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Volume XXI

including

CM 234472 to CM 235382

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

SPJGQ
CM 234472

18 JUN 1943

UNITED STATES	)	FORT MEARS, ALASKA
v.	)	Trial by G.C.M., convened at Fort Mears, Alaska, March 19, 1943. Dismissal, total forfeitures and confinement for one (1) year.
Captain LEWIS F. CANNON (0-411433), Medical Administrative Corps.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Lewis F. Cannon, Medical Administration Corps, (National Guard), did, at the 185th Station Hospital, Fort Mears, Alaska, on or about November 10, 1942, knowingly and without proper authority, feloniously accept and have in his possession four pairs of officers' pink trousers of the value of $40.00, consigned to the main branch of the local Post Exchange, then well knowing the said trousers to have been feloniously misappropriated, taken, and carried away.

Specification 2: In that Captain Lewis F. Cannon, Medical Administrative Corps (National Guard), did, at the 185th Station Hospital, Fort Mears, Alaska, on or about November 10, 1942, accept a gift of gratuity of property consisting of four pair of officers' pink trousers, of the value of $40.00, from enlisted personnel, to the prejudice of good order and military discipline.

He pleaded not guilty to and was found guilty of the Charge and the Specifications. Evidence of one previous conviction for wrongfully discharging a pistol in quarters, and of being drunk and disorderly in quarters, in violation of Article of War 95, was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The pertinent evidence for the prosecution shows that the post exchange at Fort Mears, Alaska, on September 1, 1942, ordered certain merchandise, including 24 pairs of officers' "pink" trousers, from a manufacturer in New York. On October 22, 1942, the exchange received an invoice for the merchandise, and on November 10, 1942, received a manifest from a transport indicating the arrival of the merchandise in Alaska (Ex. 8, 9). The exchange, however, never received it.

On December 24, 1942, approximately nine pairs of officers' "pink" trousers were found in the ceiling of the Medical Supply storage room at Fort Mears. They were identical with respect to the material and trade mark of the trousers ordered by the exchange.

On December 25, 1942, the two topics, viz. the arrest of a Sergeant Roberts and the missing trousers, were discussed by several officers in the presence of the accused who said, "I have four pairs of those trousers myself" (R. 9). A week later accused turned over to one of the investigating officers four pairs of officers' "pink" trousers with unfinished bottoms identical with the recovered trousers, stating that he had bought them for $5 per pair from Sergeant Roberts who had them because he anticipated going to Officers' Candidate School but because he could not go did not need them any longer (R. 6).

Sergeant William M. Roberts was a Staff Sergeant in the Medical Department at Fort Mears in November 1942, when a box containing about 50 pairs of officers' "pink" and "O.D." trousers were erroneously delivered to the Medical Supply (R. 17). Roberts helped himself to some of the "O.D.'s" and, so as not to get caught with the remaining trousers, gave them to various enlisted men and officers at the Fort. He testified that he was in the room of a Lieutenant Rinehart delivering five pair of these trousers to Lieutenant Rinehart when the latter called the accused in the room, showed him the trousers and asked if he would like to have some (R. 17). The accused said he would, told Roberts his size, and requested the same number of pairs as had been delivered to Lieutenant Rinehart. The only thing that Roberts said in the presence of the accused which might indicate that the trousers were not his own legitimate property was he advised accused "not to take them to the Post Cleaners". (R. 19, 42). Nothing was said then about payment. Later on that day Roberts placed four pairs of "pinks" in a box to deliver to accused. In order to reach the accused's room one must go through the nurses' mess hall. Roberts took the package containing the trousers through the kitchen of this mess hall and left it in a small storage room adjoining the kitchen and told an attendant there that the package was for the accused (R. 20). The next day accused indicated to Roberts that he had received the trousers.

