonel Meyer that he was "thoroughly familiar" with his rights under that article (R.83).

For the defense, Jackson Mayers testified that he had no knowledge of any request for his promotion to the grade of sergeant made by accused. Accused testified that he did not, on or about June 30, 1942, request Captain Staples to promote his brother Jackson Mayers to the grade of sergeant (R.275).

On December 12, 1942 (Specification 1), accused appeared

before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, pursuant to an order issued by the Commanding General, Western Defense Command and Fourth Army, for a supplemental investigation of alleged irregularities on the part of personnel in the Machine Records Unit (R.180). Lieutenant Colonel Linehan testified that he explained "his rights" to accused and instructed accused as to his right to remain silent and to have any statement he might give used against him, pursuant to Article of War 24. Accused expressed familiarity with Article of War 24 and with his rights (R.181). Under oath (R.182) he told Lieutenant Colonel Linehan that on three occasions he stopped at the Stone Liquor Store and received liquor. He said that the liquor was paid for with the exception of the last batch, which he received in September. As to that, he did not have enough money with him to make payment, and he intended to pay for it after the first of the month by check (R.181).

Specification 4. Captain Staples testified that about September 22, 1942, he mailed $392 worth of United States postage stamps from the San Francisco Machine Records Unit to the Los Angeles unit (R.168). The stamps were sent by air mail, special delivery, and were registered and insured (R.169). Inclosed was a letter of transmittal to the Officer in Charge of the Los Angeles unit requesting acknowledgment of the receipt of the stamps by indorsement (R.169; Pros. Ex. O). The San Francisco office received the United States Post Office Department registered mail return receipt, which acknowledged receipt of the package. About a week or ten days after the transmittal, the attention of witness was called to the fact that the formal receipt (by indorsement) of the original letter had not been received (R.169). Witness communicated with Captain Richardson of the Los Angeles unit, who reported that the stamps had not been received by the unit (R.169,170). Witness notified accused and suggested that the matter be reported to Colonel Read, but accused directed that they await the result of Captain Richardson's investigation. After a thorough investigation, in which he "turned practically all the files up side down", Captain Richardson reported to witness that he could find nothing indicating that the stamps had ever reached the unit (R.170), and witness stated that he never knew whether the stamps eventually were found. Witness discussed the matter with accused several times and accused still did not say whether it should be reported to Colonel Read. Witness stated that the formal return receipt from the post office "cleared our books", but that accused decided that the books should be "cleared formally by our formal return receipt". At length, accused directed witness to prepare a duplicate receipt "to clear our books formally" (R.171). The receipt was prepared and sent to Los Angeles (R.171), probably around October 1 or 2 (R.176). About October 7 or 8 the original duplicate receipt

arrived back at the San Francisco office. Captain Staples testified that he showed it to accused. He and accused then decided that this was not the proper method to clear the books, whereupon accused instructed witness to destroy the duplicate receipt. Accordingly, witness burned the document (R.171,173,177). A copy of the duplicate receipt, showing by first indorsement, "Receipt Acknowledged", was introduced in evidence (R.172; Pros. Ex. P). No report was ever made of the destruction of the receipt (R.173). Sometime after October 9, accused told witness that "something had come up in Los Angeles" (R.174) and that the loss of the stamps should be reported to Colonel Read (R.173, 174,178). Witness reported the loss to Colonel Read (R.174). Subsequently accused told witness that the "incident" of the duplicate receipt should not be discussed, and that anyone connected with the matter should be instructed to say nothing about it (R.174,175). Consequently, witness instructed the personnel who had been connected with the preparation of the duplicate receipt to tell no one about it (R.174). Accused did not recall whether this was before or after the investigation was "actually started" (R.175).

On December 20, 1942, in the course of the investigation by Lieutenant Colonel Linehan, accused, being under oath, stated to Lieutenant Colonel Linehan that he did not recall any such duplicate receipt having been prepared and that he did not see any such document. Later, during the same interview, he said several times that he did not know of the existence of a duplicate receipt. Still later in the interview, accused admitted that he "had knowledge of the duplicate receipt's being sent", but did not remember seeing it and did not recall its being burned (R.183,184). When Lieutenant Colonel Linehan showed accused Prosecution's Exhibit P, the copy of the duplicate receipt, and asked accused whether he knew of the existence of the original copy of the duplicate letter and first indorsement, accused said he didn't remember "that particular piece of paper at all" (R.183).

With reference to Specification 1, Charge II, accused admitted telling Lieutenant Colonel Linehan that he paid cash for all the liquor except that received on the last occasion. Accused testified that his statement was the truth,inasmuch as he did pay cash for all the liquor except that obtained on September 17 (R.272).

With reference to Specification 4, Charge II, accused testified that in the interview of December 20, 1942, he did tell the Inspector General that he had no knowledge of the duplicate receipt. Accused testified that he had no "positive knowledge" of the existence of the duplicate receipt, although he had heard rumors about the matter (R.276,277), the substance of the rumors being that there had been a duplicate receipt

"in an attempt to cover up" (R.276).

A number of persons testified by stipulation that accused's reputation for truth and veracity was excellent and that he was honest, upright, and reputable (R.280; Def. Ex. 2).

Captain Richardson, First Lieutenant Ralph Zimmerman, 77th Machine Records Unit, Santa Ana, California (R.254), and Jackson Mayers all testified that Alvin Stone's reputation for truth and veracity was poor (R. 235,240,246,254). However, Captain Richardson admitted that he had retained Alvin Stone as staff sergeant for several months, during which time he had no complaint about Stone's truthfulness. Captain Richardson also admitted that he himself had been punished as a result of the investigation into the affairs of the Machine Records Units (R.241). Lieutenant Zimmerman admitted having known accused previously. He also admitted that his statement under oath to the investigating officer that he had known accused in college was untrue (R.255-257).

Captain Richardson testified that after the investigation had commenced, Alvin Stone told him that he was going to do everything in his power to see that accused was punished (R.235,236), and Lieutenant Zimmerman testified that on October 7 Alvin Stone said that he was "out to get" accused (R.254). Jackson Mayers testified that he saw Alvin Stone on the evening of his trip with accused and Captain Richardson (October 7); that Stone was very excited; that Stone told witness that accused had informed Stone that he "was going to be transferred out"; and that Stone said that "nobody could do this to him". Stone also told witness that "he was going to do everything in his power to get" accused (R.245).

Accused testified that in his opinion Alvin Stone was a neurotic and that he "deliberately refused to learn anything about Machine Records so that there would be no possibility of him being selected as a likely man for the Mobile Units" (R.250). Alvin Stone testified that he never refused to learn the operation of the machines at the Machine Records Unit and never stated that he would refuse to learn their operation in order to avoid overseas duty (R.129).

4. a. With reference to Specification 1, Charge I, the evidence shows clearly that accused knowingly caused the transfer of Sanchez, his brother-in-law, as alleged. The Specification also alleges that he "wrongfully" caused the transfer. The transfer was effected by accused in some mysterious manner without consulting either Captain Staples or Colonel Read, the Adjutant General. Although this of itself would not necessarily brand accused's actions as "wrongful", nor would the mere

fact that Sanchez was the brother-in-law of accused, the transfer and promotion were each a part of the same plan, and if the whole plan was wrongful, so was each part of it. The Specification alleges that at about the time and place of the transfer and assignment, accused caused the promotion of Sanchez to staff sergeant, knowing that he did not possess the requisite experience and qualification for that grade. If this be true, there is no doubt of the wrongfulness of accused's activities in connection with the transfer and promotion. That accused "caused" the promotion is clear from the evidence. It is equally clear that Sanchez did not possess the requisite experience and qualifications for the grade in the line of work to which he was assigned. Although Sanchez may have handled some matters for accused not requiring any particular clerical ability and experience, the evidence shows clearly that his main work was of a clerical nature and that he was pathetically poor at it. Even accused recognized this, for on more than one occasion he enlisted the aid of a noncommissioned officer to attempt to instruct Sanchez in his duties. Accused's testimony relating to the satisfactory nature of Sanchez' services is contradicted by accused's own calls for help and by the testimony of the unbiased witnesses. Even after the transfer of Sanchez to Santa Ana, his work continued to be poor.

The evidence convinces the Board of Review beyond a reasonable doubt that accused knew that Sanchez did not possess the requisite experience and qualification for the grade of staff sergeant in a machine records unit. Since accused had never met Sanchez and apparently knew little about him, he had no positive knowledge on which to base a judgment that Sanchez was entitled to promotion. He knew that Sanchez had never worked in a machine records unit and the information which he obtained from the unidentified sergeant of Sanchez' medical detachment gave no foundation for a belief that he was worthy of promotion. Had accused been sincere in his activities, he would have communicated with the commanding officer of the medical unit, but he carefully avoided doing so. Accused had possession of Sanchez' service record, and in all probability it contained an indorsement showing Sanchez' unsatisfactory rating (par. 29, AR 345-125, Changes No. 7, Nov. 2, 1942), for his commanding officer, when a witness, characterized him as very unsatisfactory. However, since there was no definite proof of such an entry, the Board of Review dismisses the possibility as an element of proof. Accused was secretive about the relationship between Sanchez and himself and, contrary to instructions, did not submit the request for promotion to Colonel Read. Had he honestly believed in Sanchez' worth, he would have been open and aboveboard about the promotion, for the mere relationship between the two would have been no obstacle to Sanchez' advancement. Accused himself admitted that the main reason for his actions in procuring the transfer and promotion was the brother-in-law relationship.

In the opinion of the Board of Review the allegations of the Specification were proved beyond a reasonable doubt. Accused's conduct was prejudicial to good order and military discipline under Article of War 96.

b. Specifications 2,3,4,5,6, Charge I.

The evidence for the prosecution clearly proves that at the place and time alleged in Specification 2, accused solicited and received a donation of liquor from Private First Class Alvin Stone as alleged. Although the store was owned by Harold Stone and managed by Nathan Stone, each member of the family had a right to take liquor from the store and although Nathan actually delivered the liquor to accused, the solicitation was made to Alvin and it was Alvin who in fact made the donation. The donation and receipt of the liquor from Alvin Stone as alleged in Specification 4, and the solicitation as alleged in Specification 5 were likewise proved beyond a reasonable doubt. Accused's story that the liquor was taken by way of purchase rather than gift does not ring true. Accused's testimony that he paid Alvin on the first two occasions and had exactly the correct amount is not worthy of belief. Had Alvin been paid, there is no reason to suppose that he would have kept the money and cheated his own brothers, and the latter testified that no payment was received by them. The check which accused sent some months later, in the midst of an investigation into his affairs, was patently an afterthought.

With respect to Specifications 3 and 6 the evidence for the prosecution clearly proved that accused solicited a donation of the liquor as alleged in Specification 3 and that he used the abusive language toward Alvin Stone as alleged in Specification 6. Although accused denied this and indicated that the conversation between Alvin Stone and himself related to the probability of Alvin's being sent overseas, Stone's testimony, considering the whole background of their relationship and the previous liquor transactions, seems far more credible. It is almost inconceivable that Stone would conjure up such a tale merely because of the probability of service overseas, especially as there would be no reason for him to think that accused was responsible for the situation. The evidence of Alvin Stone's poor reputation for truth and veracity was uncertain and expressed by obviously biased witnesses. The Board of Review has no doubt of the correctness of the court's findings on Specifications 2,3,4,5, and 6. The acts therein committed were to the prejudice of good order and military discipline in violation of Article of War 96.

c. Specifications 7 and 8, Charge I.

The evidence clearly proves that on the respective dates and

at the places alleged in Specifications 7 and 8, accused attempted to induce Private Nathan B. Stone to testify falsely before the investigating officer, as alleged. Since the liquor was donated, not purchased, and since the evidence showed that accused's visits to the liquor store were between 2 and 4 p.m., it is clear that an attempt to induce Nathan Stone to testify to something different was an attempt to make him testify falsely. Accused's testimony that his endeavors to communicate with Nathan Stone during the critical days of the investigation arose from his concern over Nathan's welfare and progress in the Army is unworthy of belief. The evidence does not show the materiality of the statement that accused bought the liquor after 6 p.m., but remarks by counsel indicate that the purchase of liquor before that hour violated orders of the Commanding General (R.266). Specifications 7 and 8 might properly have been laid under Article of War 95, and undoubtedly amounted to a violation of Article of War 96.

d. Specifications 1,3,4,5, Charge II.

The evidence for both the prosecution and defense shows that accused testified before the Inspector General as alleged in Specification 1. The evidence for the prosecution already referred to shows that this testimony was false.

With reference to Specification 3, the evidence clearly proved that, as alleged, accused told the investigating officer that he did not request Captain Staples to promote Jackson Mayers, accused's brother, to the grade of sergeant. The evidence for the prosecution shows that he did make such a request, and, despite accused's denial thereof, it is reasonable to believe that Captain Staples, who had no reason whatsoever to lie about the matter, was telling the truth. The fact that the promotion was subsequently effected lends credence to this testimony.

The evidence relating to Specification 4 shows that accused not only knew of the duplicate receipt referred to therein, but ordered its preparation, saw it, and instructed Captain Staples to burn it. Before the investigating officer he stated under oath that he did not recall or see such a document, and he stated several times that he had no knowledge of its existence. His subsequent admission that he had knowledge of the receipt did not purge the offense.

With reference to Specification 5, accused signed his qualification card which, as he knew, contained two statements contrary to fact. Since by his own admission he knew that in signing the card he was making an official statement, the intent to deceive may be inferred. There is no direct evidence that he deceived or intended to deceive Major Piper

with reference to the date of his birth and according to his own testimony he told the truth about it to Major Piper, but the other allegations were clearly proved and the variance was immaterial.

The four specifications constituted violations of Article of War 95.

5. The Board of Review has considered a letter from accused's wife, Fredericka Mayers, to the Commanding General, Western Defense Command, dated February 5, 1943, and attached to the record of trial. The Board has also considered a brief filed on behalf of accused by Mr. Joseph A. Padway, Washington, D.C., counsel for accused.

6. War Department records disclose that accused is 39 years of age, but actually, as shown by the record of trial, he is 36 years of age. He graduated from the University of Chicago and attended the law school of that university, but did not graduate. He obtained the degree of Doctor of Philosophy from the London School of Economics and Political Science. He was a member of the Enlisted Reserve Corps for approximately three years. On October 2, 1928, he was appointed a second lieutenant, Infantry Reserve, and on February 1, 1934, was promoted to first lieutenant. On November 13, 1935, he was transferred in grade to The Adjutant General's Department Reserve. On April 17, 1939, he was promoted to captain. He entered on extended active duty on February 11, 1941, and was promoted to major on February 1, 1942. In recommending accused for promotion to major his commanding officer designated his performance as Officer in Charge, First Corps Area, Machine Records Unit, and Inspector, Machine Records Unit, Fourth Zone, as superior.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, as approved by the reviewing authority, and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

Andrew J. Lappen Jr., Judge Advocate.

Wm Trumbull, Judge Advocate.

Fletcher R. Andrews Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 7 1943 - 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 Major Ben M. Mayers (O-256243), Adjutant General's Department.

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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, but that the forfeitures and confinement be remitted and that the sentence as thus modified 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 recommendation hereinabove made, 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 action.

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(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 157, 23 Jul 1943)

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



SPJGN
CM 230844

MAR 29 1943

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| UNITED STATES<br><br>v.<br><br>Second Lieutenant JAMES R. CARDER (0-1550980), Ordnance Department. | 2ND INFANTRY DIVISION<br><br>Trial by G.C.M., convened at Camp McCoy, Wisconsin, February 6, 1943. Dismissal, total forfeitures and confinement for five (5) years. Disciplinary Barracks. |

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and COWLES, 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 93rd Article of War.

Specification: In that Second Lieutenant James R. Carder, 3461st Ordnance Company, Medium Maintenance (Q), Camp McCoy, Wisconsin, did, at Camp McCoy, Wisconsin, on or about January 26, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by mouth with Private Gus H. Orsborn, Company C, 23rd Infantry.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and included the following:

> "*** Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld".

Action is taken here, however, pursuant to Article of War 48.

3. The evidence for the prosecution shows that the accused was at the Officer's Club, Camp McCoy, Wisconsin, during the evening of January 26, 1943. At about 10:30 p.m. the accused met Private Gus H. Orsborn in the latrine of the club. According to the testimony of Private Orsborn, the accused unbuttoned Orsborn's pants and played with his penis. The accused wanted to place Orsborn's penis in his mouth but Orsborn would not permit him to do so. During the conversation between the accused and Orsborn several officers entered the latrine, and the accused requested Orsborn to hold his head while the accused pretended that he was vomiting. After the group of officers had left the latrine, the accused persuaded Orsborn to go with him to his quarters. The accused assured Orsborn that if anyone questioned them that the accused would present Orsborn as an old friend. When the accused and Orsborn reached the officer's quarters they met a lieutenant to whom the accused presented Orsborn as "Sol". The accused had promised Orsborn before he went to the room of the accused that he would give Orsborn anything he wanted, and after they were in the accused's room the accused wrote a check for $5 and gave it to Orsborn (Ex. A). The accused undressed, unbuttoned Orsborn's pants, and pulled them down. They lay on the bed together, and the accused put Orsborn's penis in his mouth, and kept it there for two minutes. Orsborn remained in the room with the accused for about 45 minutes during which time the accused was playing with Orsborn's penis. After "those lieutenants" walked into the room Orsborn left. Private Orsborn testified that the accused was not drunk. (R. 14-18)

Second Lieutenant Neal W. Johnson testified that Second Lieutenant Louis J. Sode, Lieutenant Rutstein and the accused went to the officers' club together on the evening of January 26, 1943, and that during the evening the accused drank and played the slot machine. During the evening the accused was observed in the officers' latrine, leaning over the bowl gagging as if he were vomiting. When Lieutenant Johnson and his companions left the club at about 11 p.m. the accused had already gone. When this group of officers arrived at their quarters they were told that the accused had an enlisted man in his room with him. They went to the room occupied by the accused and found Private Orsborn with him. The accused presented Orsborn to them as an old friend from West Virginia. Lieutenant Johnson and his two officer companions then left the room and after making a tour of inspection of the company area returned in about 30 minutes. Upon observing that lights were off in the accused's room, they entered and turned them on. The accused and Orsborn were lying on the bed. The accused was undressed except for his undershirt and socks, and Orsborn's pants were pulled down. Lieutenant Johnson leaned over Orsborn and observed that he was only pretending to be asleep and that his eyes were slightly open. Lieutenant Johnson pulled Orsborn off the bed, took him down stairs, and ascertained his name and organization. (R. 5-9)

4. Second Lieutenant Neal W. Johnson, Second Lieutenant Louis J. Sode, and Captain Alfred J. Villeneuve testified that they had known the accused for three months, that until the time of the present offense he had been a very efficient officer, that no immoral conduct had been observed, and that the accused's character had been excellent (R. 7, 12, 13, 19 and 20). In addition Lieutenant Johnson testified that the accused drank from 7 to 11 o'clock on the evening of January 26, and Captain Villeneuve testified that the accused became drunk. (R. 7, 19-21)

5. The accused testified that on the evening of January 26, 1943, he started drinking at about 7 o'clock and continued to drink until he left the club. He did not remember when he left the club but he thought that it must have been late because he had spent about $10 for drinks before he left. The accused testified that he did not remember going home from the club or any officers calling at his room that evening. The accused testified that he positively did not commit the act of sodomy on the night of January 26 with Private Orsborn, that the first time he had ever seen Orsborn was at the investigation of this case, and that on January 26, he did not owe Private Orsborn anything. The accused admitted, however, that the check for $5 drawn in favor of Private Orsborn and which was presented by the prosecution was drawn on the bank where he kept his money and that the signature thereon was his. (R. 21-23).

6. The Specification alleges that the accused did "*** on or about January 26, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by mouth with Private Gus H. Orsborn ***".

Sodomy is defined in the Manual for Courts-Martial as "*** sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being" (Par. 149k, M.C.M., 1928).

The evidence in the present case as presented by the pathic, Private Gus H. Orsborn, shows that the accused had sexual connection with Private Orsborn on January 26, 1942, by taking the penis of Private Orsborn into his mouth, and that the accused gave Private Orsborn a check for $5 as a payment for the privilege of engaging with Orsborn in the unnatural act. The testimony of Private Orsborn is corroborated by the testimony of Lieutenants Johnson and Sode to the extent that they testified that they saw the accused and the pathic together in the officers' latrine and later saw them lying together on a bed in the accused's room in such an unclad condition and under such circumstances as to suggest unnatural conduct. Furthermore, the testimony of the pathic is corroborated by the admission of the accused that the signature on the check which was identified by Private Orsborn as having

been given to him by the accused was in fact the accused's signature. Considered in its entirety, the evidence shows beyond a reasonable doubt that the crime of sodomy was committed by the accused as alleged.

7. The accused is 24 years of age. The records of the Office of the Adjutant General show that the accused enlisted on May 31, 1940. Upon graduation from the Ordnance School at Aberdeen Proving Ground, Maryland, on November 14, 1942, he was commissioned a second lieutenant in the Army of the United States.

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 and the sentence and to warrant confirmation thereof. A sentence of dismissal, total forfeitures and confinement for five years, or such punishment as a court-martial may direct, is authorized upon conviction of a violation of Article of War 93.

Charles Lawson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Willard B. Cowles, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 5 1943 - 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 James R. Carder (0-1550980), Ordnance Department.

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 thereof. 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 foregoing recommendation 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 - Form of ltr for sig. Sec. of War
Incl 3 - Form of Executive action

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(Sentence confirmed. G.C.M.O. 99, 7 May 1943)

JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

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



SPJGH
CM 230846

MAR 31 1943

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| UNITED STATES<br><br>v.<br><br>Second Lieutenant CHARLES A. MINNIS (0-1299450), 345th Infantry. | 87th INFANTRY DIVISION<br><br>Trial by G.C.M., convened at Camp McCain, Mississippi, January 23, 1943. Dismissal. |

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, 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 96th Article of War.

Specification 1: In that 2nd Lieut. CHARLES A. MINNIS, Service Company, 345th Infantry, was at Memphis, Tennessee, on or about January 2nd, 1943, drunk in uniform, in a public place, To Wit: The Creel Room, Peabody Hotel, under such circumstances as to bring discredit upon the military service.

Specification 2: In that 2nd Lieut. CHARLES A. MINNIS, Service Company, 345th Infantry was at Memphis, Tennessee, on or about January 3rd, 1943, drunk in uniform, in a public place, To Wit: The Main Lobby of the Peabody Hotel, under such circumstances as to bring discredit upon the military service.

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

Specification : In that 2nd Lieut. CHARLES A. MINNIS, Service Company, 345th Infantry, did, without proper leave, absent himself from his organization at Camp McCain, Mississippi, from about 0800 January 2, 1943, to about 1500, January 6, 1943.

He pleaded not guilty to and was found guilty of all Specifications and Charges. 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 is substantially as follows:

a. Specification 1, Charge I: At about 11 o'clock, Saturday evening, January 2, 1943, Second Lieutenants Albert H. Cummings and Joseph L. Dumm, with two girls, were seated at a table in the Creel Room of the Peabody Hotel, Memphis, Tennessee. The room was crowded with officers, enlisted men, civilians, and women, celebrating the New Year's week end. There was a lot of drinking. The accused was in uniform, with his blouse wrinkled and slightly mussed up. He came to the table occupied by the Cummings-Dumm group and repeatedly asked the girls for a date. While talking to the girls he was unsteady on his feet, his face was flushed, his blouse was wrinkled, and his hair was not combed. When Lieutenant Cummings asked accused to leave, he did so. Lieutenant Dumm and Lieutenant Cummings were each of the opinion that the accused was drunk. The accused was not the only officer in the room who had been drinking. The accused was not boisterous or loud, and did not bother anyone at any other table(R.3-6).

b. Specification 2, Charge I: On January 3, 1943, Lieutenants Dumm and Cummings saw the accused in the lobby of the Peabody Hotel at 11 o'clock at night, and talked to him. The accused was unsteady on his feet, and walked at an unsteady gait. He attempted to smoke a cigarette which was not lighted. He was untidy about himself, in that his blouse was wrinkled and his hair uncombed. Both Lieutenants Dumm and Cummings were of the opinion that the accused was drunk. No civilians were seen to have observed accused (R. 3-6)

c. Charge II: The extract copy of the morning report of the organization of accused, the Service Company, admitted with the express consent of accused, shows for January 5, 1943, the accused

from duty to AWOL at 0800 as of January 2, 1943, and for January 6, 1943, the accused from AWOL to arrest in quarters at 1500 (R. 6; Ex. A).

First Lieutenant Ernest E. Mattox, Commanding Officer of the Service Company during the period January 2 to 6, 1943, testified that accused was absent without leave from January 2 to January 6. At about 5 p.m., December 31, 1942, he had placed a note on the bed of accused to the effect that accused was to supervise the work for Saturday (Jan. 2, 1943). Lieutenant Mattox found the note undisturbed on the bed on January 4. Special permission was not required for absence for New Year's Day, but was required after the "second" for the week end. The affirmative answer by Lieutenant Mattox to the question upon cross-examination "You state he had permission to be gone January second", is inconsistent with his direct testimony and with his initials on the extract copy of the morning report (Ex. A). He had not stated in his direct testimony that accused had permission to be gone on January 2. The accused was selected to act as commander of the company (on January 2) because he was a good officer. His services had been satisfactory up to that time (R. 7-8).

First Sergeant Noble W. Blake, Service Company, searched for the accused on January 2, because the accused was to act as commander of the company, but was unable to find him at his quarters, the motor pool, or the regimental supply office (R. 8).

4. The defense offered no witnesses. The accused elected to submit an unsworn statement in writing, which recites that the accused had verbal permission to be absent from Camp McCain on "New Years Eve and New Years Day". He left the post about 4:30, New Year's Eve, by train for Memphis, where he registered at the Hotel Peabody. He did considerable drinking that evening and on New Year's Day. He intended catching the 0100 train out of Memphis on January 2, but was incapable of doing so. By the time the next train left for McCain he did not have enough money left to pay his hotel bill. He called Captain Miller to ask the Chaplain, who had the pay check of accused, to wire him $50. He received the money. Between his drinking and his "courting" of a Memphis girl, this money also disappeared, but the girl married him on Monday, January 4. Accused called Captain Miller on Monday and on Tuesday. Although he knew that he did not have leave, he hoped that his notifying the adjutant in this way would "cover" him. He did not believe that his drunkenness was such as to bring discredit on the military service when he appeared in the lobby of the Hotel Peabody, and in the Creel Room.

Neither the hotel detectives nor the "M.P's" on duty in the lobby had any reason to speak to him. He did not become sick in public nor bother any civilians. He did not realize the seriousness of his offense while in Memphis, but does now, and knows that any punishment allotted to him by the court "is justified" (R. 8; Ex. B).

5. As a witness for the court, First Lieutenant Wareing T. Miller, Adjutant, 345th Infantry, testified that the accused called by telephone from the Hotel Peabody on the morning of January 4, 1943, and asked him to have the Chaplain, who had the accused's pay, to forward funds to accused as "he was broke". The accused stated that he was on leave. The accused again called him the next morning and asked when he was due back. The accused was told that "he was due back at once as he was absent without leave". The accused returned on Wednesday, the sixth. The accused had no authority to be gone any part of the period "between January 2nd and 6th". The matter first came to the attention of Lieutenant Miller on January 4 (R. 9).

6. The accused is charged with being drunk in uniform in a public place on two occasions, namely, on January 2 (Saturday) and on January 3 (Sunday), 1943, in the Hotel Peabody in Memphis, Tennessee, the first in the Creel Room, and the second in the lobby.

On Saturday night in the presence of a mixed crowd of officers, civilians, women, and enlisted men, the accused was in uniform, his face was flushed, his hair was uncombed, his uniform was wrinkled, ruffled, and untidy. The accused had been drinking and he was unsteady on his feet. He came to a table at which Second Lieutenants Cummings and Dumm were seated with two girls. He repeatedly asked the girls for dates. Both Dumm and Cummings were of the opinion that the accused was drunk. The written statement of the accused to the court confirms their testimony.

At about 11 o'clock, Sunday night, the accused met Lieutenants Cummings and Dumm in the main lobby of the hotel. He was untidy about himself, in that his uniform was wrinkled and "mussed up", and his hair uncombed. He walked at an unsteady gait, and attempted to smoke an unlighted cigarette. Both Lieutenants Dumm and Cummings were of the opinion that the accused was drunk.

In his unsworn statement to the court, the accused admitted that he did considerable drinking on New Year's Eve and upon New Year's Day, and that he intended to catch the 0100 train for Memphis on January 2, but was incapable of doing so. He did not, however, believe that his drunkenness on either occasion was such as to bring discredit

on the military service. He did not, while in Memphis, realize the seriousness of his offense.

The evidence shows that the accused was, in uniform in a public place, drunk on the two occasions alleged in Specifications 1 and 2, Charge I.

> "* * * simple drunkenness is in general a military offense in violation of this [62nd now 96th] Article, whether committed by an officer or soldier. * * *. 'Drunkenness by persons in the military service is an offense against good order and military discipline whenever and wherever it occurs' * * *" (Winthrop's Military Law and Precedents, Reprint p. 722).

7. The Specification, Charge II, alleges that the accused absented himself without leave from his organization at Camp McCain "from about 0800 January 2, 1943, to about 1500, January 6, 1943. The accused admits that he left camp about 1630, New Year's Eve, that he intended to catch the 0100 train out of Memphis, January 2, 1943, but was incapable of doing so, and was absent at least until Tuesday, January 5. The evidence shows that he returned to camp and was placed in arrest in quarters at 1500, January 6, 1943. Permission was not required for his absence over January 1, New Year's Day. Saturday, January 2, was a day of duty. Accused could then have secured permission to be absent over Sunday, January 4. The evidence shows that the accused was absent without leave for the period alleged in the Specification, Charge II.

8. The accused is twenty-eight years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service in National Guard for about 10 years; inducted into active service October 15, 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and extended active duty, August 11, 1942.

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 of all Specifications and Charges; and legally sufficient to support the sentence,

and to warrant confirmation of the sentence. Dismissal is authorized for conviction of a violation of the 61st or the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 230846

1st Ind.

War Department, J.A.G.O., APR 3 1943 - 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 A. Minnis (0-1299450), 345th 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 and the sentence and to warrant confirmation of the sentence.

The accused was absent without leave from January 2 to January 6, 1943, in violation of the 61st Article of War, and during that period was drunk in uniform in a dining room of a hotel on January 2, and in the lobby of the hotel on January 3, 1943, in violation of the 96th Article of War. He was not grossly drunk nor was he disorderly on either occasion. There is testimony that his prior commissioned service was good. In view of all of the circumstances, I recommend that the sentence be confirmed, but that execution of the sentence to dismissal be suspended during the pleasure of the President.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for action, and a form of Executive action designed to carry into effect the recommendation made above.

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft.ltr.for sig. Sec. of War.
Incl.3-Form of Executive order.

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(Sentence confirmed. G.C.M.O. 97, 4 May 1943)

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



SPJGK
CM 230888

MAR 5 1943

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| UNITED STATES | ) | SECOND SERVICE COMMAND<br>SERVICES OF SUPPLY |
| v. | ) | Trial by G. C. M., convened at Fort DuPont, Delaware, January 22, 1943. Dishonorable discharge and confinement for twelve (12) years. Disciplinary Barracks. |
| Private ROBERT A. COVINGTON (32156917), 99th Quartermaster Railhead Company. | ) | |

REVIEW by the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 Charges and Specifications:

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

Specification 1: In that Private Robert A. Covington, 99th Quartermaster Railhead Company, did, at Fort Du Pont, Delaware, on or about December 26, 1942, strike First Lieutenant Ernest W. Clamp, QMC, his superior officer, who was then in the execution of his office on the mouth with his fist.

Specification 2: In that Private Robert A. Covington, 99th Quartermaster Railhead Company, did, at Fort Du Pont, Delaware, on or about December 26, 1942, strike First Lieutenant Melvin D. Mauck, QMC, his superior officer, who was then in the execution of his office on the leg with his foot.

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

Specification: In that Private Robert A. Covington, 99th Quartermaster Railhead Company, did, at Fort Du Pont, Delaware, on or about December 26, 1942, behave himself with disrespect towards First Lieutenant Ernest W. Clamp, QMC, his superior officer by saying to him "I'll kill you if I ever get you on the outside, you son-of-a-bitch", or words to that effect.

ADDITIONAL CHARGE I: Violation of the 58th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty).

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

Specification 1: In that Private Robert A. Covington, 99th Quartermaster Railhead Company, having been duly placed in confinement in the Post Guard House, Fort Du Pont, Delaware, on or about December 26, 1942, did, at Fort Du Pont, Delaware, on or about December 30, 1942, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private Robert A. Covington, 99th Quartermaster Railhead Company, having been duly placed in confinement in the Post Guard House, Fort Du Pont, Delaware, on or about December 30, 1942, did at Fort Du Pont, Delaware, on or about January 5, 1943, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Additional Charge I and its Specification and guilty of all other Charges and Specifications. Evidence of five previous convictions by special courts-martial was introduced as follows: One for disrespect toward a superior officer in violation of Article of War 63, one for forgery of a pass in violation of Article of War 93, one for absence without leave in violation of Article of War 61, one for disobedience of a lawful order in violation of Article of War 61 (sic), and one for breaking arrest in violation of Article of War 69. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty-one years. The reviewing authority approved the sentence, remitted nine years of the 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.

3. The evidence shows that on December 26, 1942, accused, Privates Powell and De Loach, all of the 99th Quartermaster Railhead Company,

Fort DuPont, Delaware, being then under restriction to the post (R. 11, 13) for having previously gone absent without leave (R. 13), broke restriction and without authority went to Delaware City, where at about 2:30 or 3 p.m. on December 26, 1942, accused and Private Powell were "picked up" (R. 20, 26) by a military police detail composed of Corporal Joseph D. Nastasi and Private Roscoe Soules, both of Military Police Section, 1231st Service Command Unit, accompanied by Corporal William T. Midgett, 99th Quartermaster Railhead Company (R. 20), and at 3:10 p.m. (R. 12) were brought to the orderly room of the 99th Quartermaster Railhead Company (R. 10, 15, 20, 26), which was just outside the office of the company commander (R. 10, 15), where First Lieutenant Ernest W. Clamp, the company commander, and First Lieutenant Melvin D. Mauck, both 99th Quartermaster Railhead Company, were on duty, and in the execution of their respective offices seated at their respective desks (R. 12, 15, 16, 18, 21, 23, 28). It was at that time and place that the incidents occurred that are alleged in Specifications 1 and 2, Charge I, and the Specification under Charge II. Lieutenant Clamp testified that one of the military policemen "came into the door" of his office with accused but was told by the witness to stay in the orderly room (R. 10). Witness further testified:

> "About that time Private Covington came in the office walked up to my desk put his hands on the desk, and said, 'What is this all about?' I was sitting at my desk. I stood up. I told the military policeman to take him out. Instead of going out, he came over to the desk and started hitting me.
> Q Where did he hit you?
> A Right here with his fist (indicating his mouth and his lower right jaw).
> Q Did he have any further conversation with you at that time other than to ask you what it was all about?
> A No, sir.
> Q He said nothing more?
> A After the military policeman came around looking for him, he said, 'I'll kill you if I ever get you on the outside, you son-of-a-bitch', or something to that effect. Then he started cursing at Lieutenant Mauck." (R. 10, 11)

As accused was being taken out, he made a lunge at Lieutenant Mauck, who was standing near the door (R. 12). Witness then ordered accused to be confined (R. 11; Ex. 1). Accused was not drunk at the time (R. 13). Lieutenant Mauck testified that on December 26, 1942,

> "I was sitting at the desk in the office when Private Covington entered the room with one of the military policeman, directly behind him. He stayed in the doorway, that is the military policeman did. Private Covington advanced toward the office. Lieutenant Clamp, the Company Commander, was sitting behind the desk. Private Covington asked him something about what it was all about and why he was going to the guardhouse. Lieutenant Clamp directed the military policeman to take Private Covington to the guardhouse. With that Private Covington advanced to the desk and went around the desk and struck him. I moved away and called the other military policeman. In the meantime the military policeman standing in the doorway grabbed Private Covington and took him away.
>
> * * * * * *
>
> "While Private Covington was being held by the military policeman he made a statement to Lieutenant Clamp about as follows, 'If I ever get you on the outside, I'll kill you, you son-of-a-bitch.'
>
> * * * * * *
>
> "As the two military policemen were taking him out of the room, I was standing in the doorway. I stepped out of the room. Private Covington made a few remarks and he said to me, 'You son-of-a bitch.' With that he kicked back at me and struck me in the upper left leg. The military policemen took him to the guardhouse." (R. 15)

The kick was deliberate and not accidental (R. 17). Corporal Nastasi testified that when the confinement order was ready accused said he wanted to ask Lieutenant Clamp something -

> "So he walked in the door and reached over the desk. He hit Lieutenant <u>Covington</u> (sic) in the mouth." (R. 21) (Underscoring supplied to indicate typographical error - Clamp obviously intended)

Accused called his company commander "a son-of-a-bitch" and a "Mother fucking bastard" (R. 21). Witness grabbed accused, rushed him out the door and took him to the guardhouse. While going through the door accused kicked Lieutenant Mauck (R. 22, 24). The kick was not an accident (R. 22, 24, 25). Private Soules testified that he was in the orderly room with accused and Corporal Nastasi -

"Private Covington went into the orderly room. I stood there with Private Powell. I heard a scuffle around there. I went into where Corporal Nastasi was. He had Private Covington around the neck with one arm. I went into help Corporal Nastasi. We took Private Covington to the guardhouse. As he went out of the door, he attempted to kick Lieutenant Mauck.

* * * * * *

Q Did you see him kick Lieutenant Mauck?

A Yes, sir." (R. 26, 27)

On December 30, 1942, at 7:30 a.m., accused and two other guardhouse prisoners (R. 34, 42) were assigned to fatigue duty with the ash and trash truck (R. 29) under guard, Private Johnnie Fitzpatrick, 99th Quartermaster Railhead Company (R. 34). The truck was stopped behind the blacksmith shop (R. 35) and accused and the other prisoners were required to get out of the truck to get some ashes (R. 35). The guard stood at the back of the truck (R. 35), and then discovered that accused had gone. Accused had no permission to absent himself from the detail (R. 43). The guard turned on the truck lights as it was dark, rainy and foggy (R. 34), searched for the accused and, failing to find him, returned to the guardhouse and reported the escape. Sergeant Robert K. Blackwood, 1231st Service Command Unit, who was then acting as provost sergeant in charge of the guardhouse and of fatigue duties of prisoners (R. 28, 29), testified that accused did not return with the detail (R. 31). A search was instituted and accused was found hiding underneath a bed in a locked room of William Demby, situated directly across from the post (R. 44). Accused was captured, handcuffed, returned to the guardhouse (R. 44), and placed in solitary confinement (R. 30). On his person was found a blank honorable discharge from the United States Army (R. 30).

On January 5, 1943, at 6:30 a.m. (R. 37), accused was assigned to a guard, Private John E. Lentz, Company D, 114th Medical Battalion, to be taken to mess under guard (R. 37). Private Lentz testified that he was marching accused "into chow" when he (accused) "made a break and ran behind the building. He left me and I shot at him" once (R. 37). Accused had no permission to leave (R. 43). The witness called the corporal of the guard and engaged in a hunt for the accused but could not find him on account of the darkness (R. 37). Later on the same day accused was found by Staff Sergeant Spencer Sims, 99th Quartermaster Railhead Company, lying on top of a 6 or 6½ foot locker (R. 41) in the supply room annex (R. 40). He was returned to the post guardhouse (R. 40, 43).

4. The evidence without conflict establishes that at the time and place alleged in Specification 1, Charge I, accused struck First Lieutenant Ernest W. Clamp, Quartermaster Corps, his superior officer and his commanding officer, who was then in the execution of his office, on the mouth with his fist; that at the time and place alleged in Specification 2, Charge I, accused struck First Lieutenant Melvin D. Mauck, Quartermaster Corps, his superior officer, who was then in the execution of his office, on the leg with his foot; and that at the time and place alleged in the Specification under Charge II, accused behaved himself, with disrespect toward Lieutenant Clamp by saying to him, "I'll kill you if I ever get you on the outside, you son-of-a-bitch", or words to that effect. The court was amply justified in finding accused guilty of all Specifications and Charges. The evidence likewise establishes that at the place and at the times alleged, respectively, in Specifications 1 and 2, Additional Charge II, accused, having been duly placed in confinement, escaped from confinement before set at liberty by proper authority.

5. The charge sheet shows that at the time of the offenses accused was 24 years of age. He was inducted June 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 and sentence.

Andrew Copp, Jr., Judge Advocate.

John Trumbull, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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



SPJGH
CM 230928

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| UNITED STATES | ) | CAMP ROBERTS, CALIFORNIA |
| v. | ) | Trial by G.C.M., convened at Camp Roberts, California, January 8, 1943. Dismissal, total forfeitures, and confinement for one (1) year. Detention and Rehabilitation Center. |
| Second Lieutenant THOMAS J. LANYON (01770820), Field Artillery. | ) | |

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OPINION of the BOARD OF REVIEW
HILL, LYON and DRIVER, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that THOMAS J. LANYON, Second Lieutenant, Field Artillery, Battery "C", 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California, did, at Camp Roberts, California, on or about October 18, 1942, feloniously take, steal, and carry away One Dollar ($1.00), lawful money of the United States of America, the property of ROBERT E. O'CONNELL, First Lieutenant, Field Artillery, Battery "B", 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California.

Incl 25

Specification 2: In that THOMAS J. LANYON, Second Lieutenant, Field Artillery, Battery C, 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California, did, at Camp Roberts, California, on or about October 18, 1942, feloneously take, steal, and carry away one (1) certain Bank of America, National Trust & Savings Association, San Francisco, California Travelers Cheque Number A6715060, dated October 3, 1942, in the denomination of Ten Dollars ($10.00), value about Ten Dollars ($10.00), and one (1) certain Bank Of America, National Trust & Savings Association, San Francisco, California Travelers Cheque Number A6715061, dated October 3, 1942, in the denomination of Ten Dollars ($10.00), value about Ten Dollars ($10.00), the property of GEORGE A. McCALEB, Second Lieutenant, Field Artillery, Battery A, 56th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California.

Accused pleaded not guilty to and was found guilty of the Charge and its Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Ninth Service Command Detention and Rehabilitation Center, Turlock, California, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that shortly after 9 p.m. on Saturday, October 17, 1942, accused went to the Officers' Club at Camp Roberts, California, where he was then stationed. At the suggestion of Lieutenant Ross Lillard he was initiated into the Short Snorters Club. A group of four or five men gathered around the bar and in the course of the initiation accused signed his name on a dollar bill belonging to Lieutenant Robert E. O'Connell. This bill, which served as the membership certificate of the owner in the Short Snorters Club, was admitted in evidence at the trial as Exhibit A. Across the top of it, written in ink, were the words and figures "Short Snorter 9/15/42" and along the side "Lt. O'Connell". There were also written on the bill ten other names, including the name of accused, of persons who had initiated or had been initiated by Lieutenant O'Connell. Lieutenant O'Connell had taken the bill out of his billfold and had kept it in his possession at all times

except while it was actually being signed by the accused. He was standing near accused, watching, and after accused signed the bill Lieutenant O'Connell picked it up and put it in his billfold. He put the bill in a separate compartment formed by a small isinglass folder. He remembered that he had to unfold the isinglass and compress the bill in order to get it in. At that time there was the usual lighting in the room, consisting of colored lights along the sides, and lights in the bar. There was more light around the bar than any place else in the club. Lieutenant O'Connell did not thereafter have occasion to remove the bill from his billfold or to take anything else out of the compartment in which he had put the bill, and he did not see it again that night or the next morning. It was about 10 p.m., Saturday night, when he last saw the bill. The "formalities" took quite a while, and accused was looking for change to pay his initiation fees, and that also took a little time (R. 9-12, 14-15; Ex. A).

Lieutenant O'Connell testified that while accused was being initiated into the Short Snorters Club, other persons in the Officers Club were drinking, and "set ups" were being paid for across the counter but, as he remembered, the immediate group participating in the initiation had not been there long enough to be served. Afterward, Lieutenant O'Connell had something to drink and bought drinks at the bar. Before going to the Officers' Club that evening he had been with a number of other officers and everyone in the group had a drink. He left the Officers' Club with Captain Duane Rasmussen and Lieutenant Ross Lillard about 1:30 a.m., and drove to Paso Robles and to Atascadero and back to camp. They did not stop at any bars on the way. They went to the room occupied by Lieutenant O'Connell and Captain Rasmussen in the officers quarters of the 54th Field Artillery Training Battalion, and in a few minutes accused appeared upon the scene. It was then about 3:30 a.m. Accused stood in the doorway and talked with the occupants of the room while they were getting ready for bed. Lieutenant O'Connell put his billfold and other small personal effects on a footlocker nailed to the wall to serve as a desk, and went to the latrine. Returning he met accused and Lieutenant Lillard, but found no one in the room except Captain Rasmussen, who was asleep. Captain Rasmussen had gone to sleep almost immediately after he went to bed and did not know when any of the other three officers left the room. Lieutenant O'Connell locked the door and retired without noticing whether all of his things were still on the footlocker. When he got up about 10 o'clock Sunday morning, his billfold was missing. It was the same billfold in which

he had put the "Short Snorter" dollar bill. The billfold also contained $16 or $17 in currency, his officer's identification card, and some club membership cards (R. 6-8, 11-18).

About 1 a.m., October 18, 1942, Lieutenant George A. McCaleb, officer of the day of his battery, went to bed in his room in the 56th Field Artillery Training Battalion Officers' Quarters. Before retiring Lieutenant McCaleb put his trousers on the vacant bunk of his roommate, who was living in Paso Robles. In the pockets of the trousers were the two $10 checks described in Specification 2 of the Charge, inclosed in a folder, and a billfold containing a Government travel pay check of $123.76, and $15 to $18 in currency. When Lieutenant McCaleb awakened about 9 o'clock Sunday morning, he noticed that his trousers were "mussed up", and the door was ajar. Investigation disclosed that the two travelers checks and the billfold were gone. Lieutenant McCaleb had signed each of the travelers checks, but had not countersigned either of them. They could not be cashed without first being countersigned (R. 18-23).

On Monday, October 19, 1942, at about 3:30 or 4 p.m., Captain John G. Messer and another officer searched the room of accused in the 56th Battalion Officers' Quarters. Under the lower bunk of a double-decked bed they found the folder containing the two travelers checks which had disappeared from the room of Lieutenant McCaleb the preceding Sunday morning. The cover was folded up and snapped shut and the folder was lying on the floor, just inside the edge of the blanket. It was not covered up by anything and Captain Messer testified that; "All I did was look under the bunk and see it. I had to get under the bunk to see it * * *" (R. 23-25, 30-32).

On the following day, about 1:30 p.m., Captain Messer, with two other officers, again searched the room of accused and on that occasion looked through a footlocker which was there. In the top compartment the searchers found a black wallet containing the Camp Roberts Officers' Club membership card of the accused and, in the money compartment, a $10 bill, two $5 bills, and three "ones". One of the dollar bills was the "Short Snorter" bill carried by Lieutenant O'Connell in the billfold taken from his footlocker shelf on October 18. When he discovered that bill in the wallet, Captain Messer noticed that the "* * * creases of the bill were opposite to the crease of the wallet". Captain Messer also found in a small pocket of the wallet, under the membership card

compartment, another dollar bill on which was written "Short Snorter 10/17/42", "Lt. Lanyon" and six other names, including the name "Robert O'Connell". Some time after the search had been concluded, and on the same day, accused identified the footlocker as his own and at the trial, on cross-examination, admitted that both the footlocker and the wallet found therein were his property. The officer who shared the room with accused had entered the hospital on October 17, 1942, and remained there a week or more after the room had been searched by Captain Messer (R. 25-29, 31-32, 53; Ex. A, Ex. C).

4. For the defense, Captain Duane Rasmussen testified that on the evening of October 17, 1942, he was at the bar in the Officers' Club with Lieutenant O'Connell, Lieutenant Lillard, another officer, accused, and possibly some others, having a drink, when someone in the group asked accused if he was a member of the Short Snorters Club. Accused replied that he was not, but indicated that he would like to join. In accordance with the customary procedure, accused gave each member present a dollar, cashing a $10 bill to get enough "ones", signed his name on each of their "Short Snorter" bills, and passed around his own bill for them to sign. While this was going on the bills were on the counter and all the members of the group were drinking. The lighting in the Officers' Club was dim and indirect. There was so much confusion in connection with the signing of the dollar bills that Captain Rasmussen had to "look twice" to be sure that he got back his own bill. About 1 a.m. he left the Officers' Club, went to Atascadero, and back to camp with Lieutenant O'Connell and Lieutenant Lillard. Captain Rasmussen undressed and went to bed. Lieutenant O'Connell also undressed, but stood around for a while and Lieutenant Lillard and accused stood in the doorway and talked. Captain Rasmussen went to sleep and did not know what happened after that (R. 35-38).

Accused testified that he received his commission on October 1, 1942, and arrived at Camp Roberts for duty on October 14. As many others were arriving at the same time, there was a shortage of quarters, and he spent the first night in Paso Robles with a friend, Lieutenant Howard Collins. The next day he was assigned a room in the 56th Battalion Officers' Quarters, and moved in with his footlocker and other personal effects. On October 17, about 5 p.m., he cleaned up, went to town, and had a cocktail and dinner with Lieutenant Collins and Mrs. Collins. Accused bought a bottle of whiskey to "reimburse" Lieutenant Lillard, and returned to his quarters about 7 or 7:30. Some time later he went over to the

54th Battalion quarters to deliver the whiskey to Lieutenant Lillard and, about 10 p.m., drove to the Officers' Club with Captain Rasmussen and Lieutenant Lillard in Captain Rasmussen's car. They immediately had drinks at the bar. Someone suggested that accused join the Short Snorters Club and he changed a $10 bill for "singles", leaving them on the bar "for the moment". The bills accused was supposed to sign also were put on the bar and everyone was passing them around. Because of the confusion and the experience of meeting so many strangers, he was not certain what happened. After the signing was concluded "there were dollar bills all over the place", and accused picked up the rest of the money on the bar and put it in his pocket. When questioned by a member of the court as to how he happened to get "the Short Snorter bill", accused said:

> "My interpretation of the Short Snorter thing is at the club Lieutenant Lillard was on the right with the fountain pen and I was on the left and the money was on the bar, all the bills were passing from Lieutenant Lillard to myself and there was nothing but one dollar bills and a lot of confusion and anything could have happened" (R. 44-46, 54).

Accused got into a "crap" game which started out to be a "friendly" one but before it ended there was $100 in the game, and when the Officers' Club closed about 2 a.m., play was continued in the latrine of the 54th Battalion Officers' Quarters. Accused remembered leaving the Officers' Club and being in the latrine, and he testified:

> "I too remember later on being upstairs and talking to Lieutenant Lillard, I don't know, I discovered the next morning apparently I had been a little loud because they were ribbing me about it Sunday morning".

There were from three to five or six players in the crap game in the latrine. Asked by his counsel "Do you remember anything at all. You mentioned at one point speaking to Lieutenant Lillard", accused replied, "No, sir, I don't; nothing I would swear to for a certain". He could not recall returning to his quarters. As to the reason for this lapse of memory, he testified: "Well, it had been a long day for one thing and it had been a rather rough evening for another". Asked on cross-examination if he had seen Captain Rasmussen and Lieutenant Lillard after they

returned to their quarters, accused said he believed that he had but could not swear to it. He testified that after leaving the Officers' Club he drank from the "remnants" of the bottle he had bought in town. Saturday evening in the "54th area" everybody had two or three bottles, and when he went to the club with Lieutenant Lillard and Captain Rasmussen they drank out of the bottle which he had given Lieutenant Lillard. In response to a query on cross-examination as to whether he became intoxicated that night, accused answered that he had, but as to being intoxicated at the time he joined the Short Snorters Club, he said, "Well, it is a fine thing to define whether you are or aren't. We had been drinking all of us for some time" (R. 47-48, 52).

Accused further testified that when he got up Sunday morning he put his billfold in the top of his locker, and thereafter did not have any occasion to look in the billfold again; that three friends of his, officers from Fort Sill who had arrived at Camp Roberts at about the same time as accused, were in and out of his room Saturday, Sunday, and Monday; and that when these officers were in the room they sat on the bunk or stood. Accused did not know how the travelers checks happened to be in his room (R. 48-49, 54).

Accused also testified that he started out as an actor in his fifth year, and thereafter had been in the show business continuously. He also had been a stage manager and theatrical producer. He never had a high school education, but attended and graduated from a theatrical or professional school. Shortly before his induction into the military service he had opened his own office in New York as a theatrical manager and producer. He had been secretary to Beckhard Lobero, and handled small accounts. As theatrical manager for J. J. Leventhal, accused had handled from $10,000 to $25,000 a week, and had never been short in his accounts. At the time of the trial he had been in the Army for almost a year, and as an enlisted man had never been brought before a court or reprimanded for anything. He had been a staff sergeant before receiving his commission. He studied nights, attended an evening "prep school" in the battery, made good, and was sent to Officers Candidate School (R. 49-50, 53-54).

Lieutenant Lillard testified that he met accused when the latter reported for duty at Camp Roberts. Lieutenant Lillard left the Officers' Club early Sunday morning with Lieutenant O'Connell and Captain Rasmussen, went to Atascadero and then back to camp, and to the room of the other officers. While they were talking, accused came down

the hall and spoke to them. After they had talked with him for a while, Lieutenant Lillard went to his own room across the hall and went to bed. He and accused had stood in the doorway of the room of the other two officers and talked to them for 7 or 8 minutes. Lieutenant Lillard testified further that, so far as he could remember, when he went to his own room accused also moved on from the doorway of Lieutenant O'Connel's room. However, on cross-examination, Lieutenant Lillard said that he did not know, and could not say definitely. Questioned by defense counsel concerning the condition of accused that morning, Lieutenant Lillard answered, "Lieutenant Lanyon had been drinking and it was noticeable he had been drinking. I realized he had been drinking. I cannot say his exact condition because * * *". (Defense counsel interrupted with a question on a different subject and the sentence was not completed.) (R. 40-42).

Lieutenant Howard Collins testified that he had known accused for 11 months, had been with him at several different places and they had attended officers' school at Fort Sill together. Accused was in a later class, which graduated a week after the class of Lieutenant Collins. Interrogated as to the character and reputation of accused at Fort Sill, Lieutenant Collins stated "he was very well liked and he was known to be very generous and I never heard anything said about his honesty or dishonesty". Accused did everything he could to get good marks at Fort Sill, and Lieutenant Collins saw him in the study hall quite a lot late at night (R. 56-57).

5. The evidence is circumstantial, and determination of its legal sufficiency requires consideration of the rule stated in the Manual for Courts-Martial as follows:

> "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. 112a, M.C.M., 1928).

The presumption or inference is one of fact, not one of law. The possession of recently stolen property by the accused is an evidentiary circumstance from which his complicity in the larceny may be inferred by the trier of the facts. The fact of possession is evidence of the probability of the guilt of the accused, as it is more likely that a stolen article would be in the possession of the

thief than in the hands of one who came by it innocently. The probative value of such evidence depends upon the character of the possession, the time that has elapsed between the theft and the discovery of the stolen goods in the possession of the accused and other attendant circumstances (Wharton's Criminal Evidence (11th Ed.) 198-200; Boykin v. The State, 34 Ark, 443; Ingals v. State, (Wis.) 4 N.W. 785; Bellamy v. State, (Fla.) 17 So. 560; State v. Williams (Ore.) 202 P. 428).

Well recognized limitations of the rule concerning the possession of stolen property are that to support the inference of guilt, the possession by the accused must be personal, exclusive, and with a conscious express or implied assertion of ownership. If other persons have equal right of access to the room, trunk, or other place where the stolen goods are found, and it is just as probable that some one other than the accused may have put them there, the possession not being exclusive or personal has no weight as evidence (Underhill, Criminal Evidence (4th Ed.) 1044-1046; 36 C.J. 869-870; 32 Am. Jur. 1054; Ex. parte LaPage, 216 F. 256; State v. Drew, (Mo.), 78 S.W. 594; State v. Boudreau (Vt.), 16A (2d), 262).

With respect to Specification 1 of the Charge, the evidence shows that the "Short Snorter" dollar bill of Lieutenant O'Connell was stolen from his room early Sunday morning, and was found the following Tuesday afternoon in a wallet or billfold in the top compartment of a footlocker in the room of accused. Both the wallet and the footlocker belonged to the accused, and it does not appear that anyone else had access to either of them. Such possession by accused of the stolen dollar bill, unexplained, clearly was sufficient to raise an inference that accused was guilty of the theft (CM 226734, Brown).

Accused tried to explain his possession of the stolen dollar bill, it is true, but the explanation offered only the suggestion that in the confusion incident to his initiation into the Short Snorters Club accused may have picked up the bill and put it in his wallet inadvertently. This theory cannot be reconciled with the testimony of Lieutenant O'Connell, to the effect that he carefully watched his "Short Snorter" bill throughout the initiation; that he picked up his own bill as soon as it had been signed; that he put it in his billfold in an isinglass compartment with which he remembered he had some difficulty at the time; and that he did not thereafter take out the bill or remove anything from the compartment

in which it had been placed. The proffered explanation of accused was not such as to support a reasonable doubt as to his guilt.

Concerning Specification 2 of the Charge, it appears that the two travelers checks of Lieutenant McCaleb were stolen from his room in the 56th Battalion Officers' Quarters some time between 1 a.m. and 9 a.m., October 18. They were found under the edge of the bed in the room of accused, in the same Officers' Quarters, about 3:30 or 4 p.m. the following day. During all of the intervening period accused was the sole occupant of the room, and was the only person, having the right to possession, other than his roommate who was then in the hospital.

Accused testified that three of his friends, officers whose names he did not mention, had been in and out of his room, but taking this wholly uncorroborated testimony at its face value it does not render inapplicable the presumption that arises from the possession of recently stolen goods. The three friends of accused were visitors to, not occupants of, his room and they did not have facility of access thereto equal to that of accused. There is no evidence that anyone of them was ever in the room at a time when he was alone and unobserved. The bare possibility that one of these friends of accused may have put the stolen travelers checks in the place where they were found, is not sufficient to destroy the probative force of the presumption.

Furthermore, the testimony affirmatively shows that accused was in the vicinity of the place where the travelers checks were kept at the time they disappeared, and that he had the opportunity to steal them. On the Sunday morning the theft occurred, accused was in the 54th Battalion Officers' Quarters and left there alone, ostensibly to return to his own room in Officers' Quarters of the 56th Battalion, about 3:30 a.m. There was no explanation as to why accused was up and wandering about in barracks other than his own at that hour of the morning, except his testimony to the effect that he followed a crap game from the Officers' Club to the latrine in the 54th Battalion Officers' Quarters, and after participating in the game at the latter place for a period of time became so intoxicated that he could not remember anything that happened until he awoke in his room. The testimony of the other defense witnesses does not indicate that accused was so intoxicated as to suffer unconsciousness or lapse of memory. With Lieutenant Lillard, accused stood in the doorway of the

room of Lieutenant O'Connell and Captain Rasmussen and conversed with the other officers for 7 or 8 minutes. Captain Rasmussen, as a witness for the defense, was not interrogated concerning the condition of the accused as to intoxication. Lieutenant Lillard testified it was apparent that accused had been drinking, but did not say that accused was drunk.

The accused offered no explanation of the presence of the travelers checks in his room, except to say that he did not know they were there. The finding of the stolen checks in the room of the accused, considering the character of his possession of them and the other attendant circumstances, was sufficient to justify an inference of the guilt of the accused.

6. On direct examination Captain Messer was asked the occasion of the search of the room of accused. He answered that on the morning of October 19 the executive officer of the 56th Battalion had called him on the telephone and reported several items had been missing from the rooms of officers the night before, and several days before. Recalled as a rebuttal witness, Captain Messer testified that losses had occurred in several barracks of "the 54th or 56th", and that the losses in the 54th Battalion Officers' Quarters occurred early Sunday morning. The prosecution did not show that the loss or disappearances of the items in question was in any way connected with the larcenies alleged in the Specifications of the Charge and the testimony with reference to such items clearly was incompetent. However, in view of the vague character of the testimony and its manifest lack of appreciable weight as evidence, it is the opinion of the Board of Review that its admission did not injuriously affect any substantial rights of the accused (R. 24, 32, 59).