Roberts was arrested the night of December 24, 1942, and while in the guardhouse he was visited by a Sergeant Kenneth M. Donnell, 135th Station Hospital, who told him that accused had asked Donnell to tell Roberts that he, the accused, had bought the trousers from Roberts who had them in anticipation of going to Officers' Candidate School (R. 21, 45). After he was released from the guardhouse accused questioned him as to what he was going to say about the trousers, but Roberts refused to discuss the matter (R. 22).

Roberts further testified that it was a common occurrence for merchandise to be erroneously delivered to the Medical Supply. If it was merchandise usable by the enlisted men, it would be distributed among them. At one time, in September 1942, some ski jackets and parkas were misdelivered, out of which Roberts gave accused a ski jacket and a parka in the presence of Sergeant Goulett and Corporal Lahman (R. 25). Roberts and accused were on friendly terms and visited each other in their quarters. Roberts admitted that it was to his interest that it appear that the trousers were not sold to accused (R. 32). He had been told by a Major Raymond that it would be a good idea for the enlisted men to stick together and make a joint statement (R. 34, 39).

Although the accused was the Detachment Commander he had nothing whatsoever to do with Medical Supply and never saw any of the misdelivered merchandise in the supply room.

Sergeant Donnell, roommate and "buddy" of Roberts, testified that shortly after Roberts was arrested the accused asked him to tell Roberts that accused was going to say that he had bought the trousers from Roberts believing that Roberts had gotten them in anticipation of going to Officers' Candidate School (R. 45). He went to the guardhouse and delivered the message. He admitted that he himself had received two pair of the "O.D." trousers for which he paid nothing, and that he had not mentioned the episode of the accused's message to Roberts to the officers investigating the case (R. 50).

4. To attack the credibility of Sergeant Roberts the defense called as witnesses: Major Norman K. Raymond, 37th Infantry, who stated that Roberts had told him during the investigation that he had delivered the trousers to the accused personally (R. 56);

Captain Robert W. Copeland, Provost Marshal, who stated that Roberts never mentioned any message alleged by Roberts to have been delivered to him by Sergeant Donnell at the guardhouse (R. 58);

Sergeant Norman R. Law, 185th Station Hospital, who stated that he had purchased for $5 one pair of trousers from Roberts (R. 68-69);

Technician Arthur F. Lenz, 185th Station Hospital, the nurses' mess hall orderly, who denied that Roberts left any package for the accused (R. 71-72);

Corporal Arthur J. Lahman, 185th Station Hospital, who denied that Roberts ever gave the accused a parka or a ski jacket in his presence (R. 73-74);

Lieutenant Ewell O. Rinehart, 185th Station Hospital, who denied that the accused and Sergeant Roberts were ever in his room together, or that he called accused to his room to see the trousers brought there by Roberts. He stated that he had purchased five pairs of trousers at $5 each from Roberts, but, so far as he knew, accused knew nothing of this, nor had he seen the trousers (R. 77).

Technician 4th Grade, Richard M. Goulett, 185th Station Hospital, had been called by the prosecution regarding the alleged gift to accused by Roberts of the ski jacket and the parka. He surprised the prosecution by testifying that he never saw Roberts give accused any articles (R. 53).

By stipulation Captain Woodford testified that he had no reason to believe that the accused knew anything of the irregularities in the Medical Supply Section prior to the investigation (R. 34).

The accused, as a witness on his own behalf, testified that Sergeant Roberts approached him early in November, 1942, and asked if he would like to buy some pants. He told Roberts that he would be interested in "pinks". Roberts said he had some he would like to sell. In answer to question of price Roberts said "the price will be right". That evening when he returned to his room he found a box on his bunk containing four pairs of neatly folded pants. He held them to his waist to see if they fit and then put them in his unlocked wall locker where they remained until turned over to the investigating officer. When he asked Roberts how much he owed him for the trousers, Roberts said he would let him know--that he didn't need the money as he had made a "hit", meaning he had won at gambling. On Christmas day, 1942, accused was sitting in Lieutenant Effron's room with another officer when Captain Copeland came in and the subject of the missing merchandise and the search of the Medical Supply came up. Trousers were mentioned. Accused said, "Oh! My God! I bought four pair from Roberts myself". Captain Copeland said, "What! you, too? That's makes about a dozen of them" (R. 82). Accused turned the trousers over to Captain Copeland on New Years Day. He denies that Sergeant Roberts had ever given him a parka or a ski jacket (R. 82-83).

On cross-examination he stated that Roberts did not tell him where he had gotten the trousers but he thought that Roberts had them in anticipation of going to Officers' Candidate School and wanted to sell them after he had learned that he was not going. He knew of others who had purchased officers' clothing with that same idea. He did not know that Lieutenant Rinehart had purchased trousers from Roberts until Christmas Eve. He then told Lieutenant Rinehart that he too had purchased trousers from Roberts (R. 90). He denied that he told Donnell to tell Roberts what to say about the trousers. (R. 92-93). Accused was commissioned a Captain on January 5, 1941 in the Medical Administrative Corps from a Sergeant instructor in Field Artillery in the National Guard following 20 years enlisted service.

His only explanation of Roberts' reason for testifying unfavorably against him was that Roberts must believe that if he could get a couple of officers involved he might get himself out of a "tough spot" (R. 90).

5. The first Specification charges the accused with having feloniously accepted in his possession four pairs of officers' pink trousers on or about November 10, 1942 "then well knowing the said trousers to have been feloniously misappropriated, taken, and carried away". The prosecution clearly showed that Sergeant Roberts had feloniously misappropriated, taken and carried away the four pairs of trousers in question and that accused had accepted them into his possession. Did the accused then know that the trousers had been stolen?

The gist of a charge of this nature is the guilty knowledge on the part of the receiver that the goods he received were stolen. This must be proved beyond a reasonable doubt, otherwise the case falls.

The relevant facts bearing upon this question of guilty knowledge are as follows: Officers' pink trousers were not carried in stock at the post exchange and were difficult to procure at Fort Mears, Alaska. The four pairs of trousers involved were officers' trousers in the possession of an enlisted man. The accused paid nothing for them. If Sergeant Roberts' testimony is worthy of belief, the accused saw him deliver five pairs of similar trousers to Lieutenant Rinehart, requested five pairs for himself, and was warned not to take them to the post cleaners. Roberts' testimony is not worthy of belief. He is the acknowledged thief. The testimony of the thief should be carefully scrutinized and no conviction should be sustained by his uncorroborated testimony (Wharton's Criminal Law, Vol. 2, sec. 1230). In this case almost every fact testified to by Roberts was contradicted by other witnesses. His story about the delivery of the five pairs of trousers to Lieutenant Rinehart in the presence of the accused and the arrangements made with the accused was denied in toto, not only by the accused, but also by Lieutenant Rinehart. His story of the manner in which he delivered the four pairs of trousers to the accused was denied by the mess orderly. It was also inconsistent with another statement made by Roberts. His story of the gift of the ski jacket and parka to the accused in the presence of two other enlisted men was denied by both of the enlisted men he named. It should be borne in mind that Roberts at no time told accused where or how he had procured the trousers. He himself admitted that the only thing he said in the presence of the accused from which the accused might possibly infer that

there was some question concerning the legality of the transaction was his warning to accused not to take them to the post cleaners. Even if this did happen, this statement would not justify an assumption that the trousers had been stolen. It might as readily have meant that the post cleaners were not capable of properly cleaning them. If the accused knew that Roberts had just sold five other similar pairs of trousers to another officer, his suspicion should have become aroused. But both officers swore that neither knew that the other was dealing in trousers with Roberts at the time. In view of the contradictions and denials enumerated, Roberts' testimony is lacking in credibility.