7. The records of The Adjutant General show the age of accused to be 25 and service as follows:

Enlisted service from January 29, 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty, October 1, 1942.

8. 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. Dismissal is authorized upon conviction of violation of the 93rd Article of War.

Curtis E. Hill Jr., Judge Advocate.

Lucy E. Gray, Judge Advocate.

Samuel M. Drever, Judge Advocate.

SPJGH
CM 230928

1st Ind.

War Department, J.A.G.O., MAY 4 1943 - 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 Thomas J. Lanyon (0-1770820), Field Artillery.

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.

The accused was found guilty of larceny of $1, United States currency, and of two travelers checks of a value of $10 each, the property of other officers, in violation of the 93rd 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 sentence and designated the Ninth Service Command Detention and Rehabilitation Center, Turlock, California, as the place of confinement. I recommend that the sentence be confirmed but, in view of all the circumstances, that the forfeitures and confinement be remitted and that the sentence as modified be carried into execution.

3. 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 carrying that recommendation into effect.

Myron C. Cramer

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

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

(Findings and sentence disapproved. G.C.M.O. 152, 20 Jul 1943)

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



SPJGN
CM 230938

APR 9 - 194

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| UNITED STATES | ) | SEVENTH ARMORED DIVISION |
| v. | ) | Trial by G.C.M., convened at North Camp Polk, Louisiana, January 8, 9, and 10, 1943. Dismissal, total forfeitures, and confinement for four (4) years. |
| Captain HENRY V. CARVILL, (0-350333), Infantry. | ) | |

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OPINION of the BOARD OF REVIEW,
CRESSON, LIPSCOMB, and SLEEPER, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the officer above named 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 93rd Article of War.
(Finding of not guilty.)

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

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

Specification: In that Captain Henry V. Carvill, Army of the United States, did, at North Camp Polk, Louisiana, on or about November 13, 1942, with intent to deceive, officially state to Colonel W. P. Shepard, Chief of Staff, Seventh Armored Division, that there was a personal check in the sum of $100.00 stolen from his (Captain Carvill's) pocketbook on or about November 7, 1942, or words to that effect, which statement was known by the said Captain Henry V. Carvill to be untrue.

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

Specification: In that Captain Henry V. Carvill, Army of the United States, did, on or about October 25, 1942, at vicinity of Mittie, Louisiana, borrow the sum of $50.00 from 1st Sergeant Albert F. DeVries, a non-commissioned officer.

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

Specification: In that Captain Henry V. Carvill, Army of the United States, did, knowingly and wilfully, at or near North Camp Polk, Louisiana, on or about December 15, 1942 falsely represent to his friends, associates, and fellow officers that Fern A. Smith was his lawful wife when he then knew that his wife, Virginia Salus Carvill, was still living and not divorced from him.

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

Specification 1: (Disapproved by reviewing authority.)

Specification 2: (Disapproved by reviewing authority.)

Specification 3: In that Captain Henry V. Carvill, Army of the United States, did, knowingly and wilfully, at Camp Claiborne, Louisiana, on or about October 7, 1942, contract an unlawful bigamous marriage with Fern A. Smith of Port Arthur, Texas, without first being divorced from his lawful wife, Virginia Salus Carvill, she being still living; the said lawful marriage having been entered into at Boston, Massachusetts, on or about August 24, 1940.

The accused pleaded not guilty to all Charges and Specifications, except the Specification, Charge II, to which he pleaded not guilty but guilty of a violation of the 96th Article of War. He was found not guilty of Specifications 1, 2 and 3, Charge I, and Charge I, and guilty of the remaining Charges and Specifications. He was sentenced to be dismissed the service, to forfeiture of all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of ten years. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Additional Charge II, and approved only so much of the sentence as provides for dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for four years, and forwarded the record of trial for action under Article of War 48.

3. (a) Concerning the Specification, Charge II, to which the accused pleaded not guilty, (but guilty of making a false statement in violation of Article of War 96), the evidence for the prosecution shows that, during official hours on November 12, 1942, the accused reported to Colonel Shepard, Chief of Staff, 7th Armored Division, the theft from the accused's pocketbook on or about November 7, 1942, of sixty dollars of company funds and of a personal check for a hundred dollars issued to the accused by his mother. In connection with this report, the accused requested permission to send two men to DeRidder, Louisiana, to take into custody a certain individual whom accused suspected of having committed the theft. Accused stated to Colonel Shepard, at a later date, that he did not know why he had stated there was a personal check for $100.00 allegedly stolen along with the service company funds. He also told Captain Tirey, in the course of a subsequent investigation, that there had been no check at all and that he had told Colonel Shepard about it. (R. 8-11, 18,24.)

(b) With reference to the Specification, Charge II, the accused testified that, at the time he made the false statement to Colonel Shepard about a check being stolen, he had not gone to the Colonel's office to make an official report, but to obtain permission to send a truck to DeRidder to pick up a man whom he suspected of having committed some or all of a series of recent thefts in his company. During the conversation in which this request was made, the accused stated to the Colonel that a personal check for $100.00, payable to the accused, had been stolen from the accused's wallet, along with $60.00 of company funds. As to why he made this admittedly false statement, the accused testified <u>in haec verba</u>:

> "The original reason I had on that was that if I could scare somebody in the company * * * to return anything taken out of that box, I would be able to use it in getting finger prints to convict a person in the company * * *".

The accused also testified that he later told Colonel Booth that he - the accused - had made a false statement at the time he requested Colonel Shepard's permission to send two men to DeRidder to apprehend the suspected thief (R. 139-140).

In response to questions by a member of the Court inquiring further into his purpose in visiting the Chief of Staff's office on the occasion on which the false statement was made, the accused admitted that, as company commander, he could have sent the truck anywhere he wanted to. He added, however:

> "There was another point there, to be frank with the Court. With all these thefts in the company I was getting to the point that I needed help to determine who was the guilty person down there, there were too many of them." (R. 142.)

(c) The Specification, Charge II, alleges that the accused did, at North Camp Polk, Louisiana, on or about November 13, 1942, with intent to deceive, officially state to Colonel W. P. Shepard, Chief of Staff, Seventh Armored Division, that there was a personal check in the sum of $100.00 stolen from the accused's pocketbook on or about November 7, 1942, or words to that effect, which statement was known by the accused to be untrue.

The accused pleaded guilty to all the foregoing specification except the words "with intent to deceive" and "officially." No other inference is tenable from the deliberate making of the false statement in the manner and under the circumstances clearly established by all the evidence relating to it (including the testimony of the accused), than that the accused meant for Colonel Shepard to believe that the statement was true. Regardless of whether or not the accused might reasonably hope to derive any benefit from the deception, the intent to deceive was implicit in the making of the false statement. Its official character is clearly established by Colonel Shepard's testimony. Moreover, even the accused's testimony shows that in reporting to the Chief of Staff on the occasion on which the false statement was made, his purpose was to make an official request which necessarily involved a report of the theft. Finally, on cross examination, the accused admitted that one purpose of his visit to Colonel Shepard's office was to get help to determine who was the thief. Thus the testimony of the accused, as well as the evidence adduced by the prosecution, fully sustains the finding of guilty of the Specification, Charge II, in violation of Article of War 95 (Winthrop, 2nd Ed., p. 713).

4. (a) Concerning the Specification, Charge III, the evidence for the prosecution shows that on October 25, 1942, Captain Spokes, whom accused had recently succeeded as company commander, visited the Service Company, 7th Armored Regiment, for the purpose of transferring to the accused the company funds of which Captain Spokes was custodian. Upon opening the strong box in which these funds were kept, Captain Spokes discovered a shortage of $86.00 in cash. Captain Spokes had no cash with him, and the 48th Armored Regiment, with which Captain Spokes was then serving, was separated a considerable distance from the service company. The accused, therefore, offered to lend Captain Spokes the money with the understanding that, upon his return, Captain Spokes would send the accused a personal check for the amount of the loan. Upon Captain Spokes' acceptance of this offer, the accused discovered that he - the accused - had only $40.00 in cash. First Sergeant Albert F. DeVries of the Service Company, who had served in the same capacity under Captain Spokes, thereupon explained to the two captains that he had some money that could be used, and volunteered to supply the difference in cash so the transaction could be completed then and there, obviating the necessity of Captain Spokes making another trip. His suggestion being favorably received, Sergeant

DeVries gave the accused $50.00 for which the accused gave the sergeant his I.O.U. The accused then handed Captain Spokes $90.00, consisting of the accused's own $40.00 and the $50.00 which he had obtained from the sergeant, taking Captain Spokes receipt for the entire amount. Captain Spokes immediately turned this money over to the accused in lieu of the missing company funds, and the accused signed the regular transfer form, acknowledging receipt in full. The accused later repaid the sergeant (R. 27-37).

(b) With reference to the Specification, Charge III, the accused testified that, upon discovery that $86.00 in cash was missing from the strong box on the occasion of Captain Spokes' visit to the service company for the purpose of closing out the council book and voucher file and transferring the company funds, the accused offered to lend Captain Spokes the amount necessary to facilitate the transfer. The accused reached in his pocket and took out his wallet and discovered and stated that he had only $40.00, whereupon Sergeant DeVries said he would be more than glad to offer $50.00 to facilitate the transfer of the fund, and laid $50.00 on the table. Continuing, the accused testified:

> "Being his company commander and to protect him I gave him an I.O.U. and handed the entire $90.00 to the Captain * * * who gave me an I.O.U. for $90.00 and when Captain Spokes paid me back I paid Sergeant DeVries the $50.00 back and reclaimed the I.O.U. I had given him to protect him."

Upon receipt of the $90.00 Captain Spokes, in turn, gave the accused $86.60, which was the exact amount of the shortage, to complete the transfer of the funds (R. 143).

(c) The Specification, Charge III, alleges that the accused did, on or about October 25, 1942, in the vicinity of Mittie, Louisiana, borrow the sum of $50.00 from First Sergeant Albert F. DeVries, a noncommissioned officer.

The proof discloses a borrowing under circumstances sufficiently exceptional to exempt it from the application of the rule announced, as dicta, in a former opinion of The Judge Advocate General that,

> "***the mere act of an officer borrowing money from an enlisted man is an offense under Article of War 96. (CM 122920 (1918); 130989 1919))" (Dig. Ops. JAG 1912-40, sec. 453(5) p. 341).

The Judge Advocate General has also held that,

> "***where the officer borrows from the enlisted man * * * without any circumstances of an exceptional character, it would be subversive of proper military discipline to permit the transaction to go unpunished" (CM 117782 (1918)).

Conversely, where the circumstances, as here, clearly eliminate the remotest possibility of any abuse of the relationship, there remains no tenable basis for regarding the borrowing as prejudicial to good order and military discipline. A conviction was sustained under a similar specification in the Strickland case (CM 192128 (1930)). There, however, the evidence tended to reinforce the presumption of prejudice by disclosing that the officer had solicited the loan for his personal benefit and, in seeking to induce it, had revealed to the enlisted man his own misconduct and resulting plight.

In our opinion, the uncontradicted evidence in the instant case absolves the accused of violating Article of War 96, in accepting the sergeant's proffered fifty dollars for the convenience not of himself but of Captain Spokes. We, therefore, consider the record of trial legally insufficient to support the finding of guilty of Charge III.

5. (a) Concerning Specification 3, Additional Charge II and the Specification, Additional Charge I, the evidence for the prosecution shows that, on August 24, 1940, the accused was married to Virginia A. Salus, who was residing, at the time of the trial, at Hotel Wentworth, New York City. During the months of October and November, 1942, the accused's allotment of $200.00, was payable, according to his pay card in the Finance Office, to Virginia A. Carvill, Hotel Wentworth, New York City, c/o First Hardin National Bank, Elizabethtown, Kentucky, where it was deposited to the joint account of Captain Henry V. Carvill and Mrs. H.Vaughan Carvill, his wife. On October 7, 1942, the accused was married to Fern A. Smith at Camp Claiborne, Louisiana (R. 97-98, 81, 104-105, 110-112).

On or about December 15, 1942, the accused, in his quarters, introduced Fern A. Smith as his wife to Lieutenants Husk, Ferguson and Carpenter, all three of whom were assigned to duty with the Service Company of the 7th Armored Division (R. 100-104).

(b) Concerning Specification 3, Additional Charge II, and the Specification, Additional Charge I, the accused testified that in July, 1942, Mrs. Virginia Salus Carvill told the accused, while he was in New York City on leave, that she was in love with another man. On August 2, 1942, after his return to Louisiana, she telephoned

him from New York to say that she wanted a divorce. He told her to proceed and that he would pay the expenses; also, in lieu of alimony, that he would send her $100.00 a month for three months. About a week later she wrote him a letter—neither produced nor accounted for—stating she had gone to a lawyer and "the divorce would be through in the end of September." Sometime thereafter, he sent her three post dated checks for $100.00 each. These checks were dated the first of October, November and December, respectively. He produced the check dated December 1, which had been paid and cancelled. It was made out to Mrs. H. Vaughan Carvill. The other two came in with his bank statements in November and December. He destroyed them after he received them back from the bank. Confronted with his bank statements, later in the trial, the accused testified that Mrs. Virginia Carvill had not cashed these two checks but had returned them to him without cashing them. She returned them because, in October and November, 1942, she was still writing checks on their joint account. In reply to an inquiry by a member of the court, why he had testified previously that the first two checks had gone through the bank, the accused testified:

> "The only answer I have to that, sir, is that I didn't intend to put across to the court that they had cleared through the bank, as I already knew that the bank statements were in the hands of the prosecution." (R. 144-151, 160-161, 165).

At the time of his marriage to Fern Smith on October 7, 1942, the accused believed he was divorced from Mrs. Virginia Salus Carvill, although he had heard nothing from her since the letter stating that she had seen a lawyer and that the divorce would be "through in the end of September," and had had no word or communication from anyone with reference to the divorce. On cross examination, accused testified that grounds for the divorce were not discussed, but that "she was going to try," although he did not know in what State she planned to attempt to institute divorce proceedings (R. 144, 154-155, 157-159).

On October 19 or 20, 1942, the accused again talked via long distance telephone with Mrs. Virginia Carvill in New York. He neither told her he was married nor asked her if she had obtained a divorce, but "from things that were said," concluded she had not. Despite reiterated inquiries both from the prosecution and from members of the court, the accused failed to recall a single specific statement made in this conversation. He testified, at one time, that it merely caused him to doubt that he had been divorced; but in answer to the question as to when it was that he learned that he was not, in fact, divorced from Virginia Carvill, the accused replied, "Around October 19 or 20" (R. 153, 157, 170-172).

In the latter part of October, 1942, the accused employed a lawyer in Leesville to investigate the matter and, if necessary, to institute divorce proceedings on behalf of Mrs. Virginia Carvill against the accused in Louisiana. These proceedings had been instituted and were pending when the accused was tried (R. 152, 155-157).

The accused admitted having presented Fern Smith as his legal wife, since learning he was not divorced from Virginia. The accused and Fern Smith were, in fact, living together as man and wife at the time of the trial (R. 152, 171, 179).

(c) Specification 3, Additional Charge II, alleges that the accused did, knowingly and wilfully, at Camp Claiborne, Louisiana, on or about October 7, 1942, contract an unlawful bigamous marriage with Fern A. Smith of Port Arthur, Texas, without first being divorced from his lawful wife, Virginia Salus Carvill, she being still living; the said lawful marriage having been entered into at Boston, Massachusetts.

Every element of the offense is not only proved but admitted by the accused. In avoidance, he urges his belief that his first wife had obtained the divorce which he and she had discussed via long distance telephone conversation in August, concerning which she had later written him to the effect that she had seen a lawyer and that "it would be through in the end of September." Having heard nothing further, either from his first wife or from anyone else, with reference to the contemplated divorce, the accused, taking the wish for the deed, contracted a second marriage, after which his first wife continued to check on their joint account in Elizabethtown, Kentucky, and was still designated as the recipient of his allotment on his November pay card. Moreover, the accused's testimony concerning both the letter he claimed to have received from his first wife in September, and his transactions with her during the subsequent two months, is palpably unreliable, and indicates that in testifying he was constantly deferring to standards of plausibility rather than to standards of truth.

Regardless of which, if any, of accused's conflicting statements are correct, he did not exercise "reasonable diligence to ascertain the truth" and his belief was not a defense. (CM 123267 (1918)) (Dig. Ops. JAG 1918-40, par. 454(18), p. 350). Nor does the evidence disclose a reasonable and honest belief that a valid divorce from his first wife had been secured, within the purview of Article 76 of the Louisiana Criminal Code, 1942, of which the court properly took judicial notice.(Par. 125, M.C.M. 1928). The evidence clearly sustains the finding of guilty of Specification 3, Additional Charge II, and shows both the commission of a crime, not capital, and conduct of a nature to bring discredit on the military service, in violation of Article of War 96.

(d) The Specification, Additional Charge I, alleges that the accused did, knowingly and wilfully, at or near North Camp Polk, Louisiana, on or about December 15, 1942, falsely represent to his friends, associates and fellow officers that Fern A. Smith was his lawful wife when he then knew that his wife, Virginia Salus Carvill, was still living and not divorced from him.

Accused's own testimony shows that on October 19 or 20, 1942, he learned he was not divorced from his first wife, and that, having engaged a lawyer to institute divorce proceedings, he nevertheless continued to live publicly, as man and wife, with Fern A. Smith, and to introduce and represent her to fellow officers, friends and associates as his lawful wife. The accused's gross negligence in failing to take any steps whatsoever to ascertain whether his first wife had obtained a divorce before undertaking to contract a second marriage had resulted in the embarrassing predicament that should have been anticipated. The accused, it is true, took one appropriate step to alleviate the situation. He engaged a lawyer to institute divorce proceedings on behalf of his first wife. Then, knowing that he was not divorced, he continued for his own convenience to live openly with Fern, and to represent her publicly as his wife, manifesting a callous disregard for her reputation and virtue as well as for law, morals, and the conventions of society, wholly inconsistent with conduct becoming an officer and a gentleman (Winthrop (2nd Ed.), p. 718, note 54; Dig. Ops. JAG, 1912, p. 142, 143, R. 23, 164, Aug. 1866; R. 42, 98, Jan. 1879).

The evidence, therefore, clearly sustains the finding of guilty of the Specification, Additional Charge I, and shows conduct unbecoming an officer and a gentleman, in violation of Article of War 95.

6. The accused's good conduct and reputation, and his outstanding ability and energy as an officer and a leader of men were attested by the division chaplain and the division inspector general. On cross examination, however, the latter testified that while his investigation had shown the accused's administration of the service company to be excellent in all other particulars, it disclosed many irregularities and discrepancies in his handling of the company funds (R. 200-204).

7. The accused is 28 years and 10 months of age. The records of the Office of The Adjutant General show that he served as an enlisted man from August 18, 1933, to August 17, 1936, when he was honorably discharged for the convenience of the Government. He was appointed a second lieutenant, Army of the United States, on January 26, 1937, assigned to extended active duty August 26, 1940, promoted first lieutenant Infantry Reserve, effective August 22, 1941, and temporary captain, Army of the United States, August 17, 1942.

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 record of trial is not legally sufficient to support the findings of guilty of Charge III and its Specification; legally sufficient to support the findings of guilty of Charge II and its Specification, Additional Charge I and its Specification, Additional Charge II and Specification 3 thereunder; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 95 or Article of War 96.

Thos. L. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 24 1943 - 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 Henry V. Carvill (0-350333), Infantry.

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 Charge III and its Specification, legally sufficient to support the findings of guilty of Charge II and its Specification, Additional Charge I and its Specification, Additional Charge II and Specification 3 thereunder, and legally sufficient to support the sentence and to warrant confirmation thereof.

The conduct of the accused in making a false official statement with the intent to deceive shows the accused to be lacking in basic standards of honesty. In addition, his conduct in entering into a bigamous marriage, and in introducing as his wife, to fellow officers and friends, the woman whom he had deceived into such marriage, was an affront to his fellow officers, an outrage to the feelings of the woman, a discredit to the military service, and a basic wrong to society. Although character witnesses describe the accused as an efficient officer, the inspector general of the division to which the accused was assigned testified to the discovery of many irregularities and discrepancies in the handling by the accused of money belonging to his company. Furthermore, the testimony of the accused in which he seeks to justify his belief that his first wife had obtained a divorce at the time of his second marriage is clearly an instance in which "inclination snatches argument to make indulgence seem judicious choice". The accused is, therefore, unworthy to remain an officer. I recommend that Charge III and its Specification be disapproved and that the sentence be confirmed. In view, however, of the fact that accused is now divorced from his first wife, and states that the birth of a child is expected as a result of his second marriage, I further recommend that three years of the sentence of confinement be remitted.

3. Attention has been given to memorandums from Honorable Henry Cabot Lodge, Jr., and David I. Walsh, United States Senate, transmitting letters written by the accused, and to letters written by the accused to the President and the Secretary of War.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the foregoing recommendations 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 ltr for sig. Sec. of War
Incl 3-Form of action

To (138)

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(Findings of guilty of Charge III and its Specification disapproved. Sentence confirmed but three years of confinement remitted. G.C.M.O. 109, 12 May 1943)

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



SPJGK
CM 231119

APR 6 1943

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| UNITED STATES | ) | 77TH INFANTRY DIVISION |
| v. | ) | Trial by G.C.M., convened at Fort Jackson, South Carolina, January 15, 1943. Dismissal and total forfeitures. |
| Captain Earl M. Lockwood (0-327546), Headquarters 1st Battalion, 305th Infantry. | ) | |

HOLDING of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 61st Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty).

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

Specification 1: In that Captain Earl M. Lockwood, 305th Infantry was, at Columbia, South Carolina, on or about December 24, 1942, in a public place, to wit, vicinity of the Wade Hampton Hotel, drunk while in uniform.

Specification 2: In that Captain Earl M. Lockwood, 305th Infantry, did, at Columbia, South Carolina, on or about December 24, 1942, in a public place, to wit, vicinity of the Wade Hampton Hotel, commit a nuisance by urinating, this to the disgrace of the military service.

Specification 3: In that Captain Earl M. Lockwood, 305th Infantry, did, at Fort Jackson, South Carolina, on or

> about December 31, 1942, with intent to deceive Lieutenant Colonel Cecil W. Nist, 305th Infantry, state to the Lieutenant Colonel Cecil W. Nist that he, Captain Lockwood, had not been out of his quarters in Columbia, South Carolina, during the period December 5, 1942, to December 31, 1942, except to visit Fort Jackson, South Carolina, which statement was known by the said Captain Earl M. Lockwood to be untrue, in that he had visited the Wade Hampton Hotel, Columbia, South Carolina on December 24, 1942.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Charge I and the Specification thereunder and guilty of Specifications 1, 2 and 3 of Charge II and of Charge II. 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.

3. From the record it appears that the court convened for the purpose of trying accused at 2:00 P.M., January 15, 1943 (R.2). At the outset of the trial, as appears from the record (p.6), the accused through individual counsel asked for a continuance. The following colloquy took place:

> "Defense: The defense would like to raise the objection to having to start this case at this time due to the fact that the defendant wasn't notified until 12:30. His trial was today and defense counsel had no knowledge that he was defense counsel on it until a short while ago and he has had no chance to prepare the case or to interview witnesses in the case or see the defendant himself or make any preparation for the case.
>
> "Law Member: The motion is overruled and denied.
>
> "Defense: I would like to take an exception to that and have it made a part of the record.
>
> "President: It will be noted. It is the ruling of the Court that five days prior service during wartime has been vacated by an Executive Order of the President and it isn't necessary that an accused have five days in which to prepare the case."

4. The Board of Review has considered a memorandum entitled "Brief and Argument", with supporting affidavits, submitted by accused through counsel. The Board has also considered a statement prepared by the trial judge advocate, dated January 30, 1943, together with the formal documents

accompanying the record proper.

It appears that the accused was not served with a copy of the charge, nor did he know of the date of his trial, prior to the day on which the trial was held. Defense counsel first learned of his detail or appointment, and of the date of the trial, at 12:15 P.M., January 15. He stated to the court that, as a result, he had had no chance to prepare the case or to interview the witnesses or see the defendant himself, or make any preparation for the case.

Accused pleaded not guilty to the charges. There were substantial issues of fact.

5. The right to prepare for trial is fundamental. To deny this right is to deny a trial. Article of War 70 provides "In time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him". This does not mean that during war an accused may be deprived of the right to prepare his defense. Nor does it mean that in time of war such preparation shall be limited arbitrarily to five days. The limitation by implication contained in this Article should be applied with great care and only when the rights of the accused are not prejudiced thereby.

In Powell v. Alabama (287 U.S. 45), known as "The Scottsboro Case", the Supreme Court reviewing the conviction in the State court said, at page 56 et seq.:

> "It thus will be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. * * * The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

In this same connection, the Supreme Court, in Avery v. Alabama (308 U.S. 444), said at page 446:

> "But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.

The Constitution's guarantee of assistance of counsel can not be satisfied by mere formal appointment."

In the present case, the issues of fact involved an incident which occurred and possible witnesses who resided some distance from Fort Jackson. Intelligent preparation for trial, the preparation contemplated by law, is possible only after charges as finally amended and formulated are served. Here the charges were not served, nor was there notice of trial, nor opportunity to confer with counsel until a few hours before the very hour of trial.

Under the circumstances, the failure of the court to grant accused a reasonable adjournment was an abuse of its discretion. As was said in CM 126651, "To try a man for charges upon which he is ignorant until he comes into court is not due process of law. It deprives him of all opportunity to consider or prepare his defense, and thus deprives him of a most substantial and well recognized right. The question of a continuance is one for the sound discretion of the court. It is believed, however, that when it is apparent upon the record that the court has abused its discretion, the conviction should be held illegal".

6. The evidence produced by the prosecution in support of Specification 1 and 2 of Charge II, indicates, prima facie, violations of Article of War 96 rather than Article of War 95. Accused was not shown to have been grossly drunk or conspicuously disorderly within the meaning of Article of War 95 (Dig. Op. JAG 1912-40, sec. 453(11).

7. The evidence introduced for the prosecution was legally insufficient to support Specification 3, Charge II.

Lieutenant Colonel Cecil W. Nist then in command of the 305th Infantry talked to accused on or about December 31, 1942, "to inquire into his status" (R.11,12). Accused had been sick in quarters since November 30, 1942 (R.32), except for two or more visits to Fort Jackson, until December 31, 1942 (R.16,22,24). Accused lived in Columbia, South Carolina, where the Wade Hampton Hotel is located (R.8), with his wife (R.19). The following testimony of Lieutenant Colonel Nist was adduced in support of this specification:

"At that time I was in command of the 305th Infantry. I asked Captain Lockwood what his status was and he told me that he was sick in quarters. He also told me that he had been in quarters ever since the 30th of November except for a couple of visits to Fort Jackson. I asked him if he were positive of

that fact and he told me that he was, that he had not been anywhere else except in quarters except for the visits to Fort Jackson. I reminded Captain Lockwood that I had a report that he had been elsewhere than in his quarters, after which he admitted that he had been at the Wade Hampton Hotel on Christmas Eve, December 24th. * * *"

A reasonable interpretation of the question to accused is that it was directed to trips away from Columbia, South Carolina. Based on such an interpretation the answer of accused was not false. Furthermore, a stop off during the late afternoon or the early evening at the Wade Hampton Hotel on the return from a visit to Fort Jackson could be interpreted fairly as within the scope of the answer given.

From the testimony it appears that at the same time and as part of the same interview the question was made more specific, whereupon accused stated that he had been at the Wade Hampton Hotel on Christmas Eve.

The use of the word "admit" by Lieutenant Colonel Nist, in this connection, was a conclusion and improper. Nor does it fairly characterize the conduct of accused in the light of the entire testimony on this point.

Regardless of the intent or purpose of accused in not stating immediately that he had been at the Wade Hampton Hotel, he corrected his statement during the interview. Making a false official statement, in violation of Article of War 95, is similar in nature to the offense of perjury. A witness who corrects false testimony before he leaves the stand "purges" himself and is not guilty of perjury.

8. That portion of the sentence which includes total forfeitures is not authorized by Article of War 95, and is illegal and void.

9. For the reasons set forth above the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Andrew Cappo Jr., Judge Advocate

John Tourtellot, Judge Advocate

Fletcher R. Andrews, Judge Advocate

SPJGK
CM 231119 1st Ind.

War Department, J.A.G.O., APR 7 1943 - To the Commanding General, Headquarters 77th Infantry Division, Fort Jackson, South Carolina.

1. In the case of Captain Earl M. Lockwood (0-327546), Headquarters 1st Battalion, 305th Infantry, I concur in the foregoing holding of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 231119).

Myron C. Cramer

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

2 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Brief and argument submitted by accused.

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

SPJGK
CM 231132

MAR 19 1943

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| UNITED STATES | 2ND ARMORED DIVISION |
| v. | Trial by G.C.M., convened at Headquarters 2nd Armored Division, A.P.O. 252 c/o Postmaster, New York, N.Y., January 21, 1943. Dishonorable discharge, total forfeitures, and death by musketry. |
| Private MICHAEL G. GLEASON (31050047), Company C, 82nd Armored Reconnaissance Battalion, 2nd Armored Division. | |

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OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Michael G. Gleason, Company "C", 82d Armored Reconnaissance Battalion, did, at Rabat, North Africa, on or about December 5, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Rabat, North Africa, on or about January 1, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions was introduced: One summary court-martial of absence without leave in violation of the 61st Article of War; and the other by special court-martial of absence without leave in violation of the 61st Article of War and of breach of restriction in violation of the 96th Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be shot to death with musketry. The reviewing authority approved the sentence, forwarded the record of trial under

the provisions of Article of War 48, recommended that "since the desertion occurred in a rear area, rather than in the face of the enemy, the sentence be commuted to life imprisonment", designated the Casablanca Military Prison Camp as the place of confinement until the pleasure of the President is known, but pending further orders relative to the transfer of the accused to the place of confinement therein designated ordered that accused be retained in confinement in the 2d Armored Division Stockade.

3. The evidence shows that on December 5, 1942, Company C, 82nd Armored Reconnaissance Battalion, 2nd Armored Division, was in the bivouac area of the 67th Armored Regiment in the cork forest on the Rabat-Monod Road, French Morocco (R.5), a rear area, rather than in the face of the enemy (action of reviewing authority). Accused, a member of Company C, 82nd Armored Reconnaissance Battalion and actively on duty with his organization, overstayed his pass that expired at 7 p.m., December 5, 1942 (R.5). His unauthorized absence was discovered later that night by Sergeant John Gleeson, acting platoon sergeant of the 3rd Platoon of Company C, as the result of a bed check taken by him under orders of the company commander. Sergeant Gleeson conducted "a search all around the entire area and couldn't locate him" (R.5). Accused was absent from reveille roll call the next morning and was carried as absent without leave on the morning report until administratively dropped as a deserter a few days later (R. 4). He remained absent until January 1, 1943 (R. 4,6,7,13), when he was apprehended by the military police (R.7) while lying in bed with his clothes on in a room in Hotel Oceania, at Rabat, French Morocco (R.13). He was confined in the police station at Rabat, brought back to camp (R.6), and confined in the 67th Armored Regiment Stockade (R.4). His absence from December 5, 1942, to January 1, 1943, was unauthorized (R.4).

Private Bill Smith, Company C, 7th Infantry, 3rd Division, testified that he saw accused two or three times during his absence from his organization (R.8). The first time was on December 10, 1942, when witness was with accused from 7 p.m., until 3 o'clock in the morning, when he went with accused to the Paris Hotel located outside Rabat, French Morocco (R.7,9). On another occasion witness saw accused down town (R.9). The third time was on or about December 30, 1942, at about 3 o'clock in the afternoon (R.8). The witness was posted as a guard with Private Lonnie Eddins, Jr., Company C, 7th Infantry, 3rd Division, at the 3rd Division Post Number 10 located directly across from Garcia's Bar (R. 8,11), on the north side of Rabat (R.11) at the gate outside of the Medina, the native village (R.11). The guard was posted to keep soldiers out of the Medina (R.11). On this occasion accused and three other soldiers, Privates Ralls, Mike Malone, and Hord, approached the guards posted on Post No. 10 (R.8), directly across from Garcia's Bar (R.8). The witness testified that accused had been drinking.

> "He was kind of staggering a little. As a matter of fact I thought all had been drinking.* * * They all came staggering across the street talking rather loud" (R.10).

These soldiers wanted to go through the gate into the Medina (R. 10). The witness urged Private Malone, one of the four soldiers, to turn in.

> " * * * they are going to get you for desertion if you don't turn in, and this Mike (witness pointing to accused) spoke up and said, 'I am not going to turn in until they catch me.' * * * Well, there was Mike Malone who came over and asked us would we want some wine. We told him no we couldn't drink it on guard and that we were going off guard at 4:00 o'clock. I told Mike Malone and Hord out of C Company they better turn in, and if they didn't turn in they were liable to be tried for desertion, because men AWOL after December 1st were tried just like deserters, and he spoke up and said he wasn't going to turn in until they caught him.
> "Q. Who spoke up?
> "A. This fellow right here (witness pointing in direction of accused)." (R.8, 9)

Private Eddins testified that he was posted as a guard at 3rd Division Post No. 10 on December 30, 1942, and saw accused and three other soldiers come straight across from Garcia's Bar and Restaurant (R. 11).

> "I was on guard. There was three of them who came over to talk. The first time they came over and asked did I want some wine. I told them no. Then they went back across the street and came back across again to where I was and the accused was with them, and the question came up about them being AWOL, and I stated that they should return to their organization because a man absent without leave after December 1st was going to be tried, and one of them spoke up and said 'I'm not going to return until they catch me', but I don't know which one of them made that statement." (R.11)

4. The defense counsel stated to the court "The accused having been advised of his rights chooses to make a sworn statement". Notwithstanding, the president of the court "further explained the rights of

the accused with reference to making an unsworn statement, a sworn statement, or remaining silent." The accused then at his own request was sworn as a witness in his own behalf and testified:

> "Well, on December 5th I was on pass with Sergeant White of my company and another private, three of us were on pass. We went to Rabat, French Morocco. We had been drinking all day long. That evening we went to a hotel for something to eat. I met my Lieutenant up there, Lieutenant Thomas. He was just coming in. We told him we were going back on the truck. We started down through town, stopped at a music store. It was getting dark. On the way down I stopped and was talking to a couple of girls. They went off. I was trying to find them and follow them, tried to find them, but couldn't, and the next thing I knew I had missed the truck back to camp. I didn't have any way to get back to camp so I walked all that night, didn't know the way to go and took the wrong road--been feeling pretty good I guess, and the next morning I found myself away out on the other side of town. I asked for the way out to the other side of town and turned around and started walking back to camp, got nervous all over then and went back to Rabat to get the right road out to our area, and got to drinking again and kept getting nervous and kept drinking, kept thinking about coming back. I didn't say I wanted to be apprehended. As to what Private Smith stated, I remember seeing him and what I said to him now. He was on guard. This Ralls he was speaking of I didn't know and this Bill Smith here had been drinking himself. He had his canteen on and insisted that I have a drink out of it. I thought he had water in it, but when I saw it was wine I said no, but he had wine in his canteen and had been drinking himself, and that is when I told him I didn't want to be apprehended, and this Ralls said he knew this Bill Smith and was going to get some wine over there to him if he gets off guard and that Bill Smith was going to meet him down town that night." (R. 12)

Between December 5, 1942, and January 1, 1943, he did considerable drinking (R.13). In fact, all he did was drink (R.14). Other soldiers usually furnished the drinks and paid for them (R.13). When he went to town he had $20.00 and obtained additional money by gifts and loans

from other soldiers (R.13). He usually slept in hallways or in trucks and bought "sandwiches around one of the cafes and got some meals with wine" (R.14). He was broke when he returned to camp and had been out of money for about three days (R.14). He slept once or twice at the Paris Hotel and twice at the Oceania Hotel with the other soldiers with whom he was associating. These were Private Swisher of the 67th, Private Moran of the 17th Engineers, Private Ralls and Mike Malone (R.14). At one time during his absence he met a private out of his company and asked him to drive him back to camp. This soldier gave accused a drink, loaned him some money but did not return (R.13).

5. The uncontradicted evidence shows that accused was absent without leave from his place of duty between the dates alleged in the Specification. His company commander, 1st Lieutenant Donald J. Stroop, testified that accused had "no other authority whatsoever to be absent any time from 7 P.M.December 5th until the date Lieutenant Jordan brought him back."

The accused manifested a clear intent not to return to the military service, by his own words "I'm not going to return until they catch me", and by his conduct. In harmony with this declaration he remained absent until he was apprehended two days later, notwithstanding a warning given him by Privates Bill Smith and Lonnie Eddins that he should return to duty, as soldiers absent from their organizations after December 1 would be tried as deserters. He was in the combat zone on duty with an army of occupation beyond the continental limits of the United States, in time of war and in a rear area. During his entire absence he was in the neighborhood of military posts and did not surrender to the military authorities; the suggestion that he at one time endeavored to arrange transportation back to camp is not impressive. He had $20 in his possession when he went absent without leave and augmented that with gifts and loans from soldiers; he used none of that money to pay for transportation back to camp.

Under all the circumstances the Board of Review is convinced beyond reasonable doubt that when accused quit his place of duty he knew that his command was engaged in important and hazardous service and that he intended by his absence not to return to it. Desertion is established.

6. The charge sheet shows accused's age as 27 years, his date of induction September 3, 1941, and his record of prior service none.

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 and sentence and to warrant confirmation thereof. The death penalty is authorized for desertion in time of war under the 58th Article of War.

Andrew Cappis, Judge Advocate.

Wm Trumbull, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAR 20 1943 - 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 Private Michael G. Gleason (31050047), Company C, 82nd Armored Reconnaissance Battalion.

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 thereof. Accused was properly found guilty of desertion. He quit his organization at a time at which it was in the combat zone beyond the continental limits of the United States. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due and to be shot to death with musketry. The reviewing authority approved the sentence but, in view of the fact that the desertion occurred in a rear area, recommended that the "sentence be commuted to life imprisonment". The offense was grave but I do not believe imposition of the extreme penalty is required. I recommend that the sentence be confirmed but that the portion thereof adjudging the death penalty be commuted to confinement at hard labor for twenty years, that the sentence as thus confirmed and commuted be carried into execution but that the dishonorable discharge be suspended until the soldier's release from confinement and that the Casablanca Military Prison Camp be designated as the place of confinement.

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 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 action.

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(Sentence confirmed but that portion thereof adjudging death penalty commuted to confinement at hard labor for twenty years. Dishonorable discharge suspended until release from confinement. G.C.M.O. 80, 7 Apr 1943)

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

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| UNITED STATES | A.P.O. 939<br>SEATTLE, WASHINGTON |
| v. | Trial by G.C.M., convened at Fort Mears, Alaska, January 25, 1943. Dishonorable discharge (suspended) and confinement for eighteen (18) years. Penitentiary, McNeil Island, Washington. |
| Technician Fifth Grade WESLEY A. SINCLAIR (37200768), Company A, 349th Engineer Regiment. | |

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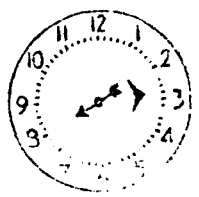

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WAR DEPARTMENT
Unclassified Message Section
J.A.G.O.

HOLDING by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Technician 5th Grade Wesley A. Sinclair, Company "A", 349th Engineers, did at Camp Murray, Washington, on or about October 15th, 1942, desert the service of the United States, in order to avoid overseas duty, and did remain absent in desertion until he was apprehended at Tacoma, Washington, on or about December 18, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. 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 eighteen years. The reviewing authority approved

APR 27 1943

the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement, 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.

3. The evidence for the prosecution shows that about October 12, 1942, at Camp Murray, Washington, the company commander of accused, First Lieutenant Richard A. Haber, informed the company that the organization was about to leave for overseas duty. Captain Paul, on two occasions, also informed the company of this fact. At "every formation" a communication from battalion headquarters was read. It was stated in this communication that all men who were absent without leave at the time of embarkation would be liable to the charge of desertion. According to Lieutenant Haber, the organization was also alerted on October 12. According to the recollection of Sergeant John J. Mc Polin, then first sergeant of the company of accused, the members of the company had been told to pack up about October 12, but "it was not really official". The men had been ordered to keep one barracks bag packed in order to embark (R. 3-6, 9).

Accused was a cook and did not ordinarily stand formation. Neither Lieutenant Haber nor Sergeant McPolin knew whether accused was in formation when the communication from battalion headquarters was read to the company, or whether the order was actually passed on to him. He was, however, then a member of the company. If accused was not present at formation, the order should have been brought to his attention by the mess sergeant. Passes were not granted during an alert, but would be given to the men when the emergency was over. On October 13 the alert was called off and passes were issued on October 14. Accused was given a pass which expired at 2400, October 14. He was missing at reveille the following morning (October 15), and was "dropped on the morning report" on October 16, twenty-four hours after the pass had expired. His company left Camp Murray, October 22, 1942, and sailed from Seattle on October 23rd. Accused was not then present. Accused stated to the officer investigating the charges, Second Lieutenant Samuel A. Martin, that he surrendered voluntarily to the civil authorities at Tacoma, Washington, December 18 (1942), and that he was then attired in his Army uniform. The company of accused had previously been alerted three times at Camp Kilmer, New Jersey (R. 4-6, 9-13; Ex. 3).

4. Accused testified for the defense that on the afternoon of October 14, he went on pass to Tacoma, Washington. He met his "girl friend" and remained with her until 5:30 p.m., October 15. He overstayed his pass on October 15. Accused put the girl on the train and then began drinking, as he was depressed by her departure.

Accused continued to drink steadily for about two months. It was his habit in civilian life to drink for one or two months and then to refrain from drinking for a period of several months. On December 17, accused "tapered off", drank very little, and decided to turn himself in about December 21st, when he thought he would be over the "shakes". Prior to this time he had not given much thought to surrendering. He was then living in a hotel with a soldier named Nelson. On December 18, accused had one drink, went out for a meal, and returned to the hotel. The civil authorities came to arrest Nelson. While there, they asked accused if he had a pass, and accused replied that he had lost it. He did not answer when he was asked if he was absent without leave. The policemen then told accused that he had better go to the police station. Accused asked them why he should go to the station when he was on a pass. He then "volunteered" to go with them. During his absence, accused worked for several firms, unloading freight. He wore fatigues belonging to Nelson. Although he was drunk, he was able to do the work (R. 14-16, 19-24).

After going to the city jail, accused was then taken to the military police jail in Tacoma, From there accused was taken to Camp Murray, and then to Fort Lawton, Washington, where he was not placed in the guardhouse, but lived in barracks. He acted as barracks leader, and was given the duty of seeing that the casuals who came in were "up and out for processing". He remained at Fort Lawton for two weeks, and then embarked at Seattle for Fort Mears (Alaska). While at Fort Lawton, accused was allowed to go to Seattle five times in two weeks on a pass. He always returned (R. 17-18, 25-26).

When his organization was at Camp Kilmer there were three or four alerts of two or three hours duration, during which no passes were issued. Then passes would be issued. Prior to his going to Tacoma on a pass, there was an alert, but 15 minutes later it was cancelled. Because he had a pass, accused believed things were normal. When he went to Tacoma, accused did not know that his organization was alerted on October 13, and did not know if it ever was alerted at Camp Murray. He did not have one barracks bag packed for embarkation, and had never been told to do so. He knew Camp Murray was an embarkation port and "It was naturally assumed when we got to Camp Murray that we were not going to stay there". Everyone thought the organization was going to Alaska, and accused thought Camp Murray was an embarkation port for Alaska. Accused made no effort to discover when his company was leaving. He "supposed they were going to move at some time". When the Second Regiment left, however, "it was common talk that the First might stay in the States". No one in authority had so informed

the accused. During his absence he made no effort to get in touch with his company commander, or with anyone in authority. He assumed that his organization was still at Camp Murray because he believed it was going to remain in the States. Accused had never heard anyone say how serious it was not to embark with his organization (R. 16-17, 19-21, 23).

5. The question presented for consideration is whether the evidence is legally sufficient to sustain the finding by the court that accused deserted the service with the intent to avoid impertant service within the meaning of Article of War 28.

The 28th Article of War states that -

> "Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter".

In order to sustain the finding of guilty under the Specification, it must have been established in evidence that accused knew that his organization was about to depart for overseas duty, and that he absented himself with the specific intent to avoid this important service (CM 224765, Butler; CM 225512, Herring; CM 226374, Collins; CM 228401, Webster).

It was clearly established by the evidence that on October 15, 1942, accused overstayed his pass, and absented himself without leave from his organization at Camp Murray, Washington. His absence without leave was terminated at Tacoma, Washington, December 18, 1942. The organization of accused left Camp Murray, October 22, 1942, and sailed from Seattle on October 23rd. His company had been alerted three times at Camp Kilmer, New Jersey. During an alert, passes were not issued, but would be issued after the alert was terminated. The organization of accused was alerted on October 12, and a communication was read at formation to the effect that men absent without leave at the time of embarkation would be liable to a charge of desertion. The men were informed three times that the organization was about to leave for overseas duty. The men had been ordered to keep one barracks bag packed for embarkation. On October 13 the alert was terminated and passes were issued. Accused received a pass good until midnight, October 14.

There is nothing in the evidence from which it may reasonably be inferred that accused knew that the embarkation of his organization for overseas duty was imminent, or that his absence would result in his

avoiding embarkation. It was not proved that accused was present on any of the occasions when the members of his company were informed, at formation, that they were to depart for overseas duty, or when the communication was read to the company as to the effect of absence without leave at the time of embarkation. In fact, accused, because he was a cook, did not ordinarily stand formation. There was no evidence that the warning that the company was about to leave for overseas duty, and the fact that an order had been issued directing that one barracks bag should be kept packed for embarkation, was ever brought to the attention of accused. The mere fact that accused was then a member of the organization concerned is not sufficient to provide a reasonable inference that he knew of the contemplated movement, nor was the fact that he absented himself approximately one week prior to the embarkation, considered either alone or in the light of the information as to the movement recently received by members of his company, sufficient to establish such an inference of knowledge by accused that embarkation was imminent. The company had been alerted three times before. The alert had been terminated and passes were then issued. It was not established in evidence that this particular alert was more likely to result in actual embarkation than those which had previously occurred. This alert was also terminated, and accused was then granted a pass.

Accused admitted that it was naturally assumed that the organization would not remain at Camp Murray. He thought that this camp was an embarkation port for Alaska, and everyone believed the company was going to Alaska. Accused "supposed they were going to move at some time". These admissions do not warrant an inevitable conclusion that accused actually knew or had reason to believe that the departure of his organization for Alaska was in any way imminent.

Accordingly, the record of trial contains no competent evidence to establish that accused knew or had reason to know that his company was about to embark for overseas duty, and to prove that he deserted with the intent to avoid overseas duty as alleged. When a specification alleges desertion with intent to avoid what is, in fact, hazardous duty, the proof must show such an intent. If no such intent is shown, but rather an intent not to return to the service, there is a fatal variance between the allegation and the proof, and a finding of guilty of desertion based upon such proof cannot be approved (CM 224765, Butler).

6. The evidence does, however, show that the accused absented himself without leave from October 15, 1942, to December 18, 1942,

and is legally sufficient, therefore, to support only so much of the findings of guilty as involves the lesser included offense of absence without leave for two months and four days, in violation of Article of War 61. The maximum authorized sentence for absence without leave for more than 60 days is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months (par. 104c, M.C.M., 1928).

7. Accused is 32 years of age. The charge sheet shows that he enlisted May 7, 1942, with no prior service.

8. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at Camp Murray, Washington, on October 15, 1942, absent himself without leave from his organization, and did remain absent without leave until December 18, 1942, in violation of Article of War 61; 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 six months.

Curtis S. Mills Jr., Judge Advocate.

Percy E. Lyon, Judge Advocate.

Edwood N. Sargent, Judge Advocate.

SPJGH
CM 231163 1st Ind.

War Department, J.A.G.O., APR 12 1943 - to the Commanding General, A.P.O. 939, Seattle, Washington.

1. In the case of Technician Fifth Grade Wesley A. Sinclair (37200768), Company A, 349th Engineer Regiment, I concur in the foregoing holding by the Board of Review. I recommend, for the reasons

therein stated, that only so much of the findings of guilty of the Charge and Specification thereunder be approved as involves findings that accused, at Fort Murray, Washington, on October 15, 1942, absented himself without leave from his organization and remained absent without leave until December 18, 1942, in violation of Article of War 61, and that only so much of the sentence be approved as involves dishonorable discharge, total forfeitures, and confinement at hard labor for six months. Thereupon you will have authority to order the execution of the sentence, provided a place other than a penitentiary, Federal reformatory, or correctional institution is designated as the place of confinement.

2. In view of the nature of the offense, and of your suspension of the execution of the dishonorable discharge, it is recommended that a detention and rehabilitation center be designated as the place of confinement.

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 231163).

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

13 43 PM

APR 27 194

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



PJGH
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APR 2 1943

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| UNITED STATES | ) | 4th SERVICE COMMAND |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Fort Bragg, North Carolina, January 29, 1943. Dismissal. |
| | ) | |
| Second Lieutenant ARLON D. ALBEE (0-1171428), Field Artillery. | ) | |

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, 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 61st Article of War.

Specification 1: In that 2nd Lieutenant Arlon D. Albee, Battery D, 8th Battalion, 3rd Field Artillery Training Regiment, did, at Fort Bragg, North Carolina, on or about 0800 November 23, 1942, fail to repair at the fixed time to the properly appointed place of assembly for drill.

Specification 2: In that 2nd Lieutenant Arlon D. Albee, Battery D, 8th Battalion, 3rd Field Artillery Training Regiment, did, at Fort Bragg, North Carolina, on or about 0800 November 24, 1942, fail to repair at the fixed time to the properly appointed place of assembly for drill.

Specification 3: In that Arlon D. Albee, 2nd Lieu-

tenant, Battery D, 8th Battalion, Third Field Artillery Training Regiment, did, without proper leave, absent himself from his station at Fort Bragg, North Carolina, from on or about 0800 December 14, 1942, until on or about 1330, December 15, 1942.

CHARGE II: (Findings of Not Guilty).

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

Specification: In that Arlon D. Albee, 2nd Lieutenant, Battery D, 8th Battalion, Third Field Artillery Training Regiment, having been duly placed in arrest at Fort Bragg, North Carolina, on or about December 15, 1942, did, at Fort Bragg, North Carolina, on or about December 27, 1942, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Arlon D. Albee, 2nd Lieutenant, Battery D, 8th Battalion, Third Field Artillery Training Regiment, was, at Fort Bragg, North Carolina, on or about December 27, 1942, in a public place, to wit, Officers Mess, Fourth Field Artillery Training Regiment, and in the vicinity thereof on "I" Street, Field Artillery Replacement Training Center, drunk while in uniform.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and of Specifications 1, 2, and 3 thereunder; not guilty of Charge II and the Specification thereunder; guilty of Charge III and the Specification thereunder; guilty of the Specification, Charge IV; and not guilty of Charge IV, but guilty of violation of the 96th Article of War. He was sentenced to be dismissed the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal, and forwarded the record for action under the 48th Article of War.

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

a. Charge I: The accused was assigned to Battery D, 8th Battalion, 3rd Field Artillery Training Regiment, for duty as an instructor in training recruits. His regular duties began at 8 o'clock in the morning. The battalion commander, Major Robert L. Lowe, was notified by First Lieutenant Bruno V. Pozzi, the battery commander of accused, that the accused was absent from drill at 8 a.m., November 23, 1942. Major Lowe went to the quarters of the accused, opened the door, and saw someone in the bed. He then went to the dispensary of the 3rd Regiment, and request the regimental surgeon, Captain Vincent T. Montemarno, to accompany him. When they opened the door of the room of accused, they found him in bed asleep. When awakened by Major Lowe, the accused, dressed in shorts, sat on the edge of the bed. In reply to the inquiry of Major Lowe as to why he did not go to drill, the accused stated, "Well, I didn't get in until a quarter of six this morning". Major Lowe directed the accused to dress, and to report at battalion headquarters. The accused then remarked, "I want to get the hell out of here. I have been a good soldier elsewhere and I can be a good soldier here but I want to get the hell out of here, get me out of here". Major Lowe did not fix the time when he and Captain Montemarno entered the quarters of accused, but stated that the accused was at battalion headquarters when Major Lowe came in at about 10 o'clock. Captain Montemarno fixed the time of their visit as around 11 o'clock (R. 11-14, 15-17)

On the morning of November 24, 1942, Major Lowe was notified, at about 8:15 a.m., that the accused was not at drill. Major Lowe visited the room of accused with Captain Montemarno and again found accused in bed (R. 13-14, 17).

The accused was a member of that portion of Battery D which remained in the battery area on December 14, 1942. He failed to report at 8 a.m., and was not present in the battery area during the entire day. A search of battalion headquarters, battalion recreation hall, and the officers' quarters failed to disclose his presence. At about 2 p.m., December 15, 1942, Sergeant John L. West of the Military Police Detachment, Fort Bragg, saw the accused in room 403, Lafayette Hotel, Fayetteville, North Carolina. It was stipulated that First Lieutenant Bruno V. Pozzi, in command of Battery D, 8th Battalion, 3rd Field Artillery Training Regiment, met the accused in Fayetteville at about 1:30 p.m., December 15, 1942, and drove him back to his regiment. The morning report of Battery D, 8th Battalion, 3rd Training Regiment, Field Artillery Replacement Center, Fort Bragg, shows the accused from duty to AWOL at 0800, December 14, 1942, and from AWOL to arrest in quarters, December 15, 1942 (R. 17-19, 20-22; Ex. 1).

b. Charge III: Lieutenant Pozzi brought the accused to the office of Colonel Augustine J. Zerbee, commanding the regiment of the accused, on the afternoon of December 15, 1942, who then placed the accused in arrest in quarters because of reported misconduct. Colonel Zerbee authorized the accused to take exercise daily between 8 and 10 a.m., limiting himself to a route from his quarters south to I Street; thence east on I Street to Second Street; thence north on Second Street to M Street; thence west on M Street to Third Street; thence south on Third Street to I Street; and thence to his quarters. Colonel Zerbee later extended the exercise period to include the hours from 2 to 4 o'clock in the afternoon, but made no change in the limits of his arrest. Colonel Zerbee testified that the accused was limited to the streets named, and added -

> "I would say, * * * that a thinking reasonable person would have understood that he was not permitted to go further from the stree t on either side than the sidewalk bordering it, if a sidewalk were there" (R. 23-25).

At about 2:15 p.m., December 27, 1942, the accused entered the Officers' Mess of the Fourth Regiment, located in a building on the south side of I Street, directly opposite the quarters of accused, in the 8th Battalion Officers Quarters of the 3rd Regiment, outside of the limits of his arrest, and remained there about two hours (R. 26, 32, 35, 40-41).

c. Charge IV: When accused, in uniform, entered the Officers' Mess, Fourth Regiment, he first went into the kitchen and talked with Private Leon Hildreth, a dining room orderly, about the home town of Hildreth. Accused asked Hildreth to go into the office. Someone had gone to the Officers' Mess and brought back a bottle of rum for accused. When accused asked Hildreth to have a drink, he stated that it was a command, and each drank a small fruit glass of rum which accused poured from his bottle. Hildreth went back at about 3 o'clock to his work in the kitchen, where there were about five people (R. 32, 40-41).

Corporal Richard F. Thomas, a cook off duty, went into the office when accused and Hildreth were there. The accused stood up, they introduced themselves to each other, and accused put his arm on the shoulder of Thomas. The accused invited Thomas to have a drink of rum. Thomas declined and soon went back to the kitchen. Private Harry G. Estes accepted an invitation of accused to have a drink of rum with accused. Sergeant Albert Grieder was in the office alone with accused when accused poured from his bottle, and each drank, one small glass of rum (R. 25-26, 32, 36).

The accused then came out into the kitchen, and talked in French with Sergeant Grieder. Accused picked up a patty of meat from the table and put it in his pocket. The accused then went back into the office with two enlisted men and each had a few drinks of the rum. The drinks the accused had were about 1½ ounces each, and were not mixed with anything. The accused went out of the mess hall some time before 5 o'clock, staggering a little, carrying his bottle in a bag, and walked to his quarters, the 8th Battalion Officers Quarters, in a little uncertain gait (R. 27-28, 30-31, 36, 38).

Four enlisted men testified with respect to the sobriety of accused. Sergeant Grider expressed the opinion that the accused was not sober, nor completely drunk, but was "kind of high". He saw accused stagger, smelled alcohol on the breath of accused, but "figured" that a man who could speak perfect French was not completely drunk (R. 37-39). Corporal Thomas based his opinion that accused was not drunk, not sober, but was "feeling good", and was "high", on the fact that accused talked louder than normal and staggered and wobbled slightly as he left to go to his quarters (R. 28-31). Private Hildreth said that the accused was drunk because his breath smelled slightly of liquor, because of the manner in which he conducted himself, his loud demanding conversation, and incoherent ideas, and because he was more sociable than an officer usually is (R. 42-43). Private Estes was of the opinion that accused was intoxicated, was "high", and staggered a little when he went out of the door, but was not drunk (R. 33-35).

4. For the defense, Captain Montemarno testified that he visited the quarters of accused on November 24 and discussed the personal affairs of accused. Several days earlier he had treated the accused for a minor injury (R. 44-45).

Captain J. G. Oatman, Medical Corps, a psychiatrist, saw the accused on December 10, 1942, in consultation with the ward officer, for the purpose of giving an opinion on the degree of "alcoholism" of the accused, and a general psychiatric opinion. The "alcoholism" of accused had not been excessive, and he was not, in the opinion of Captain Oatman, a psychopathic personality. The accused was best classed as a clyclothymic personality, one who had an extra-version of interests, "a sympathic individual, given to rather wide moodsways". Such persons are usually dynamic, active individuals, and might suffer sleeplessness because of personal troubles (R. 45-47).

Lieutenant M. D. Pendergrast testified that the accused came to his quarters and awakened him between 4 and 5 o'clock of the afternoon of December 27, 1942. The accused was talking about a letter from his father when Lieutenant Lloyd entered the room. A discussion developed

between accused and Lloyd about a disturbance in a mess hall, and the latter accused the former of having had a bottle in Lloyd's mess hall. Accused denied the accusation, did not flare up, and remained as calm as anyone would denying a charge, but was angry. The accused talked sensibly, was not boisterous, and walked straight, but his face was flushed and his breath smelled of alcohol (R. 47-49).

The accused testified that he returned to his quarters at about 10:30 p.m. on November 22, 1942, and remained there all night. He was nervous, and was unable to sleep until shortly before 6 a.m. On Monday morning, as directed by Major Lowe, he went to Battalion Headquarters about 9 a.m., and saw Major Lowe there about 10 a.m. He was not placed in arrest, but was directed to return to his quarters and rest. Monday night he went to bed about 11 p.m., but was able to sleep very little. Family worries caused his sleeplessness. He had been happily married but his wife died in 1936. In 1941 he entered into a second marriage with a French-Canadian woman, which proved most unfortunate. That marriage lasted about one week, and "to say the least, it was very rotten in every aspect". His wife had caused him trouble since he entered the Army. He started a divorce action in October 1942. His wife had threatened to call his commanding officer to cause him trouble. His daughter by his first wife resided with her maternal aunt and grandmother, and attended college in Montreal. The second wife went to the college and caused "quite a scene". She had always caused embarrassment to the father of accused, who is a member of the Inspector General's Department, in Ottowa, Canada. The divorce action was uncontested, and the decree was to be in the hands of his lawyer in New York City by February 2, 1943. His conduct in the officers mess on December 27, or at any other time, "has never been such as to disgrace the uniform". He used no profanity at any time, engaged in no arguments, and did not fall down. On November 23 and 24, 1942, there were 15 officers on duty with his battery which was used to "house O.C.S. students". There were about 15 to 30 enlisted men available for drill. He had no particular duties with the battery. The instruction was given by the noncommissioned officers. At the time the men were receiving small arms instruction from a designated officer, and the noncommissioned officers and the officers of his battery gathered in groups to watch the instruction (R. 50-54).