The defense in explanation of the unusual fact of an enlisted man having in his possession four pairs of officers' trousers showed that Roberts had been selected to go to Officers' Candidate School and then something occurred which prevented him from going. The defense also showed that in several cases of enlisted personnel being similarly selected, officers' clothing was purchased. This is an improbable but a possible explanation. If true it destroys the probative value of the fact used against the accused. The fact becomes one consistent with innocence on the part of the accused. The failure to pay for the trousers is explained by the accused by the fact that he was not present when the trousers were delivered and that when he offered to pay, Roberts told him that he did not then need the money and that the price would "be right". Here again we have a reasonably possible, though improbable explanation. It is consistent with innocence. Guilty knowledge is an essential element of the offense which must be proved by the prosecution beyond any reasonable doubt. The Board of Review is of the opinion that the prosecution has failed to meet that burden. The few suspicious facts concerning guilty knowledge shown by the evidence are as consistent with innocence as with guilt. The court may not properly convict on mere probabilities. The evidence of record is not sufficient to sustain the finding of guilty as to Specification 1 of the Charge.

With reference to Specification 2 of the Charge, the accused, as an officer, is charged with accepting a gift of property from an enlisted man. The property involved is the stolen merchandise described in the first Specification of this Charge. The donor is the thief. The only evidence that the transaction might have been a gift was the testimony of Sergeant Roberts that rather than destroy the stolen trousers he decided to "give" them away to the enlisted men and to some of the officers. It is difficult to understand how a thief can make a valid gift of stolen property in such a manner as to charge the recipient with having received a gift. However, it is not necessary to pass upon that question because Roberts

never disclosed to the accused that the transaction was a gift. According to Roberts he was delivering trousers to Lieutenant Rinehart when the accused was called into the Lieutenant's room to see the trousers. The Lieutenant asked accused if he would like to have some also. The Lieutenant testified that the transaction at the time was a purchase by him of the trousers at $5 a pair. No one said anything about a gift. Even though no price was mentioned the circumstances implied a sale. The accused considered it a sale and he was justified in his conclusions. Even the law would have implied a contract of sale under such circumstances if Roberts had been the legitimate owner of the goods. It therefore follows that as there was absolutely no evidence that the accused was consciously accepting a gift, the record is not sufficient to sustain a finding of guilty of Specification 2 of the Charge.

6. Accused is 44 years of age, married and the father of two children. War Department records show enlisted service in the Regular Army during World War No. 1 and subsequent thereto for twenty years and eight months. He was honorably discharged as sergeant on January 4, 1941, to accept commission as captain, Medical Administrative Corps, Ohio National Guard; was Federally recognized on January 6, 1941, and entered on active duty on that date at Akron, Ohio.

7. Attached to the record of trial is a recommendation for clemency signed by one member of the court and the defense counsel.

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 insufficient to support the findings of guilty and the sentence.

William A. Lounde, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 31 July 1943 - To the Acting 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 Lewis F. Cannon (0-411433), Medical Administrative 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 record is legally sufficient to sustain the findings and the sentence.

3. The accused is charged with having knowingly received stolen property in that he received four pairs of officer's "pinks" (trousers) from an enlisted man (Sergeant Roberts) who had unlawfully taken the trousers from a box of fifty pairs which were consigned to the post exchange at Fort Mears, Alaska, and which were misdelivered to the medical supply storage room where Sergeant Roberts was on duty as a noncommissioned officer in charge of medical supplies. Sergeant Roberts admits knowingly taking the trousers and disposing of them to enlisted men and officers whom he "could trust" including the accused, Captain Cannon. Captain Cannon was detachment commander and as such was Sergeant Roberts' commanding officer.

4. There is no dispute as to the sufficiency of all the elements of the offense charged except that the Board of Review is of the opinion that the record is not legally sufficient to prove to the exclusion of a reasonable doubt that Captain Cannon "knew" the trousers were stolen. It is not necessary that the accused should have actually known that the trousers were stolen. It is sufficient that the circumstances surrounding the transaction of receiving the trousers were sufficiently suspicious to put a man of ordinary intelligence on inquiry. See Winter v. State, 99 So. 249 (Fla. 1924); Stephenson v. State, 104 So. 600 (Fla. 1925); Bowers v. State, 146 NE 818 (Ind.); State v. Emory, 226 Pac. 754 (Kan.); State v. Rose, 136 Atl. 295 (NJ).