On cross-examination, the accused stated that he knew when he remained in his quarters on November 23 and 24, that he was under a duty to report to the place of assembly of his battery for drill, and that the other officers were reporting to the battery for drill.

He knew that every officer in his battery was under duty to report at 8 a.m., but, in view of the discussions of his personal affairs with Major Lowe, and his request to Captain Montemarno for hospitalization, "felt that under the circumstances some leniency might be granted me". He knew, however, that an officer could not remain away from drill without getting permission (R. 54-55).

5. At the opening of the trial, the defense moved to strike out the words "Officers Mess, Fourth Field Artillery Training Regiment" from the Specification, Charge IV, on the ground that an officers mess, as such, is not a public place (R. 6-9). The motion was properly denied (Dig. Ops., JAG, 1912-1940, sec. 453 (10) (a); CM 202846).

6. With respect to Specifications 1 and 2, Charge I, the record shows that on November 23, 1942, the accused was found asleep in bed in his quarters at some hour after 8 a.m. and before 10 a.m., and on November 24, 1942, was found in bed in his quarters shortly after 8:15 a.m. The accused admitted that he remained in his quarters on the mornings of November 23 and 24, although he was under a duty to report to the place of assembly of his company for drill at 8 a.m.

Specification 3, Charge I, alleges that the accused absented himself without leave from his station from about 0800, December 14, 1942, until about 1330, December 15, 1942. The evidence shows that the accused failed to report for duty at 8 a.m., December 14, 1942, that a search of the battery area failed to disclose the presence of accused, and he was not present for duty with his battery at any time on that date. The morning report of his battery shows the accused from duty to absent without leave at 0800, December 14, and from absent without leave to arrest in quarters at 1700, December 15, 1942. Sergeant West found accused in a room in the Lafayette Hotel, Fayetteville, North Carolina, on December 15, 1942, at about, as he testified, 2 p.m. It was stipulated that at about 1:30 p.m. that day, First Lieutenant Pozzi met accused in Fayetteville and returned him to his regiment.

With respect to Charge III, the record shows that upon the return of accused to his regiment by First Lieutenant Pozzi on the afternoon of December 15, Colonel Zerbee, commanding the regiment of accused, personally placed the accused in arrest in quarters, in the officers quarters of the 8th Battalion, on the north side of I Street, and the mess hall was on the south side of I Street directly opposite from the accused's quarters. Colonel Zerbee authorized the accused to

take exercise daily between 8 and 10 a.m., and later extended the exercise period to include from 2 to 4 p.m. The accused was limited in his exercise to a route from his quarters on the north side of I Street, south to I Street, east on I Street to Second Street, north on Second Street to M Street, west on M Street to Third Street, south on Third Street to I Street, and thence to his quarters. The accused, on the afternoon of December 27, 1942, entered and remained for about two hours in the officers mess of the 4th Field Artillery Training Regiment. That building was on the south side of I Street directly opposite the quarters of accused, and not within the limits of his arrest.

The Specification, Charge IV, alleges that on December 27, 1942, the accused was drunk while in uniform in the Officers Mess, 4th Field Artillery Training Regiment, and in the vicinity thereof on I Street, Field Artillery Replacement Center. The evidence shows that accused was in the Officers Mess from about 2:15 p.m. to about 4 p.m. that day, that he left the mess hall, walked across I Street to his quarters on the opposite side of the street, and that he was in uniform The evidence shows that over the period of about two hours, he took at least four drinks of not less than 1½ ounces each of straight rum. He was freely sharing drinks from a bottle of rum with the enlisted men who were present, and once ordered an enlisted man to drink with him. In the mess hall he fraternized with the enlisted men present, insisted upon their drinking with him, talked in a loud, although not profane, voice, his face was flushed, his breath smelled of liquor, and he staggered when he walked. While in the kitchen, he placed a patty of meat in his hip pocket. Four enlisted men testified that he was not sober; one that his conversation was not coherent; several that he was "high"; one that he was intoxicated; and one that he was drunk. The activities of the accused in the officers mess took place within the presence of at least 5 enlisted men. The accused was drunk within the definition that any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties, is drunkenness (par. 145, M.C.M., 1928). Clearly the officers mess, the street, and the balcony, the approaches to the officers mess and to the 8th Battalion Officers Quarters were public places (Dig. Ops., JAG, 1912-1940, sec. 453 (10) (2)). The record of trial is legally sufficient to support the findings of guilty of the Specification, Charge IV, in violation of the 96th Article of War.

7. The accused is 43 years of age. The records of the Office of The Adjutant General show his service as follows: Service as

second lieutenant, Infantry Reserve, January 15, 1919 to ____; service in Canadian Army, 1940-1941; enlisted service from March 26, 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and extended active duty, October 15, 1942.

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 the trial is legally sufficient to support the findings of guilty of all Charges and Specifications, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st, 69th, or 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 231232 1st Ind.

War Department, J.A.G.O., APR 8 1943 - 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 Arlon D. Albee (0-1171428), Field Artillery.

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 accused failed to report to the place of assembly for drill (2 Specs.), and absented himself without leave for about 30 hours, in violation of the 61st Article of War; breached arrest, in violation of the 69th Article of War; and was drunk in a public place while in uniform, in violation of the 96th Article of War. I recommend that the sentence of dismissal be confirmed and carried into execution.

3. 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 carrying into execution that recommendation.

Myron C. Cramer

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

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

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(Sentence confirmed. G.C.M.O. 107, 12 May 1943)

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

SPJGN
CM 231284

MAY 12 1943

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| UNITED STATES | ) | 12TH ARMORED DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Camp Campbell, Kentucky, February 9, 1943. Dismissal and total forfeitures. |
| | ) | |
| Second Lieutenant HENRY T. ADDISON (O-1012782), Infantry. | ) | |

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OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, 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 61st Article of War.

Specification: In that Second Lieutenant Henry T. Addison, 92nd Armored Reconnaissance Battalion, Camp Campbell, Kentucky did, at Camp Campbell, Kentucky on or about January 26, 1943, without proper leave, go from the properly appointed place of assembly for Battalion Officers School, after having repaired thereto for the performance of said duty.

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

Specification 1: In that Second Lieutenant Henry T. Addison, 92nd Armored Reconnaissance Battalion, Camp Campbell, Kentucky did, at Camp Campbell, Kentucky, on or about January 27, 1943, with intent to deceive First Lieutenant John R. Wheat, Adjutant, 92nd Armored Reconnaissance Battalion, Camp Campbell, Kentucky, officially state to the said First Lieutenant John R. Wheat that he was checking radio equipment between the hours of 2000 to 2100, January 26, 1943, which statement was known by the said Second Lieutenant Henry T. Addison to be untrue.

Specification 2: In that Second Lieutenant Henry T. Addison did, at Camp Campbell, Kentucky, on or about January 27, 1943, with intent to deceive First Lieutenant John R. Wheat, Adjutant, 92nd Armored Reconnaissance Battalion, Camp Campbell, Kentucky, officially state to the said First Lieutenant John R. Wheat that he talked to Technician Fourth Grade Ralph Rothenberg, Company "A", 92nd Armored Reconnaissance Battalion, Camp Campbell, Kentucky between the hour 2000 to 2100, January 26, 1943, Camp Campbell, Kentucky which statement was known by the said Second Lieutenant Henry T. Addison to be untrue.

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

Specification: In that Second Lieutenant Henry T. Addison, 92nd Armored Reconnaissance Battalion, did, at Camp Campbell, Kentucky, on or about January 26, 1943, borrow the sum of twenty dollars ($20.00) from Private First Class Anthony Shammas, Co. "A", 92nd Armored Reconnaissance Battalion, an enlisted man, this to the prejudice of good order and military discipline.

He pleaded not guilty to and was found guilty of all Charges and Specifications. 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 48.

3. The evidence for the prosecution shows that on January 26, 1943, the accused, together with other officers of the 92nd Armored Reconnaissance Battalion, was under orders to attend on that date a school for officers which was held from 7 to 9 p.m. On the evening in question, the accused was present at the beginning of the class period and was present when the roll of the class was called. Near the end of the class period, however, the class roll was called for a second time and the accused was shown to be absent from the class without permission (R. 10; Ex. A).

Between 7:30 and 8 o'clock of the same evening, the accused entered the mess hall of Company A, and had a conversation there with Private 1st Class Anthony Shammas, Company A, 92nd Armored Reconnaissance Battalion. The accused asked Shammas how he had succeeded in his gambling for the month, and when Shammas told the accused that he had done very well, the accused said "I would like to borrow some money from you, about $270 and I'll pay you back $300". Shammas thereupon lent the accused $20 in cash, and, in order to secure the balance of the money requested, sent a telegram to his sister requesting that $250 be sent to him. The accused and Shammas prepared the telegram in the orderly room, and the accused assured Shammas that he did not "have to worry about the money" because they were "both going on the same cadre". The accused was present in the orderly room from about 8 o'clock to about 8:30 o'clock. During this time the accused did nothing in connection with radio equipment (R. 16-19).

Early the following morning, the accused called Technician 4th Grade Ralph Rothenberg of his own company aside, and told him that he could do the accused a favor. He then requested Rothenberg to tell anyone who might ask him that he, Rothenberg, was checking radio equipment and discussing the radio problems with the accused on Tuesday evening between 8 and 8:30 o'clock (R. 14-15).

Later on the same day, the accused approached First Lieutenant John R. Wheat, Adjutant, 92nd Armored Reconnaissance Battalion, and asked him if he could get the leave of absence which he had requested. Lieutenant Wheat told the accused that he did not know, and thereupon requested the accused to come to his office. After entering Lieutenant

Wheat's office, Lieutenant Wheat asked the accused where he had been during the last hour of the school on the night before. To this question the accused replied that he had been at Company A checking radio equipment. Lieutenant Wheat then asked the accused to whom he had talked, and the accused replied that he had talked to Rothenberg and to the charge of quarters. Lieutenant Wheat next asked the accused if he had talked to anyone else, and the accused replied "No" (R. 11-13).

4. The accused testified that on the afternoon of January 26, 1943, his company commander, Captain William H. Derr, had instructed him to procure certain radio equipment for the use of the company during manuevers on the following day. Captain Derr also suggested that the accused confer with Rothenberg. The accused thereupon conferred with Rothenberg, and was advised by him that the necessary equipment had been borrowed from Company C. Upon further inquiry, however, the accused learned that the equipment might be needed by Company C on the following day. Later in the afternoon, the accused met Captain Derr at the officers' club and reported to him that the necessary radio equipment had been procured. He did not, however tell Captain Derr that the equipment might be recalled by Company C (R. 22).

After going to the officers' school in the evening, the accused left the school during "the break of the first class", and went to the orderly room of his company to check radio equipment. He found the supply room locked, and while in the orderly room he made the statement that "apparently 'C' Company didn't get their equipment, therefore we could use the equipment for the next day's problem * * *". On cross-examination, the accused explained that this assumption was based upon his conclusion that since no note or message was left in the orderly room for him, the equipment had not been reclaimed by C Company, and would be available on the following morning for the use of his own company (R. 22, 26).

The accused explained that while in the orderly room he became engaged in a conversation concerning officers' training school, and that before he realized how long he had been talking, it was 8:40 p.m. He then dashed back to the school, and found the officers about to leave. Later in the evening, the accused saw Major McAllister, and he told the accused about the second roll call at the officers' school. The accused also testified that "somebody said I was not in there and

they checked the roll and I had better have a good alibi and I told him exactly what happened" (R. 22-23).

On the following morning, the accused saw Rothenberg and asked him "to remember that if anyone asked him that he should remember I had gone to the Company to check the equipment". The accused testified further that he did not remember if Rothenberg was in the orderly room on the night of January 26, but there were quite a few people there (R. 22-23).

Later during the same morning, the accused went to battalion headquarters and taked to Lieutenant Wheat about his, the accused's, absence from roll call at the officers' school on the evening before. The accused told Lieutenant Wheat that he had gone to the company to check radios. The accused also told him that he had talked only to the charge of quarters and Rothenberg, and to no one else. On cross-examination the accused admitted that he had talked to Shammas before 8 o'clock about borrowing $270 from him (R. 22-23, 25).

5. The Specification, Charge I, alleges that accused "did, at Camp Campbell, Kentucky on or about January 26, 1943, without proper leave, go from the properly appointed place of assembly for Battalion Officers School, after having repaired thereto * * *".

The uncontradicted evidence shows that the accused absented himself without leave from the battalion officers' school during a session of that school on January 26, 1943. The testimony of the accused admits his leaving the school on the occasion alleged but seeks to justify his conduct by the claim that he went to his company to check radio equipment. Such an excuse, even if true, would not have justified the absence of the accused. The evidence, however, shows that the accused did not check any radio equipment, and the excuse as presented by the accused is unworthy of consideration. The evidence supports beyond a reasonable doubt every element of the offense charged and justifies the findings of guilty (par. 132, M.C.M., 1928).

6. Specification 1, Charge II, alleges that the accused did at Camp Campbell, Kentucky, on or about January 27, 1943, with intent to deceive First Lieutenant John R. Wheat, Adjutant, 92nd Armored Reconnaissance Battalion, officially state to him that the accused was checking radio equipment between the hours of 8 and 9 p.m. on January 26, 1943, which statement was known by the accused to be untrue.

Specification 2, Charge II, similarly alleges that the accused did falsely and officially state to First Lieutenant John R. Wheat that he, the accused, during the hour specified above talked to Technician 4th Grade Ralph Rothenberg.

The evidence shows very clearly that the accused made the statements alleged above, that each statement officially made to Lieutenant Wheat was known by the accused to be false. The facts show further that the accused sought to further his deception by requesting Rothenberg to falsely pretend that he, Rothenberg, was with the accused during the time the accused had represented that they were together checking radio equipment. Even the accused admitted making such a request of Rothenberg. The evidence shows beyond a reasonable doubt that these two false representations were made as alleged. The making of a false, official statement has repeatedly been held to involve such conduct as seriously compromises the character and standing of an officer and a gentleman, and to constitute a violation of Article of War 95. (CM 217538, Kelley; CM 224049, Burnham, par. 151, MCM, 1928)

7. The Specification, Additional Charge, alleges that the accused did, at Camp Campbell, Kentucky, on or about January 26, 1943, borrow $20 from Private First Class Anthony Shammas, to the prejudice of good order and military discipline. The uncontradicted testimony shows that the accused borrowed the money in the amount and on the date alleged. The act of the accused in so obligating himself to an enlisted man of his own company is conduct which is clearly prejudicial to good order and military discipline within the purview of Article of War 96 (CM 221833, Turner).

8. Accused is 24 years of age. The records of the Office of The Adjutant General show enlisted service in the South Carolina National Guard from January, 1932, to July, 1935, and from January, 1937, to July, 1940. He enlisted in the Federal Service in March, 1942, and entered the Armored Force Officer Candidate School on June 12, 1942. Upon graduation therefrom on September 12, 1942, he was commissioned a second lieutenant, Infantry.

9. 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 the sentence and to warrant confirmation thereof.

Chas. L. Gresson, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.
Benjamin A. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - 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 Henry T. Addison (0-1012782), 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 sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Consideration has been given to an attached letter from the Honorable Burnet R. Maybank, United States Senate, forwarding a letter from the wife of the accused.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should such action meet with approval.

Myron C. Cramer

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

4 Incls
Incl 1 - Record of trial
Incl 2 - Draft of ltr for sig. Sec. of War
Incl 3 - Form of Executive action
Incl 4 - Ltr fr Sen. Maybank, 4-16-43, w/incl.

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(Sentence confirmed but forfeitures remitted. G.C.M.O. 132, 1 Jul 1943)

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



SPJGK
CM 231357

APR 3 1943

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|---|---|---|
| UNITED STATES | ) | FIRST DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND |
| v. | ) | |
| Second Lieutenant KENNETH E. ADAMS (0-483506), Air Corps. | ) | Trial by G.C.M., convened at Seymour Johnson Field, North Carolina, February 4, 1943. Dismissal. |

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 61st Article of War.

Specification: In that Second Lieutenant Kenneth E. Adams, Air Corps, (AUS), Assigned 800th Technical School Squadron (Special), did, without proper leave, absent himself from his station at Seymour Johnson Field, North Carolina from about December 4, 1942, to about December 8, 1942.

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

Specification: In that Second Lieutenant Kenneth E. Adams, Air Corps, (AUS), Assigned 800th Technical School Squadron (Special), was at Seymour Johnson Field, North Carolina on or about December 8, 1942, drunk in quarters.

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

Specification: In that Second Lieutenant Kenneth E. Adams, Air Corps, (AUS), Assigned 800th Technical School Squadron (Special), was at Seymour Johnson Field, North Carolina on or about January 2, 1943, drunk in quarters.

Upon arraignment accused entered a special plea in bar of trial on the ground of "a constructive pardon or condonation" by reason of his assignment to duty as officer of the day after charges had been preferred. The special plea was overruled following the introduction of evidence in connection therewith. Accused thereupon pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification, and to the Additional Charge and its Specification. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused, a Second Lieutenant, Air Corps, reported for duty to the Commanding Officer of the 800th Technical School Squadron at Seymour Johnson Field, North Carolina, on December 3, 1942. He was ordered to report for duty by 8:00 o'clock the following morning. The commanding officer did not again see accused until after December 7, 1942. An extract copy of the morning report of the 800th Technical School Squadron, authenticated by its commanding officer, showed, by entry made December 5, accused to have been entered "AWOL" as of 6:00 o'clock on the morning of December 4 (R.10,11,12,19, Ex. 1). The commanding officer testified that he made a personal "check-up" as a basis, in part, for the entry of "AWOL" in the morning report. This consisted of his checking the Officers' Records Section and the signing-out register, and information received from "the Post Adjutant and S-1, and the Group Supervisor of the Third Provisional Group". He did not go to accused's quarters personally, did not know whether or not accused was assigned quarters, and did "not know whether or not he was on the Post or off the Post at that time". Other than that accused was not present for duty, the Commanding Officer had no "personal knowledge" on which he placed accused "AWOL" from December 4 (R.12). The first sergeant who made the entries in question in the morning report had no personal knowledge of whether accused was "present on the Field, or not" (R.19).

On December 8, 1942 (R.24), Major Clyde A. Houltry, Air Corps, Commanding Officer, 800th Technical School Squadron (R.5,10), and Major Frederick LeDrew, Medical Corps (R.19), visited accused's quarters (R.13, 19,20). Accused was lying on his bunk, fully clothed, and apparently asleep (R.16). After several requests, accused finally arose (R.16, 20). Accused's gait was unsteady and staggering, his speech was confused and incoherent (R.16,20), and there was an odor of alcohol "on his breath" (R.20) and "in the vicinity" (R.17,20). Major LeDrew gave accused "a brief sobriety test", which was "not well performed" (R.20). Major Houltry testified that accused was "intoxicated" (R.13), and Major LeDrew testified that accused was "under the influence of alcohol" (R.20).

On January 2, 1943, Major Houltry, Major LeDrew, Captain Meyer Notkin, Medical Corps, and a "Captain Solon B. Coleman" saw accused in his quarters (R. 14, 21, 23). Accused was lying on his bunk fully clothed (R.17, 23). After several requests, accused arose (R.21). He was unsteady on his feet, he staggered, and his speech was incoherent (R.17, 21, 22, 23). His breath smelled of alcohol (R. 17, 21). He was unable to perform the Rhomberg test, consisting of "standing still with toes and heels together and eyes closed" (R.23). When asked the date, he said it was December 29 (R.22). Underneath his pillow was a quart of whiskey, about half empty (R.17,22,24). Accused admitted having drunk "what had been in the bottle" (R.22). Major Houltry, Major LeDrew, and Captain Notkin each testified that accused was drunk (R.14,17,21,23).

In connection with Charge I and its Specification, the defense introduced a record book of the Officers' Club, containing the following entry:

"12/5/1942. Received of Lt. Adams, Four & 20/100 Dollars, M. Sale, (signed) Cpl. Elder" (R.30; Ex. C).

A bookkeeper employed at the club testified that there was another Lieutenant Adams, who was on detached service off the field (R.30).

Major Houltry testified that since January 2, 1943, accused's work had been above average considering his grade and experience (R. 17, 18). Captain James E. Schuyler, 792nd Technical School Squadron, characterized accused's service as Junior Officer of the Day and Commander of the Guard on January 17, 1943, as having been performed "in a very satisfactory and earnest manner" (R. 7,8). Accused declined to testify or make a statement.

4. The evidence introduced by the prosecution was legally insufficient to support the finding of guilty of absence without leave as alleged in the Specification, Charge I. Proof of accused's absence "from his station at Seymour Johnson Field" rested entirely on the morning report and on the testimony of accused's commanding officer and the first sergeant. The latter had no personal knowledge. The commanding officer knew of his own knowledge only that accused had failed to report for duty at his organization. This was insufficient to prove absence of accused from his station. The remainder of this officer's testimony as to accused's absence was based entirely on hearsay and was incompetent.

The morning report in this case was shown to be hearsay and incompetent to establish accused's absence from his station. An entry of

"AWOL" on an organization's morning report is prima facie proof of absence from the station, camp or post of that organization. It acquires presumptive authority because it is required that entries therein be made by an officer who has the duty to know the matter so stated and to record it (par. 117 M.C.M. 1928). This prima facie authority may be accepted without objection, or it may be challenged as in this case, in which event the entries are subject to explanation and contradiction (CM 183513, Lang, cited with approval in CM 207730, Earp). If upon challenge, it appears that the entries are based on hearsay then they are incompetent to prove the facts. Official reports made to a commanding officer, written or unwritten, do not give competency to entries made by him in the morning report of his command (Dig. Op. JAG 395 (21) 250.4). As stated, his knowledge must be personal and, where the entry is "AWOL", it is presumed that he has made personal search in and about the station sufficiently thorough to satisfy a reasonable man that there was no doubt of the absence. On challenge the court will satisfy itself as to the thoroughness of the search. The absence of a soldier from company formation does not in itself prove absence from his station. It is only a circumstance to establish such absence. The usual procedure is to look for him in barracks or quarters and in such other places as may be necessary to justify a reasonable conclusion of absence and to warrant the commanding officer in administratively determining the fact.

In the present case, the right of the morning report to speak with prima facie authority was challenged. The commanding officer was cross-examined. It was shown that no search had been made for accused in his quarters on the field. His failure to report at his command headquarters did not exclude and was not incompatible with the possibility that he was at that time sick or drunk in quarters, his discovered condition some days later. The other evidence relied on by the commanding officer was hearsay. On the other hand, accused proved a purchase by an officer of the same name at the officers' club on December 5. It was contended that this purchase might have been made by another officer of the same name and that there was another such officer on the field. But the fact was overlooked that unless accused had made the purchase himself, he would not have known of the availability of this evidence.

The charge of absence without leave as alleged in the Specification, Charge I, was not supported by competent evidence. The only proven circumstance of such absence was accused's failure to report to his organization, which is not included within the Specification.

5. Without regard to the pleas of guilty to the other Charges and Specifications, the evidence relating to them conclusively proves that accused was drunk in quarters at the place and on the dates alleged respectively in the Specification, Charge II, and the Specification,

Additional Charge. On each visit to accused's quarters, the officers found accused incoherent, unsteady on his feet, and staggering, and they smelled the odor of alcohol on his person. On each occasion he failed to pass a sobriety test. On the second visit a half empty quart of whiskey was found underneath his pillow, and he admitted having drunk the contents. At both times the officers were of the unanimous opinion that accused was drunk. To be drunk in quarters is a violation of Article of War 96.

6. With reference to the special plea, the court correctly ruled that accused's assignment to military duties pending charges was not a constructive pardon or condonation. To quote Winthrop, "* * * the mere restoring to command or duty, or ordering on duty, of an officer or soldier, when in arrest under charges, by his commanding officer * * * is not authorized in our law to be so treated * * * and is not so treated in practice" (Winthrop, Military Law and Precedents (Reprint) 271).

7. War Department records show that accused is 36 years of age. He attended Occidental College for one year. He served as a private, United States Infantry, from September, 1920, to September, 1921, having enlisted at the age of 14. He was commissioned a Second Lieutenant, Air Corps, and ordered to active duty in the Air Forces effective July 28, 1942 and received a diploma from the Army Air Forces Officer Training School, Miami Beach, Florida, on November 28, 1942.

8. 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 under Charge I and its Specification, legally sufficient to support the findings of guilty under Charge II and its Specification and under the Additional Charge and its Specification, and legally sufficient to support the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Andrew Lepp Jr., Judge Advocate

John Trumbell, Judge Advocate

Fletcher R. Andrews, Judge Advocate

1st Ind.

War Department, J.A.G.O., APR 15 1943 - 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 Kenneth E. Adams (0-483506), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty under Charge I and its Specification, legally sufficient to support the findings of guilty under Charge II and its Specification and under the Additional Charge and its Specification, and legally sufficient to support the sentence, and to warrant confirmation thereof. I recommend that the findings of guilty of Charge I and its Specification be disapproved, and that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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 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 action.

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(Findings of guilty of Charge I and its Specification disapproved. Sentence confirmed but execution suspended. G.C.M.O. 111, 18 May 1943)

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



SPJGN
CM 231422

MAY 7 1943

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| UNITED STATES<br><br>v.<br><br>Second Lieutenant SCOTT E. SANDERS (0-1291705), Infantry. | FOURTH SERVICE COMMAND<br>ARMY SERVICE FORCES<br><br>Trial by G.C.M., convened at Camp Wheeler, Georgia, February 4, 1943. Dismissal. |

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OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, 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 1: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at or near Macon, Georgia, on or about December 5, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

NO.

GASTONIA, N.C. Dec. 5 19 42

PAY TO THE ORDER OF Rent a-Car Company $ 15.00

Fifteen and ———— no/100 DOLLARS

To
THE CITIZENS NATIONAL BANK
IN GASTONIA
GASTONIA, N.C.
66-129
5

Richard E. East
2nd Lt. Inf.

which said check was a writing of private nature, which might operate to the prejudice of another.

Specification 2: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about December 5, 1942, for the purpose of obtaining the approval from the Rent-A-Car Co., of Macon, Georgia, of a certain application and automobile rental contract for the lease to him of and the delivery and leasing to him of a certain motor vehicle, and with intent to defraud, falsely forge and counterfeit thereon the name of then First Lieutenant, now Captain Richard Edward East, in the following words, to wit:

(to the application part thereof)
Richard Edward East
(to the contract part thereof)
Richard E. East

which said instrument was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Battalion, Camp Wheeler, Georgia, did, at or near Macon, Georgia, on or about December 5, 1942, for the purpose of obtaining the approval from the Rent-A-Car Co., of Macon, Georgia, of a certain application for the lease to him of and the delivery and leasing to him of a certain motor vehicle, and with intent to defraud, falsely, forge and counterfeit on State of Georgia Motor Vehicle Operator's License No. 136544, issued to Richard Edward East, dated June 20, 1942, by erasure and alteration under the term "color of hair" the word "brown" to "black", and under the term "height" the figure "1" to the figure "0", and under the term "weight" the figure "180" to the figure "195", as follows, to wit:

| Color of Hair | Height | Weight |
|---|---|---|
| Black | 6 ft. o in. | 195 |

which said instrument 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 Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about December 5, 1942, with intent to defraud, wilfully, unlawfully, and feloniously make and utter as true and genuine to the Rent-A-Car Co., of Macon, Georgia, a certain check in words and figures as follows:

NO.

GASTONIA, N.C. Dec. 5 19 42

PAY TO THE ORDER OF Rent a-Car Company $ 15.00

Fifteen and ———————— no/100 DOLLARS

To
THE CITIZENS NATIONAL BANK
IN GASTONIA
GASTONIA, N.C.

66-129
5

Richard E. East

2nd Lt. Inf.

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Second Lieutenant Scott E. Sanders, then well knew, falsely made and forged.

Specification 2: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about December 5, 1942, for the purpose of obtaining the approval from the Rent-A-Car Co., of Macon, Georgia, of a certain application and automobile rental contract for the lease to him of and the delivery and leasing to him of a certain motor vehicle, and with intent to defraud, wilfully, unlawfully, and feloniously pass and utter to the said Rent-A-Car Co., of Macon, Georgia, as true and genuine the said application and automobile rental contract with the name of then First Lieutenant, now Captain Richard Edward East, forged and counterfeited by him, the said Second Lieutenant Scott E. Sanders, thereon in words as follows:

(to the application part thereof)
Richard Edward East
(to the contract part thereof)
Richard E. East

a writing of a private nature, which might operate to the prejudice of another, which said names were, as he, the said Second Lieutenant Scott E. Sanders, then well knew, falsely made and forged.

Specification 3: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about December 5, 1942, for the purpose of obtaining the approval from the Rent-A-Car Co., of Macon, Georgia, for the lease to him of and delivery and leasing to him of a certain motor vehicle, and with intent to defraud, wilfully, unlawfully, and feloniously pass and utter to the said Rent-A-Car Co., of Macon, Georgia, as true and genuine a State of Georgia Motor Vehicle Operator's License No. 136544, issued to Richard Edward East, dated June 20, 1942, with, under the term "color of hair" the word "black", and under the term "height" the figure "0", and under the term "weight" the figure 195, altered, forged and counterfeited thereon, by him, the said Second Lieutenant Scott E. Sanders, as follows:

| Color of Hair | Height | Weight |
|---|---|---|
| Black | 6 ft. 0 in. | 195 |

which said State of Georgia Motor Vehicle Operator's License was a writing of a private nature, which might operate to the prejudice of another, which aforesaid words and figures were, as he, the said Second Lieutenant Scott E. Sanders, then well knew, falsely made, altered and forged.

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

Specification 1: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at or near Macon, Georgia, on or about December 5, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

NO.

GASTONIA, N.C. Dec. 5 1942

PAY TO THE ORDER OF Rent a-Car Company $ 15.00

Fifteen and ———— no/100 DOLLARS

To
THE CITIZENS NATIONAL BANK
IN GASTONIA
GASTONIA, N.C.

66-129
5

Richard E. East

2nd Lt. Inf.

which said check was a writing of private nature, which might operate to the prejudice of another.

Specification 2: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about December 5, 1942, for the purpose of obtaining the approval from the Rent-A-Car Co., of Macon, Georgia, of a certain application and automobile rental contract for the lease to him of and the delivery and leasing to him of a certain motor vehicle, and with intent to defraud, falsely forge and counterfeit thereon the name of then First Lieutenant, now Captain Richard Edward East, in the following words, to wit:

(to the application part thereof)
Richard Edward East
(to the contract part thereof)
Richard E. East

which said instrument was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Battalion, Camp Wheeler, Georgia, did, at or near Macon, Georgia, on or about December 5, 1942, for the purpose of obtaining the approval from the Rent-A-Car Co., of Macon, Georgia, of a certain application for the lease to him of and the delivery and leasing to him of a certain motor vehicle, and with intent to defraud, falsely, forge and counterfeit on State of Georgia Motor Vehicle Operator's License No. 136544, issued to Richard Edward East, dated

June 20, 1942, by erasure and alteration under the term "color of hair" the word "brown" to "black", and under the term "height" the figure "1" to the figure "0", and under the term "weight" the figure "180" to the figure "195", as follows, to wit:

| Color of Hair | Height | Weight |
|---|---|---|
| Black | 6 ft. 0 in. | 195 |

which said instrument was a writing of a private nature which might operate to the prejudice of another.

Specification 4: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about December 5, 1942, with intent to defraud, wilfully, unlawfully, and feloniously make and utter as true and genuine to the Rent-A-Car Co., of Macon, Georgia, a certain check in words and figures as follows:

NO.

GASTONIA, N.C. Dec. 5 19 42

PAY TO THE ORDER OF Rent a-Car Company $ 15.00

Fifteen and ---------- no/100 DOLLARS

To
THE CITIZENS NATIONAL BANK
IN GASTONIA
GASTONIA, N.C.

66-129
5

Richard E. East
2nd Lt. Inf.

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Second Lieutenant Scott E. Sanders, then well knew, falsely made and forged.

Specification 5: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about December 5, 1942, for the purpose of obtaining the approval from the Rent-A-Car Co., of

Macon, Georgia, of a certain application and automobile rental contract for the lease to him of and the delivery and leasing to him of a certain motor vehicle, and with intent to defraud, wilfully, unlawfully, and feloniously pass and utter to the said Rent-A-Car Co., of Macon, Georgia, as true and genuine the said application and automobile rental contract with the name of then First Lieutenant, now Captain Richard Edward East, forged and counterfeited by him, the said Second Lieutenant Scott E. Sanders, thereon in words as follows:

(to the application part thereof)
Richard Edward East
(to the contract part thereof)
Richard E. East

a writing of a private nature, which might operate to the prejudice of another, which said names were, as he, the said Second Lieutenant Scott E. Sanders, then well knew, falsely made and forged.

Specification 6: In that Second Lieutenant Scott E. Sanders, Fifth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about December 5, 1942, for the purpose of obtaining the approval from the Rent-A-Car Co., of Macon, Georgia, for the lease to him of and delivery and leasing to him of a certain motor vehicle, and with intent to defraud, wilfully, unlawfully, and feloniously pass and utter to the said Rent-A-Car Co., of Macon, Georgia, as true and genuine a State of Georgia Motor Vehicle Operator's License No. 136544, issued to Richard Edward East, dated June 20, 1942, with, under the term "color of hair" the word "black", and under the term "height" the figure "0", and under the term "weight" the figure "195", altered, forged and counterfeited thereon, by him, the said Second Lieutenant Scott E. Sanders, as follows:

| Color of Hair | Height | Weight |
|---|---|---|
| Black | 6 ft. 0 in. | 195 |

which said State of Georgia Motor Vehicle Operator's license was a writing of a private nature, which might operate to the prejudice of another, which aforesaid words and figures were, as he, the said Second Lieutenant Scott E. Sanders, then well knew, falsely made, altered and forged.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on December 5, 1942, the accused went to the Rent-A-Car Company of Macon, Georgia, for the purpose of renting an automobile. As a means of identifying himself and of showing himself legally entitled to drive an automobile in the State of Georgia, the accused presented to an official of the Rent-A-Car Company, a driver's license which falsely identified the holder as Richard Edward East, and which described the holder as a male person, with black hair, brown eyes, six feet tall, and weighing 195 pounds. The evidence shows further, that prior to presenting the driver's license in question, the accused had changed the personal description on the driver's license by changing the description of the hair from brown to black, the height of the holder from six feet, one inch, to six feet, zero inches. (Pros. Exs. 3, 6; R. 9-14, 22) After thus presenting himself as Richard E. East, the accused signed a rental contract for rental of an automobile, and made a deposit of a $15 check. The accused wrote the check on the printed form of the Citizens National Bank in Gastonia, North Carolina, made it payable to the order of Rent-A-Car Company in the sum of $15, and signed the check Richard E. East, with the words "2nd Lt. Inf." under his signature. Similarly, the accused executed the rental contract to which he also affixed the signature "Richard E. East". The officials of the Rent-A-Car Company in reliance upon the identification presented by the accused in the form of the driver's license of Richard E. East, the execution of the rental contract, and the presentation of the check in the sum of $15, delivered an automobile to the accused. After the car had been used by the accused for 20 hours it was returned to the Rent-A-Car Company. A charge of $12.34 was then made for the use of the car. The difference between this charge, and the $15 check deposited by the accused, a sum of $2.66, was paid to the accused in cash. Subsequently the check for $15 was deposited for collection and returned unpaid to the Rent-A-Car Company with a notification thereon of "No Account" (R. 9-14, 15-21, 25-26; Ex. 2).

The evidence shows further, that Captain Richard E. East, Infantry, had never given the accused authority to use Captain East's driver's license, or to sign Captain East's name to any instrument, and that Captain East did not have an account in the Citizens National Bank in Gastonia, North Carolina (R. 23-25).

A voluntary statement signed by the accused contains the following admissions:

"DETACHMENT CORPS OF MILITARY POLICE
Camp Wheeler, Ga.

Jan. 8, 1943

STATEMENT

"The wallet found in my room containing Capt. Richard E. East, Jr., Social Security Card, American Red Cross Card, Camp Wheeler Identification Card, United States Army Motor Vehicle Card, Georgia Drivers License and a block of checks for the Citizens National Bank, Gastonia, N. C., belongs to me.

"The articles belonging to Captain East were found on my bed in Officer's Quarters 5th Training Battalion.

"The blank checks were found in my apartment where I live in Macon, Ga.

"I admit that I used one of these blank checks to pay to Order of Rent a Car Company, Macon, Ga. the sum of Fifteen Dollars and no cents ($15.00). I further admit that I forged Captain East signature to this check and also that I changed the description on his Georgia State Drivers License; i.e., changed, under Color of Hair from brown to black and under Height from 1 in. to 0 in.

Scott Edward Sanders, 0-209175
2nd Lieutenant, Infantry.
/s/ Scott E. Sanders"
(R. 19-21; Ex. 6).

4. The accused elected to make an unsworn statement in which he asserted that he arrived at Camp Wheeler, Georgia, on September 8, 1942. He asserted further that since that date he has at all times endeavored to conduct himself in approved military form, and had endeavored to uphold the high ideals and traditions of the United States Army. Upon entering the room to which he was assigned at Camp Wheeler, he had found on the floor a Social Security Card, a Red Cross Card, automobile operator's permit, and an identification card, all of which belonged to Captain East. The accused was unable to locate Captain East at that time, and the accused therefore placed the items which he had found in his wallet with the full intention of returning them to Captain East as soon as he returned to camp. Thereafter, the accused forgot about the matter (R. 27-28).

On December 5, 1942, the accused needed an automobile to transport his wife's luggage to the railroad station and he went to the Rent-A-Car Company to rent an automobile. There the accused was told that an operator's license was required. The accused then recalled the fact that he had the driving license which he had found, and that it then was in his wallet. He made the change on the license so as to fit his own description, and presented the license to the Rent-A-Car Company. The accused felt that since he and Captain East

were on friendly terms that Captain East would not object to this act. Furthermore, since the accused did not have $15 in cash he felt required to draw a check using the name of Captain East so that the operator's license and the signature on the check would correspond. At no time, however, did the accused intend to prejudice anyone's rights. Before the accused was given an opportunity to explain the situation to Captain East, the situation was called to his attention. The accused stated that at no time did he intend to deceive, defraud, or to hurt anyone in any way (R. 27-28).

5. The accused presented as character witnesses, Second Lieutenant Ray E. Lowry, Infantry, who had known the accused for four months; Second Lieutenant Leonard E. Murray, Infantry, who had known the accused for eight months; and Captain Lewis M. Stewart, Infantry, his company commander, who had known the accused for approximately six months. Each of the witnesses testified in substance that the general reputation of the accused was very good, and that accused was a good and efficient officer (R. 28-35).

6. Specification 1, Charge I, alleges that the accused, did, on December 5, 1942, with intent to defraud, make a certain check payable to the order of the Rent-A-Car Company in the sum of $15, to which he falsely signed the name of "Richard E. East". Specification 2, Charge I, alleges that the accused, on the same date, forged the name of Richard E. East to an automobile rental contract which the accused executed with the Rent-A-Car Company. Specification 3, Charge I, alleges that on the same date as alleged in the other two specifications, the accused, for the purpose of securing the use and rental of an automobile from the Rent-A-Car Company of Macon, Georgia, and with intent to defraud, falsely forged and counterfeited on the motor vehicle operator's license of Richard E. East, a description of his own person, by erasure and alterations, changed the description of the hair of the holder of the license from brown to black, the height of the holder from 6 feet, 1 inch to 6 feet, 0 inches, and the weight description from 180 pounds to 195 pounds.

The three Specifications under Charges I and III allege in the same order and in identical language that the accused forged the name of Richard E. East to a check in the sum of $15, that he forged the same name to an automobile rental contract, and that he fraudulently altered Richard E. East's motor vehicle operator's license. The three Specifications under Charge II allege respectively that the accused uttered the three instruments described above.

The uncontradicted evidence shows that the accused altered the motor vehicle driver's license of Richard E. East in the manner alleged and that the altered or counterfeited license was used by him as a means of securing the rental of an automobile from the Rent-A-Car Company. Likewise, the uncontradicted testimony shows

that the accused forged the name of Richard E. East to the check described in Specification 1, and to the automobile rental contract described in Specification 2, for the fraudulent purposes therein alleged. Furthermore, the evidence shows that each of the instruments was falsely uttered as genuine. In addition, the unsworn statement of the accused admits both the alteration and uttering of the driver's license, and the forging of the name of Richard E. East, both to the check and to the rental contract as well as the uttering of both instruments. His testimony, which seeks to justify his conduct and to establish the innocence of his intent, is clearly an illustration of "inclination snatching argument to make indulgence seem judicious choice". The proof sustains, beyond a reasonable doubt, the findings of guilty of the three offenses alleged.

It should be observed that since dismissal is authorized upon conviction of Article of War 93 and is mandatory upon conviction of violation of Article of War 95, the repetition of the Specifications under Charges 1 and 3 has in no sense resulted in the assessment of duplicitous punishment.

7. The records of the Office of The Adjutant General show that the accused is 22 years of age. He enlisted in the Oklahoma National Guard on December 2, 1936, and was honorably discharged on September 1, 1939. He was inducted into the service Spetember 16, 1940, and was commissioned a second lieutenant, Infantry, on August 26, 1942.

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 and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 93 or 96, and is mandatory upon conviction of Article of War 95.

Thos. L. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 14 1943 - 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 Scott E. Sanders (0-1291705), 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 and the sentence, and to warrant confirmation thereof. The fraudulent conduct of the accused in altering an officer's driver's license so as to create a false identification for himself, of forging the name of the same officer to an automobile rental contract and to a check in the sum of $15, and of uttering each instrument as genuine shows accused to be basically dishonest and unworthy to remain an officer. I recommend, therefore, 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 foregoing recommendation 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 ltr for sig. Sec. of War
Incl 3 - Form of Executive action

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(Sentence confirmed. G.C.M.O. 130, 29 June 1943)

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



SPJGK
CM 231445

MAY 8 1943

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| UNITED STATES<br><br>v.<br><br>Second Lieutenant FRANK L. TEIXEIRA (0-1287086), 185th Infantry. | 40TH INFANTRY DIVISION<br><br>Trial by G.C.M., convened at Lihue, Kauai, T.H., February 1 and 2, 1943. Dismissal. |

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OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Second Lieutenant Frank L. Teixeira, 185th Infantry, did, at the county of Kauai, Territory of Hawaii, on or about the 21st day of January, 1943, with intent to deceive the Commanding Officer, 3rd Battalion, 185th Infantry, officially report to the Headquarters of said Battalion by telephone, that he relayed on the following message received by him from a 3rd Battalion O.P. "This is OP #1. Enemy sub sighted at 5800 mils, one mile away. Drill repeat Drill." which report was known by the said Second Lieutenant Frank L. Teixeira, 185th Infantry, to be untrue, in that the said Second Lieutenant Frank L. Teixeira, 185th Infantry, had not been authorized to initiate or render any such report.

Specification 2: In that Second Lieutenant Frank L. Teixeira, 185th Infantry, did, at the country of Kauai, Territory of Hawaii, on or about the 21st day of January, 1943, with intent to deceive S-2, 3rd Battalion, 185th Infantry, did officially state over the phone to S-2's agent, "That the message (referring to a false message) he had

received a few minutes before looked phony and suggested that he check it with the O.P. or with the District", which statement was known by the said Second Lieutenant Frank L. Teixeira, 185th Infantry, to be untrue in that he himself had originated and transmitted the false message above referred to.

Specification 3: In that Second Lieutenant Frank L. Teixeira, 185th Infantry, did, at the county of Kauai, Territory of Hawaii, on or about the 21st day of January, 1943, with intent to deceive the Commanding Officer, 2nd Battalion, 185th Infantry, officially report to the Headquarters of said Battalion by telephone, that he relayed on the following message received by him from a 2nd Battalion O.P.: "Enemy sub sighted at 300 mils, one mile away. OP #28. Drill repeat Drill." which report was known by the said Second Lieutenant Frank L. Teixeira, 185th Infantry, to be untrue, in that he, the said Second Lieutenant Frank L. Teixeira, 185th Infantry, had not been authorized to initiate or render any such report.

Specification 4: In that Second Lieutenant Frank L. Teixeira, 185th Infantry, did, at the county of Kauai, Territory of Hawaii, on or about the 21st day of January,1943, with intent to deceive First Lieutenant Charles H. Franklin Jr., 2nd Battalion, 185th Infantry, officially state, "Yes I sent it, (referring to a false message) to you about ten minutes ago. I don't think it means very much. Control Officers wouldn't be around O.P.s at this time of night. I just received this information from someone and relayed it to you." which statement was known by the said Lieutenant Frank L. Teixeira, 185th Infantry, to be untrue, in that he, the said Second Lieutenant Frank L. Teixeira, 185th Infantry, had originated and passed on said false message above referred to.

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

Specification: In that Second Lieutenant Frank L. Teixeira, 185th Infantry, did willfully and knowingly, at the county of Kauai, Territory of Hawaii, on or about the 21st day of January 1943, materially interfere with and jeopardize a certain maneuver in which armed forces stationed on said island of Kauai were engaged by, without just cause, excuse,

or authority, originating and circulating false information concerning the enemy situation, all to the prejudice of good order and military discipline.

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Second Lieutenant Frank L. Teixeira, 185th Infantry, did, at the county of Kauai, Territory of Hawaii, on or about the 22nd day of January, 1943, with intent to deceive Lieutenant Colonel John B. Maloney, G-2, 40th Infantry Division, officially state to Lt. Colonel Maloney that he had received information concerning a certain enemy submarine and passed the said information on but that he did not know the source of said information, which statement was known by said Second Lieutenant Teixeira to be untrue in that he himself had made up and initiated said enemy information reports.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and II and the Specifications thereunder, and of the Additional Charge and Specification 2 thereunder, and not guilty of Specification 1 of the Additional Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three months. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on January 21 and 22, 1943, the 185th Infantry was on drill maneuvers in the field, and was engaged in the solution of a tactical problem. In connection therewith it had established and was maintaining district headquarters at Kalaheo, Kauai, Territory of Hawaii, battalion command posts for the 1st, 2nd and 3rd Battalions, and serially numbered outposts (R. 8, 15, 16), with an inter-communicating telephone system serving district headquarters and all battalion command posts and outposts (R. 12).

On the evening of January 21, 1943, between the hours of 7 and 9 o'clock all of the officers of the 1st Battalion assembled, studied, and discussed the problem (R. 27). Following that meeting the officers were on a twenty-four hour duty status divided into shifts of eight hours each (R. 27). It was agreed that the first shift should go on duty at that hour and remain on duty until

relieved by the second shift at 4 a.m., January 22, 1943. Accused was S-2 of the 1st Battalion and chosen to go on duty with the first shift and perform the duties of Battalion S-2 and in addition thereto the duties of S-3 as an accomodation for Captain Charles L. Cecil, the Battalion S-3, until relieved by Captain Cecil at 4 a.m., January 22, 1943, when the latter officer would perform the duties of S-2 and S-3 until properly relieved (R. 15, 27).

Pursuant to that arrangement accused was on duty at 1st Battalion Command Post from about 8 o'clock p.m., January 21, 1943, until 4 o'clock a.m., January 22, 1943 (R. 7). With him on duty at the same time and place were First Lieutenant Arthur R. Smith, Jr., 1st Battalion Transportation Officer, and acting as Battalion S-1 (R. 6, 27), First Lieutenant Robert William Munyon, 1st Battalion Ammunition Pioneer Officer (R. 9, 27), and First Lieutenant Neil M. Forbes, Jr., 1st Battalion Surgeon (R. 11, 27).

At some time between 9 p.m. and 11 p.m., January 21, 1943 (R. 6, 9, 11, 12, 14), accused telephoned the 2nd Battalion Command Post, contacted Private First Class Chester J. Giles, who was on duty with the S-2 Section at that time (R. 13), and had a conversation with him (R. 14). Accused next called 3rd Battalion Command Post, contacted First Lieutenant Charles H. Franklin, Jr. (R. 12) and had a conversation with him. In about ten minutes Lieutenant Franklin called back and had a second conversation with accused.

Respecting these calls:

(a) First Lieutenant Smith testified:

"A. Well — I had just finished making some phone calls, just a couple of calls, and sat down at my desk to write a letter. Teixeira got up and rang the operator. He said something about making a couple of calls and sending a couple of messages. I didn't pay any attention to him, and kept on writing. I remember him mentioning something about O.P. Number 1, but nothing caused that to seem different to me. The next thing I remember, was the telephone ringing, and Teixeira picking it up and saying that they had traced the call back here, and then it looked kind of phony to me. I do remember one other thing, that when something was said about a submarine, Lieutenant Munyon asked if that sub was inland, and Teixeira said that it was out to sea. During one of the calls, just before he said that they had traced the call, he said they wanted to know my name, and I just mumbled, and he demonstrated to me.

"Q. Did anything else occur that night?

"A. Yes, about a half an hour later, the telephone rang, and I took the call. It was some Private in the 3rd Battalion,

and I called Lieutenant Teixeira to the phone, and the took the call. After that call was over, he called somewhere else, and said something about that message being a joke, and that it looked phony, but still it didn't look phony enough for me to think anything about it. He might have been working for the control officers because during the last maneuvers, he had sent out some messages for the control officers. It wasn't until the next morning I realized what had happened, but I didn't know anything about it when he made the calls, and it wasn't obvious enough for me to ask any questions." (R. 6)

(b) First Lieutenant Munyon testified:

"A. First of all, most of us were occupied reading, writing, and keeping busy to pass the time. Some time during the night, Lieutenant Teixeira went over to the telephones, saying on his way over, something about seeing if somebody was on duty. He then called the third battalion, stating that this was O. P. 1 calling, reporting that a submarine was sighted, at, I believe 2800 mills, some distance off shore. I am not sure whether they asked his name at that battalion, but it was the one he hung up on, muttering something. After that call was complete, he called the second battalion. The report this time was that it was O. P. 28. I don't recall the mills, 300 or 500 — something like that, and some distance off shore. I don't recall the interval. Then, there was a call back. It was from the second battalion. Lieutenant Franklin had traced the original call back, and in the conversation, Lieutenant Teixeira had told him that he had received the same information, and thought that someone was trying to make a joke or something, and that he thought the message was phony. It was then that he called the third battalion. I am not sure whether he got the third before the second telephoned back, or what. I am not quite certain of the calls, that is, when they were placed, and in what order, it is all quite vague in my mind. At least, he called the second to check the O.P., and told them that he thought that it was a joke or something, and to check, because he thought the message was phony." (R. 8)

Witness testified he thought from the reference to a submarine that "it was just a canned message" and inquired of accused "if the location of the submarine was inland" and received the reply "that it was in the ocean" (R. 9). Witness suspected that accused was acting without authority in an attempt to sabotage the problem. He testified he heard accused tell Lieutenant Franklin to disregard the call, it did not mean anything (R. 9).

(c) First Lieutenant Forbes testified:

"A. Well, we were all sitting around in the c.p. that night. During the night, several telephone calls were made. I was reading a Medical Manual, and wasn't paying much attention to the contents of the telephone calls. There hadn't been, and wasn't likely to be anything that would require my attention as surgeon, so I was just minding my own business and not paying much attention. I did hear a conversation, and heard a submarine mentioned, and that its location was so many mills. I don't know the exact number of mills, and I immediately forgot about the whole thing, because it wasn't any of my business. Then several telephone messages came in and went out, after that I don't know whether Lieutenant Teixeira called the 2nd Battalion, or whether they called him, but I do remember hearing a conversation to Lieutenant Franklin that it was a joke, and to forget about it. I didn't pay much attention to it at all, because I didn't think that it was my business, and I didn't think that there was anything to it. If I thought anything about the thing at all besides being a drill message, I probably thought it was a joke." (R. 11)

(d) Private Giles who received the call at 3rd Battalion Command Post testified:

"A. Message Center informed me that they had a call for the S-2, so I took the call, and said this is Private Giles speaking. Some voice asked me who was the duty officer, and I told him that it was Lieutenant Bielak and Captain Strohn. This voice told me that he had a message, and started out Drill repeat Drill. The message was O.P. Number one reports enemy submarine at 5800 mils, one mile range. I said all right. I knew that it wasn't any of the men at the O.P., because I knew all of the fellows that were out there at that time. I then asked who was speaking.

"Q. What happened when you asked who was speaking?
"A. Whoever that was on the other end of the line hung up." (R. 14).

Witness testified that he turned the message over to Lieutenant Bielak, 3rd Battalion, S-2, who called regimental headquarters, and on being advised that it was uninformed respecting the message requested 3rd Battalion operator to trace the call and received word from that source that the call had been traced to a commercial line (R. 14, 24).

(e) Lieutenant Franklin, 2nd Battalion, S-4, and acting S-2, who received one of the telephone messages testified:

"A. Approximately 10:20, a telephone call came in. I took the call, and the voice on the telephone said this is O. P. 28, Drill repeat Drill. Enemy submarine sighted, azimuth 300 mills, one mile away. Drill repeat Drill. I asked the voice that was calling, what his name was, and the telephone went dead. This sounded funny to me, so I telephoned the O.P., and asked the man if he had sent the message, and he said no. I had the operator trace the call, and he traced it back to the 1st Battalion. I think that he did anyway, because I got the Duty Officer of the 1st Battalion on the telephone, and I asked him if he had heard anything about this message, and he said that he had, but that he thought it was some sort of a joke, and not to pay any attention to it. I then took the information that I had to Colonel Kellas, and told him that I thought the information was misinformation. I asked him what I should do about it, and he told me to report it to District. I then sat down and wrote a telegram to District, and also telephoned the information in to District, and explained it to Captain Bush who was on duty in the G-2 office, and told him that I had tried to trace the call, and with what results. That's about all there was to it." (R. 12)

He testified that there was a lapse of about fifteen minutes between his receipt of the message and his return call to the 1st Battalion Command Post (R. 13). He signed the message to district headquarters at 10:35 p.m., after having taken it up with Colonel Kellas, the commanding officer of the 2nd Battalion (R. 13).

Accused was relieved by Captain Cecil at 4 a.m. and in response to the latter's question if "anything had taken place during his tour of duty", replied in substance that "nothing had taken place" (R. 15).

Lieutenant Colonel John B. Maloney, G-3, 40th Infantry Division, testified that he was director of the problem and had "had something to do with the preparation of the problem" (R. 16). At about 10 o'clock a.m., January 22, 1943, upon entering the G-2 office he

"* * * was confronted with some information that looked out of order, in the tactical journal that is maintained in the section. This information had to do with some reports from two of the O.P.'s of the 185th, regarding the presence of enemy submarines, and had not been sufficiently verified from the section's standpoint. * * *" (R. 16)

This notation was disturbing as he knew it was foreign to the problem.

Accordingly he started an investigation. He interviewed and obtained information from Captain Bush who at that time was on duty at district headquarters working on the problem, Lieutenant Bielak of the 3rd Battalion, Lieutenant Franklin of the 2nd Battalion, Captain Cecil and accused of the 1st Battalion.

Lieutenant Colonel Maloney testified respecting his conversation with accused which occurred at witness' office between 9 and 10 a.m., January 22, 1943:

> "* * * I questioned him at some length about where this information came from, and he indicated that it came from a unknown source, which he was unable to check because the party had not stated who it was, and he was unable to determine the source of the call. He stated that he thought the messages were a part of the problem, and had done as this party had requested him to do, and relayed the messages on. He admitted to me that it seemed to be very unusual that anyone would go to the trouble of calling the first battalion, to relay information on to the second and third battalions, but stated that he thought perhaps the phone lines were out from this party, to the particular units mentioned, and therefore, was forced to ask that the messages be relayed. I couldn't add up in my mind the information given me, by Lieutenant Teixeira, and felt that he wasn't telling the truth, and was going to confront him with my thoughts, but felt that it might be wise to call Captain McAndress, S-3 of the 185th Infantry, who was on duty in the District Headquarters, to hear the conversation. I brought Captain McAndress in the room and reviewed with Lieutenant Teixeira his conversation with me, for the benefit of Captain McAndress, and asked Lieutenant Teixeira if that had been our conversation, and he agreed. I then told Lieutenant Teixeira I didn't believe his story, and that he had developed the messages and telephoned them himself, and that no one had telephoned in asking him to relay information to the second and third battalions, and that he had done the whole thing himself. He then denied that accusation. I insisted further that I thought that he was the individual who had done it, because his story didn't ring true, and he couldn't support the statements made to me, because they were so involved and unfounded that he was unable to support them at all. I questioned him regarding the other officers who were present at the C. P. at the time he alleged these messages were received, and he told me that there were some three other officers present. I asked him if they had any knowledge of this, and he told me that they didn't,and that he had handled the whole thing himself. I pressed the questioning, and Lieutenant Teixeira told me that if I would ask Captain McAndress to leave the room, he would tell me something, and he said that he didn't want to involve anyone else, and that he didn't want to tell me with Captain McAndress there. I told him that I wouldn't ask Captain McAndress to leave, and that if he wanted

to tell me anything, he must do so with Captain McAndress there, and I told him that he might just as well tell me because we would find out sooner or later if he had anything at all to do with it. He finally admitted to me that this whole thing was a hoax, and that he had developed the information himself, and telephoned this information to the two battalions, as if he were relaying a message that was supposed to have come in from O. P's. 28 and 1. He didn't state who answered the telephone when he telephoned to the battalions, but later told me that no one asked who he was, however, the story from others state that when they inquired as to who was calling, the connection was cut. In other words, he hung up. Lieutenant Teixeira then made a clean breast of the whole thing, and admitted that he had done it by himself. I asked him why, and he said that he had just done it for a joke, and that he thought that he would have some fun with the other S-2's and that he was very friendly with them. He said that he thought that there was no harm in it, and that he didn't realize that there would be any commotion as a result of his entering this false information into the problem. I attempted to get further information as to why he had done this, but he insisted that he didn't do it with any willful intent. I asked him if he had attempted to embarrass anyone but he insisted that he was not, and then I asked him when he was relieved from duty, and he stated at about 0400 in the morning of the 22nd. I asked him if he had indicated to Captain Cecil that this thing had taken place, and he said that he had told Captain Cecil that nothing at all had taken place during his tour of duty. I asked if he was willing to make a signed statement, and put on paper what he had told me, and he said yes. I then brought in my stenographer, Sergeant Dieken, and dictated a statement for Lieutenant Teixeira, asking him to correct me if the statements I made were not correct. This was done in the presence of Captain McAndress. Lieutenant Teixeira was, by this time, rather nervous and I didn't, and he didn't feel that he could talk enough to dictate the statement, and we agreed that I should make it for him. After I had completed the dictation, I asked Lieutenant Teixeira if it was okeh and he said yes. Then the statement was typed up and read to Lieutenant Teixeira in the presence of Captain McAndress, and Lieutenant Teixeira said that it was correct, and then I asked him to sign it, which he did." (R. 17, 18)

The witness identified accused's signed statement taken on that occasion and accused's signature on it. At the time this instrument was offered in evidence the following proceedings were had:

"Defense: Lieutenant Teixeira is willing to admit this confession, but would like to change the word we to I because he feels that it might implicate others. * * *" (R. 18)

There being no objection the change was made accordingly.

The statement was received in evidence and marked Exhibit A. A copy follows:

"HEADQUARTERS KAUAI DISTRICT
Kalaheo, Kauai, T.H.

January 22, 1943

Statement made to Lt. Col. John B. Maloney, Assistant Chief of Staff G-2, Headquarters Kauai District by Lieut. Frank L. Teixeira, in the presence of Capt. Earl F. McKendriss:

I, Lieut. Frank L. Teixeira, state that at approximately 2100 21 January I suggested in the presence of Lieuts. Smith, Munyon and Forbes that I send some joke messages to the other battalions.

I then placed a telephone call to the 3rd Battalion, and indicated that I had a message that I was to relay to them from one of their OPs. The following is the message:

'This is OP#1. Enemy sub sighted at 5800 mils, one mile away. Drill repeat Drill.'

I did not state who I was when making this call. I then called the 2nd Battalion and gave them the following message:

'Enemy sub sighted at 300 mils, one mile away. OP #28. Drill repeat Drill.'

I did not state who I was when making this call. This call was made to Lieut. Franklin of the 2nd Battalion. About ten minutes later, Lieut. Franklin called me back and asked if I knew anything about this message. I said, 'Yes, I sent it to you about ten minutes ago. I don't think it means very much. Control Officers wouldn't be around OPs at this time of night. I just received this information from someone and relayed it to you.'