It is the function of the Board of Review and The Judge Advocate General, in passing upon the legal sufficiency of a record under Article of War 50½, to weigh evidence, judge of the credibility of witnesses and determine controverted questions of fact. I do not agree with the reasoning whereby the Board of Review in this case arrived at conclusions differing from the findings of the trial court and I think that the finding of the court was entirely warranted.

The only defense offered by the accused was that he "bought" the trousers from Sergeant Roberts thinking he had purchased them in contemplation of attending an Officers' Candidate School" in "The States" and that he desired to sell them because he subsequently learned he was not to attend such school.

5. Any officer should be suspicious when the sale of four pairs of officer's "pinks" is proposed to him by an enlisted man at a "right price". The average officer in "The States" probably has no more than two pairs of such trousers, and they were not procurable on the Alaskan post in question except by special order (R. 11). The accused did not comment on his possession of these scarce trousers to his fellow officers (R. 88) even though he had obtained them at an admitted bargain. He did not produce the trousers until it was apparent that he was personally involved even though he had heard of the impending investigation (R. 5-9) and the arrest of Sergeant Roberts. He was warned by Sergeant Roberts not to take them to the post exchange cleaners (R. 19) and he admits he never paid for the trousers though he had them more than a month (R. 86).

There was evidence of improper relationship between Sergeant Roberts and the accused (R. 94) running over a period of time prior to this incident which should have aroused the accused's suspicion when these trousers were received. Captain Cannon's driver verifies they rode and drank in a government "jeep" together (R. 20, 41, 101-102). Sergeant Roberts testified that he had stolen and delivered to accused a fur lined ski jacket or parka (R. 25-26, 38). A defense witness saw Captain Cannon with this fur lined parka in warm weather (R. 74) coming from Sergeant Roberts' room. The accused himself states Sergeant Roberts had illicitly procured whiskey for him (R. 83).

There is evidence to the effect that throughout the investigation, the accused lent aid and assistance to Sergeant Roberts and the other enlisted man involved hindering the investigation. He warned them (R. 23, 26). He sent Sergeant Donnell to the guardhouse to tell Sergeant Roberts what his alibi would be expecting Sergeant Roberts to protect him by verifying it (R. 45).

The testimony of Sergeant Roberts should be received with caution, it is true, and a conviction should not be sustained on it alone without corroboration. But, his testimony is so clear and convincing - so attended with human coincidences that mark the verity of any testimony - the absence of which (in the testimony of the accused) usually indicates or at least creates a strong suspicion of perjury. The court heard all the witnesses, observed their demeanor on the stand and chose to disregard the statements of the accused. Under the circumstances, I would have likewise concluded.

6. The Board of Review clearly recites its contrary views to those hereinabove set forth in its opinion. It is of the opinion that neither the weight of the evidence nor the credibility of the witnesses was sufficient to sustain the findings of guilty. Summarizing, the opinion of the Board of Review rests on the following specific conclusions:

a. The accused made to the investigating officer an immediate and voluntary disclosure of his possession of the trousers as soon as he knew they were missing or possibly stolen.

b. The conviction rests on the uncorroborated testimony of the thief whose testimony in certain material particulars was refuted by credible witnesses, and who had two motives in involving the accused, first, to "plant" the stolen property on someone else and, second, to protect himself by involving a commissioned officer.

c. Even giving full credence to the testimony of the thief, the conviction must still rest on dubious circumstances.

d. The possession by an enlisted man of officer's trousers is not unusual in Alaska and since the accused knew Sergeant Roberts had been selected but subsequently precluded from attending O.C.S. and since other selected officer candidates had purchased officer's uniforms on the post.

e. The investigating officer reported that the prima facie evidence would not sustain these charges without additional evidence which was supplied only by the thief.

f. Another officer was acquitted on practically the same charges and evidence, and

g. The accused with twenty years' service has a good reputation for honesty.