I then called the 3rd Battalion again and tried to get the S-2 but couldn't reach him. He was in his quarters and a private in the S-2 Section took the message. I told him that the message I had received a few minutes before looked phony and suggested that he check it with the OP or with the District. Lieuts. Smith, Munyon and Forbes knew that I was placing these various telephone calls, but they did not participate in making any of the calls.

However, they did have full knowledge of the fact that the information I was giving to the 2nd and 3rd Battalions was false information.

I assume full responsibility for originating these false messages. No entries were made in the Battalion unit journal of any of these telephone calls. At 0400 22 January, when I was relieved, I made the statement to Capt. Cecil that nothing unusual had occurred during my tour of duty.

/s/ Frank L. Teixeira

FRANK L. TEIXEIRA,
Lieutenant, Infantry,"
(R. 23; Ex. A)

There was no testimony or proof that accused was advised of his rights before he made the so-called statement, Exhibit A, to Lieutenant Colonel Maloney or before he signed the transcribed statement. However, it was stipulated that when "the Investigating Officer, Major James B. Pettit, investigated this case, he informed the accused of his rights in giving a statement, and while he did not make a statement at that time, he stated that he had given a statement previously to Colonel Maloney, and that this statement was correct in all details, and that the whole affair was started merely as a joke, and got out of hand before it could be stopped." (R. 20)

The witness estimated that about ten or fifteen minutes elapsed between the time he confronted accused with the fact that he thought accused "was lying" and accused's admission that he had originated and transmitted the false messages (R. 19). The witness testified that there were tactical repercussions resulting from the messages:

"A. They were considerable. I would say that there wasn't any way for the people on duty to determine whether or not the information was correct regarding those submarines, and whether or not they had to do with actual submarines, or were merely Drill repeat Drill situation. Only a few people had possession of the messages that were in the problem, and none of those on duty had any way to tell if those were actual submarines, Drill repeat Drill, or whethere it was an attempt on the part of somebody to throw confusion into the tactical situation.

* * * * * *

"* * * I could say that it was a considerable extent. You can all realize that when a problem is laid out, it is

on a time table, and that if the messages don't come in on time, and aren't sent out on time, it interferes with it considerably, and in this case, the false messages caused considerable confusion and wasted time in checking them. They created a wrong tactical picture, and would have thrown the maneuver into a tail spin if it had been a real Drill repeat Drill message. As it was, the thing seemed to be out of order, and was treated as if it had been created by some subversive element." (R. 19, 20)

Captain Earl F. McAndress, 185th Infantry, was present during the conference between accused and Lieutenant Colonel Maloney, and witnessed the preparation and execution by accused of Exhibit A. He corroborated Lieutenant Colonel Maloney in all essential particulars in relation to the subject matter of that conversation and written statement (R. 21, 22). The witness testified in respect to the tactical repercussions -

"* * * it didn't throw the maneuver out of time, except that it took up the time of various people that could have been used otherwise, to more avail. I don't believe that any troops were called out by reason of these messages." (R. 22)

4. Lieutenant Franklin was recalled as a witness for the defense and testified:

"I called District and got the G-2 office, and spoke to Captain Bush. I told him I had received a drill repeat drill message which said this is O.P. 28, enemy sub sighted at 300 mils, one mile away. Drill repeat drill. I informed Captain Bush at that time that I believed the information was misinformation." (R. 24, 25)

Second Lieutenant Salvatore P. Donadio, 185th Infantry, testified he had known accused since 1934 and had served with him in the same organization for a long time. He testified,

"A. As a noncommissioned officer he proved very efficient. He was alert, always willing to help his subordinates as well as his superiors."

* * * * * *

"* * * He was always dutiful and just."

* * * * * *

"* * * He has received numerous commendations. I can't recall all of the things that he has received for his inventive genius, his artistic ability and his ability to organize and get things done. He has been commended by his company,

battalion, and regimental commanders, and also by the division commander. He has been commended by several generals for his ability. In one instance, in 1936, Lieutenant Teixeira constructed a new device for machine gun fire at night, to simplify the conduct of machine gun fire during the hours of darkness. The plan was approved by all of his commanding officers, and was sent to the War Department." (R. 25, 26)

The witness testified that accused was commended for that achievement by his regimental commander, Colonel Beebe. At Officers' Candidate School accused "was given very high recommendations and a superior rating for his ability and leadership". (R. 26)

Accused was sworn as a witness and testified:

"On the night of the 21st, we had a meeting of all the officers of the Battalion, with regard to the maneuvers. That was from about 7:00 in the evening until about 9:00, and after the meeting, we more or less started on 24 hour duty. That is, all officers were on a 24 hour duty shift. After the meeting they divided us up into shifts. The first group was to go on duty from then until 4:00 the next morning, and then the second group would take over. Captain Cecil being S-3, and I S-2, he asked me if I had any reason for not taking the first half of the shift. I told him that it didn't make any difference to me, and that it was up to him, whatever he wanted to do. So he said you can stay here until 4:00 o'clock, and then I will relieve you, and you can go to bed, so I said okeh, and he left. I remained at the C. P. with the other officers, Lieutenant Munyon, Lieutenant Smith, and Lieutenant Forbes. Lieutenant Smith made a few calls regarding the transportation for the problem, and this took around a half an hour or so. I don't remember whether or not any of the other officers made any calls then or not. I was sitting by my own desk, and just got up from the desk, and said that I think I will make a couple of funny joke calls, and call up the other S-2's just to see what they are doing. They might be glad to talk about something, just to pass the time. I called up the 2nd Battalion, and some soldier came on the telephone, I think that it was this Private, I don't remember his name. I asked for Lieutenant Greet, and this Private told me that he had just left and went to his quarters, so I said give him this message, Drill repeat Drill. O. P. # 1 reporting enemy submarine sighted, 5800 mills, one mile away. Drill repeat Drill. I put down the receiver then, and picked it up a minute or so later, and tried to get the third battalion on the telephone. I was going to talk to the S-2 over there. I got somebody on the telephone, some enlisted man, and I asked him for the S-2, and he wasn't around at that time, so I said give him this message. This is O.P. 28. Drill repeat Drill. Enemy submarine sighted at 300 mills, one mile

(210) away. Drill repeat Drill. Then I put down the receiver on the call. Then I called the 2nd Battalion, and asked for the S-2. Whoever answered the call said that he wasn't around, so I said you just received a message from O.P. 1, and I think that it was maybe someone trying to play a joke on you. I think that it sounded phony, and that you better disregard the call. I told them to give that message to the S-2, so, whoever, I don't know who it was, said okeh. Then, as I was going to call the third battalion, the telephone rang. Lieutenant Smith was the duty officer, being senior, so he answered all telephone calls. He picked up the telephone, and it was Lieutenant Franklin on the other end. Lieutenant Franklin said I would like to get some information about a message about a submarine, and said that he had traced the call to the first battalion. Lieutenant Smith said this is your call, so I took the telephone. I gave my name, and Lieutenant Franklin said this is Lieutenant Franklin. I received a message from you about ten minutes ago about a submarine being sighted somewhere, where did you get that? I was talking to Colonel Kellas and he told me to trace the call down and find out where the information came from. Then, more or less to get rid of him, and I knew right then that I had done something I shouldn't do, I told him that I received it from somebody and thought that it was a joke, and not to pay any attention to it. I didn't hear anything more about it until morning when Colonel Maloney called me. They woke me up, and I started to get dressed and went to answer the telephone. They started asking me if I knew anything about that message, and the message to the third battalion, so I told him yes, I sent those messages. There was one to the second battalion, and one to the third battalion. Colonel Maloney said I don't know anything about the one from the first to the third battalions, I am interested in the one which Lieutenant Franklin told me you knew something about. I told him that I had received that message from somebody who had telephoned me, and asked me to relay it on to the second battalion. I was in the wrong then, and didn't want to change my story, which would make me look more foolish than before. I told Colonel Maloney that I didn't know where I got the message, and that I couldn't trace it down. He said that is all right, I am trying to get some information. Nobody said anything else, so I went back to bed. At about 10:30 Colonel Maloney wanted me to report to his office, so when I arrived at District Headquarters, Colonel Calkins was there, and I was told to sit down in the chair. They started asking me about that message, and I kept on the same story that I had received the information from someone else. Colonel Calkins had left then, and I was just talking to Colonel Maloney. When I arrived at District, I knew that the thing had been going too far, and had intended to tell Colonel Maloney right away that I had started those messages myself, but Colonel Calkins' being there, just made me feel a little bit out of place. I don't know how to explain about it, but I didn't feel

right. I continued to give Colonel Maloney the same story. Then Colonel Maloney came in with Captain McAndress and started asking me about the messages with the Captain there. After about another five minutes or so, I told him I would like to have Captain McAndress leave the room, and then I would tell him what had happened, but that I didn't want to get anyone else into trouble, also, I felt very foolish over the whole thing, and Captain McAndress being one of my regimental officers, I didn't want him to know anything about it. But Colonel Maloney said that he didn't want Captain McAndress to leave, so I went through and told them the whole thing about making the messages up myself, and calling the two battalions more or less to have something to do, and to have some fun with the S-2's of each battalion, and with no intentions of causing any trouble. I made sure that I had drill repeat drill on each of them, so that there wouldn't be any trouble, and didn't mean any harm at all. I told Colonel Maloney that it was a joke that got out of hand. (R. 27-28)

He testified further that he was born in Rio De Janeiro, Brazil, and came to the United States in 1927 at the age of 17½ years (R. 32). He learned to speak English by himself. He has been in the military service fourteen years, served under Generals Theodore Roosevelt, Short, Kreuger and Cubbison (R. 33) and was personally commended by Generals Cubbison, Short, and Roosevelt and various division, regimental and battalion commanders because of his inventions and quality of service. One such commendation related to the service of his company and himself while representing the United States Army at the New York and San Francisco World Fairs (R. 33). He was a sergeant on those occasions and later first sergeant (R. 33). He had never been accused of making false official reports before (R. 29). He did not consider that his messages would have any effect on the tactical situation. They were so worded as to be readily recognized as "drill messages merely", meriting no serious consideration (R. 29). Drill messages require no checking (R. 29). When he went to Lieutenant Colonel Maloney's office he intended to tell the whole truth at once but was deterred by reason of the presence of another officer.

5. The competent evidence clearly proves that:

(a) at the time and place alleged in Specification 1, Charge I, accused communicated by telephone to 3rd Battalion Headquarters, 185th Infantry, the message - "This is O.P. #1. Enemy sub sighted at 5800 mils, one mile away. Drill repeat Drill." The message was contrary to fact and as a drill repeat drill message unauthorized and foreign to the tactical problem in which the 185th Infantry was then engaged. It, together with other messages set forth in other specifications, caused confusion and temporary disturbance among the sections, but did not throw the maneuver out of time or involve the

movement of troops;

(b) at the time and place alleged in Specification 2, Charge I, accused stated over the phone to S-2's agent, "That the message (referring to the message set forth in Specification 1, Charge I) he had received a few minutes before looked phony and suggested that he check it with the O.P. or with the District". The implication that accused had received such message was contrary to fact as accused alone had originated as well as transmitted the message. The message was unauthorized and foreign to the tactical problem in which the 185th Infantry was engaged. It, together with other messages set forth in other specifications, caused confusion and temporary disturbance among the sections, but did not throw the maneuver out of time or involve the movement of troops;

(c) that at the time and place alleged in Specification 3, Charge I, accused communicated by telephone to 2nd Battalion Headquarters, 185th Infantry, the message, "Enemy sub sighted at 300 mils, one mile away, O.P. #28. Drill repeat Drill". This message was contrary to fact and as a drill repeat drill message unauthorized and foreign to the tactical problem in which the 185th Infantry was then engaged. It together with other messages set forth in other specifications caused confusion and temporary disturbance among the sections but did not throw the maneuver out of time or involve the movement of troops;

(d) that at the time and place alleged in Specification 4, Charge I, accused communicated by telephone to First Lieutenant Charles H. Franklin, Jr., 2nd Battalion, 185th Infantry, the message, "Yes I sent it, (referring to the message set forth in Specification 3, Charge I) to you about ten minutes ago. I don't think it means very much. Control Officers wouldn't be around O.P.s at this time of night. I just received this information from someone and relayed it to you". That portion of the message "I just received this information from someone and relayed it to you" was contrary to fact as accused alone had originated as well as transmitted the message. The message was unauthorized and foreign to the tactical problem in which the 185th Infantry was engaged. It,together with other messages set forth in other specifications, caused confusion and temporary disturbance among the sections, but did not throw the maneuver out of time or involve the movement of troops;

(e) that at the time and place alleged in Specification 2, Additional Charge, accused orally stated to Lieutenant Colonel John B. Maloney, G-2, 40th Infantry Division, that he had received information concerning a certain enemy submarine and passed the said information on but that he did not know the source of said information, which statement was contrary to fact and so well known to accused as he alone had initiated and transmitted the enemy information

reports; that within about ten or fifteen minutes after having made such false statement and in the course of the same conversation accused recanted and made a statement both oral and written in which he corrected the false statement and truthfully stated that he alone had initiated and transmitted the messages.

6. The two messages transmitted by accused in the midst of a tactical problem in which his organization was engaged purported to contain important items of military intelligence concerning the enemy. If properly a part of the problem, it was an essential factor in the estimate of the situation and in the conduct of subsequent operations (FM 100-5, secs. 193, 194). It was the duty of accused as a subordinate officer of the 185th Infantry and particularly as S-2 and Acting S-3 of the 1st Battalion of that regiment to see that his immediate commander was promptly and fully informed of the situation (FM 100-5, sec. 223). The transmission by Battalion S-2 and Acting S-3 from battalion command post of such information relating to the presence of an enemy submarine one mile off shore justified the belief that the transmitted information was genuine and properly a part of the problem. If any doubt of the genuineness of the messages existed, confusion resulted. The reaction at 2nd and 3rd Battalion, District and Division Headquarters, was normal and pursuant to regulation. Accused precipitated the tactical repercussions as explained by various witnesses notwithstanding his ineffectual attempt to rescind the messages within a few minutes following their transmission. The damage resulting therefrom had already been done. In sending these messages accused professed to be acting with authority and his act appeared to be official. It was none the less official because he acted on his own initiative, wholly without authority and in impertinent usurpation of the authority of the director of the problem. He acted by color of his office even though such act was a breach of his official duty. In this sense his messages were official messages as they were prepared and transmitted by accused in his official capacity under color of office and by virtue of his office.

7. The only explanation for his extraordinary conduct given by accused was that he intended to have some fun with the S-2s of the 2nd and 3rd Battalions with whom he was on friendly terms. His conduct as explained by him clearly indicates that accused was lacking in a proper appreciation of the duties and responsibilities of his office. It was no time or place for a hoax of the nature perpetrated by accused. The tactical training of the 185th Infantry was serious business made necessary by the military situation. It was a matter of common knowledge of which the court was warranted in taking judicial notice that the Island of Kauai was an island of the Hawaiian archipelago; that on December 7, 1941, the military and naval forces of the Empire of Japan had attacked and attempted to invade the Hawaiian Islands; that subsequent attacks and attempts had been made; that the threat of attack and attempt to invade by the enemy were ever present; that pursuant to section 67 of the

Organic Act of the Territory of Hawaii, approved April 30, 1900, the Governor of Hawaii, on December 7, 1941, had called upon the commander of the military forces of the United States in Hawaii to prevent such invasion; had suspended the privilege of the writ of habeas corpus and had placed the territory under martial law with such military commander as governor thereof; that all the islands of the Territory of Hawaii had by proper military authority been declared, designated, established and prescribed as a military area within the meaning of Executive Order No. 9066, February 19, 1942; and that Honolulu harbor had by Executive Order 8987, December 20, 1941, been established and reserved as a naval defensive sea area, to be known as "Honolulu Defensive Sea Area".

8. The "intent to deceive" alleged in Specifications 1, 2, 3 and 4, Charge I, was not proved. Under the circumstances, the conduct of the accused was wrongful and improper, and constituted a military offense but did not embody that sinister quality of intent to deceive which contributes to conduct unbecoming an officer and a gentleman as condemned under Article of War 95. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of Charge I and its Specifications except the words, in each Specification, "with intent to deceive", in violation of Article of War 96.

9. It is the opinion of the Board of Review that the evidence is legally sufficient to support the findings of guilty of Charge II and its Specification.

10. With respect to the official statement made by accused to Lieutenant Colonel Maloney, the evidence shows that this statement was false and was made with intent to deceive, as alleged in Specification 2, Additional Charge. Here the false statement was made willfully and with the intent condemned by Article of War 95. True, accused recanted shortly after making the false statement and told the truth. This is a circumstance for consideration by the confirming authority, but it did not condone or purge the offense. The facts here do not bring this case within the opinion of the Board of Review in CM 231119, Lockwood. There the allegedly false answer was caused by reasonable misunderstanding of the question. A true answer was given when the purport of the question was understood. It is the opinion of the Board of Review that the evidence is legally sufficient to support the findings of guilty of the

Additional Charge and Specification 2 thereof.

11. From War Department records it appears that accused is 34 years of age. He served as an enlisted man from March 5, 1929, to July 8, 1942, when he was commissioned a second lieutenant, Army of the United States. He became a citizen by natrualization. He is married and has two minor children. On March 7, 1937, the Chief of Ordnance recommended that accused be commended for his zeal and initiative in connection with the submission by him for examination of an invention, "Machine Gun Fire Control Instruments".

12. The court which tried accused, all the members concurring, recommended clemency. The communication on this subject, directed to the reviewing authority, is attached to the record. It reads in part:

> "In view of the fact that Lieutenant Teixeira having perpetrated the acts as stated in the charge sheets in a spirit of jesting, from which no overt results occurred, and in consideration of Lieutenant Teixeira's excellent record of prior service, it is felt that the reviewing authority might well extend such leniency as in the opinion of such authority be just."

13. 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 is legally sufficient to support the findings of guilty of Charge I and its Specifications except the words, in each Specification, "with intent to deceive", in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification and of the Additional Charge and Specification 2 thereunder, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

Andrew Copp Jr., Judge Advocate.

John Tannenwald, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 23 1943 - 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 Frank L. Teixeira (0-1287086), 185th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specifications as involves findings of guilty of the Specifications except the words, in each Specification, "with intent to deceive", in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification and of the Additional Charge and Specification 2 thereunder, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that only so much of the findings of guilty of Charge I and its Specifications be approved as involves findings of guilty of the Specifications except the words, in each Specification, "with intent to deceive", in violation of Article of War 96, that the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand to be administered by the reviewing authority and forfeiture of $25 pay per month for three months, and that the sentence as thus modified 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 recommendation hereinabove made, 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. of Sec. of War.
Incl. 3 - Form of action.

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(Only so much of findings of guilty of Charge I and its Specifications approved as involves findings of guilty of the Specifications, except the words, in each Specification, "with intent to deceive", in violation of Article of War 96. Sentence as approved by reviewing authority confirmed, but commuted to reprimand, and forfeiture of $25. pay per month for three months. G.C.M.O. 191, 4 Aug 1943)

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



SPJGK
CM 231469

APR 23 1943

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| UNITED STATES | ) | II ARMORED CORPS |
| v. | ) | Trial by G.C.M., convened at Fort Ord, California, January 8, 1943. Dishonorable discharge (suspended) and confinement for one year and six months (1-1/2 years). Disciplinary Camp, Ninth Service Command, Turlock, California. |
| Private Philip C. Marcellino (36006799), 340th Ordnance Motor Transport Company. | ) | |

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 58th Article of War.

Specification: In that Private Philip C. Marcellino, 340th Ordnance Motor Transport Company (Q), (Formerly Company "E", 58th Ordnance Regiment (HM) (Q)) did, at Desert Maneuvers, Goffs, California, on or about August 20, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Modesto, California, on or about October 21, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 1-1/2 years. The reviewing authority approved the sentence, ordered its execution, but

suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Disciplinary Camp, 9th Service Command, Turlock, California, as the place of confinement. The proceedings were published in General Court-Martial Order No. 10, Headquarters II Armored Corps, San Jose, California, February 15, 1943.

3. The record presents questions concerning the competency of certain evidence and the legal sufficiency of the competent evidence to support the findings and sentence.

4. To prove the initial absence without leave the prosecution introduced as a witness Sergeant Glen P. Mork, 340th Ordnance Motor Transport Company (Q), acting first sergeant of the company. He testified that he was the custodian of the Morning Report and "responsible for the initial entries therein" (R.3). A document was then produced by the prosecution, and Sergeant Mork identified it as "an extract copy of a morning report" (R.3). The document was read by the witness, "accepted by the defense and was then received in evidence and marked Exhibit '1P'". It contained an entry showing that accused absented himself without leave on August 20, 1942 (Ex.1P). The extract copy had been signed: "Justin B. Pastner, 2nd Lt. Ord., for Melville B. Duffey, Capt. Ord." (R.3; Ex. 1P). Lieutenant Pastner was the special assistant defense counsel and belonged to the 340th Motor Transport Company (R.1).

Without being sworn as a witness Lieutenant Pastner identified the morning report and "acknowledged signing it for Captain Melville Duffey, the commanding officer" (R.3). Thereupon the president of the court declared:

> "This does not state that it is a true copy. If it is, it should be so stated. Before this is admitted as evidence, it should be stated a true copy signed by Captain Melville B. Duffey." (R.3).

The record contains nothing further with reference to the admission of the document, but it is attached to the record, marked "Exhibit '1P'". An examination of the exhibit indicates that as a result of the president's remarks, Lieutenant Pastner lined out his signature and the word "for", and wrote "A True Copy", followed by his signature anew. Captain Duffey was originally a member of the court and had been excused only a few moments before the introduction of the morning report (R.1). Had the court desired to insist upon his signature, doubtless it could have been obtained forthwith. The fact that no further objection was interposed by the court after Lieutenant Pastner's second signing,

plus the fact that the document actually appears as an exhibit, clearly indicates that the court was satisfied despite the absence of Captain Duffey's signature and that the document became part of the evidence in the case.

5. It then becomes necessary to decide whether the document was properly admitted in evidence. As a rule, the original of a writing must be introduced to prove its contents. However, in the case of

> "* * * a public record required by law, regulation, or custom to be preserved on file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without either first proving that the original has been lost or destroyed, or without otherwise accounting for the original." (par. 116a, MCM)

This office has held that a morning report is a "public record" within the meaning of the provision quoted above (CM 226521, Thomas).

The Manual also provides:

> "A copy of any book, record, paper, or document in the War Department, * * * or in any command or unit in the Army may be duly authenticated * * * by a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original. * * *" (par. 116a, MCM)

The Board of Review has held that the company commander is the "custodian" of the morning report and that he alone is the proper person to authenticate an extract copy thereof (CM 218201, Witkowski; CM 227831, Gregory). In the latter case the Board pointed out that since the admissibility of copies is an exception to the best evidence rule, it "may not properly be extended by implication beyond its terms". Thus, the attempted authentication by Lieutenant Pastner was of no effect as an authentication. But, as noted, Sergeant Mork became a witness and identified the copy. Since paragraph 116a states that the enumerated documents "may" be authenticated in the manner stated, it might be argued that the intention was to permit authentication also by a person other than the custodian, provided the person identified the document as a witness. This possibility is precluded by the Witkowski case, in which the regimental personnel adjutant, in addition to having authenticated the extract copy by his signature, was sworn as a witness and testified that the copy was a true one. Despite this, the Board held that the copy was not properly authenticated.

Sergeant Mork's testimony that he was the custodian of the morning report does not alter the situation. Whether a person is the custodian of a document within the meaning of the Manual is a question of law, and one does not become a custodian by his own declaration (CM 218201, Witkowski). It is thus apparent that the admission in evidence of the extract copy of the morning report was open to objection.

However, the Manual also provides that an objection to the introduction in evidence of a purported copy of a public record on the ground that it is not duly authenticated is waived if not asserted when the proffer is made (par. 116a, MCM, p. 120). And the Board of Review has so held (CM 207264, Wilson; see also CM 210985, Bonner, holding oral evidence of contents of documents competent in absence of objection). The Wilson case dealt with a marriage certificate, which was the only evidence of the fact that at the date involved accused was married. The Board noted that the 1921 Manual did not contain similar provisions with reference to waiver and that cases decided prior to the 1928 Manual are not in point.

In the Witkowski case the record was held legally insufficient. However, the case is not contra to the cases cited, for in the Witkowski case the morning report entries were also hearsay, and it is fundamental to military law that a mere failure to object to the admission of hearsay evidence does not constitute a waiver. Thus, the court had no reason to discuss the waiver question involved in the present case.

It is true that paragraph 126c of the Manual states that "a mere failure to object does not amount to a waiver", but the sentence continues with the following highly significant language: "except as otherwise stated or indicated in this manual". Clearly, the situation involved in the present case comes within the exception. Moreover, there is not the slightest hint upon accused's part that he was not absent or that the extract copy of the morning report was erroneous. In fact, he admitted his absence (R.4), and so did his counsel (R.6). Furthermore, the defense affirmatively consented to the admission of the document, and Lieutenant Pastner, one of the defense counsel, was himself an officer in accused's company. (R.3). The rights of accused were not impaired.

6. With reference to the termination of accused's absence, the extract copy contained an entry made at Fort Ord, California, showing accused's apprehension by the civil authorities and return to military control at Modesto, California, on October 21, 1942. The entry was hearsay and could not be used against accused to prove his apprehension (sec. 395 (18), Dig. Op. JAG 1912-40). However, in a statement to the

investigating officer, made after he had been warned that "anything he could say would be used against him", accused in effect admitted his apprehension (R.4,5). And the morning report entry was competent as evidence in accused's favor showing the date of the termination of his wrongful absence, for without such proof the presumption that an unlawful absence, once proved, continues would govern (par. 130a, MCM, p. 143; CM 168834, Hazard).

7. On page 3 of the record it appears that the prosecution stated the following:

> "I have here a stipulation as to testimony which was entered into by the defense, prosecution and will be offered only as a matter of record not marked as an exhibit."

The record then recites that the stipulation was read by the prosecution, that it contained the signature of the defense counsel, and that the "document was then given to the court" (R.3). Between pages 7 and 8 of the record appears the following recital, signed by the president of the court, the trial judge advocate, and the defense counsel:

> "We, the undersigned who have authenticated the case of Pvt. Philip C. Marcellino, make known that the stipulation presented by the Prosecution on page three (3) of the record of trial was a stipulation as to the admissability of affidavits."

After the "stipulation" had been "given to the court" the prosecution offered in evidence a copy of a telegram from G. M. Hobin, Sheriff, Stanislaus County, California, to the Commanding Officer, Company E, 58th Quartermaster Regiment, Goffs, California, stating that Hobin was holding accused in custody (R.3; Ex. 2P). On the document appeared the words "This is a certified true copy, (signed) Justin B. Pastner, 2nd Lt. Ordnance" (Ex. 2P). Lieutenant Pastner stated in open court, but without being sworn as a witness, that the signature was his. The telegram was then received in evidence (R.3). Precisely the same procedure took place with reference to a true copy of a telegram from the Government Disciplinary Camp, Turlock, California, stating that accused had been turned over to the disciplinary camp by the sheriff at Modesto, California. The document was received in evidence (R.3,4; Ex. 3P). Second Lieutenant J.A. Guisasola, 864th Ordnance Heavy Maintenance Company, the investigating officer, was sworn as a witness and identified his signature on a so-called "affidavit", which was then received in evidence (R.4; Ex. 4P). The "affidavit" was merely a letter from Lieutenant Guisasola to the Superintendent, Flottell Cannery, Modesto, California, stating that on or about August 25, 1942, accused found employment with the cannery for about 30 days and asking the

superintendent a series of questions. Evidently the superintendent typed in the answers to the questions on the same sheet of paper. His signature does not appear on the document. The purported answers stated, among other things, that accused used the name P. Carmen Marcellino, that he wore civilian clothing while performing his work, that he earned $328.22, and that he gave General Delivery, Modesto, as his home address (Ex. 4P). The prosecution next offered in evidence a letter from the sheriff's office, Stanislaus County, Modesto, California. Lieutenant Guisasola testified that he had received this letter, and thereupon it was "accepted by the defense" and received in evidence (R.4; Ex. 5P). The letter purported to have been signed by H.B. Wright, Under-Sheriff, and contained the following statements, among others: that when apprehended accused was wearing civilian clothes, was living in a hotel in Modesto under an assumed name, said that he was not a deserter and had never been in the Army, and had $130 on his person (Ex. 5P).

A statement which accused made to the investigating officer seemed to indicate an intention to return to his organization (R.4,5). Outside of Exhibits 2P, 3P, 4P, and 5P, there was practically no evidence permitting an inference of an intention to desert. The statements contained in those exhibits produced an array of testimony so formidable that they must have been the decisive factor in the court's conclusion. Thus, if they were not properly in evidence, the finding of guilty of desertion was erroneous.

Although parties may stipulate as to facts and as to evidence, a stipulation "which practically amounts to a confession where the accused has pleaded not guilty and such plea still stands * * * should not ordinarily be accepted by the court" (par. 126b, MCM). If the so-called "stipulation" in the present case was intended as a stipulation of facts or evidence, it comes within the proscription of the Manual. But the above-quoted explanation of the "stipulation", appearing between pages 7 and 8 of the record, indicates that in fact it was no stipulation at all, but merely an agreement that certain so-called "affidavits" should be admissible. None of the exhibits was actually an affidavit and therefore none came literally within the terms of the "stipulation". Probably the intention of counsel was to permit the introduction in evidence of hearsay documents, which the exhibits under discussion clearly were. In other words the stipulation was intended as a waiver. Although the defense may waive an objection to the admissibility of offered evidence, the attempted waiver is ineffective unless it clearly appears that the defense understood its right to object (par. 126c, MCM). Accused's statement to the investigating officer was inconsistent with an intention to desert and the whole theory of the defense was that although accused was absent without leave he did not intend to desert. That being so, it is clear that neither accused nor his counsel clearly understood accused's rights,

for had those rights been understood, the defense would not have permitted the introduction of hearsay documentary evidence directly contrary to the defense's theory of the case. As a consequence, the Board of Review holds that Exhibits 2P, 3P, 4P, and 5P, were improperly admitted in evidence, that the intention to desert was not proved, and that the record of trial is legally sufficient to support a conviction for absence without leave only.

8. Since the initial absence occurred before the removal by the President of the maximum limits of punishment (Ex. Order 9267, Dec. 1, 1942), those limits should be applied. The competent evidence shows an unlawful absence of 62 days (Ex. 1P). The maximum punishment therefor is dishonorable discharge, total forfeitures, and confinement at hard labor for six months (par. 104c, sec. A, MCM).

9. 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 of the Charge and Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his station and did remain absent without leave until he was apprehended at the place and time alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

Andrew Copp Jr., Judge Advocate

Wm Tomlinson, Judge Advocate

Fletcher R. Andrews Judge Advocate

1st Ind.

War Department, J.A.G.O., APR 23 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Philip C. Marcellino (36006799), 340th Ordnance Motor Transport Company.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty of the Charge and Specification be vacated as involves findings of guilty of an offense by accused other than absence without leave at the place and time alleged, terminated by apprehension at the place and time alleged, in violation of Article of War 61, and that so much of the sentence be vacated as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinabove made, should such action meet with your approval.

Myron C. Cramer

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

2 Incls.
Incl.1-Record of trial.
Incl.2-Form of action.

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(So much of the findings of guilty of the Charge and Specification vacated as involves findings of guilty of an offense by accused other than absence without leave at the place and time alleged, in violation of Article of War 61. So much of the sentence vacated as in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. By order of the Secretary of War. G.C.M.O. 98, 5 May 1943)

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



SPJGN
CM 231487

APR 26 1943

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| U N I T E D S T A T E S | ) | 92ND INFANTRY DIVISION |
| | ) | |
| | ) | Trial by G. C. M., convened at |
| v. | ) | Camp Joseph T. Robinson, |
| | ) | Arkansas, January 29, 30, 31, |
| Second Lieutenant JOSEPH B. | ) | and February 1, 1943. Dismissal, |
| CAMPBELL (0-1300759), 371st | ) | $100 forfeiture, and confinement |
| Infantry. | ) | for six (6) months. |

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer above named 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 63rd Article of War.

Specification 1: In that Second Lieutenant Joseph B. Campbell, Company "K", 371st Infantry, did, at Camp Joseph T. Robinson, Arkansas, on or about December 23, 1942, behave himself with disrespect toward Captain Francis E. Lorenz, Regimental Headquarters Company 371st Infantry, his superior officer, by saying to him, "We don't have to take this sort of shit. I'll mop up the floor with you," or words to that effect.

Specification 2: In that Second Lieutenant Joseph B. Campbell, Company "K", 371st Infantry, did, at Camp Joseph T. Robinson, Arkansas, on or about December 23, 1942, behave himself with disrespect toward First Lieutenant Paul A. Ulkins, Company "K", 371st Infantry, his superior officer, by saying to him, "I'll knock the shit out of you," or words to that effect.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Joseph B. Campbell, Company "K", 371st Infantry, having received a lawful command from First Lieutenant Paul A. Ulkins, Company "K", 371st Infantry, his superior officer, to report to duty on the 371st Infantry bayonet course, did, at Camp Joseph T. Robinson, Arkansas, on or about December 23, 1942, willfully disobey the same.

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

Specification 1: In that Second Lieutenant Joseph B. Campbell, Company "K", 371st Infantry, was at North Little Rock, Arkansas on or about January 12, 1943, drunk and disorderly in uniform in a public place, to wit: in front of the Moseley Grill, 1801 Pike Avenue, North Little Rock, Arkansas.

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Joseph B. Campbell, Company "K", 371st Infantry, did, at 1801 Pike Avenue, North Little Rock Arkansas, on or about January 12, 1943, wrongfully appear at said address wearing a field jacket and helmet liner and without a necktie.

CHARGE IV: Vidation of the 69th Article of War.

Specification 1: In that Second Lieutenant Joseph B. Campbell, Company "K", 371st Infantry, having been duly placed in arrest at Camp Joseph T. Robinson, Arkansas, on or about December 24, 1942, did, at Camp Joseph T. Robinson, Arkansas, on or about January 4, 1943, break his said arrest before he was set at liberty by proper authority.

Specification 2: In that Second Lieutenant Joseph B. Campbell, Company "K", 371st Infantry, having been duly placed in arrest at Camp Joseph T. Robinson, Arkansas, on or about December 24, 1942, did, at Camp Joseph T. Robinson, Arkansas, on or about January 11, 1943, break his said arrest before he was set at liberty by proper authority.

The accused pleaded not guilty to all Charges and Specifications, except

Charge III, to which the record shows no plea at all. However, he pleaded not guilty to all Specifications under Charge III, and the failure to enter a plea to the Charge itself is immaterial. He was found not guilty of Specification 1, Charge II, and Specification 2, Charge III; not guilty of the violation of Article of War 64 under Charge II, but guilty of the violation of Article of War 96 thereunder; guilty of Specification 1, Charge I, except the words, "we don't have to take this sort of shit," of the excepted words not guilty; guilty of Specification 2, Charge II, except the words "willfully disobey the same," substituting therefor respectively "did fail to obey the same," of the excepted words not guilty, of the substituted words guilty; and guilty of the remaining Charges and Specifications. He was sentenced to dismissal, confinement at hard labor for six months, and forfeiture of $100 per month for six months. The reviewing authority approved the sentence but remitted forfeitures in excess of $100, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that at about ten o'clock on the morning of December 23, 1942, the accused was found by First Lieutenant Paul Ulkins, his company commander, asleep in Lieutenant Thompson's hutment. Lieutenant Ulkins, after considerable trouble rousing the accused, told him to go out on the bayonet course where he belonged. Thereupon the accused who had mumbled unintelligibly in response to Lieutenant Ulkins' earlier inquiry as to what he was doing in bed, disgustedly turned his face to the wall, and pulled the comforter up over his head. Lieutenant Ulkins smelled liquor on the accused's breath, and concluded he was drunk, but not too drunk to understand his order clearly. (R. 92-93, 109-111)

Lieutenant Ulkins left the hutment to call Captain Lorenz, executive officer of the basic school at Camp Robinson, where the accused was quartered and rationed, while pursuing a special course in bayonet instruction. When Captain Lorenz and Lieutenant Ulkins entered the hutment a few moments later, the accused was asleep. Captain Lorenz spoke to the accused twice, telling him to get up and report to the bayonet course. The accused mumbled a reply which sounded like, "Get out of here and let me sleep". Captain Lorenz then called in a loud tone, "Get out of bed; are you trying to be classified as a damn goldbrick?". The accused immediately leapt to his feet and approached the Captain saying, "I don't have to take this sort of shit. I will beat your face in. I will mop the floor with you." The eyes of the accused were bloodshot; he was frothing at the mouth; the air was redolent of liquor. (R. 112, 281-282)

As the accused stood there, pointing his finger at Captain Lorenz, reiterating that he — the accused — was not permitted to swear at enlisted men, and would be damned if any officer was going to swear at him, Lieutenant Ulkins stepped forward, and remarked to the accused, "You won't mop the hutment with anybody," to which the accused replied, according to Lieutenant Ulkins testimony, "what's more, he would kick the shit out of me". (R. 95-96, 105)

Lieutenant Ulkins then told the accused he was under arrest in quarters, and suggested to Captain Lorenz that the captain get Major Noack to settle the matter, whereupon Captain Lorenz departed for the orderly room to get his coat. As Captain Lorenz came out of the orderly room, to go to Major Noack's, the accused emerged from the hutment fully dressed, and approached the captain, saying he was ready to go to Colonel Wood. Lieutenant Ulkins, who was approximately a yard away from the accused while Captain Lorenz was still twenty yards away, ordered the accused back to his hutment. The accused started around Lieutenant Ulkins in the direction of Captain Lorenz. Lieutenant Ulkins threw out his arm to intercept the accused, who, bumping into his upraised hand, warned Lieutenant Ulkins not to put his hands on him, adding, "I'll beat the shit out of anybody who puts their hands on me". (R. 104, 106-108, 134-135, 281-282)

The next morning, December 24, 1942, Lieutenant Colonel William G. Barrett, Executive Officer, 371st Infantry, acting under instructions from the regimental commander, verbally ordered the accused under arrest. Later, on January 4, 1943, the adjutant confirmed the order in writing, at which time the limits designated were from the accused's hutment to the mess hall, to the dispensary and to the latrine. The accused was informed that any request to go elsewhere would have to be in writing and addressed to the commanding officer. Thereafter, only two such requests were received, one for permission to go to the barber shop, the other, to the dental clinic. No request was ever received by the commanding officer for permission for the accused to visit the city of Little Rock or North Little Rock or to visit the second battalion area. The accused was not released from arrest at any time during the period from December 24 to January 12, inclusive. (R. 75-87, 127, 191-196).

On January 4, 1943, Major Noack went to the accused's hutment to confer with the accused in connection with an investigation of contemplated charges. Finding him absent the first time, the Major returned. The accused was still missing. From three thirty to four o'clock that afternoon, the accused was observed by several officers wandering aimlessly around in the second battalion area. He finally went into the second battalion mess hall, where Major Gooding found him and told him to report to headquarters, second battalion, for questioning in connection with charges. The accused was not asked why he was in the mess hall nor did he offer any explanation of his presence there. (R. 164, 168-169)

About eleven o'clock on the night of January 11, 1943, the accused, accompanied by a corporal, walked into a cafe operated by Mrs. J. E. Moseley at 1801 Pike Avenue in North Little Rock, and asked for a drink. He was "mumbling and grumbling," and had the blank look of an inebriate. When Mrs. Moseley said, "we don't sell liquor here," the accused expressed a desire to go to the rest room. His companion said, "come on," but Mrs. Moseley interposed, "Oh no you don't you go outside." The corporal then took the accused outside, where the two stood for a minute, while Mrs. Moseley drew the curtains, preparatory to closing her establishment. She opened the door to let the corporal back in, but attempted to close it against the accused, who stuck his foot in. Mrs. Moseley said, "don't let him in here," whereupon the

corporal said to the accused, "boy get your foot out of this door." The accused kept repeating, "I want in," until the corporal pushed the accused's foot out of the door, and closed it. Then the accused continued pounding on the door, demanding entrance, while the corporal held his foot against the door on the inside until Mrs. Moseley had locked it. (R. 33-37).

The pounding was so loud that it attracted the attention of passers-by. Two guards employed at the nearby Government Rubber Reserve, stopped the car in which they were driving to work to ask the accused what he was doing. The accused, still shaking the door and pushing against it, said he was going in. In response to suggestions that the place was closed and that the accused had better return to camp or wherever he belonged, and not have any trouble, the accused stated he was not ready to go home. (R. 27, 23-25).

Just then military policemen arrived, in response to a telephone call from Mrs. Moseley. They found the accused intoxicated, standing on the sidewalk in front of Mrs. Moseley's restaurant, clad in a helmet and a field jacket. He was not wearing a necktie, and his trousers were unbuttoned in the front. The accused was taken to police headquarters and into the office of the chief of police, staggering and smelling strongly of liquor. There he sprawled out in a chair and apparently fell asleep. When he was taken out, one trouser leg was wet from crotch to knee. There was a wet spot on the floor just to the left of the chair he had vacated that "looked like where someone had urinated." (R. 20, 38, 48-49, 66).

4. The evidence for the defense shows that on the morning of December 23, 1942, the accused's neighbor, Second Lieutenant Doyle G. Thompson, Battery B, 599th Field Artillery, Camp Joseph T. Robinson, Arkansas, was sick in quarters. Between eight and ten o'clock, the accused walked into Lieutenant Thompson's hutment, sat down on an adjacent bunk, and started a general conversation in which, "I think," Lieutenant Thompson testified, "he talked me off to sleep." Lieutenant Ulkins, opening the door, woke Lieutenant Thompson. The accused, in the meantime, had also fallen asleep. Lieutenant Ulkins walked over to the accused, pulled the cover down, shook him, and asked him what he was doing there. "Nothing," mumbled the accused, who apparently was not fully awake. Lieutenant Ulkins walked out of the hutment and returned shortly with Captain Lorenz, who inquired of the accused, "Campbell are you a God Dam man or a Gold Brick?" As soon as the captain said that, the accused got up out of his bed and told Captain Lorenz not to curse him any more, threatening, if he did, to "poke him in his mouth." The accused was standing still, pointing his finger at Captain Lorenz, while he made this statement. Captain Lorenz stepped back and denied cursing the accused; then inquired of Lieutenant Ulkins and Lieutenant Thompson whether or not he had. Lieutenant Ulkins said no, he didn't hear him, but Lieutenant Thompson said yes, he did. After they talked back and forth a while,

Lieutenant Ulkins told the accused he was under arrest, and said he would have to go see his commanding officer. Captain Lorenz and Lieutenant Ulkins then walked out and the accused remarked to Lieutenant Thompson, "they are going to carry me to the Colonel * * * no use of waiting I might as well see him now." The accused left the hutment and, just outside, met Captain Lorenz approaching, about fifteen yards away. Lieutenant Ulkins, who was also approaching, but from the other side, ordered the accused back into his hut. Then, as the accused was backing up, Lieutenant Ulkins told him that he just had something on his mind, "A few minutes ago," Lieutenant Ulkins continued, "you were going to beat the shit out of the Captain and now * * * you want to beat the shit out of me." "Yes," the accused rejoined, "I will beat the shit out of you if you touch me again". (R. 252-259; 264-272)

5. The accused, having been duly advised of his rights, elected to take the stand under oath. He testified, in substance, that on the morning of December 22, 1942, he entered the bayonet shcool, but that the following morning he did not attend, because he planned to report to the dental clinic to get a new plate made or his old one adjusted. The dentist had told him to report any morning, preferably around ten o'clock. After breakfast, he was late arriving at the orderly room to put his name on the sick-book, which had already been taken to the dispensary. He went to the dispensary, but was unable to locate the sick-book, so returned to his hutment to wait for its return. While waiting, he visited Lieutenant Thompson's quarters, which adjoined his, and, while there, lay down across the bed and dropped off to sleep. (R. 209-210)

About nine thirty he was awakened by Captain Lorenz, saying, "Campbell, what the God damned hell are you doing here are you a God Damned gold brick, or what?" The accused stood up. "Captain Lorenz," he said, "the army regulations don't permit me to curse an enlisted man and I know you don't have the authority to curse me. I would like to have you not do that any more." Lieutenant Ulkins said, "the man is drunk I smell whiskey on him when I came in * * * let's take him to the Colonel." Captain Lorenz said, "no, Campbell you stay in your hutment until we come back". (R. 211)

About five minutes after Captain Lorenz and Lieutenant Ulkins had left the hutment, the accused opened the door. Seeing Captain Lorenz outside, he walked to within five feet of him, and said, "if you are going to take me to the Colonel why can't we go now and get this over with?" "no," Captain Lorenz replied, "I am going to see Major Noack you go back in your hutment." While the accused was still standing there, Lieutenant Ulkins came running up to the accused and reminded him that he was under arrest in quarters. The accused questioned his authority, but had started to go away when Lieutenant Ulkins seized his collar. The accused stepped back. "Lieutenant Ulkins," he said, "you had no business grabbing me in my collar that is against Army Rules * * * I don't want you to grab my collar again." "Just a minute ago," Lieutenant Ulkins asserted, "you wanted to beat the shit out of the Captain and now you want to beat the shit out of me." "I certainly do," rejoined the accused, "if you grab me by the collar again." (R. 211-213)

That morning Colonel Barrett told the accused he was under arrest in quarters. On December 27, Captain Taus told the accused he might go wherever he had business to perform if he left a note stating the time he left and his whereabouts. On January 4, the accused went to see Sergeant Pickens in the Second Battalion Mess Hall, to find out where he could establish contact with a certain Lieutenant Warren in case he needed a defense counsel. The colonel sent for the accused and asked him what he was doing in the Second Battalion Area. The accused repled that Captain Taus "told me I could go any place I had business to perform, * * * and there wasn't any specification as to where I wasn't to go." The colonel called in Captain Taus and inquired quo warranto he had so enlarged the limits of the accused's restriction. Captain Taus denied the statement attributed to him by the accused. Colonel Wood then told the accused, "I will write you out an order specifying the places where you can go." (R. 213-214).

On the afternoon of January 11, 1943, the accused had such a severe throbbing pain in his jaw that six aspirin tablets failed to relieve it. He had been unable to eat when, at nine thirty, he took two drinks of whiskey. He remembers nothing from then until the morning of January 12, 1943, when the physician was examining him in the guardhouse (R. 219-220).

6. Specifications 1 and 2, Charge I, allege that the accused behaved himself with disrespect toward Captain Lorenz and Lieutenant Ulkins, both his superior officers. The words ascribed (with the exception of one bit of obscenity excepted from the finding of guilty of Specification 1) were clearly proven, by a great and wholly convincing preponderance of the evidence, to have been addressed by the accused to the officers named, who were the executive officer of the school in which the accused was enrolled, and the accused's company commander, respectively. Each remark involved a threat of physical violence couched in vulgar, contemptuous and disrespectful terms. Each specification alleges, and the evidence establishes, an offense in violation of Article of War 63, amply sustaining the finding of guilty of Charge I and both Specifications thereunder.

7. Specification 2, Charge II, as revised by exceptions and substitutions in connection with the finding of guilty thereof, alleges that the accused, having received a lawful command from Lieutenant Ulkins, his superior officer, to report to duty on the bayonet course, failed to obey the same. The uncontradicted evidence shows that Lieutenant Ulkins, who was the accused's company commander, found the accused asleep in Lieutenant Thompson's hutment at a time when the accused's duty assignment required his presence on the bayonet course. Lieutenant Ulkins testified that, after considerable trouble rousing the accused, he told him to go out on the bayonet course where he belonged, whereupon the accused "disgustedly turned his head to the wall and pulled the comforter up over his head" (R. 111). Lieutenant Ulkins further testified that the accused looked at him, and that he -- Lieutenant Ulkins -- received the impression that the accused heard and understood

the order. He smelled liquor on the accused's breath but concluded the accused was not too drunk to understand his order clearly. Lieutenant Thompson, a defense witness, testified that Lieutenant Ulkins pulled the cover off the accused, shook him, and asked him what he was doing there, to which he received an incoherent reply; and that then, without saying anything more to the accused, Lieutenant Ulkins left the hutment and returned with Captain Lorenz. The stipulation as to what Captain Lorenz would have testified (R. 281) includes the statement that Lieutenant Ulkins, after his first visit to the hutment where the accused had fallen asleep, informed Captain Lorenz that he — Lieutenant Ulkins — could not wake the accused. The accused testified that he was awakened by Captain Lorenz, and that he had no recollection of Lieutenant Ulkins' first visit to the hutment, on which occasion Lieutenant Ulkins testified the order was given.

The three persons present at the time were Lieutenant Ulkins, Lieutenant Thompson and the accused. Lieutenant Thompson's testimony corroborates Lieutenant Ulkins' to the point of the latter's shaking the accused, addressing him and receiving some character of a reply. The accused's version is merely that, whatever happened, he was still asleep and therefore not aware of it. The evidence is ample to sustain the court's findings that the accused failed to obey Lieutenant Ulkins' lawful order to report to duty on the bayonet course, in violation of Article of War 96.

8. Specifications 1 and 3, Charge III, allege that the accused was drunk and disorderly in uniform in a public place, to wit, in front of the Moseley Grill, 1801 Pike Avenue, North Little Rock, Arkansas, and that he wrongfully appeared at the same time and place wearing a field jacket and helmet liner without a necktie. The uncontroverted evidence establishes both offenses; but the improper apparel, described in Specification 3, is comprehended in the status, "disorderly," alleged in Specification 1. It is true that the accused was then and there disorderly, both with respect to his conduct and to his apparel. But "one transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person" (MCM, 1928, par. 27, p. 17). In this instance, the sentence affirmatively shows that no prejudice resulted to the accused from the unwarranted multiplication. He was properly found guilty of the Charge; and each of the two Specifications of which he was found guilty thereunder alleged conduct of a nature to bring discredit upon the military service in violation of Article of War 96.

9. Specifications 1 and 2, Charge IV, allege breach of restrictions on January 4th and January 11th, respectively. Both offenses are clearly established by the evidence and admitted by the accused. In extenuation of the first, he testified the adjutant had verbally enlarged the limits of his restraint. The adjutant's testimony to the contrary is more convincing. Moreover, the adjutant's lack of authority to enlarge the limits was definitely shown. The accused offered no excuse for the second breach unless his testimony of amnesia, self-induced by the use of drugs and alcohol to alleviate a toothache, can be so regarded; in which event, the excuse is

inadequate. The Specifications allege and the evidence shows both breaches of arrest committed by the accused in violation of Article of War 69.

10. The accused is 25 years of age. The records of the Office of The Adjutant General show enlisted service from May 12, 1942; honorable discharge for the convenience of the Government, November 20, 1942; temporary appointment as Second Lieutenant, A. U. S., November 21, 1942.

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 the trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of a violation of Article of War 63, Article of War 69 or Article of War 96.

Thos. L. Gresson, Judge Advocate

Abner E. Lipscomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

1st Ind.

War Department, J.A.G.O., APR 30 1943 - 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 Joseph B. Campbell (0-1300759), 371st 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 thereof. The conduct of the accused in behaving himself with disrespect toward two of his superior officers by threatening each with physical violence in vulgar and contemptuous terms, in failing to obey the lawful command of a superior officer, in appearing drunk and disorderly and in improper uniform in a public place, and in breaching his arrest on two separate occasions, indicates that accused is unworthy to remain an officer. In view, however, of all the circumstances including the fact that the disrespect of the accused to his two superior officers was accompanied and probably prompted by improper remarks to the accused, and in view of the severity of the punishment involved in the dismissal of an officer, I recommend that the sentence be confirmed, but that the confinement and forfeitures be remitted, and that the sentence as thus modified 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 foregoing recommendation 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 ltr for sig. Sec. of War.
Incl 3 - Form of Executive action

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(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 104, 12 May 1943)

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



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| UNITED STATES<br><br>v.<br><br>Private JOE W. SANTO, JR. (6984634), Headquarters Company, 1st Armored Division. | FORT KNOX, KENTUCKY<br><br>Trial by G. C. M., convened at Fort Knox, Kentucky, January 26, 1943. Confinement for six (6) months and forfeiture thirty-two (32) dollars per month for a like period. Detention and Rehabilitation Center, Fort Knox, Kentucky. |

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HOLDING by the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, Judge Advocates

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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 58th Article of War.

Specification: In that Private Joe W. Santo, Jr., Headquarters Company, 1st Armored Division, did at Fort Knox, Kentucky on or about November 14, 1940, desert the service of the United States and did remain absent in desertion until he was apprehended at Welch, West Virginia on or about July 11, 1942.

The accused pleaded not guilty to the Charge and the Specification thereunder. He was found guilty of absence without leave in violation of the

61st Article of War. He was sentenced to be confined at hard labor for six months and to forfeit thirty-two dollars per month for a like period. The reviewing authority approved and directed the execution of the sentence, and designated the Detention and Rehabilitation Center, Fort Knox, Kentucky, as the place of confinement. The proceedings were published in General Court-Martial Order No. 20, Headquarters Fort Knox, Kentucky, February 20, 1943.

3. The accused was arraigned January 26, 1943, upon a Charge and Specification alleging his desertion on November 14, 1940. He was found not guilty of desertion but guilty of absence without leave in violation of the 61st Article of War.

The 39th Article of War provides in part:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: Provided, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years * * *".

It appears that at the date accused was arraigned more than two but less than three years had elapsed after the commission of the offense. The record does not disclose any facts showing that accused was absent from the jurisdiction of the United States, or was not amenable to military jurisdiction by reason of some manifest impediment, so as to toll the running of the statute. The accused did not raise the question of the statute of limitation either upon arraignment or at any other time during the trial, nor was his right to plead the statute as to the offense of which he was found guilty brought to his attention in open court, either by the court or by the trial judge advocate or defense counsel.

4. The question whether the failure of the record to show affirmatively that the accused was advised of his right to avail himself of the defense of the statute of limitations to the offense charged affects the validity of the record under the provisions of the 39th Article of War has been considered many times by the Board of Review with varying conclusions. In CM 201537, Fouts, the Board discussed at length prior holdings of the Board in CM 188778, Allen, CM 190497, Smith, CM 195388, Flanagan,

CM 195863, Zukosky, and CM 197237, Rogers.

The Board, in the Fouts case, quoted "with entire approval" from the review of the staff judge advocate in the Rogers case, in which accused upon a Charge of desertion pleaded guilty to and was found guilty of absence without leave commencing more than two years prior to his arraignment, in part as follows:

> "It is thus seen that under the provisions of the present Manual, there is no mandatory requirement that the record of trial shall contain a statement that the accused was advised of his right to plead the statute of limitations. Under the 1921 Manual the record of trial was required so to show. Under that Manual it was the mandatory duty of the president of the court, or of the law member, to make such explanation. Under the present Manual no such duty devolves upon the president, the law member, the Trial Judge Advocate, or any other member of the court; but the positive duty is upon the defense counsel to make to the accused an explanation with regard to his right to plead the statute of limitations. In the instant case the provisions of the present Manual are controlling, and under it, as has been seen, the court may make the explanation but is under no mandatory duty to do so.
>
> "There is a presumption of legality attendant upon the proceedings of courts-martial (1912 Dig. Ops. J.A.G. 557, XIV E 5; id. 570 XV C), and there is a presumption that the accused knows the law, and also a presumption that the officer representing him as defense counsel performed his full military duty (1912 Dig. Ops. J.A.G., 529 XI A 2; Par. 112 a, P. 110, M.C.M., 1928)." (CM 201537, p. 94)

The Board then said:

> "* * * The Board of Review is of the opinion that the statute of limitations may be set up by an accused as a bar to his trial or punishment either by a special plea, or by evidence of the statute and its applicability introduced under a plea to the general issue, but that without such evidence a plea of not guilty, as in the instant case, does not assert the bar of the statute. Under the present Manual for Courts-Martial it is no longer mandatory, as it was under the Manuals of 1917 and 1921,

that it appear of record that the president of the court (1917 and 1921) or the law member (1921) advised the accused of his legal rights as to the statute of limitations in each case tried by general court-martial in which, upon the face of the record it appeared that he might successfully plead the statute, but had not done so. The present requirement for the protection of the rights of the accused under such circumstances is merely the directory one that the military counsel of his own selection, or the defense counsel, will, before the trial, explain to the accused in an appropriate case his right to plead the statute of limitations, and that such explanation will be made regardless of the intentions of the accused as to how he will plead. There is no requirement that it appear of record that such a duty was properly performed by military counsel for the defense, and, in the absence of such a requirement, the prescription that it be performed 'before the trial' removes it entirely from the record. In the absence of an affirmative showing to the contrary, it may be presumed that such military counsel performed not only this duty but the other general duties of his office prescribed by paragraphs 43 b and 45 b, Manual for Courts-Martial, since the law presumes that public officers duly perform their official functions, and this presumption continues until the contrary is shown. Dig. Ops. JAG, 1912, p. 529, XI A 2." (CM 201537, p.95-96)

5. In the instant case the accused pleaded not guilty to the Charge and its Specification. The accused did not raise the question of the applicability of the statute of limitations nor interpose the bar of the statute under his plea of not guilty. There is nothing in the record to show that he was informed that he could successfully have pleaded the statute of limitations in bar of a part of the offense charged. The failure of the record to show affirmatively that the accused was informed by the court or his counsel that the statute of limitations was in any manner applicable to the offense with which he was charged, or available to him as a defense to any portion thereof, did not, in the opinion of the Board, affect the legal sufficiency of the record to support the findings of guilty under the Charge and its Specification.

The Board has not overlooked the holding in CM 217172, Rosenbaum, that a reviewing authority, after he had approved, in a case where more than two years had elapsed between the date of absence and the date of

arraignment of accused, only so much of the findings of desertion as involved a finding of guilty of absence without leave, was without power to consider such absence as a basis of punishment because punishment for such absence was barred by Article of War 39. That holding was premised upon the specific language of paragraph 87b, Manual for Courts-Martial, 1928, limiting the action of the reviewing authority. That restriction is based in logic upon the fact that the action of the reviewing authority in approving only so much of the findings as involve absence without leave, is taken after the trial has been completed, entirely in the absence of accused and in a situation where accused may not assert his rights. The paragraph does not purport to limit similarly the authority of the court to adjudge punishment where the accused is present and has, until the court finally adjourns upon his case, the opportunity of asserting his right in open court.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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

SPJGH
CM 231539

MAR 24 1943

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| UNITED STATES | ) | 76TH INFANTRY DIVISION |
| v. | ) | Trial by G.C.M., convened at Fort George G. Meade, Maryland, February 5, 1943. Dishonorable discharge and confinement for thirty (30) years. Disciplinary Barracks. |
| Private EUGENE CASARELLA (33345346) Company I, 385th Infantry. | ) | |

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REVIEW by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Eugene Casarella, Company I, 385th Infantry, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland, from about December 10, 1942, to about December 26, 1942.

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

Specification 1: In that Private Eugene Casarella, Company I, 385th Infantry, having received a lawful command

from 2nd Lt. LEO P. PEIFFER, his superior officer, to make his (the said Casarella's) bed, did at Fort George G. Meade, Maryland, on or about January 9, 1943, willfully disobey the same.

Specification 2: In that Private Eugene Casarella, Company I, 385th Infantry, having received a lawful command from 2nd Lt. LEO P. PEIFFER, his superior officer, to get up and get in line with the rest of the men, did at Fort George G. Meade, Maryland, on or about January 10, 1943, willfully disobey the same.

ADDITIONAL CHARGE II: Violation of the 63rd Article of War.

Specification: In that Private Eugene Casarella, Company "I", 385th Infantry, did at Fort George G. Meade, Maryland, on or about January 12, 1943, behave himself with disrespect towards Col. C. J. Mathews, his superior officer, by contemptuously remaining silent and refusing to answer questions asked of him by the said Col. C. J. Mathews.