7. After careful consideration of the opinion of the Board of Review and 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 that in view of the circumstances, the confinement and forfeitures be remitted and that the execution of the sentence as thus modified be suspended during the pleasure of the President.

8. 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.

5 Incls.
1 - Record of trial.
2 - Dft. of ltr. for sig. ASW marked A.
3 - Dft. of ltr. for sig. ASW marked B.
4 - Form of Ex. action A.
5 - Form of Ex. action B.

(Findings of guilty and sentence disapproved. G.C.M.O. 263, 23 Sep 1943)

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

SPJGH
CM 234505

23 JUN 1943

UNITED STATES v. Colonel THOMAS B. MURPHY (0-16974), Medical Corps.	)	NINTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Douglas, Utah, 17, 22, 23, 24, 25, 26 and 27 February 1943. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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 85th Article of War.

Specification 1: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was, at Brigham City, Utah, on or about December 1, 1942, found drunk while on duty as Commanding Officer 34th General Hospital, Bushnell General Hospital, Brigham City, Utah.

Specification 2: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was at Ogden, Utah, on or about December 5, 1942, found drunk while on duty as Commanding Officer, 34th General Hospital, Bushnell General Hospital, Brigham City, Utah.

Specification 3: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was at Logan Utah, on or about December 9, 1942, found drunk while on duty as Commanding Officer, 34th General Hospital, Bushnell General Hospital, Brigham City, Utah.

Specification 4: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was at Salt Lake City, Utah on or about December 12, 1942, found drunk while on duty as Commanding Officer, 34th General Hospital, Bushnell General Hospital, Brigham City, Utah.

Specification 5: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was at Salt Lake City, Utah, on or about December 13, 1942, found drunk while on duty as Commanding Officer, 34th General Hospital, Bushnell General Hospital, Brigham City, Utah.

Specification 6: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was at Bushnell General Hospital, Brigham City, Utah, on or about December 14, 1942, found drunk while on duty as Commanding Officer, 34th General Hospital, Bushnell General Hospital, Brigham City, Utah.

Specification 7: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was at Ogden, Utah, on or about December 15, 1942, found drunk while on duty as Commanding Officer, 34th General Hospital, Bushnell General Hospital, Brigham City, Utah.

Specification 8: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was at Bushnell General Hospital, Brigham City, Utah, on or about December 16, 1942, found drunk while on duty as Commanding Officer, 34th General Hospital, Bushnell General Hospital, Brigham City, Utah.

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

Specification 1: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was, at Brigham City, Utah, on or about December 1, 1942, in a public place, to-wit: Idle Isle Restaurant, drunk and disorderly while in uniform.

Specification 2: (Finding of Not Guilty).

Specification 3: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was, at Logan, Utah, on or about December 6, 1942, drunk and disorderly while in uniform, at the home of Lieutenant N. W. Hatfield in the presence of other persons.

Specification 4: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was, at Salt Lake City, Utah, on or about December 13, 1942, in a public place, to-wit: Kwong Nom Low Restaurant, drunk and disorderly while in uniform.

Specification 5: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was, at Ogden, Utah, on or about December 15, 1942, in a public place, to-wit: Hotel Ben Lomond, drunk and disorderly while in uniform.

Specification 6: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, was, at Brigham City, Utah, on or about December 14, 1942, in a public place, to-wit: People's Drug Store, drunk and disorderly while in uniform.

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

Specification 1: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, did, at and near Bushnell General Hospital, Brigham City, Utah, between about December 1, 1942 and December 16, 1942, drink intoxicating liquor to the extent that he rendered himself unfit for duty.

Specification 2: In that Colonel Thomas B. Murphy, Medical Corps, 34th General Hospital, did, at Bushnell General Hospital, Brigham City, Utah, on or about December 16, 1942, at 0330 o'clock, while drinking and under the influence of intoxicating liquor, wrongfully and to the prejudice of military discipline, drill and cause to be drilled, the enlisted personnel of the 34th General Hospital, Brigham City, Utah.