The accused pleaded not guilty to all Charges and Specifications. During the trial the court granted a motion of the prosecution to amend the Specification of the original Charge by changing the date "December 10, 1942" to read "December 12, 1942" (R. 40). The accused was found guilty of all Charges and Specifications. He was sentenced, three-fourths of the members of the court present concurring, to be dishonorably discharged, to forfeit all pay and allowances due "and" to become due, and to be confined at hard labor for thirty years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks at Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that the accused was, on December 6, 1942, a patient in the Station Hospital, convalescing from an attack of pneumonia. It was determined by a physical examination, which included the taking of x-rays, that he had recovered sufficiently to have a three-day pass, and one was issued to him. He did not come back at the end of the three-day period but his family notified the hospital that he was ill. Accused also wrote from Scranton, Pennsylvania, on December 10 to an officer on the hospital staff, that he was sick,

and inclosed with his letter a copy of a certificate of a doctor. His pass was extended three days to December 12th. He never returned to the Station Hospital and did not report to his organization until December 26, 1942 (R. 17-20, 22; Ex. 1).

At about 7:20 a.m., January 9, 1943, Second Lieutenant Leo P. Peiffer, Regimental Prison Officer, entered the guardhouse where accused was then confined and found him still in bed. The officer pulled the blankets off him and told him to get up. He sat up on the bed with his feet hanging down to the floor, and did not stand up until ordered to do so the second time. When asked by Lieutenant Peiffer why he was not out of bed, he said "I am not going to work and I don't have to", and upon being told to get his shoes on and be ready to fall out with the rest of the men, the accused said "I refuse". Lieutenant Peiffer directed accused to have the bed made and be ready to fall out by the time he returned, and went out to give the prison guard some instructions. When he came back about twenty minutes later, he noticed that accused was lying on the bed again and that it was not made. He took accused around to the side of the bed and said to him "you make the bed right now", and accused replied "I refuse". Lieutenant Peiffer finished his inspection of the other prisoners, and assigned them to work. In the afternoon of the same day he talked with accused, read the "Article of War" to him, and persuaded him to make his bed and go to work (R. 23-25, 29).

The next day, January 10th, was Sunday, and accused was permitted to go to mass, under guard, at about 9 a.m. Afterward he was assigned to a work detail and went out with four or five other prisoners to clean up a building. After dinner, when the time came for the detail to go back to work and the prisoners had been lined up in the guardhouse in a column of twos, Lieutenant Peiffer found the accused lying on the bed in his cell. He told accused "to get up and fall out to work with the rest of the men", and "to get up and get in line with the rest of the men". The accused refused to do so, and said that he did not have to work because he had not yet been tried. The officer then sent the other prisoners out to work, called the accused into his office and, in the presence of the acting provost sergeant and the sergeant and a corporal of the guard, read to him the 64th Article of War. He then asked accused if he refused to work and the latter replied "yes" (R. 24, 27-28, 31-32).

On January 12, 1943, the prison officer reported the conduct of accused to the commanding officer of the 385th Infantry, Colonel C. J.

Mathews, who went into the guardhouse and to the bed on which accused was lying, spoke to him to ascertain whether he was awake, and asked him a number of questions. Accused did not answer and stared "in an insolent manner". When told by his commanding officer to answer him, accused remained silent and continued to stare "in an insolent and insubordinate manner". Colonel Mathews testified that the questions which he asked the accused were, "Are you awake", "Do you realize what you are doing by refusing to answer my questions", "Do you realize what it means to refuse to obey a superior officer", "have you had the Articles of War explained to you", and other similar questions. Accused was then in a prone position on the bed facing toward Colonel Mathews, who was only two or three feet away and looking him "in the eyes". Colonel Mathews went out to get a Medical Corps officer to make a physical examination of accused, and when he returned to the guardhouse the officer had already arrived and the examination was in progress. Accused was standing in the middle of the floor "perfectly rational and obeying the doctor's orders" (R. 25, 34-36).

The medical officer who examined accused at the direction of Colonel Mathews was Captain Robert Bandi. As Captain Bandi went in the cell block door at the guardhouse the accused, who was on his bunk, stood up and came over and started to talk to him. Accused was given a "routine" physical examination. He complained of a pain in the chest. Captain Bandi went over his chest very carefully, but with the "limited means" available, a stethoscope, palpation, "and so forth", could find nothing abnormal about him. However, accused kept complaining bitterly and it looked "as if he was not in the best of physical shape". Although Captain Bandi "could find nothing", he concluded that it would be best "to have a consultation on him". Captain Bandi testified that, at the time of the examination, accused was physically able to work and that there was nothing wrong with his hearing or eyesight (R. 36-37).

Major Irving Hyman, Medical Corps, a member of the Neuropsychopathic Section of the Station Hospital, also examined accused on January 12. Accused complained to him of pains and aches in his joints, palpitation, "headache and dizzy spells for four or five years". He said that he had consulted civilian doctors because of these symptoms and had been told that he was nervous. He also told Major Hyman that he had gone home on a pass but when he arrived had felt very ill; that he had called his civilian doctor and remained at home until he felt well enough to return

although he knew that he was overstaying his leave. The examination by Major Hyman revealed nothing of a physical nature to substantiate the complaints of the accused. He was cooperative and agreeable and answered questions readily and completely. With reference to the mental condition of accused, Major Hyman found that he was quite a nervous person and that he had "many hypochondriacal reactions manifested by these pains and aches all over his body and dizzy spells" for which no organic basis could be found. He could tell the difference between right and wrong. As to his ability to work, Major Hyman testified:

> "That is a matter of question as to the amount of work he might be required to do. He is rather a thin person and he has these complaints which are determined by his nervousness and he might feel that he couldn't do hard work and actually that might be so" (R. 37-38).

4. The defense offered no testimony. Defense counsel stated that the accused had been warned of his rights. When accused was asked by the president of the court if he understood his rights, and again if he wished to take the stand, the accused made no answer. The president then stated that it was assumed that he did not desire to make a statement in his own behalf. The president later again asked if accused desired to remain silent. The defense stated that the accused refused to answer. The president then stated that it was assumed that the silence of accused meant that he did not care to testify on his own behalf (R. 39-40).

5. It is clearly shown by the undisputed evidence that accused absented himself from his organization without proper leave from December 12, 1942, to December 26, 1942 (Spec., Orig. Chg.).

The evidence also amply supports the findings of the court that the accused, at the place and times alleged, willfully disobeyed the lawful commands of his superior officer (Specs. 1 and 2, Add. Chg. I). The officer gave accused a direct and definite command which the officer was authorized to give, to make his bed and to get up and get in line, respectively, and accused each time did not do and expressly refused to do the thing ordered. His attitude, as disclosed by the evidence, clearly was one of intentional and willful defiance of authority.

It was likewise established by the evidence that on January 12, 1943, accused behaved himself with disrespect toward his superior officer,

Colonel Mathews (Spec., Add. Chg. II).

> "The disrespectful behaviour contemplated by this article [63rd Article of War] is such as detracts from the respect due to the authority and person of a superior officer. * * *.
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> * * *
>
> "* * *. Disrespect by acts may be exhibited in a variety of modes—as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer. (Winthrop)" (par. 133, M.C.M., 1928).

The deliberate, insolent and defiant refusal of the accused to answer the questions addressed to him by the commanding officer of his regiment under the circumstances, constituted disrespectful behaviour within the meaning of the 63rd Article of War.

6. When asked if he desired to introduce individual counsel, accused at first remained mute but after he had been told by the president of the court to answer, he replied "I don't know". The president then said "All right; he doesn't care to". Thereafter, as a "special plea" the defense made a timely request for a continuance of one week on the ground that "he [accused] desires to introduce individual counsel which as yet has not arrived and he further desires to introduce witnesses on his own behalf, his private physician". According to the undisputed testimony of a number of witnesses called by the prosecution in opposition to the continuance, accused had been given ample opportunity prior to the trial to procure individual counsel. The use of the telephone in the guardhouse, with complete privacy and free long distance telephone service, had been offered to him. The defense made no showing that accused had attempted to make arrangements for additional counsel either military or civil or that he could or would procure such counsel if the continuance were granted (R. 3, 7-15).

It was not shown that the private physician of the accused, the only proposed witness specifically mentioned by the defense, was a material witness, that due diligence had been exercised to secure his testimony or attendance, or what facts accused expected to prove by him.

The law member did not rule on the application for a continuance, but the court closed and upon reopening the president announced that by secret written ballet, two-thirds of the members present concurring, "the plea for a continuance is overruled" (R. 15).

The action of the court was irregular. The application for a continuance was an interlocutory matter other than a question of the admissibility of evidence, upon which the law member should have ruled, subject to objection by any member of the court (pars. 51a, b, M.C.M., 1928).

However, there was no showing of reasonable cause for a continuance on the ground of the absence of a witness (par. 52c, M.C.M., 1928). Moreover it affirmatively appears that, since at least two-thirds of the members of the court voted against granting the continuance, a ruling of the law member favorable to the accused could not have been sustained. The procedural irregularity, therefore, did not prejudice any substantial right of accused.

7. The charge sheet shows that accused is 22 years of age and that he was inducted into the military service at Wilkes-Barre, Pennsylvania, on June 3, 1942.

There is no maximum limit of punishment for willful disobedience in time of war of the lawful command of a superior officer (Specs. 1 and 2, Add. Chg. I) (par. 104c, M.C.M., 1928), nor for absence without leave committed after December 1, 1942 (Chg.) (Ex. Order # 9267, Nov. 9, 1942). The maximum authorized punishment for behaving with disrespect toward his superior officer (Add. Chg. II) is confinement at hard labor for 6 months and forfeiture of two-thirds pay for a like period.

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 and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

NOTE: Lieut.Col. Elwood W. Sargent signed the rough copy of this review (contained in file), but left for an overseas station before the review was retyped in final.

Lester S. Hill, Jr.,
Colonel, J.A.G.D.,
Chairman, Board of Review No. 1.

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



SPJGK
CM 231610

APR 29 1943

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| UNITED STATES | ) | 102ND INFANTRY DIVISION |
| v. | ) | Trial by G.C.M., convened at Camp Maxey, Texas, February 8 and 9, 1943. Dishonorable discharge and confinement for thirty (30) years. Penitentiary. |
| Private PAUL O. MONTOYA (38169890), Antitank Company, 407th Infantry. | ) | |

REVIEW by the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Paul O. Montoya, Anti Tank Company, Four Hundred Seventh Infantry, did, at Hugo, Oklahoma, on or about January 2, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anus with Oscar Dean Williams, a boy, age 12 years.

Specification 2: In that Private Paul O. Montoya, Anti Tank Company, Four Hundred Seventh Infantry, did, at Hugo, Oklahoma, on or about January 16, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anus with Troy Le. Douthit, a boy, age 12 years.

Specification 3: In that Private Paul O. Montoya, Anti Tank Company, Four Hundred Seventh Infantry, did, at Hugo, Oklahoma, on or about January 17, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anus with Richard Randolph, a boy, age 10 years.

Specification 4: In that Private Paul O. Montoya, Anti Tank Company, Four Hundred Seventh Infantry, did, at Hugo, Oklahoma, on or about January 23, 1943, commit the crime of sodomy, by feloniously and against

the order of nature having carnal connection per anus with Billy Bell, a boy, age 13 years.

Specification 5: In that Private Paul O. Montoya, Anti Tank Company, Four Hundred Seventh Infantry, did, at Hugo, Oklahoma, on or about January 2, 1943, with intent to commit a felony, viz, sodomy, commit an assault on Oscar Dean Williams, a twelve year old boy, by willfully and feloniously placing a knife blade against chest of the said Oscar Dean Williams.

Specification 6: In that Private Paul O. Montoya, Anti Tank Company, Four Hundred Seventh Infantry, did, at Hugo, Oklahoma, on or about January 16, 1943, with intent to commit a felony, viz, sodomy, commit an assault on Troy Le. Douthit, a twelve year old boy, by willfully and feloniously grabbing him by the shoulder and threatening him with a knife.

Specification 7: In that Private Paul O. Montoya, Anti Tank Company, Four Hundred Seventh Infantry, did, at Hugo, Oklahoma, on or about January 17, 1943, with intent to commit a felony, viz, sodomy, commit an assault on Richard Randolph, a ten year old boy, by willfully and feloniously twisting his arm and shoulder.

Specification 8: In that Private Paul O. Montoya, Anti Tank Company, Four Hundred Seventh Infantry, did, at Hugo, Oklahoma, on or about January 23, 1943, with intent to commit a felony, viz, sodomy, commit an assault on Billy Bell, a thirteen year old boy, by threatening him with a knife and pushing him by the shoulder.

He pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and Specifications 1 to 7, inclusive, and guilty of Specification 8 except the words, "threatening him with a knife and ". 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 thirty years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence shows that the accused, a private in the 407th Infantry (R. 8), met Oscar Dean Williams, a twelve year old boy, at

about 7 o'clock in the evening, January 1 or 2, 1943, at the Yellow Cab Station, in Hugo, Oklahoma (R. 16, 18, 19, 26). Accused asked the boy if he wanted to make 50 cents by getting him, accused, a box. Apparently the boy was willing for he accompanied accused to a WPA project, a building in a rock bed (R. 19), where accused said there was a box (R. 20). Accused and Oscar Williams were alone at this place (R. 20). Upon their arrival accused "pulled a knife on" the boy and said "Let's do it." The boy said "What?" Accused replied: "You know what." (R. 21). Accused held the knife against the clothing on the boy's chest (R. 22, 31), and made him pull his clothes down to his knees and lie on the ground (R. 21, 22). The boy was afraid; he thought he would be killed (R. 32). Then accused "put his penis in" the boy's "rectum." It "actually entered into" his "rectum" (R. 22). After about 30 minutes accused let the boy up and the boy ran (R. 30).

At about 8:30 p.m. on a Saturday night, two or three weeks before the trial, which was held on February 8, 1943 (R. 35), accused met Troy Le Douthit, a 12-year-old boy, at the skating rink at Hugo, Oklahoma, and told him he would give him 50 cents to help carry a box to the bus station (R. 35-37). Troy consented (R. 37) and accompanied accused down one block from the skating rink, where there was a big bunch of Government tin (R. 38, 39). Here the boy stopped, about 15 feet from the pile of tin (R. 46), and said "there wasn't no box out there" and started back (R. 38). Thereupon accused grabbed the boy by the shoulder and "drawed" a knife on him (R. 38, 47, 48), saying to go along or he would kill him (R. 38). The knife was open and Troy believed accused would use it (R. 38-40). Accused would not let go of the boy and got him back to the tin pile by saying that if he "didn't go on back in there with him" he was going to kill him (R. 40). He then "made" Troy get down on his knees and pull "his clothes" off. As the boy said: "You would have done it, too, if he had a knife in your back." He then made the boy get on his stomach and, to quote the boy "he corn holed me" (R. 40). The boy explained what he meant by this expression: "put his penis in your anus" (R. 40) and "stuck his thing in" - - - inside of the rectum (R. 41). The boy continued: "It hurt so I told him I had to be excused after he had done it about half an hour." Accused then let him up (R. 41).

On a Friday evening, about three weeks before the trial, at about 8:45, Richard Randolph, ten years old, who lived at Hugo, Oklahoma, was outside the skating rink in Hugo (R. 55, 57, 58). The accused spoke to Richard, saying he would give him 50 cents to help him carry a box to "the taxi" (R. 57). Richard said "O.K.," and went with accused "down in back of the skating rink," when he asked: "Where is the box?" Accused replied "Over yonder." The boy said there was not any box over there and started to turn around and walk back but accused caught his arm and twisted it backward, hard enough

to make the boy do what accused wanted for he feared his arm might be broken "or something." (R. 58, 59) Accused then took Richard over behind "a bunch of tin close to the barn." There was no one else near at the time that the boy knew of. Accused was twisting his arm and would have hurt him had he "hollered." Then accused made Richard pull down his clothes and lie down; and, according to Richard "he went and stuck his penis in my rectum." The penis went inside his rectum. After about five minutes accused "got up off" the boy, and the latter pulled up his clothes, went over to the skating rink looking for his brother. His brother was not there, so Richard went home and told his mother "as soon as he got home." (R. 58-60)

Billy Bell, a 13-year-old boy, of Hugo, Oklahoma, was accosted by the accused down by the skating rink in Hugo, on a Saturday night, about January 23, 1943 (R. 66, 68, 71, 92, 93). Accused walked up to him and asked if he wanted to make 50 cents, that there was a package "over there" he wanted the boy to help him carry down to the bus station. The boy said "All right" and accompanied accused "over there behind that lumber building" where it was rocky, gravelly, and secluded. When accused got the boy there he told him "what it was all about." (R. 69) He said "I will give you a dollar to let me corn hole you." Billy replied: "No, I don't like to do that kind of stuff." Accused said he "would, too." Accused also told Billy that he had a knife in his back pocket. Accused did not draw the knife, but saying "come along," he shoved Billy until he got him around to the north corner of the hay barn. Accused "kind of had" him by the shoulder. Billy stated that he "couldn't break away," that he did not try, that he was "scared," explaining: "I thought he would kill me." (R. 69, 70) Accused then told the boy to pull down his pants. The boy evidently complied, explaining on inquiry that while accused did not say anything to him "about threatening" him and used a little, not much, force, he was afraid he might be killed, he - the boy - having "been hearing things." Accused "made me get down on the ground and then he corn holed me - he stuck his penis in my rectum," actually into his rectum, according to the boy. They remained back of the car barn five or ten minutes, when the accused let him up and the boy ran. He met Troy Le Douthit and they both went to the military police where they told what accused had done to them. (R. 71, 72, 90, 95) Later on the same day they brought the other two boys to the Military Police Station in Hugo (R. 98).

The next Sunday afternoon, January 24, 1943, accused was seen by Billy Bell in front of a store and followed to a "beer joint." Billy then went down and told the Military Police and they located accused and arrested him (R. 72, 95, 97, 103, 104, 108, 109.) At eight o'clock that evening (R. 96, 101), the four boys attended at the Military Police Station to identify their assailant. With the accused in the room were five or six military policemen and two or three other soldiers picked up off the street. Billy Bell came in

with his father. He identified accused as his assailant. He did not know accused's name, but he pointed him out (R. 95, 96, 98). Accused was "standing up in the office and several other soldiers were standing." Each of the four boys, one at a time, identified accused. "They all pointed him out and said that was the man" (R. 96, 101, 102).

As stated, on Saturday evening, January 23, at about 9 o'clock, Billy Bell and Troy Le Douthit had gone to the Military Police Station, in Hugo, Oklahoma, and complained to Corporal Lociaro, Acting Desk Sergeant, that they had been attacked. They said they had been molested, attacked, "forced by someone with a knife to take their pants down" (R. 94). The boys "attempted" to give a description of the man (R. 90-95). Later on, the same day, Douthit and Billy Bell brought the other two boys into the Military Police Station (R. 98). Oscar Williams testified that he made a report of this act "later" to LeRoy Thompson, "a boy that goes to school" (R. 23). Troy Le Douthit testified that he went to the "M. P.'s" the same night (R. 52, 53) and made complaint. He saw them in front of the skating rink and "they laughed" at him (R. 41, 53). After that he waited a little while and told Billy Bell who "turned it in to the M. P. Station" (R. 41, 92, 93). He also told his mother and Billy Mantoorth (R. 49, 53). Richard Randolph testified that he went on home, after the occurrence, and told his mother as soon as he got home (R. 59, 60, 62, 65).

Dr. Orin R. Gregg, a civilian physician of Hugo, and Public Health Director of Choctau and McCurtin, testified for the prosecution. He stated that on or about January 25, 1943, he examined the persons of Oscar Dean Williams, Troy Douthit, Richard Randolph and Billy Bell, by order of the Chief of Police (R. 76, 77). In the case of Oscar Dean Williams, he found "an abrasion at the upper angle of the anus, and the lower angle of the anus." In the case of Troy Douthit, "there was a dark spot on one side of the angle of the anus that looked very much like there had been a hemorrhage or was a hemorrhage, a good deal like a black eye". In the case of Richard Randolph, "in the upper angle of the anus" the doctor found an abrasion and "there were five or six large sores on his buttocks". About to testify as to the result of his examination of Billy Bell, the witness was interrupted by another question and he never completed his evidence on that point (R. 77, 78).

The interruption consisted of a question by the prosecution as to whether the doctor had an opinion as to what caused the dark spot found by him in his examination of Troy Douthit. The doctor testified that in his opinion the condition was caused by bruise or trauma (R. 78).

The doctor testified that in his opinion the large sores on the buttocks of Richard Randolph were caused by an infection (R. 78, 79, 81); that on January 25, he examined the person of accused and found "a lot of small sores, breaking—broken out spots on the front part of his body around the genital organs on the inside of the thigh"

(R. 80). The sores found on the accused "were infectious" (R. 81). The doctor also testified that an examination of Richard Randolph did not disclose sores of "this type" on any other part of his body (R. 82). On cross-examination Doctor Gregg said that it was impossible for him to state that there was a similarity between the disease of the accused and that of the boy without a microscopic examination (R. 85). Richard Randolph, recalled, testified that he had sores on his buttocks when the doctor examined him; that the sores "came on" "about a week after then", after "he cornholed me"; and that before then he had no sores like that on his body (R. 88).

At the time of his arrest, accused wore a ring with a green stone on the little finger of his left hand. (R. 97, 104, 134, 136-138; Ex. C). When Billy Bell was at the Military Police Station to identify accused at the time of his arrest, he was asked how he could identify the accused, Billy replied: "He had a green ring on his left hand, little finger." Then according to Corporal Lociaro, Billy: "pointed him out in the office—and the ring on his finger". (R. 96, 97) Each boy, except Randolph, testified that the man who assailed him wore this ring on his little finger. Randolph said that his assailant wore a similar ring. (R. 24, 43, 64, 65, 73, 74; Ex. C)

Accused told Lieutenant Colonel Randolph Gordon, investigating officer in the case, after being informed "of his rights to refuse to answer any questions—that any statement he might make could be used against him", that he spent Saturday night, January 16, 1943, in Hugo and that he returned to his company about 11 o'clock Sunday night, January 17 (R. 110, 111).

Private Martin Noon testified that he knew accused and saw him in Hugo on Saturday, January 23, 1943. He was in a beer garden between 3 and 4 o'clock. He also saw accused that night between 10 and 11 (R. 112, 113).

For the defense, Private Luis P. Saenz testified that he had been with accused to Hugo on two occasions, the last time having been January 2 (R. 115). He and accused left camp around 2:30 or 3 o'clock and remained in Hugo until about 12:30 "after midnight". He was with accused "pretty well all the evening" (R. 118), "making the beer joints around town", going to the carnival and the skating rink (R. 115-119). Saenz said that he left accused with two boys, soldiers (R. 120), at the skating rink while he went to a beer joint by himself and then returned to the skating rink when he met accused again with the two boys (R. 118-119).

On cross-examination, Saenz testified that it was around 8 or 9 o'clock at night when he went off to the beer garden by himself, that he was gone about half an hour (R. 119, 120).

Sergeant Manuel L. White, of accused's company, a witness for the defense, was in charge of quarters on January 16. It was his duty to see that the men signed out in the company book kept for that purpose. He stated that he could not state whether or not accused "signed out" on January 16, "there were so many signing out on that particular Saturday", that according to the book accused had not signed out on that date (R. 123, 124). Sergeant White said that while the rule required all men to sign out it was possible that it had not been done (R. 125).

The "sign out" book, of accused's company, received in evidence (R. 126; Ex. A), shows accused on January 2, 1943, out of camp at two o'clock, "Destination-Hugo", and "Time in-1:30". The next entry relating to accused's absence is dated January 3. After that, there is another absence, without date. Then follow January 7, January 9, and January 11, 1943, in order. A further and last entry for January bears no date. It shows a return to camp at 10:30. There are only two entries showing Hugo as the destination: January 2 and 9. The signout time for January 9 is 1:00 and the return is marked 10:00 (Ex. A).

Accused testified in his own behalf. He stated that he had been to Hugo three times, the 16th, the Saturday "that they picked me up", and when he went to Hugo with Private Saenz (R. 128). He and Saenz "went straight to a beer joint", then "went to a carnival, came back--went to a show--to the beer joint" and back to camp around 12:30 (R. 129). He and Saenz went to town a second Saturday. He signed out the second time. They left camp at five or six o'clock. That was the time he and Saenz met the two other boys. They had a room in Hugo where they went after going to "beer joints" (R. 129, 130). The third time accused went to Hugo was the following Saturday (R. 130, 131). That was the time when he was put "in the city hall" and asked questions, and when they brought up the "little boys" (R. 131). That time accused had not "signed out". Saturday he left camp with "this other guy", they went to one "beer joint" in Hugo and stayed drinking until it closed. Accused continued:

> "We had a room, we rented a room. That was Saturday and then Sunday we were still drinking. It was four o'clock I guess when they picked me up in that beer joint." (R. 131, 132)

Accused testified further that he did not have a breaking out or other sores on his legs "at that time". But when they took him to the guard house he put on heavy woolen underwear, and when he used that underwear it made his skin red. He stated that he was married and thought his wife was expecting a child. (R. 132, 133) Accused denied that he had even seen any of the "small boys" prior

to the time that he was confronted with them in the "police station" (R. 132, 138, 141).

On cross examination, accused said that January 2, 1943 was the first night he went to Hugo. He went with Saenz (R. 135). He went to Hugo two weeks later, the 16th, and remained over night (R. 135). He again went to Hugo January 23, the night before he was arrested in Hugo (R. 135).

4. Specifications 1, 2, 3, and 4, of the Charge allege, respectively, that accused, did at Hugo, Oklahoma, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anus, on January 2, 1943, with Oscar Dean Williams, a twelve-year-old boy; on January 16, 1943, with Troy Le. Douthit, a 12-year-old boy, on January 17, 1943, with Richard Randolph, a 10-year-old boy, and on January 23, 1943, with Billy Bell, a 13-year-old boy.

Specifications 5, 6, 7, and 8 of the Charge allege, respectively, that accused, did at Hugo, Oklahoma, with intent to commit a felony, viz., sodomy, commit an assault on January 2, 1943, on Oscar Dean Williams, a twelve-year-old boy, on January 16, 1943, on Troy Le. Douthit, a twelve-year-old boy, on January 17, 1943, on Richard Randolph, a ten-year-old boy, and on January 23, 1943, on Billy Bell, a 13-year-old boy.

The evidence is clear and persuasive that the accused was guilty of each Specification. Each boy told a story that contained every element necessary to make out the offense charged. The testimony was complete to show penetration in each case. Resistance in each case was overcome, or consent to the act was obtained, through force and by means of fear induced by the accused in displaying a knife and holding it against the chest of Oscar Dean Williams and in threatening to kill Troy Lee (referred to as Le. in the Specifications) Douthit, by twisting the arm of 10-year-old Richard Randolph, and by threatening Billy Bell with a knife which accused said he had in his hip pocket. Each boy feared either that he would be killed or would be injured.

There is corroboration of their stories in the evidence that all of the boys made "complaint" after the act. The first boy testified that he told a schoolmate, whom he named, "later". Troy Lee Douthit said he complained to the military police the same night on which he was assaulted. He also told his mother, and about a week later he again reported the matter to the military police. This last complaint was corroborated by them. Richard Randolph testified that he told his mother the same night. Billy Bell went immediately with his complaint to the military police and they corroborated his testimony as to this. There is in the record of trial medical corroboration

of the testimony of three of the boys that sodomy per anus was committed on them. The physician examined all four boys on January 25. He found abrasions in the upper angle of the anus in the case of Oscar Dean Williams and Richard Randolph. He found a dark spot on one side of the angle of the anus of Troy Lee Douthit, that looked as though there had been a hemorrhage, a condition caused by bruise or trauma. The doctor was asked if the condition of the Randolph boy could not have been caused by sitting down on a sharp instrument by accident, "slipping on a piece of glass". The answer of the doctor is significant not only with respect to the Randolph boy but with respect to the symptons of the other two boys whose condition he described. The doctor answered:

> "All I know is that it was more like a regular abrasion of the upper angle and the sitting on the piece of glass could not have got the glass clean up there." (Underscoring supplied) (R. 83.)

The sores which the doctor found on the buttocks of Richard Randolph, which came on after the assault, coupled with the fact that accused had a lot of "infectious" small sores around his genital organs, constituted circumstantial corroboration of the testimony of this boy.

The doctor was interrupted when he started to testify as to his physical examination of Billy Bell. There is no medical corroboration of Billy Bell. However, there is overwhelming proof that Billy Bell made immediate complaint, the same night of the offense, to the Military Police.

On the trial, each boy made positive identification of the accused as his assailant. At the military police station, there was in effect a line up, and each boy, brought in singly, pointed out the accused.

The testimony of the accused placed him in Hugo on the nights mentioned in the Specifications, January 2, 16, 17 and 23. However, the "signout book" had already shown him in Hugo on January 2; before the trial he had admitted his presence there on the nights of January 16 and 17; and his arrest in Hugo on January 24, the second day of a two day visit to Hugo, proved him there on January 23. A defense witness testified that he had been with accused on one of the earlier trips to Hugo, but this witness testified that there had been a good bit of prolonged drinking going on and that he left accused for about "half an hour," one time, at the skating rink, around 8 or 9 o'clock. It was about this time, generally, that the assaults occurred. The assailant of each boy, except Oscar Dean Williams, had met his victim at the skating rink.

5. The testimony of the four boys was competent. They were 12, 12, 10, and 13 years of age, respectively. The competency of a child witness under the age of 14 is not determined by the age of the child alone. It is within the discretion of the court whether or not it will accept the sworn testimony of a child. Hence the children, before being sworn, were carefully examined. They proved to be mentally alert, to have received religious instruction, and to know and realize their obligation to tell the truth. The result of their examination together with the character of their testimony, as shown by the record, demonstrated beyond question their comprehension of the questions put, their ability to receive just impressions of fact and to relate them truly, their memory, their accuracy, and their honesty. In receiving the testimony of the children the court did not abuse its discretion.

6. From the record, it appears that Specifications 1 and 5 were based on the same occurrence, as were Specifications 2 and 6, 3 and 7, and 4 and 8, respectively. The joinder of a specification charging sodomy with a specification charging assault with intent to commit sodomy, arising out of the same act, is not improper. Nor is it improper to punish for each offense. The act of sodomy is an offense. An assault for the purpose of committing sodomy on an unwilling person is a separate and distinct offense meriting separate punishment. There is no separately condemned offense which covers the accomplishment of sodomy by force, as there is in the case of rape.

In C.M. 187564, Roberts, et al., it was held that the offense of sodomy is separate and distinct from the offense of assault with intent to commit sodomy if committed by force on an unwilling pathic, although both offenses were part of the same transaction.

7. Considering each specification on the basis of the evidence which is applicable to it, the Board of Review is of the opinion that there was substantial evidence sufficient to warrant the findings of guilty. It was the province of the court-martial and the reviewing authority to weigh the evidence, judge of its credibility, and determine controverted facts.

8. The accused is 24 years old. He was inducted into service at Santa Fe, New Mexico, November 18, 1942. There was no prior service.

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 the sentence. Confinement in a penitentiary is authorized by Article

of War 42 for the offense of sodomy, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 107, Title 22, District of Columbia Code.

Andrew J. Copp, Judge Advocate.

Wm Trammell, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

SPJGN
CM 231636

MAY 4 1943

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| U N I T E D S T A T E S | ) | 7TH SERVICE COMMAND<br>ARMY SERVICE FORCES |
| v. | ) | Trial by G.C.M., convened at Fort Riley, Kansas, January 11, 1943. Dishonorable discharge and confinement for life. Penitentiary. |
| Private WILLIE CURTIS (37371411), Company C, 743rd Military Police Battalion (ZI). | ) | |

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REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willie Curtis, Company C, 743rd Military Police Battalion (Z-I), did, at Fort Riley, Kansas, on or about September 16th, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private First Class Kermit J. T. Callaway Jr., Company C, 743rd Military Police Battalion (Z-I), a human being by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. The offense was committed in time of war. 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 the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The evidence for the prosecution shows that about 10 o'clock on the night of September 16, 1942, in a latrine near the 743rd Military Police Area, at Fort Riley, Kansas, a group of soldiers, variously estimated at from 18 to 25, including the accused and the deceased, Private Callaway, were engaged in a crap game. The accused was on the east side of the table on which the dice were being rolled, and the deceased opposite him on the west side (R. 5-9, 11, 17-19, 25-26).

The deceased was shooting the dice. The accused had some money bet on the table at the same time. His bet was that the deceased would make his point. The dice rolled up on the money which the accused had bet, and stopped on seven; as a result, both the accused and the deceased lost their bets (R. 10, 26). The deceased remarked that if the accused "hadn't bet on the dice they wouldn't have come out on seven". "I had more money bet on the dice than you did", the accused protested, "I lost more money than you did". (R. 26) Then, according to the witness, Private Robert Alwood, 743rd Military Police Battalion:

> "Private Curtis first mentioned the words 'mother-fucker' and Calloway returned the words and said don't bet on my hand because you have no luck and through you I lose, and the words were returned back and forth by both parties. The same words were used by both parties. * * *" (R. 10).

Private Harry Williams' version of this phase of the same incident follows:

> "* * * Then they started the cussing between them.
> "Q. What did they say?

"A. Son-of-bitches and Mother so and so.
"Q. Do you know who first called the other one a son-of-a-bitch?
"A. It was exchanged about the same time. It seems like it was Private Calloway who used the first words.
"Q. But you think they exchanged words about the same time?
"A. Yes, sir." (R. 26-27)

The deceased left his place and started around the table toward the accused. The deceased was exchanging some money from one hand to the other and putting it in his pocket as he approached the accused, who stepped back from the table and faced him. The deceased "was coming around there pretty fast". According to one witness, "He looked as though he might have been a little hot or something;" according to another, "He acted pretty snotty like he was ready to fight any minute;" according to a third, he was merely walking "like he was going to take a leak or get a drink". When the deceased, with his hands in his pockets, reached the place where the accused was standing, the latter slashed out and struck the deceased with an open jackknife, having a blade three and a quarter inches long. "It was just like you were walking along right fast", an eyewitness testified, "and walked into somebody". As he struck, the accused repeated one of the obscene epithets which he and the deceased had recently exchanged, and stated that the deceased had better come straight with him— "or else". (R. 10, 11, 13, 16, 17, 19-21, 23, 24, 27-32)

The deceased, his face bloody, crumpled to his knees, beseeching help. With the exception of Privates Alwood and Elihue Miller (both witnesses at the trial), the crowd hurriedly dispersed, the accused among them. Alwood and Miller were supporting the deceased when Sergeant Henry Smith, 743rd Military Police Battalion, arrived, immediately after the stabbing. At that time, the deceased fell and "didn't speak any more". Sergeant Smith and the two privates carried him 50 or 75 yards. Then, according to the witness Alwood, "Somebody brought a pillow and they laid him down * * * and then the ambulance came and then a little later he was dead". No knife or other weapon was found on his body, nor at the scene of the encounter (R. 11, 14-16, 20, 24, 33-34).

Fifteen minutes later, the accused was discovered in bed in his tent, fully dressed, with "blood on his pants and a little on his shirt".

The knife, introduced in evidence at the trial, was picked up shortly afterwards in a corner of the Company D latrine, which was located between the accused's tent and the latrine where the dice game took place. The knife was closed and had blood stains on it. The blood had started to harden but was not thoroughly dry (R. 12, 35-39).

The next day, a medical officer performed an autopsy on the body of the deceased, which showed that death was due to a stab wound in the heart. There was also a slight laceration on the left side of the face of the deceased, deep enough to cause a flow of blood (R. 43-47).

The prosecution introduced two written statements, made and signed by the accused after proper warning, one on the day after the knifing, the other on September 28, 1942. In the first statement, the accused stated that he saw the deceased "trying to get his knife out", as he approached the accused; that he — the accused — got his knife out and hit twice at the deceased, the first time high, the second time low; that he could not say for sure that the deceased had a knife in his hand, but was under the impression that the deceased was going to attack him with a knife. In the second statement, he reiterated his impression that the deceased was going to attack him with a knife, and asserted further that the deceased

> "was getting close upon me so in order to try to keep him off of me I swung twice at him. * * * He was hot enough to do away with me if he could. I don't want to stab him, I don't have nothin against him, but I don't want him to stab me either * * * His hand was out of his pocket when he got around where I was.* * * I couldn't tell if he had anything in his hands or not." (R. 41, 43; Ex. E-1; Ex. F-1).

4. The evidence for the defense shows that the deceased once threatened Private Clyde Law, 743rd Military Police Battalion, with a knife, after losing to him shooting dice, and that Private Law held him off with an iron. Private Law had discussed this matter with the accused. Private Lee Turner, Cavalry, once saw the deceased, in an argument over a dice game, take out a knife and open it, and put the knife back in his pocket, "like he was trying to slip up on somebody". Charges were pending against both these witnesses, who had been associates of the accused in the guardhouse, pending the latter's

trial (R. 49-51, 69-70).

5. The accused, having been properly advised of his rights, elected to take the stand under oath. He testified, in substance, that the deceased was opposite him at the dice table, and that someone else was shooting. The deceased had bet a dollar and the accused had bet five dollars that the dice "don't pass". When the dice passed, causing both the deceased and the accused to lose their bets, the deceased grabbed one of the dice, threw it on the table, and said, "I have never been able to win a thing with that nigger", whereupon the accused observed, "You only lose one dollar and I lose five dollars". The deceased leaned across the table and called the accused a "mother-fucker", and the accused returned the compliment. The deceased picked up his money, started around the table, and ran his right hand into his pocket. The accused attempted to back out of the door and get away — it would not have been a wise thing to turn his back on the deceased, because he believed he was coming around to knife him -- but, as he backed up, he bumped into the door itself, which opened inward, or into some other occupant of the crowded room, bent like the accused, on a hasty departure. By that time, the deceased was on him. The accused drew his knife and struck. The first time, he struck the deceased around the face; the next time, he swung low. After the first blow, the deceased had put up his hands. It was then that the accused noticed that the deceased had a knife. The accused's knife was lost in the scuffle. There were two cuts in the shirt which the accused wore that night; they had not been there before the encounter. The accused did not have time to face the door and "try and get out"; he could have tried, if he had left his money. The deceased had the reputation of being a hard loser. The accused, in another dice game, saw the deceased get in an argument, take a knife out of his pocket, open it, and put it back in his pocket, but the fight was stopped by a lot of fellows. In response to a question by a member of the court, "Did you say Calloway made the first pass at you with the knife?" the accused replied, "Yes". (R. 55-68)

6. The Specification alleges that the accused, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation killed the deceased by stabbing him with a knife.

The act of the accused in plunging his knife into the heart of the deceased the instant the latter came within striking range manifests a state of mind comprised within the meaning of the term "malice aforethought," the existence of which is corroborated by the remark uttered

by the accused as he struck, that the deceased had better come straight with him — "or else".

In spite of the exchange of verbal insults which immediately preceded the killing, there is no evidence that the fatal wound was inflicted in the heat of sudden passion caused by adequate provocation. The only issue raised by the testimony is self defense.

> "* * * To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * *. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can." (par. 148a, p. 163, M.C.M., 1928)

The prosecution's evidence is convincing that the deceased was unarmed, and that, in approaching the accused, he was shifting money from one hand to the other and putting it in his pocket; further, that when the accused first struck, the deceased's hands were in his pockets. The testimony of eyewitnesses, on these points, is substantially corroborated by the admissions of the accused after the killing, properly introduced in evidence, in which the accused says he saw no weapon on the deceased, although he believed, when he struck, that the deceased had one. The issue of "reasonable grounds" was raised by the evidence, and if the court's findings of guilty are based on the court's determination that "reasonable grounds" did not exist for the accused's alleged belief that it was necessary for him to slay the deceased in order to save his own life, such determination is amply sustained by the evidence.

The findings might also be based on the court's determination from the evidence, that the accused had not retreated as far as he safely could have before delivering the fatal stab. There is a preponderance of the evidence to sustain this determination. While the accused testified he felt it would not be safe to turn his back on the deceased during the latter's approach, and also that he did attempt to back out of the door but was impeded, three eyewitnesses testified that he merely stepped back from the table and faced the approaching deceased in a manner which enabled

him to strike instantly and effectively the moment the deceased arrived within striking range. The room was crowded, and the deceased and the accused were on opposite sides of the table. The deceased came around the table on the side opposite the open door. The accused, if he had had any disposition to retreat, had, for a brief space at least, a very favorable opportunity, as well. His testimony that he could have tried if he had left his money, contradicts his earlier testimony that he did try, and corroborates the effect, in this regard, of the testimony of the prosecution's witnesses.

The prosecution introduced competent evidence to establish every element of the offense charged, ample to sustain the court's findings of guilty of the Specification and the Charge.

7. The accused is about 32 years of age. He was inducted at Jefferson Barracks, Missouri, July 10, 1942. His record shows no prior service.

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 and the sentence. A sentence either of death or of imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Chas. T. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
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| UNITED STATES<br><br>v.<br><br>Private HERBERT JOHNSON (33206050), Company C, 779th Military Police Battalion. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NORTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND<br><br>Trial by G.C.M., convened at Fort Winfield Scott, California, February 11, 1943. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks. |

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HOLDING by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

Specification: In that Private Herbert Johnson, Company C, 779th Military Police Battalion, having received a lawful command from 1st Lieutenant Wilfred Als, his superior officer, to return to the guard house, did, at Camp Ashby, Berkeley, California, on or about February 2, 1943, wilfully disobey the same.

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

Specification: In that Private Herbert Johnson, Company C, 779th Military Police Battalion, did, at Camp Ashby, Berkeley, California, on or about February 2, 1943, threaten to strike Sergeant Ollie Harris, a noncommissioned officer, with a bottle, while said Sergeant Ollie Harris was in the execution of his office.

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

Specification: In that Private Herbert Johnson, Company C, 779th Military Police Battalion, did, at Camp Ashby, Berkeley, California, on or about February 2, 1943, with intent to do him bodily harm, commit an assault upon Corporal Adolph Barnes with a dangerous instrument, to wit, an ax.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction of being drunk and disorderly in a public place in violation of Article of War 96 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, 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 evidence is legally sufficient to support the findings of guilty of Charge I, of Charge II, and of the Specification under each.

4. The only question requiring consideration is whether the evidence is legally sufficient to support the findings of guilty of Charge III and of the Specification thereunder.

The evidence for the prosecution in pertinent part shows that on February 2, 1943, at Camp Ashby, California, after visiting "practically all afternoon" in the barracks of Company B, 779th Military Police Battalion, accused became involved in a disturbance which eventually culminated in his being forcibly ejected from the building by Corporal Adolph Barnes. Barnes pushed him up against the wall beside the door, and although the accused resisted by pushing back, forced him on out through the doorway. While the disturbance was still in progress, Sergeant Joseph E. Johnson had gone out to report it to the officer of the day. First Lieutenant George S. Franklin, Officer of the Day, with First Lieutenant Richard Spies, the commanding officer of accused, and two members of the guard, immediately went to the quarters of Company B, and entered the building by the south door. Sergeant Johnson came back with them, pushed the door open for the others, and was the last to enter. It was then about 9:20 o'clock in the evening (R. 9, 24-25, 33, 41, 50-51).

In the meantime, accused had gone to his own quarters, picked up an ax, and returned with it, in "Something like two or three minutes". He also came to the south entrance of the building and stepped in "right behind" Sergeant Johnson. He stood just inside the doorway, holding the

ax in the reverse position of port arms, his left hand grasping the handle near the end, about even with his left hip, and with his right hand gripping the handle a few inches below the head which was opposite his right shoulder (R. 25, 34, 53, 58).

Sergeant Johnson testified that as accused came in accused said "Barnes why did you hit me in my face?", and that accused and Barnes were only about five or six feet apart. However, he also testified that Barnes was then sitting on the corner of his bunk next to the "eave" and that he, Sergeant Johnson, was standing between them (R. 25-27, 29).

Corporal Barnes testified that he was sitting on his bed, the third one from the door on the west side of the room "right by the stove", when accused stepped in and said "Where is that God damned Barnes?", and that the distance between him and accused was "about ten feet * * *. It was the distance from the door to about where the stove is. * * * It looked ten feet or better". When accused made the remark above quoted, Barnes immediately went back down the "hall of the barrack" and picked up a brick (R. 32, 34-35).

Accused did not follow or attempt to follow Corporal Barnes. Lieutenant Spies engaged accused in conversation, walked up, took hold of the handle of the ax with both hands, and after "10 or 15 seconds" when accused relaxed his grip, took the ax away from him. Lieutenant Spies then grasped accused firmly by both arms just below the shoulders, the guard detail gathered around, and accused was taken to the guardhouse. Accused had been drinking; "he had had a few drinks", but was not drunk (R. 28, 44-46).

According to the testimony of Lieutenant Franklin, when accused came into the barracks, accused was only three or four feet from Lieutenant Spies. Lieutenant Spies testified, however, that he (Lieutenant Spies) was then standing "Right at the stove, with one hand on the stove". Lieutenant Spies further testified that the accused appeared to be tense and agitated, "seemed undecided just what to do as he first entered the building; he glanced around, apparently looking for someone * * *" and,

> "I said, 'Bruiser [the nickname of accused], do you know who I am?' I faced him and took a step or two— I was probably eight or nine feet away at that time. He said 'Yes, sir, Lieutenant'. I said, 'Tell me, what is all the trouble about?' And as I said that, I saw that he was sober enough to reason with and that he relaxed slightly; so I thought that was a proper time to take the weapon away from him, so I walked up to him and grasped the ax with my two hands."

As Lieutenant Spies approached him, the accused said "I will kill all them suckers" or "I will kill them suckers. They can't go pushing me around" (R. 43-45, 51).

It was clearly established by the uncontradicted evidence that accused did not advance into the building from the doorway, that he made no effort to push aside Sergeant Johnson to get at Corporal Barnes, and that he did not offer or attempt to strike Barnes with the ax or make any threatening gesture whatsoever toward anyone in the room. When asked on cross-examination whether accused had made "any threatening gesture at all", Lieutenant Spies replied "Not unless you call his attitude was menacing and the way he was holding the weapon was menacing, I would say, to everyone in the building; everyone, but no particular person" (R. 29, 31, 38, 48-49, 53).

6. The defense offered no testimony. The accused elected to remain silent (R. 62-63).

7. There is no competent proof that accused committed an assault upon Corporal Barnes as alleged in the Specification of Charge III.

> "An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. (Clark and Marshall) * * *" (par. 149l, M.C.M., 1928).

Preparation, a mere threat of violence and a purpose, however, fully indicated, to inflict a violent personal injury upon another, are not sufficient to constitute an assault. There must be an offer or an attempt or the unequivocal appearance of an attempt to commit such an injury, the commencement of some act which, if not prevented, would, in its apparent course, result in a battery. A menace of violence is not enough, for until the execution of the violence has actually begun, there can be no assault. (1. Wharton's Criminal Law, 12th Ed. 1097; 4 Am. Jur. 133; 5 C.J. 716; State v. Milsaps, 82 N.C. 549; State v. Painter, 67 Mo. 84; Merritt v. Commonwealth, 180 S.E. (Va.) 395; State v. Huber, 148 P. (Nev.) 562).

If it be assumed, as the circumstances tend to indicate, that accused entered the barracks of Company B for the purpose of striking Corporal Barnes with the ax, he did not, by any overt act, begin to carry his purpose into execution. His conduct as disclosed by the evidence for the prosecution did not go beyond preparation and a menace of violence.

8. The maximum limit of punishment for threatening to strike a noncommissioned officer in the execution of his office is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (Charge II). There is no maximum limit of punishment for willful disobedience in time of war of the lawful order of a superior officer (Charge I) (Par. 104c, M.C.M., 1928).

9. For the reasons stated, the Board of Review holds the record of trial legally insufficient 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, of the Specification, Charge II, and of Charge II, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____(Dissent)_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
(274) In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 231675

MAR 27 1943

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| UNITED STATES | NORTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND |
| v. | Trial by G.C.M., convened at Fort Winfield Scott, California, February 11, 1943. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks. |
| Private HERBERT JOHNSON (33206050), Company C, 779th Military Police Battalion. | |

DISSENTING OPINION by LYON, Judge Advocate

I am in complete agreement with the majority holding as to the law of this case. Our divergence of views grows out of the failure of the majority holding to apply the law as declared to to the evidence upon Charge III and its Specification,

I think that the testimony of Corporal Barnes, if true, fully warrants the findings of guilty of this Charge and Specification. According to the testimony of Corporal Barnes there was more than a mere threat of violence on the part of the accused. There was such a demonstration of force as to cause Barnes to leave his bed for safety. The principle is well established that not only is a person who offers or attempts by violence to injure another guilty of an assault, but no one by the show of violence has the right to put another in fear, and thereby force him to leave a place where he has the right to be. I think when the accused, whose reputation had won for him the name of "the Bruiser", went out and armed himself with an ax and returned to the barracks with the ax in a drawn or menacing attitude and said "Where is that God damned Barnes", "Barnes, what did you strike me for", all within a few feet of Barnes, and thereby forced Barnes to leave his bed; that "the Bruiser" committed an assault. The display of force under such circumstances, causing Barnes to do what he otherwise would not have done constitutes the assault.

Lucy G. Lyon Judge Advocate.

SPJGH
CM 231675

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War Department, J.A.G.O., APR 7 1943 - To the Commanding General, Northern California Sector, Western Defense Command, Presidio of San Francisco, California.

1. In the case of Private Herbert Johnson (33206050), Company C, 779th Military Police Battalion, I concur in the foregoing holding of the Board of Review. I recommend for the reasons therein stated that the findings of guilty of the Specification, Charge III, and of Charge III be disapproved. Thereupon you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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 231675).

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

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WAR DEPARTMENT
SERVICES OF SUPPLY
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WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.



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| U N I T E D S T A T E S | ) | FOURTH MOTORIZED DIVISION |
| v. | ) | Trial by G.C.M., convened at Camp Gordon, Georgia, January 29, 1943. Bearden: Acquitted. Lewis: Dishonorable discharge and confinement for forty (40) years. Williams: Dishonorable discharge and confinement for thirty (30) years. Penitentiary. |
| Privates JAMES BEARDEN (7003871), CHARLIE W. LEWIS (14027900) and LAVESTA E. WILLIAMS (7003889), all of Company L, 22nd Infantry. | ) | |

HOLDING by the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Charlie W. Lewis, Private Lavesta E. Williams, and Private James (NMI) Bearden, all of Company L, 22nd Infantry, acting jointly and in pursuance of a common intent, did, at Augusta, Georgia, on or about December 9, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private Joseph A. Brown, Band, 12th Infantry, United States currency, value about eighteen dollars ($18.00).

ADDITIONAL CHARGE AGAINST PRIVATES LEWIS AND WILLIAMS:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Charlie W. Lewis and Private Lavesta E. Williams, both of Company L, 22nd Infantry, acting jointly and in pursuance of a common intent, did, at Augusta, Georgia, on or about December 4, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of W. H. Tabb, United States currency value about twelve dollars ($12.00).

Specification 2: In that Private Charlie W. Lewis and Private Lavesta E. Williams, both of Company L, 22nd Infantry, acting jointly and in pursuance of a common intent, did, at Augusta, Georgia, on or about December 5, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private Estus N. Stewart, Company A, 83rd Chemical Battalion, United States currency, value about nineteen dollars ($19.00).

Specification 3: In that Private Charlie W. Lewis and Private Lavesta E. Williams, both of Company L, 22nd Infantry, acting jointly and in pursuance of a common intent did, at Augusta, Georgia, on or about December 5, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private Lacy Leroy Rodgers, Company A, 83rd Chemical Battalion, United States currency, value about one dollar ($1.00).

ADDITIONAL CHARGE AGAINST PRIVATE LEWIS:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Charlie W. Lewis, Company L, 22nd Infantry, did, at Augusta, Georgia, on or about December 10, 1942, wrongfully and unlawfully carry a concealed weapon, to wit, a blackjack.

ADDITIONAL CHARGE AGAINST PRIVATE WILLIAMS:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Lavesta E. Williams, Company L, 22nd Infantry, did, at Augusta, Georgia, on or about December 10, 1942, wrongfully and unlawfully carry a concealed weapon, to wit, a .25 caliber automatic pistol.

ADDITIONAL CHARGE AGAINST PRIVATE BEARDEN:

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

Specification: (Finding of not guilty).

Accused Lewis pleaded not guilty to the Charge and its Specification, not guilty to the Additional Charge against Privates Lewis and Williams, and to Specifications 1, 2, and 3 thereunder, and guilty to the Additional Charge against Private Lewis and its Specification. Accused Williams and Bearden pleaded not guilty to all Charges and Specifications. Accused Lewis was found guilty of all Charges and Specifications. Accused Williams was found

not guilty of the Charge and its Specification, guilty of the Additional Charge against Privates Lewis and Williams, and Specifications 1, 2, and 3 thereunder, and guilty of the Additional Charge against Private Williams and its Specification. Accused Bearden was found not guilty of all the Charges and Specifications. No evidence of previous convictions was introduced. Accused Lewis was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 40 years. Accused Williams was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to confinement at hard labor for 30 years. The reviewing authority approved the sentences, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. a. The evidence shows that accused, Charlie W. Lewis and Lavesta E. Williams were Privates, Company L, 22nd Infantry, at Camp Gordon, Georgia.

b. Charge, Specification: On December 9, 1942, Private Joseph A. Brown, Band, 12th Infantry, Camp Gordon, Georgia, went to Augusta, Georgia. He took a blouse to a store to be altered. Having to wait for about an hour and a half, he stopped in a "beer joint" where he bought a few beers. He had been sitting there for about five minutes, when accused Lewis entered. The two struck up a conversation. After fifteen or twenty minutes, accused Lewis said he knew a couple of girls and asked Brown to go along. After refusing at first, Brown went with him. They were walking along the street "above Broad", when "somebody or something step out from the corner of a building". Brown was hit with a blackjack and knocked to his knees. He was hit again and a finger was broken in three places. "Pretty groggy", Brown was not knocked out completely. One of the men stood over him with a gun, saying: "If you move I will drill you", and accused Lewis went through his pockets and took his wallet. They took between nineteen and twenty dollars. The "last thing" Brown remembered, he "seen them running" (R. 10-12). (Accused Williams was not recognized as one of the robbers and was acquitted on this Charge and Specification).

c. Additional Charge against Privates Lewis and Williams, Specification 1: On the night of December 4, 1942, W. H. Tabb, 1115 Cobb Street, Augusta, Georgia, a civilian, was returning to his home by bus. He got out the front end at Heard Avenue in Augusta, Georgia. Two soldiers got off the bus at the same time "at the back door". Tabb had gone about a block when "these boys ran by" him, "turned around and told" him "to stop". One of them "had a gun, or something hard like a gun". "So," according to Tabb, "one of them tried to put his hand over my mouth and said 'don't holler, we are not going to hurt you, we just want your money'". Tabb said "all right, in my pocket. Just go ahead and take it". They took at least $12 from Tabb. Tabb recognized accused as the two men who robbed him, ---- "they were right up to" him (R. 12-13).

d. Additional Charge against Privates Lewis and Williams, Specifications 2 and 3: On the night of December 5, 1942, Privates Estus N. Stewart, Lacy L. Rodgers and George T. Cairl, of Company A, 83rd Chemical Battalion, Camp Gordon, Georgia, were together in a restaurant on Broad Street, in Augusta (R. 15), drinking beer. "A boy", accused Lewis, came in and started talking to Stewart and Rodgers (R. 13, 14, 16). Accused Williams spoke to Cairl (R. 18). According to Cairl; "these fellows came up * * * and they started talking about women, they could get women" (R. 18). Cairl went to the latrine and when he returned Stewart, Rodgers and accused Williams were gone (R. 18). Accused Lewis had talked to Stewart and Rodgers and had said that there were a couple of girls "down there" they "could go see". They walked out with accused Lewis, went across the street, and turned down an alley. Stewart testified that at a corner, "one of them walked around with a handkerchief tied on his face". Stewart continued: "This guy took our money and told us to get going. We started on and I said, 'Rogers'* * *. We turned around and just as we got there they cracked us on the head" (R. 14). Stewart added that the man who "stepped up" had a small, shiny gun, "like about a .22", about the size of Exhibit "A" which was a gun subsequently found in the possession of accused Williams (R. 7, 8); that they took about $19 from him; that it was accused Lewis who hit him with what he "took it to be a brick bat"; and that during the robbery he actually saw accused Lewis reach in his (Stewart's)pocket and take some money out (R. 13-15). Rodgers, after relating that accused Lewis came in when Stewart, Cairl and he were drinking beer, and talked of the availability of some girls, testified: "We went on out, and went about a block * * * and got to a little alley and another guy walked out with a gun and said, 'get them up'". They took $46 from Rodgers. Rodgers stated that when he and Stewart left, accused Lewis did not go with them but "stayed right there", and that when he and Stewart came back "they were both there", "they were there together". Rogers also testified that accused Lewis "didn't take much hand in it until right at the last", that the man with the gun referring to accused Lewis, said, "I guess I can use that guy". Rodgers did not notice that the man with the gun searched accused Lewis. Whether accused Lewis took part in "the scuffle" that occurred when Stewart and Rodgers returned to the scene of the robbery, Rodgers did not know, "but", he said, "the little fellow with the gun walked beside me and about that time something hit me on the side of the face". He was hit on the side of the head and knocked down. Rodgers added, he did not know who hit him (R. 15-17). Meanwhile, when Cairl came out of the latrine he did not see accused Williams or Stewart and Rodgers. He "had an idea" where they had gone so he "went out of the place and walked around the corner and everything went black". When he woke up, he thought he was in the military police jail. He was not drunk, but he had a big bump on his head and about $19 was missing (R. 17, 18).

Exhibit "A" was a .25 caliber automatic, "a shiny gun" (R. 19) which Private Howard F. Saunders, Company L, 22nd Infantry, had loaned to accused Lewis with a clip of bullets in the gun, "just before he got into trouble"

(R. 19, 20). This gun shown, as Exhibit "A", to Stewart, on the stand, was declared by him to be similar in size to the small "shiny" gun which he described as carried by the man with the handkerchief over his face who stepped up and held up him and Rodgers (R. 14). Exhibit "A" was the gun for unlawful possession of which accused Williams was tried and found guilty under Additional Charge against Private Williams and its Specification, which Charge and Specification are discussed under paragraph 3e herein.

e. Additional Charge against Private Lewis, Specification, Additional Charge against Private Williams, Specification: On the night of December 10, 1942, Corporal Junius P. Foxworth and Private Dodson of the Military Police, Camp Gordon, were on patrol duty. They went to "Jack Dempsey's No. 3", on Sand Bar Ferry Road about 3:45 a.m. There, they questioned accused Williams about some blood on his blouse. Private Dodson searched accused Williams "mostly for whiskey bottles in his pockets". Nothing was found at that time. Accused Williams was arrested and taken to the police station in the reconnaissance car. He was placed by himself in the rear of the car on the small seat right behind the driver. Foxworth and Dodson rode in front. A few minutes before accused Williams was placed in the rear of the car, Foxworth had occasion to search the rear of the car. He turned up the seats to look for a piece of wire with which to make a repair to the car. He was positive, as a result of the search, that there was no gun in there at that time. When they placed this accused in the back of the car his blouse was buttoned. When they took him out of the car at the police station his blouse was unbuttoned. After turning accused Williams over to the desk sergeant to be held for investigation, the two military policemen returned to their patrol car. Dodson flashed his light in the back seat where accused Williams had been seated. Then the revolver was found. It was a .25 caliber automatic, small and nickel-plated. There was one round in the chamber and five in the clip. Received in evidence it was marked Exhibit "A". Twelve minutes elapsed between the time accused Williams was placed in the car and Exhibit "A" was found. No one other than accused Williams had been in there during that period. The car had been left alone "but some other M.P.s were standing out in front". Within seven to eight feet of the car were a city policeman and a sergeant from the air base. All the windows of the car were up except the back right window. After leaving the police station, Foxworth and Dodson went back to Jack Dempsey's No. 3 and then to a place called "Nicholson's". At the latter place, they found accused Lewis. He was searched and a blackjack was found in his possession, Exhibit "B" (R. 6-10).

4. Accused Lewis testified in his own behalf. He said that on December 5, he went to Augusta. He met three women on Broad Street. They asked if he could get somebody to go out with them. He said "yes" and went to a cafe and two boys were sitting at the counter drinking beer, "the two boys * * * was the two out here just a few minutes ago. * * * Rodgers is one of them" (R. 25).

He asked them if they wanted to go out. He said he had some women. They assented and the three left and walked down the street where accused had told the women to meet him. They stepped around a corner and "the guy" stepped out with a gun and said "hands up". They were told to turn around and then were robbed. Accused lost four one-dollar bills. Continuing, this accused related that after the robbery he was told to stand there, that he could be used, and the other two were told to go on. They started off and got twenty or more feet away when they came back, at which time "some guy stepped around the corner real quick and knocked one down and swung on the other" (R. 26). This accused said he was not with accused Williams at all on the night of December 5 (R. 27). Accused Lewis then testified that on December 9 he went to town and met a fellow in a cafe by the name of Brown. Brown was sitting at the bar "puking into a spitoon" (R. 26). Accused Lewis and Brown got acquainted. Brown had left a blouse some place to get fixed. They walked down there and it was not ready. They went to a place called the "Tropical Spot". There, Brown got into an argument with a negro and accused Lewis left Brown. A little later a negro accosted him and asked for some money. A fight ensued and this accused hit the negro in the face and got blood all over his hand. He then took two blackjacks from the negro, one of which was found on him when he was arrested at Nicholson's. After the fight with the negro, accused Lewis said he walked up Broad Street to a place called "Gaddy's" and met accused Williams. They went to Jack Dempsey's, where accused Williams was arrested. He then went to Nicholson's where he was arrested. Accused Lewis stated that on the night of December 4, he and accused Williams went to town together and stayed together all the time. They did "much of nothing" (R. 26) and returned to camp about 10 or 11 o'clock. Shown the gun, Exhibit "A", accused Lewis denied he had ever seen it "before the M.P.s showed it" to him (R. 27). On cross-examination, this accused again denied that he went to town with accused Williams on December 5 (R. 25-27).

Accused Williams testified that on December 4, after dark, he and accused Lewis went to town together. They "messed around", "Didn't do very much", and "came back to camp * * * around eleven o'clock * * * got back to the company before midnight" (R. 23). He said that he did not remember where he was on December 5, except he was not with accused Lewis that night. On December 9, he testified, he signed out and left camp sometime after 5 o'clock. He went to "Buddy's", a little liquor place. He stayed there 30 or 40 minutes and went to the "Belmont Restaurant" for supper. He then went to the "Deluxe Grill" in the 500 block on Belmont Street. He went to several other places and finally met accused Lewis at Gaddy's. From there they went in a cab to Jack Dempsey's. While there, Foxworth came in, asked him about some blood on his blouse and placed him under arrest (R. 22-24).

First Lieutenant James Kemp, Company L, 22nd Infantry, Camp Gordon, testified for accused Lewis. He regarded him a willing worker and an average soldier who had never given any special trouble. He had been with Company L,

22nd Infantry, since June, and did not recall ever having given accused Lewis company punishment. He had never received any complaints about him. (R. 20-21).

5. a. There was ample evidence to justify the findings of guilty against accused Lewis on each Charge and Specification. He was identified and proven an accessory to the robbery alleged in the original Charge and its Specification. He not only lured the victim to the scene but went through his pockets while his accomplice stood by with a gun. Accused Lewis was recognized and identified as one of the two assailants and robbers of the civilian, Tabb, as alleged in the Additional Charge against Privates Lewis and Williams, Specification 1. There was force employed, a hand held over the victim's mouth and the threat of an instrument that looked like a gun. The fact that the accused said "Don't holler, we are not going to hurt you, we just want your money", did not neutralize the threat of apparent, present ability to use force, if necessary, to accomplish the larceny. This was construed, and so intended, to mean: "Be good! And we shall not hurt you." With respect to the robbery of Stewart and Rodgers, as alleged in Specifications 2 and 3, respectively, of the Additional Charge against Privates Lewis and Williams, accused Lewis was identified by both Stewart and Rodgers as a participant. It was he who enticed the victims to the place where the robbery was consummated. Both agree that after the robbery he remained behind with the masked accomplice. And Stewart testified that he saw accused Lewis reach in his, Stewart's, pocket and that when he and Rodgers came back it was Lewis who hit him with something like a brick. As to the Additional Charge against Private Lewis, and its Specification which alleged that he did "wrongfully and unlawfully carry a concealed weapon, to wit, a blackjack", the evidence is clear that a blackjack was found in his possession, or on his person, at around 4 a.m. on December 10, 1942. Besides, he pleaded guilty to this Specification and Charge.

b. Accused Williams was found guilty of the Additional Charge against Privates Lewis and Williams and each of its three Specifications. The evidence was sufficient to justify such findings. The three Specifications each charge robbery. The proof as to the corpus delicti of the three robberies has been discussed herein. As to the question of whether, in these several robberies, accused Williams was an accessory: In the robbery of the civilian, Tabb, accused Williams was one of the two men who ran up, overtook Tabb, stopped him and ordered him to deliver. He was recognized and identified at the trial. It does not appear which one of the accused carried the instrument that looked like a gun, which one put his hand over Tabb's mouth, which demanded the money, or which went through his pockets. Both of the accused are proven to have come together, to have stood by together, to have acted together, to have gone away together. The act of one was the act of both. They were acting jointly. The two who robbed Stewart and Rodgers, as alleged in Specifications 2 and 3, were acting jointly. The act of the one, the force employed by one, was that of the other. It is clear that accused Williams was the robber who wore the handkerchief over his face. Accused Lewis and Williams both came into the restaurant

about the same time. While accused Lewis was talking "women" to Stewart and Rodgers, accused Williams was discussing the same subject with Cairl. It appears clearly that while Cairl was in the latrine, accused Lewis had departed with Stewart and Rodgers to keep a rendezvous which proved different than that which had been promised. When Cairl returned, accused Williams had also departed. He had arrived with accused Lewis and departed at the same time. It was he who reappeared and participated in the robbery, using the small, shiny revolver. This revolver had been loaned before the crime to accused Lewis. It was found after the robbery in the possession of accused Williams. To recapitulate: The revolver is loaned to accused Lewis. A short time before the robbery, accused Lewis and Williams enter the restaurant together. A few minutes before the robbery, accused Lewis is known to leave the restaurant in the company of the two victims; and accused Williams is known to have left the restaurant at practically the same time. There occurs the robbery, in which a small, low-caliber, shiny gun was used by the masked robber. Later, this revolver is found on accused Williams. The gun loaned to accused Lewis, transferred to accused Williams, and found in Williams' possession, turned out to be a .25 caliber small, nickel-plated automatic. As alleged in the Additional Charge against Private Williams and its Specification, accused Williams had in his possession at the time and place specified a .25 caliber automatic pistol. When accused Williams was arrested and cursorily searched on the morning of December 10, 1942, no pistol was found. If it was on his person at that time, as it later proved to have been, its discovery escaped that search because it was concealed. That it was in his possession is proven. Accused Williams was put in the back seat of a car where a search, just made, proved there was no gun. When this accused got into the car his blouse was buttoned. When he got out his blouse was unbuttoned. Almost immediately afterwards the gun was found in the back of the car. No one had been there save accused Williams. Further, that gun was proven to have been recently loaned to accused Lewis, a soldier in whose company accused Williams had admittedly been during the evening. Accused Lewis had not been near the car.

6. The offenses charged under Specifications 2 and 3, Additional Charge against Privates Lewis and Williams, do not constitute, legally, an improper multiplication of charges. True, the robbery of Stewart and Rodgers, separately specified, occurred at the same time and place. The force employed to accomplish both robberies was one and the same act. Had the offense charged been larceny, there should have been only one Specification employed (MCM, 1928, par. 27). Robbery, however, involves a trespass, in part, against the person, force against the person. In C. M. 192409 (1930) the accused in attempting to escape fired at his pursuers as a group and with the purpose of striking anyone of them. There the Board of Review held that separate specifications alleging assaults as to each man fired upon were proper, although the offenses arose out of the same transaction and resulted from the same shots. However in that case, which involved three specifications each charging assault "with intent to commit a felony, viz., kill", the maximum confinement at hard labor was sixty years

and the court imposed only ten years, which was reduced to five years by the reviewing authority. The court, there, undoubtedly treated the transaction as one offense.

In the present case, accused Lewis was found guilty of four specifications charging robbery. He was sentenced to confinement for forty years, the maximum period being ten years for robbery. Similarly, Williams found guilty of three specifications charging robbery was sentenced to confinement for thirty years.

Under the circumstances, for the purpose of punishment, the Board of Review is of the opinion that the robberies of Stewart and Rodgers charged in Specifications 2 and 3, respectively, of Additional Charge against Lewis and Williams, are substantially one transaction and have been made the basis for an unreasonable multiplication of charges.

> "If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect " (M.C.M., 1928, par 80).

7. Accused Lewis, as shown by the charge sheet, is 22 years old. He enlisted December 10, 1940. There was no prior service.

Accused Williams is 18 years old. He enlisted February 27, 1940. There was no prior service.

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 holds the record of trial legally sufficient to support the findings of guilty. The Board of Review also holds that since the findings as to Specification 2 and 3, Additional Charge against Privates Lewis and Williams, relate to what is substantially one transaction, that the record of trial is legally sufficient to support only so much of the sentence in the case of accused Lewis as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for thirty years, and to support only so much of the sentence in the case of accused Williams as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years. Confinement in a penitentiary is authorized by Article of War 42 for the offense of robbery, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 463, Title 18, United States Code.

Andrew J. Copp Jr., Judge Advocate

John Brandwell, Judge Advocate

See attached note, Judge Advocate

TE:

I concur in the foregoing holding because there was but one ct of putting in fear directed against the two victims. I am not prepared to hold that in every case where two or more people are robbed at he same time and place the maximum confinement is ten years. If, for xample, at the same time and place a robber should hit A and B over the ead with the butt of a revolver and injure each severely, it would seem mproper to limit the court to the maximum punishment permitted in a obbery involving violence toward A alone.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

MAY 11 1943

War Department, J.A.G.O., - To the Commanding General, 4th Motorized Division, Camp Gordon, Georgia.

1. In the case of Privates Charlie W. Lewis (14027900) and Lavesta E. Williams (7003889), both of Company L, 22nd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as to accused Lewis as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for thirty years, and legally sufficient to support only so much of the sentence in the case of accused Williams as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years, which holding is hereby approved. Upon vacation of so much of the sentence in the case of accused Lewis as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for thirty years, and upon vacation of so much of the sentence in the case of accused Williams as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years, you will have authority to order the execution of the sentences.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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:

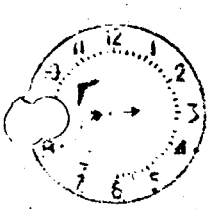
(CM 231710).

Myron C. Cramer

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

1 Incl.
Record of trial.

MAY 12 '43 AM



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

SPJGK
CM 231727

JUN 3 1943

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| UNITED STATES | NEW YORK - PHILADELPHIA SECTOR, NACF |
| v. | Trial by G.C.M., convened at Fort Hancock, New Jersey, February 11, 1943. Dismissal. |
| First Lieutenant JOSEPH B. WALTON (O-331845), Dental Corps. | |

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, 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 96th Article of War.

Specification 1: In that First Lieutenant Joseph Bernard Walton, Dental Corps, Medical Detachment, 245th Coast Artillery (HD), was at Fort Hancock, New Jersey, from on or about December 16, 1942, to on or about December 22, 1942, unable to perform his official duties as a result of over indulgence in alcoholic liquor this to the prejudice of good order and military discipline.

Specification 2: In that First Lieutenant Joseph Bernard Walton, Dental Corps, Medical Detachment, 245th Coast Artillery (HD), was at Fort Hancock, New Jersey, from on or about January 16, 1943, to on or about January 23, 1943 unable to perform his official duties as a result of over indulgence in alcoholic liquor this to the prejudice of good order and military discipline.

Accused pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and Specification 1 thereof and guilty of Specification 2 "except the words and figures 'January 23, 1943'; substituting therefor respectively the words and figures 'January 19, 1943'; of the excepted

words, not guilty; of the substituted words, guilty". Evidence of one previous conviction by general court-martial for being unable to perform his official duties during two separate periods as a result of overindulgence in alcoholic liquor, in violation of Article of War 96, was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused was a member of the Dental Corps, assigned to the Medical Detachment, 245th Coast Artillery (R.36,37). Major Thayne McManus, 1225th Dental Corps, testified that the Dental Corps was on duty from 8 a.m. "until we finish at night, until 4:00 o'clock", but when asked, "Are you not on duty twenty-four hours?", he replied, "Yes, sir" (R.15).

On the morning of December 16, 1942, Major Herbert Wendelken, Medical Corps, Commanding Officer of the Medical Detachment, 245th Coast Artillery (R.8; Pros. Ex. A), saw accused in bed in his quarters. In the opinion of Major Wendelken accused was "under the influence of alcohol" and "unfit for duty" from "over indulgence in alcohol" (R.9). Summoned to "look at" accused, Captain A. Van Buskirk, Medical Corps, Medical Detachment, 245th Coast Artillery, went to accused's barracks about 10 a.m. and found accused asleep. Captain Van Buskirk aroused accused. He testified that accused was "not in condition to report for duty", "not able to perform his duties", and "apparently under the influence of liquor" (R.13,14). Accused was taken to the station hospital, where he remained until December 22 (R.9,13; Pros. Ex. A). Lieutenant Colonel Logan M. Weaver, Medical Corps, Station Hospital, Fort Hancock, New Jersey, testified that accused was hospitalized for acute alcoholism and that from December 16 to 22 he was incapable of performing his duties because of acute alcoholism (R.33,34).

With reference to Specification 2, Major Wendelken testified that accused was on pass and that when he returned he was "under the influence of liquor" (R.9). Although witness referred to the date as January 16, 1943, he testified subsequently that the date was "approximate" (R.10), and undoubtedly accused's return from his pass was before January 16 and apparently was January 13, 14, or 15 (R.14). Witness stated that on the morning after accused's return, accused was "unable to do any duty" and that witness "left him in quarters" (R.9). In the opinion of witness accused was "unfit for duty" from "overindulgence in alcohol" (R.9). When witness returned to accused's quarters "that

evening", accused apparently had imbibed more liquor. Witness then had accused's meals sent over to him, "thinking that he might come out of it", and he "did seem to snap out of it", but "was hospitalized again for the same thing" (R.9).

On Saturday, January 16, in the evening (R.16), Major McManus saw accused at the Officers' Club Bar. As accused came toward Major McManus, apparently wishing to speak to him, Major McManus noticed that accused's eyelids "drooped", and that he was "a little bit wobbly and unsteady on his feet" (R.15). Accused was "weaving", not "limping" (R.16). Major McManus testified further that when accused spoke, he "did not articulate clearly" and "was not able to carry on an intelligent conversation" (R.15). In witness' opinion, accused was not fit for duty and was drunk (R.15).

On instructions from Lieutenant Colonel Weaver (R.15), Major McManus called Captain Nelson J. Dente, Medical Corps, 245th Medical Detachment, who was Medical Officer of the Day on January 16 (R.17), and directed Captain Dente to go to the barracks and take accused to the hospital. Arriving at the barracks about ten minutes after the call, Captain Dente found accused in bed. He told accused that he had come to take accused to the hospital and requested him to dress. Accused dressed himself and talked in an intelligent manner, although he did not want to go to the hospital and considered it unnecessary. Captain Dente examined accused thoroughly. He discovered an injury to the knee, about which accused complained, and in his opinion accused "was not fit for duty" because "under the influence of alcoholic beverages" (R.18,19).

Upon arrival at the station hospital accused was examined by Captain Mitchell Oestreich, Medical Corps, 1225th Medical Detachment, the officer of the day. Although Captain Oestreich found accused in "high spirits," he stated that accused "seemed to be able to control his faculties" (R.20). Captain Oestreich ordered a blood test to determine the alcoholic content of the blood, but he did not supervise or make the test himself (R.20,21). Apparently the blood was sent to the Second Service Command laboratory for a determination of the alcoholic content. There was introduced in evidence without objection a copy of the report from the Second Service Command laboratory, apparently signed by "S. Stern", a laboratory technician (R.22,24; Pros. Ex. C). This report revealed an alcoholic content of 2 milligrams per 1 cubic centimeter of blood (R.20,21,22; Pros. Ex. C). Captain John R. Gannon, Medical Corps,

Headquarters Detachment, 245th Coast Artillery, testified that a Major James J. Simmons, in his "laboratory procedure for the United States Army", has set the normal quantity of alcohol as 1.3 milligrams per cubic centimeter of blood (R.22). He testified further that according to the standard set by Major Simmons, accused was drunk (R.22). However, he stated that the reaction to a given number of drinks differs with the individual and that he had no opinion relative to accused's condition based on his own knowledge, since he had not done any work in this field "on his own" (R.23). Lieutenant Colonel Weaver testified that from January 16 through 19 accused's incarceration in the hospital was due to alcoholism and overindulgence in alcoholic beverages, by reason of which accused was incapable of performing his duties. His retention thereafter resulted partially from a knee injury (R.33,34). On January 17, witness told accused that the latter was unfit for duty (R.35). Accused was released from the hospital on January 23 (Pros. Ex. A).

The defense introduced no evidence relating to Specification 1. With reference to Specification 2 the defense produced evidence that on January 16 accused drank two or three Scotch and sodas at the Officers' Club bar and purchased a pint of rye whiskey which he took with him (R.27-30; Def. Ex. 1-6). He left the club four or five minutes after receiving the bottle of rye (R.30). Private John A. Riley, 245th Coast Artillery, bartender at the Officers' Club, testified that he formed no opinion with reference to "the sobriety" of accused "on that evening" and that had accused been "particularly under the influence of liquor", he would have noticed it (R.30,31).

4. It thus appears that the evidence relating to Specification 1 consists of statements by the three medical officers that accused was unable to perform his duties as a result of overindulgence in alcoholic liquor. The testimony of Major Wendelken and Captain Van Buskirk relates solely to December 16; that of Lieutenant Colonel Weaver covers the period from December 16 to 22. Major Wendelken and Captain Van Buskirk saw accused. They did not state the facts upon which their conclusions were based. This omission did not render their testimony incompetent.

The rule is stated by Wigmore as follows:

> "* * * there is no principle and no orthodox practice which requires a witness having personal observation to state in advance his observed data before he states his inferences from them; all that needs to appear in advance is that he had an

opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination * * *" (italics author's) (7 Wigmore, Evidence, 3rd ed., p. 20).

In accordance with the foregoing rule, the testimony was properly received and considered by the court. Since the witnesses were medical officers, they were qualified to give their opinions with reference to the subject matter.

The testimony of Lieutenant Colonel Weaver presents an additional problem. Although he was on duty at the station hospital, it did not definitely appear in evidence that he ever saw accused during the latter's sojourn there. It is entirely possible that his opinion was based upon the reports of other persons. We turn again to Wigmore for the rule. He writes:

"Observation of the matters to be testified to is an essential conception in the qualifications of every witness without exception * * *"

* * *

"* * * since the probabilities are all against a particular person, out of all persons, having been one to observe the particular matter in hand, it cannot be assumed that he is one of the few admissible persons, and his qualifications as to observation, or knowledge, must be made to appear beforehand. Such is the generally accepted rule.

"Hence, the witness, before he refers to the matter in hand, must make it appear that he had the requisite opportunities to obtain correct impressions on the subject * * *" (italics author's).

* * *

"Where this preliminary inquiry is omitted, the opposing counsel cannot afterwards object to it as a technical violation of rules; this is usually placed on the theory that the knowledge may be presumed, but it is more correct to place it upon the rule * * * that a failure to make objection at the proper time is a waiver of the objection. Yet where the subsequent course of the examination develops a total lack of opportunity of knowledge, no doubt the testimony may be struck out, on the ground that the waiver was merely of the requirement of the preliminary burden of proof, and not of the substantial qualifications of the witness" (italics author's) (2 Wigmore, Evidence, 3rd ed., pp. 756,758).

Under the above rule, the testimony of Lieutenant Colonel Weaver was incompetent unless failure to object to its admission constituted a waiver of the irregularity. As remarked by Wigmore, the failure to object would amount to a waiver in a civil court, but military law surrounds an accused with more firm safeguards. The Manual for Courts-Martial exemplifies this viewpoint in prescribing that "a mere failure to object does not amount to a waiver except as otherwise stated or indicated in this manual" (par. 126c, M.C.M.). The defense did not object to Lieutenant Colonel Weaver's testimony. Nothing in the Manual specifically provides that a failure to object under such circumstances amounts to a waiver. Consequently, the failure to object did not constitute a waiver and the evidence was incompetent.

Although the record fails to reveal direct evidence that accused had any specific duties on December 16 and the ensuing days, the duty hours of Dental Corps officers were in evidence, and this fact, together with the statements by Major Wendelken and Captain Van Buskirk that accused was unfit for duty, suffices as proof that there were duties to be performed, if such proof be necessary - a point which will be considered subsequently. December 16 fell on a Wednesday and the Board of Review has no doubt that there were duties awaiting accused. The specific duties for the performance of which accused rendered himself unfit need not be alleged (sec. 454(91), Dig. Op. JAG 1912-40) and in the opinion of the Board of Review they need not be proved in detail.

The evidence of Lieutenant Colonel Weaver being incompetent, there remains only the evidence of Major Wendelken and Captain Van Buskirk, for although the morning report was competent to prove the date of accused's release from the hospital, no inference may be drawn from it as to the reason for his protracted stay. The evidence of the two officers referred to was clear and uncontradicted that on December 16, 1942, accused was unable to perform his official duties as a result of overindulgence in alcoholic liquor, as alleged. Although, as noted, Lieutenant Colonel Weaver's testimony was incompetent, its admission did not constitute prejudicial error, for it was merely corroborative and the remaining evidence was sufficiently compelling to warrant the finding of guilty. Failure to prove accused's unfitness for the whole period alleged is not fatal error. The variance in time is immaterial (CM 230201, Eubanks).

5. With reference to Specification 2, Major Wendelken's testimony shows that on a date shortly before January 16, accused returned to his station under the influence of liquor and that on the next day he was unable to do any duty and was unfit for duty from overindulgence in alcoholic liquor. This testimony was not controverted. January 16

falling on a Saturday, accused's unfitness immediately prior thereto must have occurred on an ordinary duty day, and the remarks relative to proof of duty, made in discussing Specification 1, apply.

Because of the confusion in dates resulting from Major Wendelken's testimony, it cannot be said that the prosecution proved accused's failure to perform his duties during the ordinary duty hours on January 16. However, the prosecution proved that he had overindulged and as a consequence was unfit for duty on the evening and night of January 16 and that his unfitness continued into Sunday, January 17. Proof of unfitness for duty on the latter day rests upon Lieutenant Colonel Weaver's testimony that he saw accused and told him that he was unfit for duty. Implicit in this testimony is the fact that in Lieutenant Colonel Weaver's opinion accused was unfit for duty. The evidence of the defense witnesses with reference to accused's condition on Saturday evening is insufficient to controvert the clear and convincing evidence of the prosecution.

There is no evidence that the regular duty hours of the Dental Corps applied to Sundays, and accused's unfitness on Saturday, January 16, occurred after regular duty hours. However, Major McManus testified that the Dental Corps unit was on duty 24 hours a day. Apparently this meant that the members of the organization were subject to call at all hours and on all days. Under Article of War 85, certain officers, by reason of their official positions, are considered constantly "on duty", and therefore drunkenness upon their part automatically becomes drunkenness on duty even though the drunkenness occurs outside the routine hours of duty (par. 145, M.C.M.; CM 230201, Eubanks). The medical officer of a post comes within this category (Dig. Op. JAG, 1912, p. 127). The theory underlying the rule is that the very nature of the particular officer's job makes it imperative that he be continuously on call. The testimony of Major McManus places the officers of accused's dental unit within the 24-hour duty class. Like medical officers, they must be fit at all times to respond to calls. Article of War 85 is a serious offense, carrying mandatory dismissal among its punishments. If being on call 24 hours a day satisfies the definition of "on duty" in Article of War 85, it should with equal logic satisfy the definition of "duty" or "duties" in the offense of being unable to perform one's duties by reason of overindulgence in alcoholic liquors under Article of War 96. In each case it is enough that the position of the officer carry with it the requirement of constant readiness for a specific duty. If by reason of overindulgence in alcoholic liquor an officer on 24-hour duty unfits himself for a duty to which he is subject to call, he is guilty of the offense charged in the present

case. That accused put himself in that condition on Saturday evening and remained in the same state on Sunday is undisputed.

Except for his testimony relating to Sunday, when he saw accused, Lieutenant Colonel Weaver's testimony was incompetent for reasons already explained. There was no competent proof that by reason of overindulgence in alcoholic liquor accused was unable to perform his official duties on Monday, January 18, or Tuesday, January 19, as found by the court. True, he remained hospitalized during those days, but so far as appears, that may have been due to any one or more of a myriad of reasons. There is no presumption that the cause of his Saturday and Sunday indisposition carried over to the ensuing days. This is especially true because the evidence of accused's condition at the time of his admission to the hospital on Saturday night indicates that his drunkenness was not of an extreme degree.

Clearly, then, the evidence shows that shortly prior to January 16, 1943, and on January 16 and 17, accused was unable to perform his official duties by reason of overindulgence in alcoholic liquor in violation of Article of War 96. As in the case of Specification 1, the variance in dates between the findings and the proof is immaterial and does not affect the validity of the findings.

6. The report of the blood test (Pros. Ex. C) was properly admitted in evidence under an exception to the hearsay rule to the effect that an official statement in writing is admissible when the person making it had the duty to know the matter so stated and to record it (par. 117 a, M.C.M.). Although it was not affirmatively shown that "S. Stern, Tech, 2nd S.C. Lab.", who apparently signed the report, had the duty to know the matter so stated and to record it, the inference is inescapable that he, a technician, was the person who made the test and wrote a report of it. The report was authenticated by "J. Gannon, Capt.,M.C.". This was Captain John R. Gannon, Medical Corps, 245th Coast Artillery, Fort Hancock, New Jersey, who identified the document as a witness. It does not appear that he was the custodian of the original, as required by paragraph 116a, Manual for Courts-Martial, but improper authentication is waived unless objected to (par. 116a, M.C.M.) and there was no objection in the present case.

7. In the opinion of the Board of Review Captain Gannon's reference to Major Simmons' treatise about blood tests was improper. It is true that an expert may testify to knowledge which he has gained from a study of standard treatises on the subject, but it is essential that he be sufficiently experienced in the general subject to be able to estimate the probable soundness of the views expressed by the author (2 Wigmore,

Evidence, 3rd ed., sec. 665b). By Captain Gannon's frank admission he had done no work of his own in the field and therefore did not come within the principle stated. Furthermore, his reference to Major Simmons' work did not disclose that the latter stated categorically that an alcoholic content of 2 milligrams of alcohol per one cubic centimeter of blood necessarily proved drunkenness. However, Captain Cannons' testimony and reference to Major Simmons' manual did not prejudice accused. At most, the evidence was merely cumulative, and the court itself recognized the flimsy nature of the testimony by pointing out that the reference to the manual constituted hearsay and that the court wanted witness' own opinion (R.24).

8. In connection with Specification 1 there was admitted in evidence without objection a clinical report authenticated by Captain Gannon, reciting accused's admission to the hospital on December 16, and containing a diagnosis of alcoholism, acute and chronic (R.22, 24; Pros. Ex. B). This was clearly hearsay and inadmissible. It did not fall within the "official report" exception for there was nothing to indicate that Captain Gannon "had the duty to know the matter so stated" (par. 117a, M.C.M.). So far as appears, the diagnosis may have been made by some one else. Again, however, the evidence was merely corroborative and the error harmless.

9. Colonel Carl J. Smith, 245th Coast Artillery, president of the court, stated that he was familiar with the case, had instituted the charges, and had formed an opinion concerning the guilt or innocence of accused. He was excused and withdrew (R.5). Subsequently he became a witness for the prosecution. He testified that shortly after December 22 he received a report that accused was unable to perform his duties due to overindulgence in alcohol (R.25). Although this testimony was hearsay and inadmissible, the officers who saw accused on December 16 testified to the same thing and the error was harmless.

Colonel Smith then testified that he had accused brought to his office. He told accused that he "had taken the case up with higher authorities and that he (accused) would not be reclassified". He also told accused that if accused continued such conduct "he would eventually get discharged before a court martial" (R.25). Without doubt this testimony was irrelevant and improper, but since it had nothing to do with the issues and was merely the recital of a reprimand and warning administered to accused, the Board of Review does not believe that it influenced the court or injuriously affected the substantial rights of accused.

10. All the members of the court, together with the personnel of the prosecution and defense, joined in a recommendation of clemency addressed to the reviewing authority. The document is attached to the record of trial. The recommendation was that accused be permitted to resign from the service. It specifically stated that "no other form of clemency" was recommended. The reviewing authority disapproved the recommendation, and accused's "201" file discloses that it was disapproved by the Secretary of War.

Attached to the record of trial is a letter from accused's wife, Mrs. Joseph B. Walton, requesting clemency.

11. War Department records show that accused is 36 years of age. He attended St. John's College and graduated from Georgetown University School of Dentistry. On May 8, 1935, he was appointed a first lieutenant, Dental Corps Reserve. He was discharged from this commission on January 18, 1939, for failure to answer official communications. He was appointed a first lieutenant, Dental Corps, Army of the United States, on June 17, 1942, and entered upon extended active duty on July 2, 1942.

12. The court was legally constituted and had jurisdiction of the person and subject matter. 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 thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 11 1943 - 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 Joseph B. Walton (O-331845), Dental 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 sentence and to warrant confirmation thereof. 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 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 action.

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(Sentence confirmed. G.C.M.O. 181, 4 Aug 1943)

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

SPJGN
CM 231757

JUN 7 1943

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| U N I T E D S T A T E S | ) | EIGHTH SERVICE COMMAND<br>ARMY SERVICE FORCES |
| v. | ) | |
| Private WALTER J. BOHN (13116338), Headquarters Company, Engineer Unit Training Center. | ) | Trial by G.C.M., convened at Camp Claiborne, Louisiana, January 29, 1943. Death by hanging. |

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OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

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

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

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Walter J. Bohn, Headquarters Company, Engineer Unit Training Center, did, at Alexandria, La, on or about January 8, 1943, forcibly and feloniously, against her will have carnal knowledge of Esther E. Ruttkay (Mrs Frank W.)

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

Specification 1: In that Private Walter J. Bohn, Headquarters Company, Engineer Unit Training Center, did, at Alexandria, La, on or about January 8, 1943, unlawfully enter the dwelling of 2nd Lieutenant Frank W. Ruttkay, with intent to commit a criminal offense, to wit, assault, therein.

Specification 2: In that Private Walter J. Bohn, Headquarters Company, Engineer Unit Training Center, did, at Laexandria, Louisiana, on or about January 8, 1943, feloniously take, steal, and carry away lawful currency of the United States of the value of forty-six dollars ($46.00), the property of Eunice B. Davy.

Before the accused pleaded to the Charges and Specifications, the defense made a motion that the court inquire into the sanity of the accused. After evidence had been presented in support of this motion, the court overruled the motion and the accused then pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence, and forwarded the record of trial for action under Article of War 50½. The record has been reviewed as if forwarded under Article of War 48.

3. The evidence for the prosecution concerning the Charges of housebreaking and rape as presented by the testimony of the victim of the alleged assault shows that at about 11 o'clock on the morning of January 8, 1943, as Mrs. Esther E. Ruttkay, the wife of Second Lieutenant Frank W. Ruttkay and a bride of four months, was opening the back door of her apartment in Alexandria, Louisiana, to dispose of some garbage, she saw the accused walking along the street. Upon seeing the accused Mrs. Ruttkay decided to delay the disposal of her garbage until the accused had passed. The accused, however, did not pass, but came up the steps of Mrs. Ruttkay's apartment and asked for a glass of water. At this time the door of the apartment was open but the screen door was closed. In order to comply with the request of the accused, Mrs. Ruttkay left the accused standing on the steps and went into a room

adjoining her kitchen to get a glass. Upon returning to her kitchen, she found the accused standing in the room. Although Mrs. Ruttkay had not invited the accused into her apartment, she gave him a glass of water, thinking that he would leave after he had drunk it. The accused, however, began swaying and said that he was sick. Mrs. Ruttkay suggested that there was a doctor across the street, but the accused said, "No, I'll be all right". Mrs. Ruttkay then gave the accused half a glass of milk. He then asked for another glass of water. As Mrs. Ruttkay complied with this request, the accused took the glass from her, placed it on the table, seized her, pressed his thumbs against her throat, and said "Are you going to do what I want you to do now"? Mrs. Ruttkay freed herself and ran to the front door, but as she was unlocking it the accused struck her in the eye. In the struggle that followed she kicked and screamed for help. The accused ran his hand into his pocket and threatened to use a knife against her if she did not submit. Although he did not draw a knife Mrs. Ruttkay was afraid that he would kill her. The accused forced Mrs. Ruttkay to the floor and criminally assaulted her, accomplishing penetration. The accused held Mrs. Ruttkay on the floor with her head near a stone-gas heater. As she tried to edge away from the heater the accused "went out of position", and thereupon insisted that Mrs. Ruttkay take off her underclothes. The accused, however, proceeded to take them off himself. Mrs. Ruttkay then pleaded with him to permit her to get a cold wet cloth to place over her bruised eye. By promising that she would let him do whatever he wanted to do, she induced him to let her get up. The accused then handed Mrs. Ruttkay the glass of water and threw her a towel. As she was placing the towel over her eye and watching the accused in a mirror, she suddenly dashed through the front entrance, ran to her neighbor and requested her aid (R. 24-32, 63-64). Later during the same day, the military police brought the accused to Mrs. Ruttkay and she at once identified him as the person who had assaulted her stating when the accused was presented, "That is the man" (R. 29).

The testimony of Mrs. Ruttkay concerning her spontaneous recognition and identification of the accused was corroborated by the testimony of three witnesses who were present at the time she first identified him (R. 37, 42, 47, 48, 49).

The testimony of Mrs. Ruttkay showing the struggle which she had with the accused in her apartment was corroborated by the testimony of Mrs. Minnie Lindsey, who was in an adjoining apartment at the time.

Mrs. Lindsey testified that on the occasion in question she heard someone kicking the door, struggling, screaming, and begging for help in Mrs. Ruttkay's apartment. She also testified that she heard Mrs. Ruttkay call out "O God", that she ran into the hall but that she was afraid to open the door or go into the Ruttkay apartment because she thought Lieutenant and Mrs. Ruttkay were having a fight, that she then ran back into her room, and "about that time she (Mrs. Ruttkay) threw open my door and asked for help. She said there was a soldier in the house and that he had attacked her". Mrs. Linsdey testified further that Mrs. Ruttkay appeared to be very frightened (R. 33-36).

First Lieutenant Sidney Thier, the medical officer, testified that on January 8, 1943, he examined Mrs. Ruttkay, that she had a marked swelling of the right eyelid, right forehead, and right temporal region, and that the upper lid of the right eye was bruised and discolored. The medical officer testified further that although it is sometimes possible to determine by examination when a married woman has been criminally attacked, he found no evidence of such an attack in his examination of Mrs. Ruttkay (R. 37, 40).

The prosecution, through the testimony of Captain Robert E. Hobbs, medical officer, presented in evidence the results of the laboratory test determining that the stains on the fly of a pair of trousers which were brought for examination by a sergeant from Camp Beuregard on January 8, 1943, showed the presence of cells and mucuous of the vagina of a woman. Although the trial judge advocate had stated at the time of the reception of this testimony that he would later introduce additional evidence to show to whom the trousers belonged, no evidence was offered to establish such ownership or to relate the trousers to the accused (R. 19, 20).

4. The evidence for the prosecution concerning the Charge of larceny (Specification 2, Charge II) shows that, in the early afternoon on the same day as the events above described, the accused inserted his head into the parked automobile of Mrs. Eunice Davy, while it was parked in Alexandria, Louisiana, and asked if the car was a taxi. When he was told that it was not a taxi he backed out of the car but then proceeded to intrude again and asked "Is that a taxi behind you?" When Mrs. Davy had turned around to look the accused left the car, whereupon Mrs. Davy missed her purse, which contained $46 in money, a ration book, car keys, driver's license for New York State, and other articles (R. 51, 55).

On the same afternoon when the accused was arrested by a member of the Military Police it was found that he had $46 in bills in his possession. The accused was taken to Mrs. Davy and she identified him as the person who had intruded into her car. The accused later directed the police to the place where he had thrown Mrs. Davy's purse. The purse and some of its contents were repossessed by the police and subsequently identified by Mrs. Davy as belonging to her (R. 50, 56, 62, 63).

5. The accused, after his rights as a witness were fully explained to him, elected to remain silent, and no evidence was presented by the defense.

6. The Specification, Charge I, alleges that the accused did, at Alexandria, Louisiana, on or about January 8, 1943, "* * * forcibly and feloniously, against her will have carnal knowledge of Esther E. Ruttkay". This language appropriately alleges the crime of rape, one of the two crimes made punishable under Article of War 92.

Rape is defined as "* * * the unlawful carnal knowledge of a woman by force and without her consent" (M.C.M., 1928, par. 148b). The Manual for Courts-Martial, in discussing this definition, states that:

> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
>
> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent.
>
> "It has been said of this offense that 'it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.'" (M.C.M., 1928, p. 165).

When the evidence is examined in the light of the above definition, and the supplemental admonitions of caution presented in connection therewith, it becomes apparent that the accused is guilty of rape as charged.

The testimony of Mrs. Ruttkay shows that at the time and place alleged, the accused made a violent and brutal attack upon her, and by the use of force, and by threatening her life succeeded in having carnal knowledge of her against her will. Mrs. Ruttkay testified that she was afraid that the accused would kill her, that the accused forced her to the floor and accomplished penetration, and that before the sexual act was completed she escaped from the accused and ran for help.

The essential elements of the rape regarding the use of force in the accomplishing of penetration, and honest resistance by the victim are shown not only by the testimony of Mrs. Ruttkay, but by several corroborating circumstances — by the physical evidence of her beaten and bruised eye, by the testimony of Mrs. Lindsey showing that she heard Mrs. Ruttkay struggling with the accused and crying for help, and by the fact that when Mrs. Ruttkay ran from her apartment she was in a very frightened condition.

The identification of the accused by Mrs. Ruttkay as the soldier who made the attack was positive and unequivocal, and was shown by corroborating witnesses to have been made spontaneously.

Considered in its entirety, the evidence shows beyond any reasonable doubt every element of the crime alleged, and justifies the findings of guilty.

7. Specification 1, Charge II, alleges that the accused did, at Alexandria, Louisiana, on or about January 9, 1943 "* * * unlawfully enter the dwelling of 2nd Lieutenant Frank W. Ruttkay, with intent to commit a criminal offense, to wit, assault, therein".

In order to sustain the finding of guilty of housebreaking with intent to commit an assault, as alleged above, it is necessary that the evidence show that the accused had a specific intent to commit an assault at the time he entered the house (par. 149e, M.C.M., 1928).

Colonel Wigmore, in considering the problem of proving intent in connection with housebreaking, has made the following statement:

> "* * * If, for example, the charge is of breaking and entering with intent to steal, obviously 'intent' here signifies 'design', or 'plan', and whatever would otherwise be receivable to show Design would also be here receivable, - in particular, the conduct throwing light on the design of the person's entrance. * * * Intent as a separate proposition for proof does not commonly exist. * * *" (Wigmore on Evidence, Third Ed., Vol. II, sec. 242, pp. 38, 39).

An example of the application of the above logic is presented in the case of State v. Teeter (69 Ia. 718, 27 N.W., 485), wherein the court stated as follows:

> "* * * It often occurs in human experience that the mere fact that a particular act has been done affords the best evidence of the motive or intention with which it was done. If one was to break and enter a building which was known to be on fire, the reasonable presumption from his act would be that his intention was either to attempt the extinguishment of the fire, or the rescue of the property or persons within it. So, if one was to be found in the night-time in the act of breaking into a building in which money or property of great value was deposited, his act would give very strong evidence indeed of the motive or purpose which prompted it. ***."

Moreover, the above principle of proof was applied in the cases of CM 199369, Davis, and in CM 220805, Peavy.

The evidence shows very clearly that the accused, without authority or permission, opened the screen door to the apartment of Second Lieutenant Frank W. Ruttkay and wrongfully entered therein. The fact that Mrs. Ruttkay had gone from her back door to an adjoining room to get a glass of water for the accused gave him by implication no license, privilege, or permission to open the screen door and enter Lieutenant Ruttkay's apartment. The subsequent attack which the accused made upon

Mrs. Ruttkay reveals the feigned character of the pretexts which he employed in gaining entrance to her apartment and affords a rational basis for the inference that the entry into the apartment was accompanied by an intent to commit the assault actually committed. The evidence sustains beyond any reasonable doubt every element of the offense alleged.

8. Specification 2, Charge II, alleges that the accused did, at Alexandria, Louisiana, on or about January 8, 1943, "* * * feloniously take, steal, and carry away lawful currency of the United States of the value of forty-six dollars ($46.00), the property of Eunice B. Davy."

The offense of larceny is defined as:

> "* * * the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein" (par. 149g, M.C.M., 1928).

The evidence concerning this Specification shows beyond a reasonable doubt that the accused took and carried away the purse of Mrs. Eunice B. Davy, and its content of $46, knowing that such property belonged to Mrs. Davy, and with the intent of depriving her permanently of her property therein.

9. As previously stated, at the beginning of the trial, the defense moved the court to inquire into the sanity of the accused, and presented in support of its motion the testimony of two officers. At the completion of their testimony the motion of the defense was overruled.

Captain Charles N. Sarlin, Medical Corps, psychiatric section, Station Hospital, Camp Claiborne, Louisiana, testified that on the afternoon of January 26, 1943, he examined the accused along with 50 or 60 other patients. The witness testified further that he had been impressed by the vague and passive answers to questions directed to the accused concerning the charges against him, that the accused appeared to have a personality which manifested itself in inability to mix well with people, that he appeared to be in a condition "before insanity" which could break down into a form of insanity, and that he could not say from

his brief examination whether the accused was capable of judging right from wrong although he questioned his ability to do so (R. 7-9). On questioning by the court, the witness stated that he based his entire opinion upon the vagueness of the responses made by the accused, that his examination was superficial, that he had not made a diagnosis of the accused's condition, and that he could not tell if the accused had feigned insanity (R. 10-11).

Second Lieutenant Irvin Luthi, who appeared as a lay witness, testified that he was a personal consultant to the classification section, Camp Claiborne, and that for three months he had been giving mental tests to persons referred to him, that he had given the accused a Wechster Mental Ability Scale Test, which is the official Army individual test, and that the accused had an I.Q. of 130 and a mental age of 15 plus. The witness asserted that this score was "very superior" for a man of the accused's training. The witness explained further that in that part of the test dealing with moral character he found the accused's answers very disconcerting, and that he had concluded that the man "lacked certain moral judgment". As a lay witness he testified that the accused could distinguish between right and wrong. He also asserted that he thought the accused had made exaggerated statements to him (R. 14-17).

Although the above evidence is clearly not of such probative force as to create a reasonable doubt as to the sanity of the accused, it was suggestive of the desirability of his further examination. Subsequent, therefore, to the completion of the trial, the accused was on February 11, 1943, examined by a board of medical officers detailed for that purpose. Under the direction of this board consisting of Major Leon Ferber, Captain John J. Smerznak and Captain John J. Francis, all of the Medical Corps, the accused was admitted to the neuro-psychiatric section, Station Hospital, Camp Claiborne, Louisiana, for a period of observation. In connection with the board's examination, the accused, on February 16, was given a narcoanalysis (hypnosis with intravenous sodium amytal). The board reported the results of this examination and its conclusions concerning the sanity of the accused as follows:

> "In the hypnotic state the prisoner was questioned thoroughly and the result of the examination was as follows: While being prepared for the examination the patient became quite anxious and fearful, tears began to come from his eyes, and he said that he knew what this was for and seemed afraid. Under the influence of the medication, he said that he had maintained

an attitude of indifference and had answered questions vaguely to 'put a doubt in your minds about me being sane - - I did not want you to think I was insane - - I just wanted you to have a doubt in your minds about me'. At that time he became very emotional, said he was afraid of hanging and knew that he had no defense. He said that at the advise of his defense counsel he had made no statement at the trial although he desired to explain everything in detail. With further questioning, he recounted the whole period before, during and after the commission of the crime. For about a week before he committed the crime, he had been feeling nervous, went AWOL and began drinking on an average of three or four pints a day. He said that many of the things that occurred during that time were vague and mixed up to him. On the morning of the incident, he was feeling very badly and felt thirsty. He saw a woman walking out of her house and emptying garbage in her yard and he asked her for a glass of water. He then spontaneously said 'I would have asked any man for a glass of water because I felt so badly and was so thirsty' (apparently an indication that he had no intent to do wrong at this time). The woman then invited him into the house and gave him a glass of water. While he was drinking the water he noticed that her dress was well above her knees, the neck of the dress was cut very low, and that as she moved about her dress seemed to move up higher. Her attitude was friendly and while he was sitting at the kitchen table drinking his water, she went into the bed room and bent over to make up her bed. This stimulated him a great deal. When she returned to the kitchen she offered him a glass of milk and a sandwich which he accepted and they talked in a very friendly manner. He had an impulse to "grab her" and this he did. He said she objected to the embraces and kisses, but 'awful little'. He then lay her on the floor and when asked did she resist, he said 'not too much'. He said her cries were 'awful weak'. He then asked her to 'take off her pants'. She did cry out several times again but he said these cries were 'awful weak'. He had her underclothes about half off when she jumped up and ran to the door. He then struck her on the left side of the head with the palm of his hand. After this she did not cry

out again, offered no resistance at all except that before he made penetration of her vagina, she struck him severely on the penis. He then stated that she told him 'it was good'. After the act was completed she jumped up, cried out a few times and ran out the front door. He then ran out the back door. When questioned about the robbery he said that he had already done one bad thing and that he might just as well do another. He could offer no other reason for the robbery. He then decided to take a taxi cab and get out of town but did not wear his cap keeping it in his pocket and because of this he was arrested by the MP's. It was then that they realized that he was the soldier that was wanted. (His explanation for not wearing a cap was vague and unsatisfactory). During this examination under medication, he showed no evidence of being insane.

"On the morning of February 17, 1943, he was confronted by members of the board with all the information he had given under narcosis and frankly admitted that his behavior before had been feigned to put doubt 'as to his sanity' in the minds of the examiners. His thinking was perfectly well intergrated and he showed no evidence of insanity.

"In the Psychiatric evaluation of this patient there is evidence of emotional conflict and instability throughout his past adjustment. Beginning in early childhood an unfavorable home environment contributed to his emotional conflicts. Much of his mal adjusted behavior in maturity is a result of these early emotional difficulties. He himself is unaware of these conflicts which motivate his asocial behavior.

"OPINION OF THE BOARD: (1) Prisoner WALTER J. BOHN is not insane at this time nor was he insane at the date of occurrence of the crime on January 8, 1943.

(2) He was able to distinguish between right and wrong on January 8, 1943 and can also distinguish between right and wrong at the present time.

(3) The crime being due to an impulsive behavior, it is apparent that on the date of occurrence of the crime, January 8, 1943, he did not have the ability to depart from the wrong and adhere to the right, although at the present time he does have the ability to depart from the wrong and adhere to the right."

Thereafter on March 23, 1943, the accused was again examined by a board of medical officers at La Garde General Hospital, New Orleans, Louisiana, consisting of Major Henry W. Brosin, Captain George S. Ingalls, and Captain Hanson H. Leet, all of the medical corps. The report of this board was approved by Colonel William H. Smith. This board presents a history of the accused as follows:

"PRESENT ILLNESS: The history from the patient and other sources indicates that the patient's present illness began in his childhood. He has always had a 'hard time;' he has no memory of his early life experiences to the age of 8. He was restless, unable to concentrate for long periods of time, and preferred outdoor activities to the school room. He was poorly disciplined and was truant frequently from school, appeared in the Juvenile Court, Wilkes Barre, in December, 1930, in January, 1931, and was committed to the Kis-Lyn Industrial School for boys in February, 1931, for repeated truancy.

"There was considerable conflict between the patient's mother and his stepfather, so that the home was usually in a turmoil. The patient also was in conflict with his stepfather and was considered to be 'always in the wrong.' At age 16 the patient and some other boys of his age spontaneously agreed to run away from home. They returned, however, after a few days, but during the time they were gone the parents of the other children complained to the patient's parents that he had led them astray. After this the patient said that he felt that there was not any use in trying to live right; he said that he would 'make a "bum" out of himself' and started on a life of self-degradation and self-destruction. He began to drink heavily and would consume large quantities

of whiskey. He had a craving for whiskey and would drink for several weeks at a time. During these periods he frequently got into fights, would come home, fly into a rage because dinner was not ready, destroy the furniture, and would be arrested for disorderly conduct on complaint of his mother. Beginning October 13, 1938, there is a record of eight arrests for crimes including highway robbery, robbery and aggravated assault and battery, disorderly conduct, threats, capias, vagrancy, and malicious mischief. He served numerous sentences in the Luzerne County Prison, the longest, 2 to 4 years, beginning October 25, 1938. On September 8, 1942 when the patient was arrested for malicious mischief, arrangements were made for him to join the Army rather than serve a jail sentence."

After a lengthy narration of observation concerning the accused this Board made the following findings:

FINDINGS:

1. Diagnosis: Constitutional Psychopathic state; Criminalism; Chronic.
2. Condition did exist prior to entry into the Service.
3. Was not incurred in line of duty was was not due to causes incident to the Service.
4. The patient was sane on January 8, 1943, and is sane now.
5. Patient understood the nature and quality of his acts on January 8, 1943, and does so now.
6. The patient was legally responsible for his acts on January 8, 1943, and is so now."

In addition to the above examinations of the accused, he was examined by Lieutenant Colonel Franklin G. Ebaugh, Medical Corps, Neuropsychiatric Consultant, Eighth Service Command, who summarized his findings as follows:

"Summary and Diagnosis.

"The ten-year history of truancy, vagabondage, alcoholism, stealing and various types of aggressive, provocative, antisocial conduct with a pattern of impulsivity is typical of

a Constitutional Psychopathic State, with Chronic Criminalism. From a legal point of view he is sane and has the ability to distinguish right from wrong and refrain from doing wrong. He is sane now and was so at the time the criminal act was committed January 8, 1943. He is a dangerous individual who will continue to act out his impulses in criminal activities. He should not have been inducted into the Army in the first place; and the coercive attitude of the jurist (if correct), as well as the acceptance of this man following induction examination, is most reprehensible."

While the record of this case was being reviewed in this office the board of officers, at the request of the Acting Assistant The Judge Advocate General reconsidered its original findings and on May 20, 1943, made the following report:

"The Board, after reconsideration, finds that:

"1. Diagnosis: Constitutional Psychopathic State; Criminalism; Chronic.
2. Condition did exist prior to entry into the Service.
3. Was not incurred in line of duty and was not due to causes incident to the service.
4. The patient was sane on January 8, 1943 and is sane now.
5. The patient understood the nature and quality of his acts on January 8, 1943, had the ability to distinguish right from wrong and to adhere to the right at the time of the commission of his offense.
6. The patient was legally responsible for his acts on January 8, 1943, and is so now."

10. Each of the medical reports concludes that the accused could distinguish right from wrong on the date upon which he was examined and on January 8, 1943, the date of the alleged crime. Likewise, each report concludes that the accused was not insane. Although Major Ferber and Captains Smerznak and Francis in their report of February 11, 1943, state that the accused could not because of his impulsive behavior, depart from the wrong and adhere to the right on January 8, 1943, the report of Lieutenant Colonel Ebaugh, and the report of Major

Brosin and Captains Ingalls and Leet, with the approval of Colonel Smith, clearly and unequivocally state that the accused could on January 8, 1943, both distinguish right from wrong and adhere to the right. The opinions of the above medical experts are corroborated in part at least, by the record of the accused's acts on January 8, 1943, which clearly reflect conduct of a sane individual. From the entire record, including the above medical reports, the conclusion is justified beyond a reasonable doubt that the accused understood the nature and quality of his acts on January 8, 1943, that he had the ability at that time to distinguish right from wrong and to adhere to the right, that he was sane and legally responsible for his acts, both at the time of his trial and at the time of the commission of the alleged offenses.

11. The charge sheet shows that the accused is 26 years of age, that he enlisted on September 14, 1942, for the duration of the war plus six months, and that he has had no prior service.

12. 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. A sentence of death or imprisonment for life is mandatory upon a conviction of rape, in violation of Article of War 92.

Chas. L. Lesson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Shafer, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 12 1943 - 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 Private Walter J. Bohn (13116338), Headquarters Company, Engineer Unit Training Center.

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 thereof. In view of the nature of the crime committed, and the previous record of the accused, as recorded in his medical history, of robbery, aggravated assault, and other offenses, I recommend that the sentence of death be confirmed and carried into execution at a time and place to be designated by the reviewing authority.

3. Consideration has been given to the attached letter from Mrs. Helen Bohn, dated May 24, 1943, addressed to the President and referred to this office by The Adjutant General.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should such action meet with approval.

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

4 Incls
Incl 1 - Record of trial
Incl 2 - Draft of ltr for sig. Sec. of War
Incl 3 - Form of Executive action
Incl 4 - Ltr fr Mrs. Bohn, 5-24-43

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(Sentence confirmed. G.C.M.O. 151, 19 Jul 1943)

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



SPJGK
CM 231925

MAY 6 1943

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| UNITED STATES | ) | 3RD AIR FORCE |
| v. | ) | Trial by G.C.M., convened at Barksdale Field, Louisiana, January 15, 1943. Dishonorable discharge and confinement for twenty (20) years. Disciplinary Barracks. |
| Private CHARLES R. LYONS (20714389), Company C, 634th Tank Destroyer Battalion. | ) | |

REVIEW by the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 69th Article of War.

Specification 1: In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Gp., Armored Force School, Fort Knox, Ky., having been duly placed in confinement at Fort Knox, Kentucky, on or about August 11, 1942, did at Fort Knox, Ky., on or about August 19, 1942, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Group, Armored Force School, Fort Knox, Ky., having been duly placed in confinement at the Post Guardhouse, Barksdale Field, La., on or about September 11, 1942, did at, Barksdale Field, Louisiana, on or about October 5, 1942, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Group, Armored Force School, Fort Knox, Ky., did at Fort Knox, Kentucky, on or about August 19, 1942, desert the service of the United States, and did remain absent in desertion until he was apprehended at Shreveport, Louisiana, on or about September 11, 1942.

Specification 2: In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did, at Barksdale Field, Louisiana, on or about October 5, 1942, desert the service of the United States, and did remain absent in desertion until he was apprehended at Monroe, Louisiana, on October 8, 1942.

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

Specification 1: In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did, at Shreveport, Louisiana, on or about August 24, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

The Peoples National Bank Little Rock Ark.
~~THE FIRST NATIONAL BANK OF SHREVEPORT~~ 84-2
Peoples National Bank of Little Rock (written)

Shreveport, La., August 24 1942 No.___

Pay to Barksdale Military Supply or order $10.00

Ten and no hundred ---------- DOLLARS

Capt.
#0072436

(Signed) Frank C. Butler

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Shreveport, Louisiana, on or about August 25, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

The Peoples National Bank Little Rock Ark.
Peoples Nat. Bank Little Rock, Ark.
THE FIRST NATIONAL BANK OF SHREVEPORT 84-2
Shreveport, La., ~~April~~ August 25 1942 No. —

Pay to Barksdale Military Supply or order $10.00

Ten & no hundreds ---------- DOLLARS

Capt. (Signed) Frank C. Butler
0072436

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Shreveport, Louisiana, on or about August 29, 1942, with intent to defraud, false make in its entirety a certain customers draft in the following words and figures, to wit:

CUSTOMERS DRAFT

COMMERCIAL NATIONAL BANK 84-1
in Shreveport

Shreveport, La. August 29 1942

PAY TO THE ORDER OF

The Glass Hat $20.00

Twenty & no hundreds ---------- DOLLARS

For value received and charge to account of with exchange

TO 1st Nat. ~~Bank & Trust Co.~~ )
Cincinnati )
~~Cincinnatti~~, Ohio )
0074368 64696

(signed) Frank C. Butler
Capt.

which said customers draft was a writing of private nature, which might operate to the prejudice of another.

Specification 4: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Shreveport, Louisiana, or about August 31, 1942, with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

~~The F~~

~~COMMERCIAL NATIONAL BANK~~ 84-1
in Shreveport

SHREVEPORT, LA., 8/31 1942

On Demand PAY TO THE ORDER OF

Cash ---------- $25.00

Twenty Five and 00/100 ----------DOLLARS

For value received and charge to account of with exchange

TO The First Nat Bank

& Trust Co. of Cenncinatti (Signed) Frank C. Butler

Ohio 0074369 C. P. T.

CUSTOMERS DRAFT

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Specification 5. In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Shreveport, Louisiana, on or about September 1, 1942, with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

CUSTOMERS DRAFT

COMMERCIAL NATIONAL BANK 84 - 1
in Shreveport

Shreveport, La., Sept. 1 1942

On sight PAY TO THE ORDER OF

The Glass Hat Bar $25.00

Twenty Five & no hundreds DOLLARS

For value received and charge to account of with exchange

TO First Nat Bank )
of Cinncinati Ohio ) (Signed) Frank C. Butler

0074369

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Specification 6: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company Training Group, Armored Force School, Fort Knox, Kentucky, did at Shreveport, Louisiana, on or about September 1, 1942, with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

CUSTOMERS DRAFT

COMMERCIAL NATIONAL BANK 84-1
in Shreveport

Shreveport, La., Sept 1 1942

On Sight PAY TO THE ORDER OF

Cash $25.00

Twenty five & no hundreds ---------- DOLLARS

For value received and charge to account of with exchange

TO First Nat. Bank )
of Cinncinati Ohio ) (Signed) Frank C. Butler

0074369

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Specification 7: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Bossier City, Louisiana, on or about September 2, 1942, with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

CUSTOMERS DRAFT

BOSSIER STATE BANK
Bossier City, La. 84-398

Sept. 2 194 2

PAY TO THE ORDER OF

CLUB CORONADO $20.00

Twenty and no/100 * DOLLARS

value received and charge to account of with exchange

TO

First Nat Bank of

Cinncinati Ohio

(Signed) Frank C. Butler
A.S.N. 0074369

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Specification 8: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Bossier City, Louisiana, on or about Sept., 3, 1942 with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

BOSSIER STATE BANK
Bossier City, La. 84-389

CUSTOMERS DRAFT

On Demand 9/3 194 2
Pay to the Order Of
CLUB CORONADO $20.00
Twenty and no/100 DOLLARS
Value received and charge to account of with exchange

TO Firt Nat Bank of )
Cincinati Ohio )

(Signed) Frank C. Butler
A.S.N. 0074369

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Spedification 9: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Bossier City, Louisiana, on or about September 3, 1942, with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

BOSSIER STATE BANK
Bossier City, La. 84-398

CUSTOMERS DRAFT

Sept. 3 194 4
PAY TO THE ORDER OF
CLUB CORONADO $30.00
DOLLARS
Value received and charged to account of with exchange

TO
First Nat Bank of )
Cinncinat Ohio )

(Signed) Frank C. Butler
A.S.N. 0074369

(324)

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Specification 10: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Shreveport, Louisiana, on or about September 4, 1942, with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

CUSTOMERS DRAFT

COMMERCIAL NATIONAL BANK 84-1
in Shreveport

Shreveport, La., Sept. 4 194 2

On Sight PAY TO THE ORDER OF

Cresent Jewelry Co. $100.00

One hundred & no hundreds ---------- DOLLARS

For value received and charge to account of with exchange

To Marquette Nat. Bank )
Los Angeles Calif. ) (Signed) Carlton Lavell

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Specification 11: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at Bossier City Louisiana, on or about September 5, 1942, with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

CUSTOMERS DRAFT

BOSSIER STATE BANK
Bossier City, La. 84-389

9/5 194 2

On Demand

PAY TO THE ORDER OF

CLUB CORONADO $66.00

Sixty Six and no/100 ---------- DOLLARS

Value received and charge to account of with exchange

TO

First Nat Bank )
of Cinncinati, Ohio ) (Signed Frank C. Butler

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Specification 12: In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Gp., Armored Force School, Fort Knox, Kentucky, did at Bossier City, Louisiana, on or about September 7, 1942, with intent to defraud, falsely make in its entirety a certain customers draft in the following words and figures, to wit:

~~First~~
~~BOSSIER STATE BANK~~
Bossier City, La. 84-398

On Sight Sept 7 1942
Pay to the order of
CLUB CORONADO $25.00

Twenty five & no hundreds DOLLARS
Value received and charge to account of with exchange

TO
First Nat Bank )
)
Of Cinncinati Ohio ) (Signed) Frank C. Butler
Sereal 0074369

which said customers draft was a writing of a private nature, which might operate to the prejudice of another.