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

Specification 1: In that Colonel Thomas B. Murphy, Medical Corps, Station Complement, Service Command Unit 1902, Fort Douglas, Utah, having been restricted to the limits of Fort Douglas, Utah exclusive of the Station Hospital did on or about February 3, 1943 break said restriction by going to said Station Hospital.

Specification 2: In that Colonel Thomas B. Murphy, Medical Corps, Station Complement, Service Command Unit 1902, Fort Douglas, Utah, having been restricted to the limits of Fort Douglas, Utah exclusive of the Station Hospital did on or about February 5, 1943 break said restriction by going to said Station Hospital.

Specification 3: In that Colonel Thomas B. Murphy, Medical Corps, Station Complement, Service Command Unit 1902, Fort Douglas, Utah, was at Fort Douglas, Utah on or about February 3, 1943 drunk and disorderly in the Station Hospital while in uniform.

Specification 4: In that Colonel Thomas B. Murphy, Medical Corps, Station Complement, Service Command Unit 1902, Fort Douglas, Utah, was at Fort Douglas, Utah on or about February 5, 1943 drunk and disorderly in the Station Hospital while in uniform.

He pleaded not guilty to all Charges and Specifications, and was found guilty of all Charges and Specifications, except Specification 2, Charge II, of which he was found not guilty. 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 only so much of the sentence as provides for dismissal and total forfeitures, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows by stipulation (Ex. 1) that during the period involved the accused was in the military service and wore the uniform of an officer and that at all times between 1 December and 16 December 1942, inclusive, he was Commanding Officer of the 34th General Hospital, which was stationed at Bushnell General Hospital, Brigham City, Utah.

a. Specification 1, Charge I, and Specification 1, Charge II: The accused reported to Headquarters, 34th General Hospital at Brigham City, Utah, on 1 December 1942. About midafternoon the accused, with Captain Joseph R. Rebillot, Captain Frederick A. Olsen, First Lieutenant Joseph T. Farrell, First Lieutenant N. W. Hatfield, Second Lieutenant Paul F. Kopp, and Second Lieutenant Hansford A. Cole, went to Captain Rebillot's apartment and had some drinks, "several pretty fast drinks". The accused became "rather abusive" and made several indecent remarks to and in the presence of Mrs. Rebillot. Then the accused, Captain and Mrs. Rebillot, and Lieutenant Hatfield went to the downtown district of Brigham for dinner. They entered the Idle Isle restaurant and went to a back room where they were alone. The accused placed a nickle in the "juke" machine, but finding the music too soft went out into the restaurant. He returned in a few moments with a waiter, stating in a loud voice "the country couldn't be very good with all these Mormons in it". The accused was drunk at this time. He talked to either the manager or head waiter about making the music louder, but this person said it was loud enough. The accused became angry and said he "wouldn't stay in his God damn place, that he would get out". The accused left and the others, after trying to explain to the manager that "it was just one of those things that happened, and it would be all right",

followed the accused to the Paris Grill (or Grill Cafe) nearby. There they ordered food and sat in a booth. The accused obtained a bottle of whiskey from some soldiers nearby, poured two glasses of water on the floor and put whiskey in the glasses. He drank quite a bit there. The accused next went into two drug stores, asking if they had any "sulphobonadine". He was drunk at this time. They then returned to Captain Rebillot's apartment for a poker game with some other officers. They had numerous highballs during the evening. At about 11:30 the poker game ended, and the accused and two other officers drove to downtown Brigham and went to the Hotel Howard and the Hotel Brigham. The accused was drunk, talked loudly, used profanity, pounded on the desk at one hotel and demanded a room without bedbugs, and accosted strangers on the street. He wanted to go to Ogden, Utah, and the two other officers drove him there. At a coffee shop in Ogden the accused obtained a bottle of whiskey. The accused then went into two hotels while drunk. They then returned to Brigham about 3 or 3:30 a.m. When they returned the accused woke up two other officers, broke the alarm clock of one of them against a radiator and then gave the owner $5.00 with which to purchase another clock (R. 47-54, 96-108, 119-122, 250-256).