Specification 13: In that Private Charles R. Lyons, Company "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, did at New Orleans, Louisiana, on or about September 9, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures to wit:

HOTEL ROOSEVELT
Pride of the South

New Orleans, Louisiana Sept 9 19 42

Name of Bank Lebanon, County Bank

City Lebanon, Ohio

Pay to the Order of Leon Miller $395.50

Three hundred & ninty five & fifty hundreds DOLLARS

For Value received, I represent that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof. (N.P.) (14-10)

Signature /s/ George C. Carling
Street Lebanon City Ohio

which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Spedification 1: In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Gp., Armored Force School, Fort Knox, Kentucky, with intent to defraud the Barksdale Military Supply, did, at Shreveport, Louisiana, on or about August 24, 1942, unlawfully pretend to the Barksdale Military Supply Company that he was a certain Captain Frank C. Butler of the United States Army, well knowing that such pretense was false, and ny means thereof did fraudently obtain from the said Barksdale Military Supply Company merchandise in the sum of six dollars ($6.00) and cash in the sum of four dollars ($4.00).

Specification 2: In that Private Charles R. Lyons, C. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Group, Armored Force School, Fort Knox, Ky., with intent to defraud the Barksdale Military Supply Company, did, at Shreveport, Luisiana, on or about August 25,1942, unlawfully pretend to the Barksdale Military Supply Company that he was a certain Captain Frank C. Butler of the United States Army, well knowing that such pretense was false, and by means thereof did fraudently obtain from the said Barksdale Military Supply Company cash in the sum of ten dollars ($10.00).

Specification 3: In that Private Charles R. Lyons, C. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Gp., Armored Force School, Fort Knox, Ky., with intent to defraud the Glass Hat Bar & Grill, did at Shreveport, La., on or about August 29, 1942, unlawfully pretend to Lynn Oliver, proprietor of the Glass Hat Bar & Grill that he was a certain Captain Frank C. Butler of the United States Army, well knowing that such pretense was false, and by means thereof did fraudently obtain from the said Lynn Oliver, doing business as the Glass Hat Bar & Grill, cash in the sum of twenty dollars ($20.00).

Specification 4: In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Gp., Armored Force School, Fort Knox, Kentucky, with intent to defraud the Glass Hat Bar & Grill, did, at Shreveport, Louisiana, on or about August 31, 1942, unlawfully pretend to Lynn Oliver, proprietor of the Glass Hat Bar & Grill that he was a certain Captain Frank C. Butler of the United States Army well knowing that such pretense was false, and by means thereof did fraudently obtain from the said Lynn Oliver, doing business as the Glass Hat Bar & Grill, cash in the sum of twenty-five dollars ($25.00).

Specification 5. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Gp., Armored Force School, Fort Knox, Kentucky, with intent to defraud the Glass Hat Bar & Grill, did, at Shreveport, La., on or about September 1, 1942, unlawfully pretend to Lynn Oliver, Proprietor of the Glass Hat Bar & Grill that he was a certain Captain Frank C. Butler of the United States Army well knowing that such pretense was false, and by means thereof did fraudently obtain from the said Lynn Oliver, doing business as the Glass Hat Bar & Grill, cash in the sum of twenty-five dollars ($25.00).

Specification 6. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Gp. Armored Force School, Fort Knox, Kentucky, with intent to defraud the Glass Hat Bar and Grill, did, at Shreveport, Louisiana, or or about September 1, 1942, unlawfully pretend to Lynn Oliver, Proprietor of the Glass Hat Bar & Grill that he was a certain Captain Frank C. Butler of the United States Army well knowing that such pretense was false, and by means thereof did fraudently obtain from the said Lynn Oliver, doing business as the Glass Hat Bar & Grill, cash in the sum of twenty-five dollars ($25.00).

Specification 7. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Gp., Armored Force School, Fort Knox, Kentucky, with intent to defraud the Club Coronado, did, at Bossier City, Louisiana, on or about September 2, 1942, unlawfully pretend to the Club Coronado that he was a certain Captain Frank C. Butler, United States Army, well knowing that such pretense was false, and by means thereof did fraudently obtain from the said Club Coronado cash in the sum of twenty dollars ($20.00).

Specification 8. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Gp., Armored Force School, Fort Knox, Kentucky, with intent to defraud the Club Coronado, did, at Bossier City, Louisiana, on or about September 3, 1942, unlawfully pretend to the Club Coronado that he was a certain Captain, Frank C. Butler, United States Army, well knowing that such pretense was false, and by means thereof did fraudulently obtain from the said Club Coronado cash in the sum of twenty dollars ($20.00).

Specification 9. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Gp., Armored Force School, Fort Knox, Kentucky, with intent to defraud the Club Coronado, did, at Bossier City, Louisiana, on or about September 3, 1942, unlawfully pretend to the Club Coronado that he was a certain Captain, Frank C. Butler, United States Army, well knowing that such pretense was false, and by means thereof did fraudulently obtain from the said Club Coronado cash in the sum of thirty dollars ($30.00).

Specification 10. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Gp., Armored Force School, Fort Knox, Kentucky, with intent to defraud the Crescent Jewelry Company, did at Shreveport, Louisiana, on or about September 4, 1942, unlawfully pretend to the Crescent Jewelry Company that he was a certain Captain Carlton Lavell, United States Army, well knowing that such pretense was false, and by means thereof did fraudulently obtain from the said Crescent Jewelry Company merchandise of a value of one hundred dollars ($100.00).

Specification 11. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, with intent to defraud the Club Coronado, did, at Bossier City, Louisiana, on or about September 5, 1942, unlawfully pretend to the Club Coronado that he was a certain Captain Frank C. Butler, United States Army, well knowing that such pretense was false, and by means thereof did fraudulently obtain from the said Club Coronado cash in the sum of sixty-six dollars ($66.00).

Specification 12. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Company, Training Group, Armored Force School, Fort Knox, Kentucky, with intent to defraud the Club Coronado, did, at Bossier City, Louisiana, on or about September 7, 1942, unlawfully pretend to the Club Coronado that he was a certain Captain Frank C. Butler, United States Army, well knowing that such pretense was false, and by means thereof did fraudulently obtain from the said Club Coronado cash in the sum of twenty-five dollars ($25.00).

Specification 13. In that Private Charles R. Lyons, Co. "C", 634th Tank Destroyer Battalion, attached to the 14th Co., Training Gp., Armored Force School, Fort Knox, Kentucky, with intent to defraud the jewelry firm of Leon Miller, did, at New Orleans, Louisiana, on or about September 9, 1942, unlawfully pretend to the Leon Miller Jewelry Company that he was a certain Major George C. Carling, well knowing that such pretense was false, and by means thereof did fraudulently obtain from the said Leon Miller Jewelry Company merchandise of the value of three hundred ninty-five dollars ($395.00).

He pleaded not guilty to Charge I and its Specifications; guilty to each Specification under Charge II except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words, guilty, and not guilty to Charge II but guilty of violation of Article of War 61; guilty to Charges III and IV and Specifications 1 to 12, inclusive, under each Charge, and not guilty to Specification 13 under each Charge. He was found guilty of all Charges and Specifications except Specification 13, Charge IV, of which he was found guilty "except the word 'Leon' in line 4 of the Specification, substituting therefor the word 'Leo', of the excepted word not guilty, of the substituted word guilty. 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 the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to 20 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and withheld execution of the sentence pursuant to Article of War 50½.

3. The competent evidence shows:

a. In respect to Specification 1, Charge I, and Specification 1, Charge II: Accused was confined with the Prison and Casualty Detachment at Fort Knox, Kentucky, on July 14, 1942, at 3:30 p.m.. He escaped from such confinement on August 11, 1942, at 4 p.m., was again confined August 11, 1942, at 5:30 p.m., and again escaped August 19, 1942, at 3:40 p.m. (Ex. A). Technical Sergeant John W. Davis, 857th Guard Squadron, Barksdale Field, Louisiana, testified that on September 11, 1942, at 11 a.m., while on duty in the provost marshal's office, acting upon information received from the Davis Theater in Bossier City, Louisiana, he apprehended accused at Bossier City, dressed in officer's clothing without the insignia (R. 16). Accused was confined in the Post Guardhouse, Barksdale Field, Louisiana, September 11, 1942 (Ex. B).

b. In respect to Specification 2, Charge I, and Specification 2, Charge II: Accused on October 5, 1942, escaped from confinement from the Post Guardhouse, Barksdale Field, Louisiana, (R. 15, 18), was apprehended in

Monroe, Louisiana, October 8, 1942, (R. 18) and returned to confinement in Post Guardhouse, Barksdale Field, Louisiana, at 1:35 a.m. (Ex. B). Joseph D. Busby, Captain of the Monroe Police Department, Monroe, Louisiana, testified that on October 7, 1942, at about 6:30 p.m. he apprehended accused. At the time of his apprehension accused was dressed in civilian clothes, represented that his name was Edward C. Charles, but later in the day at the police station admitted that he was Charles R. Lyons and had escaped from Barksdale Field (R. 18).

c. In respect to Charge III and the 13 Specifications thereunder, and Charge IV and the 13 Specifications thereunder, during the period of accused's unauthorized absence commencing with his escape from confinement on August 19, 1942, and ending with his apprehension at Bossier City, Louisiana, on September 11, 1942, he forged, uttered, and received full face value in either cash or cash and merchandise for the 13 checks and customers drafts referred to and copied at length in Specifications 1 to 13 inclusive, Charge III, respectively, and thereby perpetrated the frauds as alleged therein and in Specifications 1 to 13 inclusive, Charge IV. These checks and customers drafts aggregated the face value of $771.50 (Ex. D,E,F,G,H,I,J,K,L,M,N,O and P). The name of the maker was in each instance fictitious and signed by accused. The name of Frank C. Butler was the fictitious name used by accused as maker on the checks and customers drafts referred to in Specifications 1, 2,3,4,5,6,7,8,9,11, and 12 Charge III, and ChargeIV (R. 34). The fictitious name Carlton Lavell was used by accused on the customers draft referred to in Specification 10 (R. 36), and the fictitious name George C. Carling was used by accused as the maker of the check referred to in Specification 13 (R. 36).

Mr. J. E. Miller, a tailor in the Barksdale Military Supply Store, Shreveport, Louisiana, testified that accused made some purchases at the Barksdale Military Supply Store on August 24, 1942, and tendered in payment thereof the check referred to in Specification 1, Charge III, and on August 25, 1942, accused returned to the Barksdale Military Supply Store and made further purchases, and tendered in payment thereof a check referred to in Specification 2, Charge III. At the time of both transactions he was in the uniform of a captain with emblems indicating that he was a captain in The Adjutant General's Department (R. 21). The witness testified that accused stated that he was an officer of the United States Army with the rank of captain and was from Washington, D. C. On the strength of that representation and accused's impersonation of an officer of the United States Army, the checks of the accused were accepted in payment of the merchandise purchased and cash given to him for the difference between the purchase price and the face of the checks (R. 20,21). These checks were presented in due course of banking practice upon the bank upon which drawn and were dishonored (R. 20). The Barksdale Military Supply Store has not been reimbursed for the amounts of those checks.

Mr. Lynn Oliver, manager of the Glass Hat Bar and Grill, Shreveport, Louisiana, testified that on August 29, August 31, and September 1, 1942, the

Glass Hat Bar and Grill of Shreveport, Louisiana, cashed for accused at his request the customers drafts referred to in Specifications 3,4,5, and 6, Charge III. At the time of those respective transactions accused was dressed in the regular uniform of an officer of the United States Army of the rank of captain (R.22). The customers drafts were accepted and cash paid for them because of his impersonation of an officer with the rank of captain of the Army of the United States and upon his statement that he was such officer and captain (R. 23). All four customers drafts were deposited for collection according to due banking practice and returned with the notation "No such bank". The Glass Hat Bar and Grill has not been reimbursed for the amounts of those checks.

Mr. R. L. Brown, manager of the Club Coronado, Bossier City, Louisiana, testified that accused represented himself to be Frank C. Butler (R. 26), on September 2, 3, 5 and 7, 1942, presented to the Club Coronado the customers drafts referred to in Specifications 7,8,9,11, and 12, Charge III, and received cash for the full face value thereof (R. 24). At the time of that transaction accused was dressed in an officer's uniform indicating that he was a captain in the United States Army, and his customers drafts were cashed upon that impersonation and his representation that he was a United States Army officer (R. 25).

Lee W. Noeline of the Crescent Jewelry Store, Shreveport, Louisiana, testified that on September 4, 1942, accused selected and purchased a diamond ring of the price of $100 and gave the Crescent Jewelry Store the customers draft referred to in Specification 10, Charge III, in payment thereof (R. 26). At the time of the transaction accused was dressed as a captain, wearing a summer uniform with two silver bars on his shoulders indicating that his rank was that of captain (R. 27). He also stated that he was an Army captain (R.26).

Miss Bernice Dan of the Crescent Jewelry Store testified that before the Crescent Jewelry Store accepted the customers draft referred to in Specification 10, Charge III, accused identified himself by the name of Captain Carlton Lavell. When he made out the check described in Specification 10, Charge III, he was dressed in United States Army uniform with captain's bars on his shoulders, and it was because of his impersonation as an officer of the Army that she accepted the check and delivered the merchandise to him. The check was presented for payment upon the bank on which drawn and was returned in due course dishonored. The Crescent Jewelry Company has not received back the merchandise sold or been reimbursed for the amount of the check (R.28).

Leo Miller of the Leo Miller Jewelry Company, New Orleans, Louisiana, testified that on September 9, 1942, he sold and delivered to the accused a diamond ring for the price, including Federal, city, and state taxes of $395, and accepted from accused a check for that amount, referred to in Specification 13, Charge III. At the time of the transaction accused represented himself to be Captain George C. Carling, an officer in the United States Army (R.28,30).

He was dressed in the uniform of an Army captain. Later during the course of negotiations of accused's purchase of the diamond he appeared dressed as a major, and wore major's insignia on his uniform. The check was deposited for collection, in due course presented to the bank on which drawn, and returned dishonored (R. 29). Accused represented that he was a graduate from West Point, had been down in South America, was in Army Intelligence, that he had flown up by clipper from Venezuela to Miami, that in flying he had fallen asleep, and had been flown into Shreveport before he realized it, that he had received a promotion from captain to major and was registered at the hotel as Captain Carling (R. 30). The check was accepted and the merchandise delivered on the strength of accused's impersonating himself as and representing himself to be an officer of the United States Army (R. 29).

4. Accused at his own request was sworn and testified:

"I will start off with when I left the guardhouse at Fort Knox, Kentucky. I escaped from there, having been tried for disobedience of a direct order and sentenced to six months in the guardhouse. My record up to that time had been clean and I was attending school there. I had just completed my course and it was only a matter of a day or two before receiving my diploma from that school. I felt more than a little bitter in getting the six months sentence and without any future plans in mind, I escaped from the guardhouse there. I did not exactly know where I was going or what my destination was to be.

"When I came down here, I was acquainted to a certain extent, having been to a post nearby, and I did not know just exactly what to do. I had no income and I had obligations which I knew were necessary. My mother had a $2350.00 mortgage on her home which had been taken out last Spring. She paid $24.00 per month on that. If she lost the home, there would be no place for my mother to stay. I was not supporting her as it was. I had to have some income and I had to have some money. I did write the checks to which I pleaded guilty. I had been down here perhaps two weeks when I got a letter from my mother. I had not contacted her at all. I had not even notified her that I had left the guardhouse, however, the prison officer at Fort Knox was a neighbor of ours, living a couple of blocks from my home, and he contacted my mother and told her what I had done. When I did not go home, she assumed I might be here. She wrote me here in care of some friends. When I received her letter I called her and naturally I saw that or saw the folly of my ways, and saw what I was leading into. I told her that I was going back to Fort Knox right then. She told me she would write the Chaplain there who also is a friend of the family. She wrote him a letter and I went and packed my bag and left. I started back to Fort Knox and was apprehended about fifty miles north of Shreveport and was placed in the guardhouse here at Barksdale Field.

"When I was placed in the guardhouse, I had every intention of serving my time and getting it over with. I knew there was no question as to whether I had done anything wrong. I knew that. I had just been there and I made up my mind I was going to leave that guardhouse the first opportunity I got. Naturally, after having left Fort Knox, it did not seem so important, such a big thing - escaping. There's the phrase 'familiarity breeds contempt' - my reason for leaving was because of the way the prisoners were being treated at the time and I was there perhaps a month. I don't know exactly how long and I did leave. I went to Monroe. While I was there I wrote a letter to Brigadier General Stephen O. Henry, Fort Knox, Kentucky, and told him exactly what I had done. I said I was coming back there and told him the reason why I was coming back. I sent that to General Henry and the next day I was apprehended again. I believe that's all there is to it." (R. 31,32)

Accused further testified that he had delivered the diamond ring purchased from the Crescent Jewelry Company to Captain Hershel C. West, Air Corps, Barksdale Field, and assumed that it had been returned to the jeweler. He testified that he had signed an affidavit respecting the ring purchased from Leo Miller Jewelry Company authorizing its return to that company. He testified that he had a high school education and two years in college. He fixed the date of escape from confinement at Camp Knox as August 19, 1942 (R. 32) and the date of his escape from confinement at Barksdale Field October 5, 1942 (R.33), the date of his apprehension by Sergeant Davis September 11, 1942, and the date of his apprehension by Police Officer Busby October 8, 1942, at Monroe, Louisiana. He explained his escape from confinement and absence from Fort Knox as follows:

"Q. What was your original reason for leaving Fort Knox?

"A. I got a six months sentence and I, at the time, felt that there was a great injustice done and six months seemed like an awful long time.

"Q. What did you do?

"A. I was charged with disobeying a direct order.

"Q. That was one or two days before school was out?

"A. I had completed my course and two or three days before we were to receive our diplomas. It was quite a blow - to go through the school and pass and not to get the diploma and to be kicked out of the school. It was pretty hard to face my friends and company commander there. In view of my previous service and my record, I felt that I was pretty badly abused.

"Q. You were in school there at Fort Knox? Where was your outfit stationed?

"A. They were at Camp Claiborne, Louisiana, when I left but shortly after that they were transferred to Camp Hood,

Texas. I heard something mentioned about Fort Dix, N. J. That is one company in the battalion which was formed at Fort Dix and the remnants of a stream-lined division which was stream-lined there and had not been sent down. I understood, however, that my organization was at Camp Hood." (R.33-34).

He testified that the names Frank C. Butler, Carlton Lavell, and George C. Carling were entirely fictitious; that all checks and customers drafts were written by him (R. 34,35,36); that he wore an officer's uniform (R. 33); that he had had no criminal record during his civilian life, and stated that in respect to his intention of returning to the military service "I had no place in particular to go to. I did not have any destination or any intentions. I did not know just exactly what I was going to do" (R.34),-- "Frankly, the thought of returning to my organization was quite a ways from my mind. I did not have any intention of going." (R.34). He testified that he felt that the conviction by general court-martial because of which he had been confined in the guardhouse prior to his escape from confinement on August 11, 1942, was based upon an unjust accusation. The offense as alleged was disobedience of an order by his company commander to surrender the keys to his 1941 Buick so that his car could be used in the company motor pool. His refusal to surrender the keys was based upon his unwillingness to allow his car to be used in the company motor pool, but he had no objection to its being used in the military police motor pool (R. 35). His objection to allowing his car to be used by the company motor pool was that -

"There were a bunch of kids in charge of this motor pool, and I just could not see my car keys hanging up in the dispatcher's office and someone moving out my car while I was restricted." (R.36)

5. Smarting under a confinement adjudged by a court-martial on a charge deemed by him unjust, accused, notwithstanding a theretofore good civil and military record, escaped from confinement at Fort Knox on August 11, 1942, but was returned to confinement on the same day. He again escaped from confinement on August 19, 1942, and remained absent without leave until he was apprehended at Bossier City, Louisiana, on September 11, 1942, and on that date placed in confinement in the guardhouse at Barksdale Field, Louisiana; from which confinement he escaped on October 5, 1942, and remained absent without leave until he was apprehended by the civil police at Monroe, Louisiana, on October 8, 1942, dressed in civilian clothes, and again placed in confinement in the post guardhouse, Barksdale Field, Louisiana. During the periods of unauthorized absences following his initial escape from confinement at Fort Knox, he frankly acknowledged that "the thought of returning to my organization was quite a ways from my mind. * * * I had no place in particular to go to. I did not have any destination or any intentions. I did not know just exactly what I was going to do." During the period of unauthorized absence between August 19, 1942, and September 11, 1942, he embarked upon an extraordinary career of crime. With intent to defraud: (a) he forged and uttered thirteen checks and customers drafts; (b) used fictitious names as

makers, (c) drew on banks in which he had no account or credit and some of which were non-existent; (d) falsely assumed and pretended to be an officer of the Army of the United States; (e) falsely took upon himself to act as such; (f) in such pretended character and with the use of forged checks obtained money and merchandise to the value of $771.50 from various merchants and persons in and in the vicinity of Shreveport, Louisiana; (g) to establish a false identity, falsely represented himself under various aliases; and (h) confessed he had no plans or fixed intention to return.

Such conduct was utterly inconsistent with an intent to return voluntarily to the military service and clearly manifested an intention not to return.

In consideration of accused's pleas of guilty, and all the evidence in the case including the testimony given by accused, the court was warranted in finding accused guilty of all charges and specifications.

6. The record shows that accused enlisted November 15, 1937, for a term of three years, was honorably discharged from that enlistment on November 14, 1940, and reenlisted November 15, 1940, in the grade of private to serve three years. He was 22 years and one month of age at the time of the commission of the offenses as alleged. His home was in Minneapolis. He had completed high school, two years of college, and one year of business college education, and had been employed in a law office as a law clerk and also as an accountant. He was employed by the International Harvester Company a short time and by Perry Sloan and Frank A. Sloan as salesman. He also engaged in the independent business of salesman.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed by the court. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

Andrew S. Copp Jr., Judge Advocate

Wm Tomnbill, Judge Advocate

Fletcher R. Andrews, Judge Advocate

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

SPJGH
CM 231953

JUN 5 1943

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| UNITED STATES | ) | NEW ORLEANS PORT OF EMBARKATION |
| v. | ) | Trial by G.C.M., convened at New Orleans Port of Embarkation, New Orleans, Louisiana, February 11 and 12, 1943. Dismissal, forfeiture of all pay and allowances, and confinement for five (5) years. |
| First Lieutenant WALTER W. HENTZ (O-453189), Adjutant General's Department. | ) | |

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OPINION of the BOARD OF REVIEW

HILL, DRIVER and LOTTERHOS, Judge Advocates

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

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

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

Specification 1: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, being at the time Class "A" Agent Finance Officer, Provisional Casual Detachment, did, at New Orleans Staging Area, Louisiana, on or about December 1, 1942, feloniously embezzle by fraudulently converting to his own use lawful money of the United

States of the value of One Hundred Thirty-five Dollars and forty-five cents ($135.45), the property of the United States, furnished and intended for the military service thereof, intrusted to him the said First Lieutenant Walter W. Hentz, by Colonel R. K. Le Brou, Finance Department, New Orleans Port of Embarkation, New Orleans, Louisiana.

Specification 2: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, being at the time Class "A" Agent Finance Officer, Provisional Casual Detachment, did, at New Orleans Staging Area, Louisiana, on or about December 7, 1942, feloniously embezzle by fraudulently converting to his own use lawful money of the United States of the value of Eighty and no one-hundredths Dollars ($80.00), the property of the United States, furnished and intended for the military service thereof, intrusted to him, the said First Lieutenant Walter W. Hentz, by Colonel R. K. Le Brou, Finance Department, New Orleans Port of Embarkation, New Orleans, Louisiana.

Specification 3: In that First Lieutenant Walter H. Hentz, Provisional Casual Detachment, being at the time Class "A" Agent Finance Officer, Provisional Casual Detachment, did, at New Orleans Staging Area, Louisiana, on or about December 12, 1942, feloniously embezzle by fraudulently converting to his own use lawful money of the United States of the value of Fourteen Dollars and Fifty-five cents ($14.55), the property of the United States, furnished and intended for the military service thereof, intrusted to him the said First Lieutenant Walter W. Hentz, by Colonel R. K. Le Brou, Finance Department, New Orleans Port of Embarkation, New Orleans, Louisiana.

CHARGE II: (Nolle prosequi entered).

Specification: (Nolle prosequi entered).

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

Specification 1: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, did, at New Orleans

Staging Area, Louisiana, on or about December 1, 1942, with intent to deceive Colonel R. K. Le Brou, Finance Officer, United States Army, officially certify to the said Colonel R. K. Le Brou, that certain supplemental; partial; and regular payrolls for the month of November, 1942 had been paid, which certifications were known by the said First Lieutenant Walter W. Hentz to be untrue, in that certain enlisted men on said pay rolls had not been paid.

Specification 2: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, being indebted to Technician fifth grade Russell Haddad, 31118154, Provisional Casual Detachment, in the sum of Ten dollars and seventy-three cents ($10.73) for funds advanced for Lieutenant Walter W. Hentz, which amount became due and payable on or about December 5, 1942, did, at New Orleans Staging Area, Louisiana, from about December 5, 1942 to January 5, 1943, dishonorably fail and neglect to pay said debt.

Specification 3: (Nolle prosequi entered).

Specification 4: (Nolle prosequi entered).

Specification 5: (Finding of not guilty).

Specification 6: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, did at New Orleans, Louisiana, on or about December 15, 1942, with intent to deceive and injure, wrongfully and unlawfully make and utter to Private Abraham Hockstein, 32524683, a certain check, in words and figures as follows, to wit: "New Orleans, Dec 15, 1942 Pay to the order of Abraham Hockstein - $28.00 Twenty Eight-Dollars Whitney National Bank of New Orleans Carrollton Branch New Orleans, La. Walter W. Hentz, Custodian", in payment of money due from a pay roll of the United States, he the said First Lieutenant Walter W. Hentz, then well knowing that he did not have and not intending that he should have sufficient funds in the Whitney National Bank of New Orleans, Carrollton Branch, New Orlean, La., for the payment of said check.

Specification 7: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, did, at New Orleans, Louisiana, on or about December 30, 1942, with intent to deceive, wrongfully and unlawfully make and utter to The Loubat Glassware and Cork Company, a certain check, in words and figures as follows, to wit: "New Orleans, December 30 1942 No.__ Whitney National Bank Carrollton Branch Pay to the order of The Loubat Glassware & Cork Co. $13.50 (Loubat $13.50cts.) Dollars Walter W. Hentz, Custodian", in payment of a bill for merchandise which had been charged to the Provisional Casual Detachment, he the said First Lieutenant Walter W. Hentz, then well knowing that he did not have and not intending that he should have sufficient funds in the Whitney National Bank of New Orleans, Carrollton Branch, New Orleand, La., for the payment of said check.

Specification 8: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, did, at New Orleans, Louisiana, on or about December 23, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the New Orleans Athletic Club, a certain check, in words and figures as follows, to wit: "New Orleans, Dec. 23 19__ No. -_ Whitney National Bank of New Orleans Carrollton Branch Pay to the order of N.O.A.C. $20.00 Twenty - x/o Dollars Walter W. Hentz Custodian", and by means thereof, did fraudulently obtain from the New Orleans Athletic Club ($20.00) Twenty dollars in cash, he the said First Lieutenant Walter W. Hentz, then well knowing that he did not have and not intending that he should have sufficient funds in the Whitney National Bank of New Orleans, Carrollton Branch, New Orleans, La., for the payment of said check.

Specification 9: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, did, at New Orleans, Louisiana, on or about December 25, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the New Orleans Athletic Club, a certain check, in words and figures as follows, to wit: "New Orleans Dec 25 1942 Pay to the order of NO AC $15.00 Fifteen - x Dollars Whitney National Bank of New Orleans Carrollton

Branch New Orleans, La. Walter W. Hentz Custodian", and by means thereof, did fraudulently obtain from the New Orleans Athletic Club ($15.00) Fifteen dollars in cash, he the said First Lieutenant Walter W. Hentz, then well knowing that he did not have and not intending that he should have sufficient funds in the Whitney National Bank of New Orleans, Carrollton Branch, New Orleans, La., for the payment of said check.

Specification 10: In that First Lieutenant Walter W. Hentz, Provisional Casual Detachment, did, at New Orleans, Louisiana, on or about December 27, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Saint Charles Hotel, a certain check, in words and figures as follows, to wit: "New Orleans, Dec 27 1942 Pay to the order of Cash $15.00 Fifteen - xx/0 Dollars Whitney National Bank of New Orleans Carrollton Branch New Orleans, La. Walter W. Hentz Custodian", and by means thereof, did fraudulently obtain from the Saint Charles Hotel ($15.00) Fifteen dollars in cash, he the said First Lieutenant Walter W. Hentz, then well knowing that he did not have and not intending that he should have sufficient funds in the Whitney National Bank of New Orleans, Carrollton Branch, New Orleans, La., for the payment of said check.

Specification 11: (Nolle prosequi entered).

He pleaded not guilty to Charge I, and the Specifications thereunder, and to Specifications 1 and 5, Charge III and guilty to Charge III and Specifications 2, 6, 7, 8, 9, 10. He was found not guilty of Specification 5, Charge III, and guilty of all other Charges and Specifications. 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 Specifications of Charge I allege embezzlement of property of the United States, furnished and intended for the military service, consisting of money entrusted to the accused by Colonel P. K. Le Brou, Finance Department, New Orleans Port of Embarkation, New Orleans,

Louisiana, as follows: $135.45 under Specification 1, $80 under Specification 2 and $14.55 under Specification 3.

a. The evidence shows as to Specification 1 that the accused was designated as Class "A" Agent Officer for Colonel Le Brou, Finance Officer at New Orleans Staging Area, for November and December, 1942 (Exs. U, V and W). As such, the accused received on November 30, 1942, from Colonel Le Brou, through Captain Charles C. Clubb, Finance Department, Class "B" Agent Officer (Ex. T), the sum of $6,355.79 with which to pay enlisted men of the Provisional Casual Detachment, and executed Finance Department Form No. 45-A therefor (Ex. B). This money was to cover four November payrolls, vouchers No. 115856 (Ex. H), No. 115899 (Ex. I), No. 115900 (Ex. J) and No. 115901 (Ex. K), which were delivered to the accused with the money. On December 1, 1942, the accused executed and returned Finance Department Form No. 45-B (Ex. C), accompanied by paid vouchers for $5,798.21 and the balance, $557.58, the amount red-lined, in cash (R. 14-22).

On voucher No. 115901, Private Uno J. Lehtonen was shown as paid $135.45 (Ex. K), but Private Lehtonen was in the hospital from September 18, to December 28, 1942, and never received the sum of $135.45 due him on that payroll. Lieutenant T. J. Kubricht signed the original and duplicate copies of that payroll as certifying officer. He testified that the men indicated on the payroll as paid were not all paid, that the money of men not present was put in sealed envelopes marked with their names and that the envelopes were left in the possession of the accused (R. 31-32, 37-39, 103-106).

b. The evidence shows as to Specification 2 that the accused similarly received on December 7, 1942, $11,065 with which to pay personnel of the Provisional Casual Detachment upon six November payrolls, vouchers No. 122600 (Ex. L), No. 122601 (Ex. M), No. 122602 (Ex. N), No. 122603 (Ex. O), No. 122604 (Ex. P) and No. 122605 (Ex. Q). The accused executed Finance Department Forms, No. 45-A and No. 45-B covering this transaction (Exs. D and E), and on December 9, 1942 returned paid vouchers for $10,980 and the balance of $85, the amount red-lined, in cash (R. 18-20).

On voucher No. 122600 Private Robert C. Barr was shown as receiving $15, Private Erssie O. Brown, $20 and Private Carl Hansen, $20 (Ex. L). Private Barr was on furlough from December 11 to December 28,

1942. On his return he asked Sergeant Alvin W. Sumerau, Chief Personnel Clerk of the Detachment, for his money. A few days after his return the $15 was paid to him by Sergeant Sumerau. Private Brown was on a three-day leave when the other men were paid. When he returned he asked for his money but never received the $20 shown on that payroll. Private Hansen was in the hospital from November 30 to December 27, 1942, and has never received the $20 shown on that payroll (R. 32, 47-48, 51-53, 67-69).

On voucher No. 122603, Private Sherman Kaplan was shown as receiving $10 (Ex. O). He was in the hospital from November 30 to December 11, 1942, and never received the $10 shown on that payroll. On voucher No. 122605, Private Wesley H. Palmer was shown as receiving $15 (Ex. Q). He was absent when the other men were paid and never received this $15. Lieutenant Kubricht was the certifying officer on the payroll, voucher No. 122605, but could not remember what was done with the money of men who were not present when three payrolls were paid that day (R. 32, 70-75, 105).

The aggregate amount shown as paid on the above vouchers, but in fact not received by the five men at the time the payrolls were paid, was $80. Of that amount Private Barr received $15 about twenty-one days later, but the balance of $65 was never received by the other men.

c. The evidence shows as to Specification 3 that the accused similarly received on December 12, 1942, $1,468.55 with which to pay personnel of the Provisional Casual Detachment on two November payrolls, vouchers No. 125294 (Ex. R) and No. 125295 (Ex. S). The accused executed Finance Department Forms No. 45-A and No. 45-B covering this transaction (Exs. F and G), and on December 12, 1942, returned paid vouchers for $1,331.90, and the balance of $136.65 in cash (R. 18-20).

On voucher No. 125295, Private Wayne L. York was shown as receiving $14.55 (Ex. S). He was in the hospital from December 4 to December 12, 1942. Upon his release from the hospital, he asked for his money, but did not receive it until Sergeant Sumerau paid it to him on December 31, 1942, although he made several inquiries about it. Captain Morris M. Nemser, who was the certifying officer on this payroll, testified that he actually saw all of the men on the payroll paid except two. One of the two was Private York, whose money was placed in an envelope, which was last seen in the possession of the accused (R. 33-34, 36-37, 76-78).

d. As to the three Specifications the evidence shows that Sergeant Martin Savitsky, who worked in the Personnel Section, prepared the payrolls from data in the service records of the men. The service records of the seven men involved were introduced in evidence (Exs. EE-KK), and show that Private Lehtonen was paid for November on December 1, 1942, that Privates Barr, Brown, Hansen, Kaplan and Palmer were paid on December 8, 1942, the amounts respectively shown on the payrolls in evidence, and that Private York was paid to include November 30, 1942 (R. 97, 99-100).

The accused opened a bank account in the name of "Walter W. Hentz, Custodian" on December 1, 1942, in the Whitney National Bank, Carrollton Branch, and made two deposits therein, one for $484.10 and the other for $2.84. Mr. Angelo Mangiapane, Manager of the branch, testified from the ledger sheet of this account that from December 1 to December 28, 1942, fifteen checks totalling $510.34 were paid out to the account, leaving an overdraft of $25.44, and that after December 28, other checks were presented but payment was refused. A deposit of $100 was made on January 12, 1943, which covered the overdraft. Sergeant Sumerau testified that he accompanied the accused when he deposited the $484.90 (sic) and that the accused had stated that rather than turn the money back he would keep it and pay the men on their return and rather than carry the money on his person he had opened this account for the one purpose of paying these men off. This was about December 1, 1942. The accused told him that too much money was accumulating and that he was going to put it in the bank. There was some other money that belonged to a fund that had been raised in the detachment (R. 61-63, 67, 81, 83-85).

Sergeant Sumerau paid a "couple" of men who had claims for payments due them on payrolls, with checks signed "Walter W. Hentz, Custodian". He stated that the accused turned the checkbook over to Sergeant Savitsky when the accused left, with the signature of the accused on blank checks to be used to pay off the men. Sergeant Savitsky testified that his instructions were to make checks out and pay the amounts due to some of the men who were not present when the "payroll was paid off". There were seven men so paid and he got their names from the accused. The check stubs were introduced in evidence (Exs. MM, NN, OO). Sergeant Sumerau testified further that he went to the Finance Office with the accused, who there obtained $100 in cash on account of his uniform allowance, that the accused gave the $100 to

Sergeant Sumerau to pay the men, and that out of this $100 he paid Private York about $14, Private Barr $15, Private Lehtonen $25 and another man $46 (R. 78-80, 82, 85, 100-102).

4. As to the Specifications, Charge III, it is shown under Specification 1 that the accused made returns of payroll vouchers No. 115856, No. 115899, No. 115900 and No. 115901 (Exs. H-K), aggregating $6,355.79, by showing $5, 798.21 paid and returning $557.58 in cash. As a part of the return of these payrolls, Finance Department Form No. 45-B was executed under date of December 1, 1942, showing the same figures (Ex. C). There is no direct proof that the name "W.W. Hentz" on these documents was the signature of the accused, but it is shown that the returns were made by the accused, to whom the payrolls and the money had been delivered as Class "A" Agent Officer. Payroll voucher No. 115901, as returned, showed that $135.45 had been paid to Private Lehtonen, but Private Lehtonen did not receive this sum, nor any part of it (R. 18-19, 39).

The evidence as to Specification 2 shows that Technician, Fifth Grade, Russell Haddad expended $10.73 early in December under instructions of the accused, who was to make prompt refund, and that the accused did not repay him. Under Specifications 6-10, it is shown by evidence and stipulation that checks signed by the accused as custodian were not good, as follows: December 15, 1942, to Private Abraham Hochstein for $28 (Ex. AA); to Loubat Glassware & Cork Company for $13.50; December 23, to New Orleans Athletic Club for $20 (Ex. BB); December 25, 1942, to New Orleans Athletic Club for $15 (Ex. CC); and December 27, 1942, to cash (St. Charles Hotel) for $15 (Ex. DD) (R. 65-66, 106-110, 113-116).

5. The defense presented no testimony. The accused elected to remain silent.

6. The evidence as to the three Specifications, Charge I, shows that the accused as Class "A" Agent Officer received from the disbursing officer, Colonel R. K. Le Brou, sums including the amounts alleged in each specification for the payment of men of the Provisional Casual Detachment, failed to account to Colonel Le Brou for money in those amounts due seven men who were not present to be paid, but who were shown on the payrolls as paid, and did not pay the sums due the men, except that Private Barr was paid $15 and Private York $14.55 by Sergeant Sumerau at a later time from the sum of $100 given him for that purpose by the accused after obtaining it on his uniform allowance.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268). Where money is delivered to a company commander for the payment of members of his organization and there is no evidence that any enlisted man had constituted the officer as his agent to collect or have custody of his pay, and where the men failed to receive their pay and there is no explanation by the officer as to the disposition of the money, the proof constitutes a prima facie case of embezzlement under the 94th Article of War (Dig. Ops. JAG 1912-40, sec. 452 (3)).

The evidence as to Specification 1, Charge III, shows that the return of payrolls made by the accused under date of December 1, 1942, contained the false statement that Private Lehtonen had been paid the sum of $135.45, and this sum was not thereafter paid by the accused, to Lehtonen. As to Specification 2, to which accused pleaded guilty, it is shown that the accused failed to make payment to Technician Fifth Grade, Haddad as alleged, and under Specifications 6-10, to which accused pleaded guilty, it is shown that the accused issued checks as alleged which were not good on account of insufficient funds.

The making of a false official statement to a superior officer is cited by Winthrop as an instance of conduct unbecoming an officer and a gentleman in violation of the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 713). The Manual for Courts-Martial, in stating instances of violation of this article, includes knowingly making a false official statement, dishonorable neglect to pay debts, and giving a check on a bank where he knows or reasonably should know there are no funds to meet it and without intending that there should be (par. 151, MCM, 1928). The evidence clearly warrants the conclusion that the false statement (Spec. 1, Chg. III) was made by the accused for the purpose of deceiving Colonel Le Brou; that the failure to pay the sum of $10.73 to Technician Fifth Grade Haddad (Spec. 2) constituted a dishonorable neglect; and that the accused gave bad checks (Specs. 6-10) knowing or charged with knowledge that there were not sufficient funds in his account to pay them, and without intending that there should be. These facts constitute offenses cognizable under the 95th Article of War.

7. Careful consideration has been given to two letters from the wife of accused, one dated April 30, 1943, addressed to the President, and the other dated April 5, 1943, addressed to Mrs. Eleanor Roosevelt, seeking clemency for the accused.

8. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from September 20, 1935; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, January 23, 1942; appointed temporary first lieutenant, July 30, 1942.

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 to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th Article of War and mandatory upon conviction of a violation of the 95th Article of War.

Martin S. Kelly Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., JUN 11 1943 - 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 Walter W. Hentz (0-453189), Adjutant General's Department.

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. On three separate occasions the accused received money as Class "A" Agent Officer to be used in paying enlisted men under accompanying payrolls, and embezzled a total of $230 due seven men, who were not present to be paid, were shown on the returned payrolls as paid, and were not in fact paid, in violation of the 94th Article of War. The return of payrolls made by the accused on December 1, 1942, contained the false statement that a certain soldier had been paid $135.45, whereas this sum was not then nor afterward paid to the soldier by the accused, in violation of the 95th Article of War. The accused also failed to pay a debt of $10.73 to an enlisted man, although it was to have been paid promptly, and issued five checks aggregating $91.50 which were not honored because of insufficient funds (as to which pleas of guilty were entered), in violation of the 95th Article of War. I recommend that the sentence to dismissal, total forfeitures, and confinement for five years be confirmed and carried into execution. Careful consideration has been given to two letters from the wife of the accused, one dated April 30, 1943, addressed to the President, and the other dated April 5, 1943, addressed to Mrs. Eleanor Roosevelt, seeking clemency for the accused.

3. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

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, carrying into effect the recommendation made above.

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

3 Incls.
Incl.1- Rec. of trial.
Incl.2- Dft. ltr. for sig. of Sec. of War.
Incl.3- Form of action.

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(Sentence confirmed but confinement reduced to two years. G.C.M.O. 163, 24 Jul 1943)

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

SPJGN
CM 231963

MAY 27 1943

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| UNITED STATES | ) | SECOND DISTRICT<br>ARMY AIR FORCES<br>TECHNICAL TRAINING COMMAND |
| v. | ) | |
| Second Lieutenant KENNETH A. HATTEBERG (O-559251), Air Corps. | ) | Trial by G.C.M., convened at Truax Field, Wisconsin, February 1, 2 and 3, 1943. Dismissal, total forfeitures, and confinement for two (2) years. |

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OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

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

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 Kenneth A. Hatteberg, Air Corps, 619th Technical School Squadron (Special), did, without proper leave, absent himself from his proper station at TS, AAFTTC, Truax Field, Madison, Wisconsin, from about December 17, 1942 to about December 23, 1942.

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

Specification 1: (Finding of not guilty).

Specification 2: In that 2nd Lieutenant Kenneth A. Hatteberg, Air Corps, 619th Technical School Squadron (Special), did, at Madison, Wisconsin, on or about December 18, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Loraine Hotel, Madison, Wisconsin, a certain check in words and figures as follows, to-wit:

St. Louis, Mo. Dec. 18, 1942
MISSISSIPPI VALLEY TRUST COMPANY

Pay to the order of LORRAINE HOTEL (No Pro) $25 00
79-52

Twenty Five 00/100 - - - - - - - - - - Dollars

K. A. HATTEBERG

and by means thereof did fraudulently obtain from the Loraine Hotel $25.00 lawful money of the United States of the value of $25.00, he, the said 2nd Lieutenant Kenneth A. Hatteberg then well knowing that he did not have, and not intending that he should have sufficient funds in the Mississippi Valley Trust Company, St. Louis, Missouri, for the payment of said check.

Specification 3: (Finding of not guilty).

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

Specification 1: In tnat 2nd Lieutenant Kenneth A. Hatteberg, Air Corps, 619th Technical School Squadron (Special), was at or near Madison, Wisconsin, on or about December 12, 1942, in a public place, to wit, the Venus Cafe, drunk while in uniform, in the presence of enlisted men and in view of other persons.

Specification 2: In that 2nd Lieutenant Kenneth A. Hatteberg, Air Corps, 619th Technical School Squadron (Special), did, at Madison, Wisconsin, on or about December 18, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Loraine Hotel, Madison, Wisconsin, a certain check in words and figures as follows, to-wit:

St. Louis, Mo. Dec. 18, 1942
MISSISSIPPI VALLEY TRUST COMPANY

Pay to the order of LORRAINE HOTEL (No Pro) $25 00
79-52

Twenty Five 00/100 - - - - - - - - - - - Dollars

K. A. HATTEBERG

and by means thereof did fraudulently obtain from the Loraine Hotel $25.00 lawful money of the United States of the value of $25.00, he, the said 2nd Lieutenant Kenneth A. Hatteberg then well knowing that he did not have, and not intending that he should have sufficient funds in the Mississippi Valley Trust Company, St. Louis, Missouri, for the payment of said check.

Specification 3: In that 2nd Lieutenant Kenneth A. Hatteberg, Air Corps, 619th Technical School Squadron (Special), having received a lawful order from Major Lawrence E. Bandt, Air Corps, 619th Technical School Squadron (Special), on December 18, 1942, "To report for duty at 0800 tomorrow morning", or words to that effect, the said Major Lawrence E. Bandt being in the execution of his office, did, at TS, AAFTTC, Truax Field, Madison, Wisconsin, on December 19, 1942, fail to obey same.

Specification 4: (Finding of not guilty).

Specification 5: (Stricken).

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

Specification: In that 2nd Lieutenant Kenneth A. Hatteberg, Air Corps, 619th Technical School Squadron (Special), having been duly placed in arrest of quarters on or about December 23, 1942, did, at TS, AAFTTC, Truax Field, Madison, Wisconsin, on or about January 1, 1943, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that 2nd Lieutenant Kenneth A. Hatteberg, Air Corps, 619th Technical School Squadron (Sp), did, at Milwaukee, Wisconsin, on or about December 20, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to-wit:

St. Louis Mo. Dec. 20, 1942
MISSISSIPPI VALLEY TRUST COMPANY

Pay to the Order of CASH $25 00

Twenty Five and 00/100 - - - - - - - - - - - Dollars

Lt. Berg
H K

which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification: In that 2nd Lieutenant Kenneth A. Hatteberg, Air Corps, 619th Technical School Squadron (Sp), did,

at Milwaukee, Wisconsin, on or about December 20, 1942, with intent to defraud, willfully, unlawfully, and feloniously utter as true and genuine a certain check in words and figures as follows:

St. Louis, Mo. Dec. 20, 1942
MISSISSIPPI VALLEY TRUST COMPANY

Pay to the order of CASH $25 00

Twenty Five and 00/100 - - - - - - - Dollars

Lt. Berg
H K

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said 2nd Lieutenant Kenneth A. Hatteberg then well knew, falsely made and forged.

The accused pleaded not guilty to all the Charges and Specifications. Specification 5, Charge III, was withdrawn during the trial (R. 144). He was found guilty of the Specification, Charge I and Charge I; Specification 2, Charge II and Charge II; Specifications 1, 2 and 3, Charge III and Charge III; the Specification, Charge IV and Charge IV; the Specification, Additional Charge I and Additional Charge I; the Specification, Additional Charge II and Additional Charge II. He was found not guilty of Specifications 1 and 3, Charge II; and Specification 4, Charge III. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. At the beginning of the trial, after the trial judge advocate had announced that the prosecution did not desire to challenge any member of the court, either for cause or peremptorily, the defense counsel inquired what members of the court, if any, had been commissioned in the "Judge Advocate Department". Major Flota and Captain Pound signified that they had. Defense counsel then inquired whether the law member had been commissioned in the "Judge Advocate Department". The law member replied, "I have not" (R. 5).

The Assignment of Errors filed by the defense counsel includes the following:

> "First. There were two members of the court who were commissioned in the Judge Advocate General's Department. Neither of them were designated law member of the court. This does not comply with Article of War # 8. See page 5 of the record".

The order appointing the court details Lieutenant Colonel Arthur J. Stanley, Jr. (0234148), GSC, as law member, and Major Charles T. Flota (0189721) AC, and Captain John M. Pound (0358338) AC, members of the court. All three were present at the trial (R. 1-2). The records in the office of The Adjutant General and in the office of The Judge Advocate General show, with reference to Major Flota, that he accepted his appointment as First Lieutenant, Judge Advocate General's Reserve Corps, on December 27, 1923, and has continuously held a commission in The Judge Advocate General's Reserve Corps since that time. He was promoted to the grade of Captain, J.A.G.D., on November 9, 1929, and to the grade of Major, J.A.G.D., on February 8, 1939. He was assigned to extended active duty with the Air Corps, effective May 1, 1941, first serving as Post Judge Advocate, Scott Field, Illinois, and thereafter, since June 13, 1942, as Post Judge Advocate, AAFTTC, Sioux Falls, South Dakota, in which capacity he was serving when appointed a member of this court.

The same records show, with reference to Captain Pound, that he accepted appointment as Captain, Judge Advocate General's Department, in the Officers Reserve Corps, on July 10, 1937, such appointment "to date from the second day of July, nineteen hundred and thirty seven", and has continuously been commissioned, in the same grade and

section, from that time to the present. He was assigned to active duty with AAF, AFTTC, effective September 6, 1942, at Jefferson Barracks, Missouri, where his principal duties, according to his file in the Personnel Section, JAGO, have been "Assistant Post Judge Advocate, Reviewing Court Martial cases, Law Member General Court-Martial, member special court-martial, full time Post Summary Court Officer and Assistant Post Adjutant" (underscoring supplied), "from September 6, 1942, to the present."

The second paragraph of Article of War 8 provides that:

> "The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member."

> "A general court-martial upon which no law member has been detailed is, by reason of the mandatory provisos of Article of War 8, not legally constituted and its proceedings are void. CM 159140, 159143, 159144, 159146, 159149, 159228, 163239, 163259 (1924); 187098, 187201 (1929)." (Dig. Ops. JAG, 1912-1940, Sec. 365 (9), p. 175; underscoring supplied).

The proviso that the member detailed as law member shall be an officer of The Judge Advocate General's Department when available, is couched in language equally as mandatory as that construed in the authorities cited.

It is true that The Judge Advocate General has held that the detailing as law member of an officer commissioned in another branch, imports the appointing authority's decision that no member of The Judge Advocate General's Department was available (CM 209988 (1938)). The presumption so established has been applied only where no member of The Judge Advocate General's Department was detailed as a member of the

court. Where, however, as in the case under consideration, two members of The Judge Advocate General's Department were actually detailed and served during the trial as members of the court, their availability being positively and affirmatively shown, no basis exists for presuming that the appointing authority, in selecting the court, decided that no member of The Judge Advocate General's Department was available, unless the word "available", be construed as having been used in the statute not in its ordinary significance of "at one's disposal" (Schwabacher Hdw. Co. vs. Miller Sawmill Co., 155 Pac. 767), "accessible" (Huskey v. Metropolitan Life Ins. Co., 94 SW (a) 1075, 1078) or "such as one may avail oneself of" (Woodley Petroleum Co. v. Arkansas Louisiana Pipeline Co., 153 So. 539, 542, quoting Webster's Dictionary) but with the added— and, according to Webster's Unabridged Dictionary, obsolete - connotation of "having sufficient power, force or efficacy for the object" or "capable of being used", or "suitable to the purpose" (Bouvier).

This latter construction, if authorized, would permit — with grave and deplorable reflection on the personnel of the legal department of the army — the extension of the presumption that the appointing authority had properly decided that no members of The Judge Advocate General's Department were "available" for detail as law member, to cases in which officers of The Judge Advocate General's Department are actually detailed and sit as members of general courts having as law members officers commissioned in other branches; on the theory that the judge advocates on such courts were not suitable for the purpose, or that they lack sufficient power, force or efficacy to function as law members of general courts-martial, despite their special training and experience as officers commissioned in The Judge Advocate General's Department.

This strained interpretation apparently did not even occur to the compilers of Corpus Juris Secundum, from which the following statement is quoted: "The eighth Article of War (10 U.S.C.A. 1479) provides for the appointment of a law member who must be when possible, an officer of the judge-advocate-general department" (6 CJS, 451).

Moreover, the absence of any requirement that an officer commissioned in The Judge Advocate General's Department, and detailed as law member, be "selected by the appointing authority as especially qualified to perform the duties of law member", and the presence of such requirement in the provision of the appointment, as law member, of an officer commissioned in any other branch, when a member of The

Judge Advocate General's Department is not available, indicates clearly that the term "available" is used here in its ordinary signification of "at one's disposal", "accessible", or "such as one may avail oneself of". Under the statute, membership in The Judge Advocate General's Department imports the requisite power, force and efficacy. The reviewing authority is authorized to determine an officer's professional qualifications to act as law member only when such appointment is made, under the statutory exception, from another branch.

That any other construction does violence not only to common usage, but to the intention of Congress in incorporating this provision in the Act of June 4, 1920, is disclosed by the reports of the committee hearings which preceded its passage. At these hearings, stress was laid on the status of all members of The Judge Advocate General's Department as trained lawyers, and the point was made that having any member of this department as law member of a general court-martial would strongly tend to eliminate errors in trials.

The bill originally introduced in the Senate provided that a judge advocate should preside over every general court, and rule on admissibility of evidence and other matters. This provision was revised, and passed as Article of War 8 in accordance with suggestions made to the committee by representatives of the War Department, including the then Judge Advocate General. The original provision for the qualifications of a court judge advocate follows:

> "No person shall be appointed judge advocate for a general court unless at the time of his appointment he is an officer of the Judge Advocate General's Department, except that when an officer of that department is not available the appointing authority shall appoint an officer recommended by The Judge Advocate General of the Army as specially qualified by reason of legal learning and experience to act as judge advocate * * *" (Hearings, Senate & House, Amendments to Articles of War pertaining to Military Justice, 64th, 65th, and 66th Congress, p. 5).

The following comments made by General Bethel at the committee hearings are illuminating as to Congress' intention of making membership in The Judge Advocate General's Department the criterion for eligibility to serve as law member on general courts-martial:

> "I think it is extremely desirable to have a man learned in the law to preside in court-martials and decide all questions of law. It will require a good many more judge advocates, however, possibly a great many more than the person who drew this bill thought. However much we may endeavor to reduce the number of trials by general court-martial, they are going to be necessary here and there, and in distant places, and the court-martial cannot delay the trial of a case until a judge advocate can come from a long distance, or until he can get through presiding over the trial of some other case. In order that we may have prompt trials, trials that shall promptly follow the commission of offenses, we must have a great surplus of judge advocates if we are to have one to preside at every general court-martial, so that I regard this proposition more as a practical question for you gentlemen in Congress as to whether you desire to increase the corps of judge advocates so much as will be necessary. The purpose of the office of judge advocate, presiding at a trial is excellent, because it will eliminate a great deal of irrelavant testimony, and I trust reduce the number of serious errors. As it is now we have to disapprove a considerable number of cases because a serious error has been made to the prejudice of the accused, and learned judge advocates presiding at trials ought to be able to prevent that sort of thing" (Hearings, Senate & House, Amendments to Articles of War pertaining to Military Justice, 64th, 65th and 66th Congresses, p. 589) (underscoring supplied).

The synonyms for the adjective "available", given by Webster's Unabridged Dictionary, are "accessible, attainable, convenient, handy, ready, usable". Those contained in Rogets Thesauras are "ready, convenient,

handy, usable." It has been noted that Captain Pound, one of the officers commissioned in The Judge Advocate General's Department who was appointed as a member of the court, had served, according to the records in this office, as law member of another general court-martial in the same command. It thus appears affirmatively that the appointing authority had already determined he was not only "available" in the sense of accessible, ready, handy and convenient, for detail as law member of this court, but in the sense of "usable" as well, although the determination of his availability in the first sense was enough to preclude the exception.

Article of War 37 has no application to the error noted, which is not procedural but pertains to the constitution of the court.

4. Although the Board considers that the subsequent proceedings of the court, including its findings and sentence are void for want of jurisdictional power, it has written a full review of the facts for the consideration of the confirming authority. The subsequent conclusions presented are subjected, however, in each instance to the jurisdictional defect discussed above.

5. The evidence for the prosecution, relative to the 8 Specifications of which the accused was found guilty shows the following facts.

a. During the early evening of 11 December 1942 the accused was standing in the bar room of the Loraine Hotel in Madison, Wisconsin, drinking brandy when he was joined by Staff Sergeant Donald E. Karonenberg and Corporal Howard L. Russell, both of whom were members of his organization. After drinking together, they went to the nearby Park Hotel where they had another drink together. Then at about 10 or 11 o'clock they went to the Venus Cafe, a public eating place, and a place where liquor was not sold. The accused, however, had a pint of whiskey with him and the three continued drinking. The cafe was crowded with soldiers and civilians but no other officer than the accused appeared to be present. Shortly after 1 a.m., 12 December 1942, two civilian policemen entered the cafe. The accused introduced himself to them and engaged them in conversation. Each of these officers testified that from the conversation, manner and conduct of the accused and from the fact that the accused staggered slightly when he walked, it was evident that he was under the influence of liquor. Both Sergeant Karonenberg and Corporal Russell also testified that the accused was under the influence of liquor and Sergeant Karonenberg testified further that the accused was in that condition during the entire evening. The accused was dressed in his officer's uniform and wore the insignia of his rank. (R. 50-56, 80-91).

b. Subsequent to the events just described, the accused on

17 December 1942, absented himself without leave from his proper station at Truax Field, Madison, Wisconsin, and remained absent therefrom to 23 December 1942 (Pros. Ex. 3; R. 116-118)

c. At about 10 p.m., on 18 December 1942, accused requested a waiter in the Loraine Hotel to have a check cashed for him. The accused then wrote a check in the sum of $25 on the Mississippi Valley Trust Company, St. Louis, Missouri, making it payable to the Loraine Hotel. The waiter took this check to the cashier of the hotel and secured $25 for the accused. At the time of this transaction, the accused was described as being sober. In due course of business the check was presented for payment and dishonored. It was returned to the Loraine Hotel stamped "account closed." The deposition of the auditor of the Mississippi Valley Trust Company shows that the accused wrote to his organization on 16 November 1942, and requested that his account be closed and that a check covering his balance be forwarded to him. In response to this letter, the Mississippi Valley Trust Company closed the accused's account on 19 November 1942 and mailed a check to the accused in the sum of $11 in payment of the balance which he had on deposit on that date. The deposition also showed that there had been no arrangement made between the accused and the Trust Company for the extension of a loan to the accused (Pros. Ex. 6, 10; R. 102-104, 104-107, 107-114).

d. At about 5:30 o'clock on the afternoon of 18 December 1942, after the accused had been absent without leave for a day, as shown in paragraph b above, Second Lieutenant Alan D. Beggs, at the direction of Major Lawrence E. Bandt, the squadron commander of the accused, called the accused by telephone at the Loraine Hotel where the accused was known to be staying at that time. After Lieutenant Beggs had a brief conversation with the accused and had recognized his voice and manner of speech, he turned the telephone over to Major Bandt. Major Bandt asked the accused why he had not been present for duty on that day and the accused replied that he had been "pretty busy". Major Bandt then ordered the accused to report for duty on the following morning and the accused replied "Yes, sir, I will be there". The accused, however, did not report on the following morning and was not present during the entire day (R. 35, 73-75).

e. On 20 December 1942 the accused, accompanied by one known as Bud Marshall entered a restaurant in Milwaukee, Wisconsin, known as "Joe's Lunch". This lunch room was owned and operated by a Mr. and Mrs. Frank Zimmer. Marshall presented the accused to Mrs. Zimmer with whom he had been acquainted for several years, and asked her to do him a favor. He then asked her if she "could" cash a check. The accused then

wrote a check in the sum of $25 on the Mississippi Valley Trust Company, St. Louis, Missouri, to the order of "cash", and signed it "Lt. H. K. Berg". After Bud Marshall had indorsed the check and Mr. Zimmer had approved the cashing of it, Mrs. Zimmer paid the accused $25. The accused was described as being in a jovial, good-natured mood but not intoxicated. He and his companions asserted that they were out having a good time and the accused insisted upon Mr. and Mrs. Zimmer accompanying them to an adjoining tavern for a drink. During the interval in the tavern, the accused regaled Mr. and Mrs. Zimmer with stories of his exploits in Africa. After accepting one drink from the accused, Mr. and Mrs. Zimmer returned to their restaurant. The check in question was thereafter negotiated by Mrs. Zimmer to a Mr. Reuben and in due course it was presented to the Mississippi Valley Trust Company for payment. The check was, however, dishonored by the Trust Company, and returned marked "no account". The check was in turn returned to the Zimmer's who reimbursed Mr. Reuben in the sum of $25. The depostion of the auditor of the Mississippi Valley Trust Company shows that there was no checking account in that bank in the name of Lt. H. K. Berg. (R. 38-45, 45-50; Pros. Ex. 1, 10).

f. On 23 December 1942 the commanding officer of Truax Field sent an officer to Milwaukee, Wisconsin, to return the accused to his station. On the same day the officer returned with the accused and delivered him to the officer of the day. The officer of the day at once read to the accused the written order of the commanding officer of Truax Field placing the accused in arrest in quarters in rooms 2 and 4, Building 2904. The accused was read the order and signed it. Thereafter on 1 January 1943 the officer of the day was directed to bring the accused to the office of the local staff judge advocate. The officer of the day, however, could not find the accused although he searched the accused's quarters and the adjoining buildings thereto. Neither could the accused be found in the officers' mess or at the officers' club. The quarters of the accused were checked at least four times on that date. Subsequently on 3 January the accused was met at the Chicago Northwest Railway station, Madison, Wisconsin, and conducted to the Truax Field Hospital (R. 116-122, 122-126, 127-131; Pros. Ex. 7).

6. First Lieutenant Carey P. Hunt Air Corps, testified for the defense that on New Year's Eve he saw the accused at the officers' club at Truax Field with a glass in his hand containing a fluid which resembled ginger ale (R. 146-148).

The accused elected to make an unsworn statement in which he asserted that his military career started while he was a student at the University of Iowa studying business administration. He explained that on 26 August 1941, he was drafted into the Army and thereafter chose to reenlist in the Air Corps because he felt he could be of more service there. He was recommended for Officers' Candidate School and graduated from that school with a grade of 89.5. Thereafter he

went to Scott Field and served as adjutant at the Parks Air College, and thereafter served as supervisor for the training department of Emerson Electrical School. He asserted that he would like to continue in the service even if he had to become a private. He explained that charges brought against him resulted from his conduct during a period in which he was intoxicated at all times and that he could not recall any of the circumstances involved in the charges (R. 156). The accused then presented an unsworn written statement in which he further asserted that he had not discharged the obligations which had developed as a result of his drunken conduct because he had been restricted to the hospital and had not been able to make arrangements or see people about them. He asserted that he had not been paid since November but that he intended to make full payment in the future. He asserted that he was the only person present when he was examined by the investigating officer and that he was not present when the witnesses against him were examined and that he had not had a chance to cross-examine them. He asserted further that he had not had the benefit of counsel, during the time of this investigation. He asserted further that he did not remember presenting a check at the Loraine Hotel. He explained that his breach of restrictions New Year's Day resulted from a drunken spree during the holidays. The accused then repeated that his misconduct was due entirely to drunkenness (R. 158-159).

7. The Specification, Charge I alleges that the accused "* * * did, without proper leave, absent himself from his proper station* * * from about December 17, 1942 to about December 23, 1942." The uncontradicted evidence beyond any reasonable doubt sustains the findings of guilty under this Specification.

8. Specification 2, Charge II, alleges that the accused did on 18 December 1942 wrongfully make and utter to the Loraine Hotel a check in the sum of $25, by means thereof did fraudulently obtain $25 well knowing that he did not have sufficient funds in the Mississippi Valley Trust Company for the payment of said check. The Specification is alleged to be a violation of Article of War 95. Specification 2, Charge III, makes the same allegation but is alleged to be a violation of Article of War 96.

The evidence shows that the check was made and uttered on the day and in the manner alleged. The evidence also shows that on 16 November about a month prior to the making of the check in question, the accused had requested the Mississippi Valley Trust Company to close his account and remit to him the balance to his credit. In response to this request the account of the accused was closed on 19 November and payment of the check was therefore refused upon its presentation. The check was returned to the depositor marked "account closed". Since the evidence shows that the accused was not drunk at the time the check was written, that he had, prior to that time, closed his account and had

made no arrangements with his bank for the extension of a loan, it must be inferred thatthe accused wrote the check with the fraudulent purpose alleged, and not intending that it should be paid. The evidence beyond a reasonable doubt, sustains every element of the offenses charged.

It should be observed that since the punishment assessed by the court is authorized upon conviction of either Article of War 96 or 95, the repetition of the Specification under Charges II and III has in no sense resulted in the assessment of duplicitious punishment, and has in no way prejudiced the rights of the accused.

9. Specification 1, Charge III, alleges that on 12 December 1942 the accused was drunk in uniform in the Venus Cafe, a public place, in the presence of enlisted men and in the view of others. The uncontradicted testimony of two enlisted men and two civilian policemen show that the accused was drunk to the extent that he staggered as he walked, and that his conversation and manner revealed his intoxication. Every element of the offense is established as alleged beyond a reasonable doubt.

10. Specification 3, Charge III, alleges that the accused failed to obey the lawful order of Major Lawrence E. Bandt to report for duty on 19 December 1942. The evidence shows that on 18 December Major Bandt talked over the telephone to the accused, asking him why he did not report for duty on that day, and ordered him to report for duty on the following morning. The evidence shows further that the accused failed to report as ordered and continued to remain absent without leave. The identity of the accused as the person who received the order was clearly established and the findings of guilty are supported by evidence beyond a reasonable doubt.

11. The Specification, Charge IV, alleges that the accused, having been placed in arrest in quarters on 23 December 1942 did, on about 1 January 1943 break his arrest. The evidence clearly establishes the arrest of the accused and his subsequent breach of the arrest on 1 January. The evidence sustains every element of the offenses beyond a reasonable doubt.

12. The Specification, Additional Charge I alleges that the accused did, at Milwaukee, Wisconsin on 20 December 1942, with intent to defraud, falsely make a check, payable to cash, on the Mississippi Valley Trust Company for $25, and signed it Lt. H. K. Berg. The making of this check is alleged as an offense in violation of Article of War 93. The Specification, Additional Charge II, alleges that the accused with intent to defraud, willfully, unlawfully, and feloniously uttered this check as true.

The evidence shows that the accused on the date and in the place alleged, wrote and uttered the check described above and falsely signed the name Lt. H. K. Berg thereto. The evidence shows further that the accused uttered the check in the manner alleged, and that thereafter the check was dishonored and returned to the depositor marked "no account". In addition the evidence shows that although the accused had been drinking upon the occasion of the making and the uttering of this check, he was not drunk. These facts clearly justify the inference that the accused made and uttered the check in question with the intent to defraud and justify the findings of guilty of both Charges and Specifications.

13. Prior to the arraignment of the accused, the defense questioned the mental and emotional responsibility of the accused for the offenses charged and presented as its witnesses concerning such questions Major John Chornyak, Medical Corps, Chief of the Neuro-psychiatry Section of the local station hospital and Major Charles S. Higley also a medical officer at the local station hospital. Major Chornyak testified that after observing the accused, he had diagnosed his condition as that of a "psychopathic state, emotional instability". He stated that the accused was not insane, that he was able to understand the nature of the proceedings and cooperate in his defense, that he knew right from wrong, and that he has normal intelligence for his age as determined by the fact that he had gone through college. He testified further that there were two major developments in indivduals, one is intelligence, and the other is emotional. In his opinion the accused had normal intelligence, but was emotionally immature and lacking in good judgment (R. 8-16, 148). Major Higley corroborated the substance of the above testimony (R. 17-19, 151-155).

Since neither witnesses for the defense testified that the accused was insane or that he could not adhere to the right, where as each, on the other hand, testified that he was sane, the court's ruling that the accused was legally responsible for his acts is supported by uncontradicted testimony. Moreover this medical testimony adduced by the defense cannot be said to have injected any issue of the accused's insanity into the case, since both of his own experts testified that he was sane.

14. The defense complained of the action of the court in not permitting the defense counsel to question each member of the court prior to the exercise of the challenges for cause. The record shows, however, that the defense was not deprived of the right to question each member of the court and no prejudice is shown by the ruling of the court. Moreover, it has been held in CM 186755, Keller, that it is no error to refuse to permit members of a court-martial to be questioned prior to interposing a challenge to the member desired to be questioned. Other rulings of the court are assigned as error but they are not deemed to be of sufficient merit to require discussions.

15. The records of the office of The Adjutant General show that the accused is approximately 27 years of age, that he was a member of the R.O.T.C. in 1933 and 1934, that he enlisted in the Army on 21 August 1941 and was honorably discharged on 10 May 1942 to accept a commission in the Army Air Corps.

16. 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 Charges and Specifications thereunder, and the sentence.

Charles L. Decker, Judge Advocate

Abner E. Lifsecomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

1st Ind.

War Department, J.A.G.O., 6 - JUL 1943 - To the Secretary of War.

1. Pursuant to the provisions of Article of War 50½, as amended, there are transmitted herewith for the action of the President, the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth A. Hatteberg (0-559251), Air Corps.

2. I do not concur in the opinion of the Board of Review, and for the reasons hereinafter stated, I am of the opinion that the court was legally constituted, and that the record of trial is legally sufficient to sustain the findings and the sentence.

3. The Board of Review is of the opinion that the court was lacking in jurisdictional power to try the accused because the appointing authority failed to comply with the jurisdictional requirement of Article of War 8 concerning the appointment of a law member by appointing as members of the court two officers whose basic commissions were in The Judge Advocate General's Department Reserve and who were originally called to extended active duty by the Air Corps and, at the time they were appointed to the court, were detailed for duty in the Air Corps, and by appointing the law member from a branch of the service other than The Judge Advocate General's Department. In pursuance, however, of its duty, the Board of Review has written a full review of the facts and the law applicable thereto, and has concluded that if the court had jurisdiction to try the accused, the evidence would be legally sufficient to sustain the findings of guilty and the sentence.

4. The pertinent part of Article of War 8 pertaining to the appointment of a law member of a court-martial provides that:

> "The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member."

In order to understand the true meaning and purpose of the above requirements, we must view them in the light of their legislative history. In this connection it must be remembered that prior to the enactment of

Article of War 8 in 1920, military law did not provide for or require the services of a law member on a court-martial. Under the impetus for reform, however, the original draft of what is now Article of War 8 provided that every general court-martial should have the legal services of a judge advocate whose duties were to be similar to those of our present "law member". The proposed Article would have provided further that the judge advocate of the court be a member of The Judge Advocate General's Department or an officer whose qualifications and fitness were approved by The Judge Advocate General (Hearings, Senate & House, Amendments to Articles of War pertaining to Military Justice, 64th, 65th and 66th Congress, p. 5). The proposed Article was, however, abandoned for the more practical and workable provisions of the present Article. Thus the provisions of Article of War 8 concerning the requirement for a law member on a general court-martial and the qualifications for his appointment represent a compromise between the extremes of the old procedure and the extremes of the proposed procedure. Although Article of War 8 definitely makes the appointing of a law member a jurisdictional requirement for every general court-martial, it does not deprive the appointing authority of that flexibility in the choice of the law member which the necessities of military administration and justice require.

As above indicated the requirement of the Article that the law member shall be an officer of The Judge Advocate General's Department is subject to the qualification that the appointing authority may select a law member from some other branch of the service when an officer of The Judge Advocate General's Department is "not available for the purpose".

Although the meaning of the word "available" has received various interpretations, the legal meaning most persistently attributed to it is the meaning of "suitable to the purpose or capable of being used to advantage" (Bouvier's Law Dictionary; 6 Corpus Juris 871; for similar definitions see also Black's Law Dictionary and A Dictionary of Law, W. C. Anderson). This concept of the word is also illustrated in the English case wherein the court held that dwellings of a kind suitable for the working class but which at the time were occupied by a different class of tenants were not available for the working class within the meaning of the English Housing of the Working Class Act (In re: Calverley 1 Ch. 150, 156; 6 Corpus Juris 871). The above meaning of "available" is further illustrated in the case of Hoebrecht v. State, 72 S.W.R. 2d 1100, in which the Texas Court of Criminal Appeals stated that "the word 'available' used in the enactment of the inter-

changeable jury law implies the authority to exercise discretion in the distribution of the jurors so that each court may be supplied". From the above precedents it appears that the word "available" imports not only the narrow concept of physical accessibility but also the broader concept of discretion in the determination of the suitability of the person or thing desired.

The Board of Review in considering the meaning of the word "available" as used in Article of War 8 in the case of CM 209988, Cromwell, made the following statement:

> "The requirement of Article of War 8 for detail of officers of The Judge Advocate General's Department as law members of general court-martial is subject to the exception that another qualified officer is to be appointed when an officer of The Judge Advocate General's Department is not available. The appointment of an officer other than a member of The Judge Advocate General's Department as a law member imports a decision by the appointing authority that an officer of this category is not available for the duty. Such a decision reached in the exercise of a sound discretion must, in the interests of efficient administration of justice and exercise of command, be held to be conclusive upon the question of availability. The discretion lodged in the appointing authority in this respect does not differ in principle from that formerly lodged in the appointing authority with respect to the number of officers, within prescribed maximum and minimum limits, which might be appointed as members. In that connection it was held that the decision of the appointing authority, in the exercise of his discretion, was conclusive. Martin v. Mott, 25 U.S. (12 Wharton) 19, 35. See also par. 7, M.C.M., 1917." (Underscoring supplied).

The above decision and many others similar thereto recognize the basic principle that military justice and the rules and regulations governing trial by courts-martial are designed to meet the needs of efficient military administration, which places substance above form, and justice above the appearance of justice. Moreover, it should be

observed that the Board of Review offers no criticism of the services and rulings of the law member. In view of this fact, and of the effectual manner in which the law member performed his functions, it is apparent that the discretionary power under which the law member was appointed was wisely exercised within the purview of Article of War 8.

5. After careful consideration of the entire record, I am of the opinion that the court was legally constituted and that the record of trial is legally sufficient to sustain the findings and the sentence. I recommend, therefore, that the sentence be confirmed, but in view of the severity of that portion of the sentence involving two years of confinement, and in view of the mitigating circumstances of the case, I recommend further that the confinement be remitted, and that the sentence as thus modified be carried into execution.

6. The Board of Review has given careful consideration to the assignment of errors of the military defense counsel, to the briefs of the civilian counsel, and to the attached letter from Honorable Henrik Shipstead, United States Senate.

7. Inclosed are two drafts of letters for your signature, marked A and B, each transmitting the record and your recommendations to the President. Draft A states your concurrence with the opinion set forth above, whereas Draft B states your concurrence with the opinion of the Board of Review. There are also inclosed two forms of Executive action, marked A and B. Draft A is designed to accomplish the confirmation and commutation of the sentence in accordance with my recommendation, and Draft B is designed to accomplish the disapproval of the findings and sentence in accordance with the opinion of the Board of Review.

Myron C. Cramer

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

7 Incls.
Incl 1 - Record of trial
Incl 2 - Dft of let. for sig. Sec. of War, marked A.
Incl 3 - Dft of let. for sig. Sec. of War, marked B.
Incl 4 - Form of Executive Action marked A.
Incl 5 - Form of Executive action, marked B.
Incl 6 - 2 briefs of civilian counsel.
Incl 7 - Let. from Honorable Henrik Shipstead.

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**(Findings of guilty approved. Sentence confirmed but confinement remitted. G.C.M.O. 183, 4 Aug 1943)**

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

SPJGN
CM 231988

APR 22 1943

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| UNITED STATES | ) | NORTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND |
| v. | ) | Trial by G.C.M., convened at Camp Morro Bay, California, February 17, 1943. Dishonorable discharge and confinement for life. Penitentiary. |
| Private PORTER STEELS (36020701), Battery A, 54th Coast Artillery. | ) | |

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REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Porter (NMI) Steels, Private, Battery A, 54th Coast Artillery, did, at the Battery A, 54th Coast Artillery Area, Shell Beach, California, on or about February 2, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Walter (NMI) Dickerson, Corporal, Battery A, 54th Coast Artillery, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. The offense was committed in time of war. 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 the term of his natural life. 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 pursuant to Article of War 50½.

3. The evidence for the prosecution shows that the accused and Corporal Dickerson, the deceased, were boon companions. Theirs was a rough and ready comradeship, involving frequent incidents of horseplay and scuffling, but never, until the day of the corporal's death, an interchange of steel and lead. On February 2, 1943, the accused was detailed as a member of gun crew No. 3, in charge of Corporal Dickerson. About 8 o'clock that morning, the corporal walked into Company A barracks and said to the accused "Come on; go down to the guns". The accused replied, "I am not going down to the guns. I am going with the 'old man' this morning". He was referring to Sergeant Davis, who was present. "No", Corporal Dickerson insisted, "you are going to the guns". An argument ensued, and finally the accused pushed Dickerson, who drew his knife and lunged, cutting the accused high up on the inside of his left thigh. Sergeant Davis pushed the two apart, and both left the barracks, the corporal going down to his gun position, and the accused to the infirmary where seven stitches were required to close his wound. (R 9-10, 12, 15, 16, 19-20, 22, 24, 26, 29, 43-47)

At about 11 o'clock the same morning, the accused, disregarding instructions of his gun commander to remain in barracks, appeared at gun position No. 3, carrying an M-1 rifle, and called out to the crew, "Get out of the way, boys; I am going to kill Cpl. Dickerson". The crew scattered, and Corporal Dickerson, who was sitting back in the powder pit, tried to get up and run too; but, instead, he stumbled and fell. The accused unlatched the safety on his rifle; Corporal Dickerson grabbed Private Millard's leg, in an effort to pull himself up; just at that moment, the accused fired one shot from his hip. The bullet struck Dickerson in the head, killing him instantly. The accused was standing (according to the estimates of various witnesses) not less than six feet and not more than eight paces from the deceased at the time the shot was fired. (R. 11, 15, 17-19, 20-30, 34, 38, 42, 43, 53)

After the shooting, the accused threw the rifle to the ground beside Dickerson's body and walked away, remarking that if anybody mistreated him, he would kill them. He proceeded toward the battery command tower where he met Lieutenant Baehler with the remark, "I did it, Lieutenant! I did it! You can shoot me now". "Did what?" Lieutenant Baehler inquired. "I shot him" replied the accused, "Cpl. Dickerson; over there!" After the Lieutenant had verified the reported shooting by viewing the corporal's body, he demanded of the accused why he had done it, and received the following explanation:

> "Lieutenant, sir, that man cut me. I have got a cut on my leg where I had seven stitches. I have been lying in my bed waiting for him to stick a knife in me. — I haven't been able to sleep!" (R. 15, 17, 19, 21, 24-25, 27, 29, 31-34, 37-38)

The rifle was found about four feet from Dickerson's body. It appeared to have been recently fired, and one round was missing from the eight-round clip with which it was loaded. A post mortem examination disclosed that the bullet had entered the deceased's head in the left temple region, about half an inch from the left ear, penetrated through the occipital region in the back of the head, and left a hole one inch or two inches in diameter in the rear of the head where the bullet had blasted through. Death was instantaneous. (R. 32, 34, 38, 39, 41-42)

4. The evidence for the defense shows that the accused and deceased were close friends and playmates, who had never had any trouble before. Immediately after the cutting, however, the deceased warned the accused, "We will settle this here later. You will always regret this day." (R. 10, 27, 30, 47)

The accused, having been duly advised of his rights as a witness, elected to take the stand under oath. He testified, in substance, that, on the morning of the killing, he was late, and the deceased told him to go to the gun crew. When the accused started for the door, he pushed the deceased aside, whereupon the deceased drew a knife and cut him. After treatment at the infirmary, the accused loaded his rifle because Corporal Dickerson had told him that he - the accused - was to "take over at the gate". A regular guard was there, however, so he went on over to gun position number 3. The deceased, who was sitting down, got up as the accused approached. The accused, trying to bluff

and scare the deceased, told the deceased that he was going to shoot him. He also told the gun crew to get back, that he was going to shoot Corporal Dickerson. He really meant to pull the safety, which was off, and accidentally and without aiming, pulled the trigger. Although he is a qualified rifleman and a good shot, he had never shot from the hip before. He did not know he had shot the deceased until he actually saw him fall. He then threw his gun down and started toward the battery command tower, which is about fourteen feet from the gun position. Halfway there he met Lieutenant Baehler and told him he had shot Dickerson (R. 47-51).

5. The Specification alleges that the accused, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, killed the deceased by shooting him with a rifle. The uncontradicted evidence, including the testimony of the accused, establishes the killing of the deceased by the accused by the means alleged, to wit, by shooting him with a rifle. The only defense raised by the accused's testimony is that the killing was accidental.

> "In * * * murder * * * the specific intent must be established either by independent evidence, as, for example, words proved to have been used by the offender or by inference from the act itself" (par. 126a, p. 135, M.C.M., 1928).

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed * * *. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, * * *" (par. 148a, p. 163, M.C.M., 1928).

The proof required is: (a) that the accused killed a certain person named or described by a certain means, as alleged and (b) that such killing was with malice aforethought.

The evidence shows that, three hours before the killing, the accused had provoked a personal encounter with the deceased in which the accused was the aggressor. The deceased's use of his knife in this previous encounter exceeded justifiable retaliation, and furnished the accused with a grievance and a motive for his subsequent conduct which resulted in the killing of the deceased. Had the accused acted immediately, the issue of adequate provocation might have been involved. The law recognizes the fact that a man may be

provoked to such an extent that, in the heat of sudden passion caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself; and, in such a case, does not punish him as severely as if he were guilty of a deliberate homicide.

> "* * * The killing may be manslaughter only, even if intentional, but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists" (underscoring supplied, par. 149a, p. 166, M.C.M., 1928).

The cooling time, in the instant case, eliminates the possibility of the cutting as adequate provocation, but not as a motive for the subsequent unlawful, deliberate actions of the accused. When he left the infirmary he loaded his rifle and proceeded, in defiance of instructions, to the place where he knew the deceased to be. He expressed his intention of killing the deceased, and warned those around him to get out of his way. Words used by the offender are recognized as cogent evidence of specific intent.

The accused's words and actions immediately after the killing manifest an attitude of uninhibited satisfaction at the accomplishment of his purpose. The shooting from the hip by a proficient rifleman at close range involves no such unusual procedure as to controvert the overwhelming evidence of specific intent. All of the evidence is wholly consistent with the existence of malice, which much of it positively shows; and fatally inconsistent with the accused's unsubstantiated contention that the shooting was accidental.

In the opinion of the Board of Review the evidence considered in its entirety closely meets the standard required for proof of malice aforethought. It indicates conclusively that the fatal act of the accused was done "willfully, deliberately, feloniously, unlawfully, and with premeditation", as alleged in the Specification, and amply sustains the findings and sentence.

5. The charge sheet shows that the accused, with no prior service, was inducted, June 3, 1941, in the Army of the United States for one year, and was assigned to Battery A, 54th Coast Artillery, June 13, 1941.

6. 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 and the sentence. A sentence either of death or of imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Thos L Dresson, Judge Advocate.

Abner E. Lifscomb, Judge Advocate.

Benjamin R Sleeper Judge Advocate.

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



SPJGK
CM 232017

MAY 5 1943

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| UNITED STATES<br><br>v.<br><br>Second Lieutenant ANTONIO M. MARINELLI (0-1170068), 229th Field Artillery Battalion. | 28TH INFANTRY DIVISION<br><br>Trial by G.C.M., convened at Camp Gordon Johnston, Florida, February 13, 1943. Dismissal and total forfeitures. |

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Antonio M. Marinelli, Two Hundred and Twenty-ninth Field Artillery Battalion, did, at Newton, Texas, on or about November 2, 1942, gamble with enlisted men, to the prejudice of good order and military discipline.

Specification 2: In that Second Lieutenant Antonio M. Marinelli, Two Hundred and Twenty-ninth Field Artillery Battalion, did, at Flatwoods Louisiana, on or about November 8, 1942, gamble with enlisted men, to the prejudice of good order and military discipline.

Specification 3: In that Second Lieutenant Antonio M. Marinelli, Two Hundred and Twenty-ninth Field Artillery Battalion, did, at Flatwoods, Louisiana, on or about November 8, 1942, gamble with enlisted men after having been called from a game, instructed by his Battery Commander, Captain Leon W. Beisel, Two Hundred and Twenty-ninth Field Artillery Battalion, not to gamble

and having told Captain Beisel that he, Lieutenant Marinelli, would not gamble.

Specification 4: In that Second Lieutenant Antonio M. Marinelli, Two Hundred and Twenty-ninth Field Artillery Battalion, did, at Camp Livingston, Louisiana, on or about January 1, 1943, gamble with enlisted men to the prejudice of good order and military discipline.

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

Specification: In that Second Lieutenant Antonio M. Marinelli, Two Hundred and Twenty-ninth Field Artillery Battalion, having been duly placed in arrest in quarters at Camp Gordon Johnston, Florida, on or about January 27, 1943, did at Camp Gordon Johnston, Florida, on or about February 9, 1943, break his said arrest before he was set at liberty by proper authority.

2ND ADDITIONAL CHARGE: Violation of the 69th Article of War.

Specification: In that Second Lieutenant Antonio M. Marinelli, Two Hundred and Twenty-ninth Field Artillery Battalion, having been placed in arrest in quarters at Camp Gordon Johnston, Florida, on or about January 27, 1943, did, at Camp Gordon Johnston, Florida, on or about February 5, 1943, break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to Specifications 1, 2, and 3 of the Original Charge and to the Original Charge, and to Additional Charge II and its Specification; and he pleaded not guilty to Specification 4 of the Original Charge and to Additional Charge I and its Specification. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that the accused, a second lieutenant, assigned to the 229th Field Artillery Battalion, was, on November 2, 1942, shooting dice with enlisted men of his battalion, at or near Newton, Texas (R.9,11, 15). The immediate commanding officer of accused, Captain Leon W. Beisel, saw him playing (R.15) and warned him to stop, telling him that "it was not customary for officers to associate with enlisted men in that respect" (R.15).

On November 8, 1942, at Flatwoods, Louisiana, accused again engaged in gambling with enlisted men (R.11-12,15), and was again warned by his commanding officer that the practice was to be stopped (R.15).

Again on or about January 1, 1943, at Camp Livingston, Louisiana, accused engaged in gambling with enlisted men (R.10). On all of the aforementioned occasions accused was the only officer participating. The other players were enlisted men (R.9,10,11,12).

On January 27, 1943, Major T.N. Dupuy, commanding officer of the 229th Field Artillery Battalion, placed accused under arrest and defined the limits of his arrest as accused's quarters, the latrine, and the officers' mess hall of the battalion (R.18). On February 5, 1943, accused broke his arrest by going to the Post Theater (R.20,22,23).

Accused again broke his arrest on February 9, 1943, by entering the officers' mess hall of the 628th Tank Destroyer Battalion (R.19,20). He was discovered there by Major Dupuy and Captain Joseph J. Prusaitis drinking Coca Cola (R.19) and was asked by Major Dupuy if he understood the limits of his arrest, to which he replied that he did (R.19).

For the accused, defense counsel, through cross-examination, brought out the fact that the mess hall of the 628th Tank Destroyer Battalion was about 10 yards from the quarters of accused (R.19), and that the officers' mess hall of the 229th Field Artillery was about 600 yards away (R.19). And defense counsel also introduced direct evidence confirming the proximity of the 628th Tank Destroyer Battalion officers' mess hall to the quarters of accused (R.24).

On cross-examination by the defense counsel Captain Beisel testified that the accused was under his command from October until just before Christmas in 1942, that his duties were those of ammunition officer and that during that time the "professional performance" of his duties was "very satisfactory" (R.16). And on re-direct examination the witness testified that his military rating would be "excellent" (R.16).

4. Without regard to the pleas of guilty the uncontradicted evidence establishes that the accused, in spite of warnings from his battery commander, was guilty of gambling with enlisted men on the dates and at the places alleged in the Specifications to the Original Charge. His conduct in that respect was plainly to the prejudice of good order and discipline. The evidence also conclusively proves the breaches of arrest by accused on the dates alleged in the Specifications of the Additional Charges.

5. War Department records show that accused is 23 years of age. He attended New York University for two years. He enlisted in the Army on January 21, 1942, attended officers' candidate school at Fort Sill, Oklahoma, and was commissioned as second lieutenant, Army of the United States, on September 17, 1942.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 69 and 96.

Andrew Cappy Jr., Judge Advocate.

John Tomaultil, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 7 1943 - 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 Antonio M. Marinelli (0-1170068), 229th 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 and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified 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 recommendation hereinabove made, 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. to President.
Incl. 3 - Form of action.

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(Sentence confirmed but forfeitures remitted. G.C.M.O. 126, 28 Jun 1943)

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



SPJGH
CM 232116

APR 16 1943

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| UNITED STATES | ) | 77th INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Many, Louisiana, February 10, |
| Second Lieutenant LEE A. | ) | 1943. Dismissal. |
| BOWLING (0-376217), Infantry. | ) | |

OPINION of the BOARD OF REVIEW
HILL, LYON and DRIVER, 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 Specifications.

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Lee A. Bowling, 305th Infantry, did, at Fort Jackson, South Carolina, prior to about 0930 January 22, 1943, render himself unfit for duty by excessive use of intoxicants.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Specifications and to the Charge. He was found not guilty of Specification 2, guilty of Specification 1 and of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, and forwarded the record of trial under the 48th Article of War.

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

At about 0930, January 22, 1943, the accused reported to Second Battalion Headquarters, 305th Infantry, and requested permission of his Battalion Commander, Major Robert D. Adair, to go into Columbia on personal business. Major Adair immediately detected a very strong odor of alcohol. When questioned by Major Adair, the accused stated that he had been drinking at the Elks Club in Columbia on the previous night and had stayed overnight at a hotel in Columbia. The accused did not stand steadily. Major Adair reported accused immediately to the 305th Infantry Dispensary, and instructed Lieutenant Joseph S. Tumiel to examine accused and prepare a statement as to the sobriety of accused. Upon reporting the incident to the commanding officer of the regiment, Major Adair was instructed to report the accused to him with the findings of the medical officer (R. 17).

First Lieutenant Joseph S. Tumiel (apparently a medical officer though he did not so state), at the request of Major Adair, examined accused at the 2nd Battalion Infirmary, 305th Infantry, at 10 a.m., January 22, 1943, and "found he was under the influence of liquor; his breath had an alcoholic odor, his speech was slurring and his movements were incoordinate". Lieutenant Tumiel stated that he did not mean by his statement "under the influence of liquor", that the accused was drunk. He made an affirmative answer to the question of the court, "Is it your opinion, as a medical man, that the accused was sufficiently under the influence of alcohol as to make himself unfit for military duty?" No blood test was taken to determine the amount of alcohol in the blood of accused (R. 10-12).

At about 11:30 a.m., January 22, 1943, the accused and Major Adair entered the office of Lieutenant Colonel Cecil W. Nist, 305th Infantry. Colonel Nist testified that the accused was unsteady on his feet, his eyes bloodshot, his face flushed, he talked with a very thick speech, and in the opinion of Colonel Nist, was drunk "In all the definitions of the Manual". In his opinion, the accused was certainly not in any fit condition to do duty with his organization that morning, and he placed accused in arrest in quarters. Colonel Nist made a routine inspection that day of the quarters of accused, found them in a "state of disorder, -- very filthy", and directed that in addition to being in arrest, he also clean up his quarters (R. 6-9).

4. For the defense, the accused made an unsworn statement. He was drinking on the evening of January 21st, but considered himself fit for duty on January 22nd. He came from town on the 22nd and reported

for duty. After a short time he went to Battalion Headquarters of his own volition and asked permission to go to town to settle some personal business. Colonel Nist had been rather severe with him for several months and had no consideration for him. Accused had recently been transferred to the 307th Infantry and was becoming acclimated there and enjoying his work.

5. It is clear from the testimony that the accused was under the influence of liquor on the morning of January 22, 1943, had a strong odor of liquor, was unsteady on his feet, his movements were incoordinated, his speech slurring, his eyes bloodshot, and his face flushed. Colonel Nist was of the opinion that the accused was drunk. Lieutenant Tumiel, after examining accused at the battalion dispensary, found that the accused was under the influence of liquor, but was not drunk, and expressed his opinion that the accused was sufficiently under the influence of alcohol as to make him unfit for military duty. The accused admitted that he had been drinking on the evening of January 21st, and had spent the night at a hotel.

The evidence shows that the accused, by the excessive use of intoxicants, had unfitted himself for duty on the morning of January 22, 1943.

6. Upon the convening of the court, the defense moved for a continuance in view of the fact that defense counsel had been notified to take the case only about 30 minutes before the trial started, and had not had time to consult with the accused. After the court had closed for deliberation and opened, the president announced that the court denied the motion at that time and that the defense might renew the motion after the close of the case of the prosecution. After the last witness for the prosecution testified, the prosecution asked for a recess. After the recess the prosecution and defense stipulated the testimony of Major Adair. The defense then proceeded with the presentation of its case without renewing its motion for a continuance.

It is apparent from the above that the defense did not see fit to renew its motion for a continuance. In view of the circumstances, it does not appear that the accused was in any manner prejudiced in the presentation of his defense by the conditional denial of the motion for a continuance.

7. The accused is 27 years of age. The records of The Office of The Adjutant General show his service as follows: Appointed second

lieutenant, Infantry-Reserve, from R.O.T.C., May 24, 1939; extended active duty, November 9, 1940.

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, and legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Victor S. Hall, Jr., Judge Advocate.

Percy A. Lyon, Judge Advocate.

Samuel M. Driver, Judge Advocate.

SPJGH
CM 232116

1st Ind.

War Department, J.A.G.O., APR 14 1943 - 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 Lee A. Bowling (0-376217), 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 and the sentence, and to warrant confirmation of the sentence.

The accused rendered himself unfit for duty by the excessive use of intoxicants, in violation of the 96th Article of War. In the opinion of a medical officer the accused was under the influence of liquor sufficiently to make himself unfit for duty, but was not drunk. The accused admitted that he had been drinking in town the previous evening, and had spent the night there in a hotel. In view of all of the circumstances, I recommend that the sentence to dismissal be confirmed, but that the execution thereof be suspended during the pleasure of the President.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

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

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

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(Sentence confirmed but execution suspended. G.C.M.O.115, 25 May 1943)

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

SPJGK
CM 232160

MAY 25 1943

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| UNITED STATES | ) | TRINIDAD SECTOR AND BASE COMMAND |
| v. | ) | |
| Private JAMES H. McCLOUDY (36125729), Headquarters Battery, 1st Battalion, 99th Coast Artillery. | ) | Trial by G.C.M., convened at Fort Read, Trinidad, British West Indies, November 13 and 17, 1942. Dishonorable discharge, total forfeitures and to be shot to death with musketry. |

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

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

CHARGE I: (Motion for finding of not guilty sustained).

Specification: (Motion for finding of not guilty sustained).

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

Specification: In that Private James H. McCloudy, Headquarters Battery, 1st Battalion, 99th Coast Artillery, did, at Arima, Trinidad, B.W.I., on or about July 25, 1942, with intent to do him bodily harm, commit an assault upon Private James Wright, by striking him on the head, with a dangerous weapon to wit, a night stick.

CHARGE III: Violation of the 65th Article of War. (Finding of guilty disapproved by the reviewing authority.)

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

CHARGE IV: Violation of the 69th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

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

Specification: In that Private James H. McCloudy, Headquarters Battery, 1st Battalion, 99th Coast Artillery, having received a lawful command from Second Lieutenant William E. Skelton, his superior officer, to get into a motor vehicle, to wit the military police "jeep", did at Arima, Trinidad, B.W.I., on or about July 25, 1942, willfully disobey the same.

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

Specification: In that Private James H. McCloudy, Headquarters Battery, 1st Battalion, 99th Coast Artillery, having been duly placed in confinement in the 99th Coast Artillery guardhouse, Fort Read, Trinidad, B.W.I., on or about July 25, 1942, did, at Fort Read, Trinidad, B.W.I., on or about July 31, 1942, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private James H. McCloudy, Headquarters Battery, 1st Battalion, 99th Coast Artillery, did, at Fort Read, Trinidad, B.W.I., on or about July 31st, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Ortoire Ferry, Trinidad, B.W.I., on or about September 13, 1942.

He pleaded not guilty to the Charges and Specifications. The court sustained a motion for findings of not guilty of Charge I and its Specification (R.39). Accused was found not guilty of Charge IV and its Specification and guilty of all other Charges and Specifications. Evidence of two previous convictions by special courts-martial, one for absence without leave, in violation of Article of War 61 and for applying to his own use a Government vehicle in violation of Article of War 94, and one for disrespect toward a superior officer in violation of Article of War 63 and breaking restrictions in violation of Article of War 96, was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority disapproved the findings of guilty of Charge III and its Specification, and approved only so much of the findings of guilty of Charge V and its Specification as involved a finding that accused failed to obey the order of a superior officer in

the execution of his office at the time and place alleged and in the manner alleged, in violation of Article of War 96, approved the sentence, forwarded the record of trial for action under Article of War 48, and recommended that "because the conditions existing at the time and place of the desertion were not such as to warrant imposition of the death penalty", the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for 8 years.

3. The evidence shows that on the night of July 25, 1942, accused, a member of Headquarters Battery, 1st Battalion, 99th Coast Artillery, was on duty at Arima, Trinidad, British West Indies, as a military policeman (R.21,22,27,33,35). Shortly after reaching the town of Arima accused went to a private dance hall and entered over the protest of the doorkeeper (R.21). Prior to entering the dance hall accused had been drinking (R.21,22), and on the inside of the dance hall he became involved in an argument with a civilian policeman on duty there. Accused cursed the policeman (R.22,25). Nothing was taking place in the dance hall at the time, and two or three civilians and the civilian policeman were the only persons present (R.22). The policeman sent a member of accused's battery to find a military police officer and bring him to the hall, and asked two other members of the same battery, Privates Herbert Burton and James Wright, to get accused out of the dance hall, and on the outside accused began to quarrel with Private Wright (R.22,25,27). The sergeant in charge of the military police detail came upon the scene at that juncture and tried to prevent accused from assaulting Wright (R.25), but accused evaded the sergeant and struck Wright on the head with his night stick (R.22,24,25,27). Lieutenant Skelton, a member of the same organization as accused and the officer in charge of the military police detail, arrived at that time and placed accused under arrest, instructing the sergeant to place accused in the military police truck (R.28,35). When accused was taken out to the truck he told the sergeant that he wanted to urinate and was taken behind the dance hall, whence he escaped (R.28).

Accused was recaptured the same night and taken to Lieutenant Skelton's jeep (R.29). Lieutenant Skelton ordered accused to get into the jeep and accused did not do so (R.29,38). He said nothing to Lieutenant Skelton (R.36). He cursed the members of the military police detail, and after a moment or two was forcibly placed in the jeep by the military police on the orders of Lieutenant Skelton (R.25,29,33,36, 38). Accused had been drinking but the witnesses disagreed as to the extent to which he had been affected thereby. Private Burton stated that accused was drunk (R.26), Sergeant Henry I. Gomes, Headquarters Battery, 1st Battalion, 99th Coast Artillery, stated that he was not (R.29), and Lieutenant Skelton stated that accused knew what he was doing (R.37).

It was stipulated by the prosecution and defense that accused was placed in proper confinement on July 25, 1942 (R.9). He was placed in what was apparently the regimental guardhouse. This guardhouse

consisted of some tents, about seven in number, unfenced, and guarded by three sentries (R.12). There were definite limits fixed which were known to the prisoners, although the Provost Sergeant was unable to state positively that he had explained the limits to the accused (R.12). On August 1, 1942, the officer of the day took the roll at the guardhouse and accused failed to answer (R.10,11). A search was made for him and he could not be found (R.10,11). The morning report for August 1, 1942, stated that accused had escaped confinement (R.54; Pros. Ex. B).

Accused went to a woman named Octavia Reynolds and stayed with her in Manzanilla for more than a month (R.16). He was dressed in civilian clothes and told her that he was not going back to the Army (R.16,17). Patrick Voisin, manager of a coconut plantation, testified that on August 18, 1942, accused came to him for employment, that witness employed him, and that accused worked for witness for four and one-half days (R.13-14). Accused was dressed in civilian clothes at that time (R.13).

On September 13, 1942, accused was apprehended. Sergeant Kalleta, Company H, 33rd Infantry, was on patrol duty on Manzanilla Beach on the morning of September 13 (R.18). While crossing Ortoire Ferry he saw accused among a group of natives. Accused saw him and started to run, the sergeant gave chase and, drawing his pistol, ordered accused to halt (R.19). Accused stopped, saying "you have got me Sergeant" and surrendered quietly (R.19).

For the defense, testimony was offered only with respect to the charge of wilfully disobeying the command of a superior officer, the charge of escaping from confinement, and the charge of desertion. Private Carruthers Hayes, a member of accused's organization, testified that he was on military police duty on the night of July 25, 1942, and that he was present when accused was ordered by Lieutenant Skelton to get into the jeep (R.40). The witness stated that "the Sergeant" and another were holding accused and that it was impossible for him to get into the jeep because of that fact (R.40-41). He testified that he believed that had accused been released by the men holding him he probably would have "gotten" into the jeep. Asked if accused had understood the order, he said that "he [accused] probably did not know" (R.43).

Accused testified with respect to Charges VI and VII only. He admitted having escaped from confinement (R.47). He stated that he left the guardhouse, and went to Manzanilla to meet a girl. She (Octavia Reynolds) brought him some whiskey and he started drinking. There were some American soldiers in the house where he stayed (R.47-53). He intended to return to the Army, but was drinking continuously, and as a result kept postponing his return (R.48,49). He testified:

"When I began to sober up, I thought of what had happened and I wanted to come and turn myself in. But on the first occasion I attempted to do it, I went to Louvinia's husband and I 'got to drink', and then being back in Cocal five miles, a long distance, back in the house on the beach, I would drink more than I could." (R.53)

Accused remembered asking for a job (R.53). He became ill during his absence. Upon his return to military control he was placed in the station hospital (R.49, 50). The defense offered and there was received in evidence the "Proceedings of a Board of Officers * * * dated October 13, 1942" (Def. Ex.A). The board found that accused was sane and that he had been sane at all times. It made the following diagnosis:

"1. Malarial Fever, Estivo-Autumnal Type.
"2. Typhus Fever.
"3. Syphilis.
"4. Constitutional Psychopathic, Criminalism." (Def. Ex.A,p.2)

4. The evidence establishes that at the place and time alleged, accused, after an altercation, struck Private Wright over the head with his night stick. He was placed in arrest by the officer in charge of the military police detail and remanded to the custody of Sergeant Gomes. He succeeded in breaking away from Sergeant Gomes but was captured later that evening. Brought to the military police truck, he was ordered by the officer in charge of the military police detail, Lieutenant Skelton, to get into the truck. He failed to do so and had to be placed in the truck by force. Confined in the regimental guardhouse he made his escape therefrom on August 1, 1942, and remained absent until apprehended on September 13, 1942. Although the guardhouse was not fenced, accused was definitely under physical restraint, and that his departure was not authorized is an inescapable inference from all the evidence. During his absence accused dressed in civilian clothes and sought and obtained employment. He was at all times in close proximity to military establishments and military police. He made no effort to surrender himself. All of those circumstances evidenced an intent to desert. Further evidence of accused's intent to desert is found in the fact that accused's absence was begun by escape from confinement (par. 130, M.C.M. p. 144).

5. Before the arraignment of accused, Lieutenant Colonel Charles H. Nolan, 99th Coast Artillery, president of the court, announced that he had formed an opinion in the case. On voir dire he testified that he and accused were both members of the 99th Coast Artillery, and that although he did not know accused personally, he had formed an opinion in the case. He explained that he was not familiar with the matters charged in the case and that his opinion was "more or less an opinion

of the man himself, based on a long period of association, and a knowledge of his behavior as a member of this regiment" (R.3). He continued: "I can sum it up thus. I have formed a conviction that the accused would be better out of the Military Service for the good of the United States in a general way" (R.3). The court treated the proceedings as a challenge for cause and ruled that the "challenge" was not sustained (R.4). However the trial judge advocate challenged Lieutenant Colonel Nolan peremptorily and he was excused and withdrew (R.5).

In the opinion of the Board of Review the remark made by Lieutenant Colonel Nolan to the effect that accused should be out of the service did not constitute an error or irregularity. Paragraph 57, Manual for Courts-Martial, requires that at the beginning of the trial each member of the court disclose in open court every ground of challenge believed by him to exist against himself or any other member. Naturally, the purpose of this disclosure is to place before the court and counsel all information relative to the member's qualification to sit in the case. All facts showing bias or prejudice should be revealed. Failure to reveal them completely results in a lack of sufficient data upon which to determine the member's fitness to remain on the court. When Lieutenant Colonel Nolan made the statement in question, he was merely giving a true picture of his attitude toward accused. That is exactly what he was supposed to do on voir dire and no error or irregularity resulted.

The dissenting opinion is predicated upon the basis that Lieutenant Colonel Nolan's remark constituted error. If, for the purposes of argument, it be assumed that the remark was error, the "error" did not injuriously affect the substantial rights of accused (A.W. 37). The evidence of guilt was compelling.

Some discussion of the points raised by the dissenting opinion is desirable. Our discussion thereof is based upon the assumption that an error or irregularity occurred - an assumption with which, as already noted, we do not agree. The dissenting opinion states that the rule prohibiting evidence of an accused's bad character is "fundamental". But so are the rules prohibiting the introduction of hearsay evidence, involuntary confessions, and many other forms of incompetent testimony. The mere fact that a rule of evidence is "fundamental" does not imply that every violation of it constitutes prejudicial error. If that were so, Article of War 37 would be a nullity and each case would turn upon the question whether the rule violated was "fundamental" or not "fundamental", - an obviously unworkable proposition. Indeed, the dissenting judge advocate concedes that the "error" in the present case was not prejudicial so far as the findings of the court are concerned. However, he declares that it was prejudicial so far as the sentence is concerned. The cases which he cites to sustain his position fail to do so. People v. Mahoney and People v. Sobrieskoda have nothing whatsoever to do with the sentence. In each case a conviction was reversed because of errors which the court considered prejudicial. As noted, the dissenting judge advocate admits that the conviction in the present case was proper despite the "irregularity". The isolated passages quoted in the dissenting opinion are entirely irrelevant as guides for our decision in the

present case. Williams v. State depends upon a particular Arkansas statute. That statute permitted the jury to pronounce a sentence of either death or life imprisonment upon a conviction of first degree murder. The Arkansas decisions also held that evidence improperly admitted should be treated as prejudicial unless there was something to show the contrary, - a principle foreign to military jurisprudence. In the Williams case the jury sentenced the accused to death. The court held that the erroneously admitted evidence of other crimes was prejudicial in that the jury selected the more severe of the alternate sentences. The court sustained the conviction but imposed the milder sentence, as it had a right to do under Arkansas law. Whether we should follow the Williams case if a court-martial imposed the more severe of two permitted sentences need not be decided, for no such limited alternative exists for violation of the Articles of War of which accused was found guilty. The penalty for desertion in time of war is death "or such other punishment as a court-martial may direct" (A.W. 58). Thus, for the desertion alone, the death penalty was permissible and the sentence was not limited to a choice between that and some other one punishment.

The dissenting judge advocate quotes a passage from the Staff Judge Advocate's review to the effect that the sentence is "patently excessive". With this we agree, but that does not taint the sentence with the mark of illegality, nor does the Staff Judge Advocate so hold. In the opinion of the dissenting judge advocate the Board of Review must correct "this error", which he holds is not prejudicial as to the findings. But how correct it? Implicit in the dissenting opinion is the conclusion that the sentence is partly legal and partly illegal. We are not told which part is the one and which the other. If it is partly legal, we should recommend confirmation of that part and hold the other part illegal. Obviously there is no basis upon which any such computation may be made, nor does the dissenting judge advocate suggest any, nor cite any authority for his proposition. The Articles of War and the Table of Maximum Punishments constitute our guides in determining the legality of a sentence, and under their aegis the present sentence is legal: - all of it. What then is the remedy? Clearly it is commutation by the confirming authority. The dissenting judge advocate says that this is not enough, and he brands such corrective action as "sentimental rather than as a matter of strict legal rights". This overlooks a fundamental concept of military jurisprudence. Courts-martial are merely advisory bodies to the reviewing or confirming authority. There is no such separation of the executive, judicial, and legislative functions as exists in our Federal and state governments. The reviewing or confirming authority is an integral part of the court-martial system and no case of conviction is finally concluded until he has acted upon it (A.W.40). His position is entirely different from that of the governor of a state to whom recourse is sought solely as a matter of grace. It is to the confirming authority that we must look for relief from an excessive sentence unless, of course, the sentence is actually illegal. For example, if an accused is convicted of larceny of property of over $50 in value, the longest confinement allowed by the Table of Maximum Punishments is five years (M.C.M., p. 99). If the court sentences an accused to confinement for six years, one year of the sentence is illegal,

and the Board of Review must correct the error. However, as noted, the present sentence is not illegal, but merely excessive, and there is no illegality to correct. Commutation by the confirming authority is entirely adequate and is the only method provided by military law.

The dissenting judge advocate refers to the influence of rank as a material factor in his determination, although he does not deem it sufficiently material to render the findings illegal. Apparently had the improper remarks emanated from the lips of a second lieutenant they would not have caused so much concern. The presence on the court of several officers of Lieutenant Colonel Nolan's command, inferior to him in grade, seems also to have been a determinative element in the minority's conclusions. If we are to presume that the decisions of courts-martial are influenced by rank, it behooves us to scrap the present court-martial system and make a fresh start. Our whole theory of a court-martial, surrounded as it is by the protection of the secret ballot, contemplates that each member of the court will exercise an independent judgment in arriving at his decision on the guilt of accused and on the sentence. It may often happen that the accuser or a witness for the prosecution is the superior officer of some members of the court, or that one member of the court is the commanding officer of another. If we are to weigh that factor in considering the validity of the findings and sentence, we shall become enmeshed in a series of imponderables incapable of logical solution. In any event, if the "irregularity" did not prejudice accused so far as the findings are concerned - and the dissenting opinion holds that it did not - there is no foundation for holding the sentence illegal, and relief must come from the final authority in the military justice procedure - the confirming authority.

6. Attached to the record of trial is a letter from Captain K.D.S. Pogue, Chaplain, 99th Coast Artillery, requesting that the sentence of death be commuted to confinement for a term of years.

7. The charge sheet shows that accused is 24 years of age and was inducted into the military service on August 8, 1941.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. The death penalty is authorized for desertion in time of war in violation of Article of War 58.

Andrew J. Cappy, Judge Advocate.

(Dissent), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

SPJGK
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MAY 25 1943

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| UNITED STATES | TRINIDAD SECTOR AND BASE COMMAND |
| v. | |
| Private JAMES H. McCLOUDY (36125729), Headquarters Battery, 1st Battalion, 99th Coast Artillery. | Trial by G.C.M., convened at Fort Read, Trinidad, British West Indies, November 13 and 17, 1942. Dishonorable discharge, total forfeitures, and to be shot to death with musketry. |

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DISSENTING OPINION
of
Lieutenant Colonel John Warren Hill, Judge Advocate.

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I do not concur in the majority opinion. A grave irregularity occurred during the organization of the court. At that time the Trial Judge Advocate requested the members to disclose any grounds of challenge known to them. The member senior in rank then stated that he had formed an opinion in the case. The Trial Judge Advocate questioned this member. He testified that he was a member of accused's organization, that he did not know the accused personally, and that he had formed an opinion in the case. The Trial Judge Advocate then requested that the member be excused. The Law Member questioned the challenged member as follows:

> "Law Member: Colonel Nolan, have you formed a definite opinion as to the guilt or evidence [sic] as to any offense charged?
>
> "Witness: None of the offenses charged here, because I am not familiar with the offenses charged at the present time. My opinion is more or less an opinion of the man himself, based on a long period of association, and a knowledge of his behavior as a member of this regiment.
>
> "Law Member: You would not find the accused guilty of any of the charges merely because he was charged with the offense?
>
> "Witness: No.
>
> "Law Member: In other words, at the present time you don't know what the charges contain?
>
> "Witness: I don't know. I can sum it up thus. <u>I have formed a conviction that the accused would be better out of the Military Service for the good of the United States in a general way</u>. * * *" (R.3) (Underscoring supplied)

Attention is directed to the underscored part of the member's statements. It is this which I shall discuss. No comment, then or later, was made by any member of the court, the personnel of the prosecution, or the defense, upon the statement. The court was not admonished to disregard it. No corrective statement was made. The court was closed again and when it opened it was announced that the challenge against the member was not sustained. Subsequently, the Trial Judge Advocate peremptorily challenged him and he was excused. It was not only inflamatory, but it violated the cardinal rule, a rule which the Manual for Courts-Martial, 1928, on page 112 terms "fundamental", that the bad character of an accused may not be shown in any form "either by general repute or by personal opinion" except under certain circumstances, none of which operated here to excuse or justify this sworn statement. Coming from so high an authority the erroneous character of this statement was doubly pernicious. This statement was highly irregular.

There remains to be considered the question of whether the making of the remark prejudiced the substantial rights of accused. Insofar as the findings of the court are concerned I am convinced that the determination of accused's guilt was in no wise affected by the statement. There was sufficient evidence before the court to justify its findings of guilty.

In deciding, however, whether or not an error or irregularity has been prejudicial to an accused, his guilt or innocence is not the sole determinant. For instance, evidence of the general character of an accused may reflect itself in the sentence rendered to a degree beyond that justified by proof of commission of the act presently charged. I am of the opinion, for reasons hereinafter stated, that insofar as the sentence imposed is concerned this error operated in just this way to the substantial prejudice of accused.

In discussion of the effect of the error upon the sentence I may well quote the observations respecting the sentence made by the Staff Judge Advocate in his review of the case. He said:

> "Although desertion in time of war is, since Executive Order of February 3, 1942, a capital offense, the death sentence imposed by the court is patently excessive. Dishonorable discharge, total forfeitures and confinement at hard labor for a reasonable term of years would have been adequate punishment for the offenses for which the accused here stands convicted."

It is my belief that the improper remark of the challenged member, allowed to pass as it was without exception and without comment, contributed to the unwarranted severity of the sentence. It will be borne in mind that it was made by a member superior in rank to the other members named to the court. That in itself is an important circumstance in deciding its effect. As a member of accused's organization it would appear that he had information to justify his remark. His status as an officer, with no apparent motive for malice, would impart to any statement of his a weight and verity equal, if not superior, to the testimony of a witness. Furthermore this member was attached to the same regiment to which four other members of the court belonged. He had been executive officer of that regiment. I cannot say, in view of this, that his opinion was without effect upon the judgment of the members remaining on the court. Their opinion of accused is reflected in their sentence.

It is not, in my view, necessary to go to the extent of the holding in the case of Williams v. State (39 S.W. (2nd) 295 (Ark.)), that the improper admission of evidence is prejudicial when the maximum penalty is inflicted. In that case the court admitted that the guilt of accused was conclusively proved, but held, seemingly, that the inflicting of the maximum penalty served automatically to render the error prejudicial. No such inflexible rule is required here. The prejudice to accused was factual. The sentence imposed exceeded by far the customary and usual sentence for accused's offenses. Nothing in the circumstances of accused's conduct justified the imposition of the death penalty under present standards. I cannot escape the conviction that the severity of the court's sentence derived in part from the perhaps unconscious prejudice implanted in its mind by the improper statement of the member. The right to a fair trial includes the right to trial and sentence by a court uninfluenced in its conclusions as to accused's guilt and the measure of punishment merited.

I believe, in view of the maximum sentence imposed, unjustified as it was, that the unfortunate remark weighed heavily in the mind of the court and that accused did not have the question of his guilt determined by a court entirely free from bias. In the case of People v. Mahoney (258 Pac. 607) the Supreme Court of California, at page 610, said,

> "The fact that a record shows defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have that fair trial guaranteed him by law and by the Constitution."

And in People v. Sobieskoda (139 N.E. 558) Justice Pound, speaking for the Court of Appeals of New York, at page 561, said,

> "It is the duty of the court 'to give judgment without regard to technical errors or defects or to exceptions which do not affect substantial rights.' Code Crim. Proc. sec. 542. The district attorney urges that defendant's guilt is so clearly established that his substantial rights were not affected by these errors. But the question of substantial right is not the abstract question of guilt or innocence. A guilty man is entitled to a fair trial, and a trial is not fair if the verdict may be related to errors in the judge's charge. * * *" (underscoring supplied)

The statement of this high ranking member of the court, made under oath, before he left the court, in which statement he improperly impugned the character of accused was highly prejudicial to substantial rights of accused. It constituted serious error. It probably resulted in the death sentence which was imposed, a penalty not mandatory, in fact "unusual" under the circumstances.

The Board of Review is required by law to correct this error. To hold the record in this case good, recommending commutation of sentence as means of according substantial justice, is not to correct error in the manner prescribed by law.

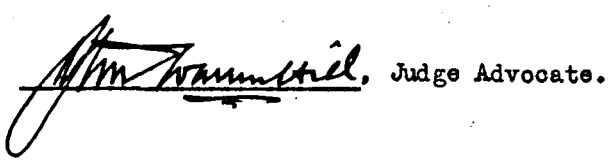
And since the error in this case was aggravated because it flowed from high ranking authority, it becomes the duty of the Board of Review to underscore the impropriety not only out of concern for the rights of accused but in order that the integrity and authority of courts-martial be not weakened by practices which give undue attention to the opinion of ranking officers in a court room.

Military law itself recognizes rank as a potential evil in the court room. It has jealously guarded against the dangers inherent in this situation. Its purpose has been to avoid even the appearance of evil. However, despite rules and practices adopted as safeguards, the subtle influence of rank occasionally manifests itself. On such occasions it is the solemn responsibility of the Board of Review to speak in no uncertain terms, condemning as substantial error any incident which endangers the even handed administration of justice in the Army.

If the summation of a trial judge advocate can be held inflamatory and prejudiced, how much more so the personal views of a

commanding officer spoken in prejudgment of an accused, impugning his character and condemning him before trial, in the presence of a court largely composed of officers serving under him.

Unless the Board of Review speaks out condemning what occurred in this case as a flagrantly improper and prejudicial incident, the error involved will continue. The Board of Review is quick to see and to act with respect to errors which affect findings. The same policy should dictate with respect to errors affecting, or potentially affecting, sentences imposed. It is not enough to rely on the confirming authority to correct injustices resulting from error. Such corrective action may be regarded as sentimental rather than as a matter of strict legal rights. Reasons for action by the confirming authority are never communicated to the field for its information and guidance. And gross errors may continue as a result of lack of exact knowledge with respect to the practice or act here condemned.

 , Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 10 1943 - 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 Private James H. McCloudy (36125759), Headquarters Battery, 1st Battalion, 99th Coast Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for eight years, that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Consideration has been given to the following attached communications: Copy of letter from Honorable Harry F. Kelly, Governor of the State of Michigan, to the Secretary of War, dated February 11, 1943, with copies of four inclosures; copy of letter from Charles J. Opdyke, Lansing, Michigan, dated February 9, 1943, addressed to the President; copy of telegram from Joseph A. Powers, Detroit, Michigan, dated February 11, 1943, to the President; letter from Honorable Murray D. VanWagoner, then Governor of the State of Michigan, dated December 30, 1942, addressed to The Judge Advocate General, with one inclosure; and letter from Percival R. Piper, Esq., Attorney at Law, dated May 11, 1943, addressed to The Judge Advocate General.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

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

8 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4- Copy let. fr. Hon.Harry F. Kelly,2-11-43,w/incls.
Incl.5-Copy let. fr. Chas.J. Opdyke,2-9-43.
Incl.6-Copy telegram fr.Jos.A. Powers,2-11-43.
Incl.7-Let.fr. Hon.Murray D. Vanwagoner,12-30-42,w/1 incl.
Incl.8-Let.fr.Percival R. Piper,5-11-43.

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**(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for eight years. G.C.M.O. 144, 17 Jul 1943)**

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TITLE

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