b. Specification 2, Charge I: On the evening of 4 December 1942, the accused and several other officers, with three nurses, Mrs. Rebillot and Mrs. Dorothy Marden, dietician at the hospital, had a party in the recreation room of officers' quarters at the hospital. There was drinking and dancing. At about 10:15 p.m., the accused was sober. Later, about 11 p.m., he was drunk, or entering a state of drunkenness, and shortly afterward was seen drunk, in the washroom. The party ended about midnight, or earlier. At this time the accused was drunk, became angry because he said the others had not told him good night or were leaving without his consent, and threw a glass at the nurses, breaking it against the wall. The accused then wanted to go to Ogden or Salt Lake City. After some difficulty, he started a car, and from about 12:30 to about 1:30 a.m. (5 December) tried to get someone to go with him. About 2:30 a.m., the accused, who was drunk, returned to officers' quarters, awakened several officers, and tried to get them to take a drink (R. 55-64, 122-126, 161-168, 188-189).

About 9 p.m., on 5 December, the accused came to the cabin or apartment of Lieutenant Farrell, in Brigham City, and they had a bridge game. In the course of the evening, the accused, who was drunk, made several indecent remarks to Mrs. Farrell and to her mother, Mrs. Finney. He wiped his hands on the children's clothes, hanging up to dry in the bathroom, rather than use towels, broke two glasses in the kitchen sink, and stepped on the card table, knocking it over. The accused was at Captain Rebillot's home from about 2 a.m. to 7 a.m. (6 December) and

then returned to officers' quarters, drunk, where he required several officers to take a drink in his room (R. 75-78, 84-87, 127, 168-169, 227-228, 256-258).

c. Specification 3, Charge II: About 8:30 on the evening of 6 December, the accused, with Captain and Mrs. Rebillot, came to the home of Lieutenant Hatfield in Logan, Utah, while two lieutenants were there for dinner. The accused was drunk, and demanded an apology because Lieutenant Hatfield had invited the two lieutenants to dinner, without inviting him. Later in the evening the accused returned to Lieutenant Hatfield's home and pounded on the door (R. 109, 115-117, 189-190, 227-230, 248, 259-261).

d. Specification 3, Charge I: About 6:30 p.m., on 9 December, the accused came to the home of Lieutenant Farrell and asked for a drink. As Lieutenant Farrell had no whiskey, the accused left, and returned shortly with a quart of whiskey. The accused had about four drinks. Lieutenant Farrell and his wife were going to Logan, looking for a house to rent. The accused, Captain Rebillot and Mrs. Rebillot went with them. Lieutenant Farrell could not say that the accused was either sober or "really drunk" at that time. On arriving at Logan, Lieutenant Farrell and his wife went in search of a house, and the others went to the Bluebird Cafeteria, where Lieutenant and Mrs. Farrell joined them later. The accused had more drinks there and was drunk. He required Captain Rebillot to stand at attention, salute the accused, and sit on the floor. After they left the Bluebird, the accused went to a tavern nearby and was found there sitting in a booth with three girls. He wanted the three girls to go with the party to Lieutenant Hatfield's home, and they, after being assured by Mrs. Rebillot that it was all right, consented to do so. At Lieutenant Hatfield's home in Logan, no one was at home but the two children and a "baby tender", a girl about fourteen or fifteen years old. The accused made improper remarks to this girl, pulled coats off the hangers, scattered the contents of a purse and two kitchen drawers, and was drunk (R. 65-74, 87-95, 110, 117-118, 263-268).

e. Specifications 4 and 5, Charge I, and Specification 4, Charge II: About two or three o'clock on the afternoon of 12 December, the accused was seen drunk in the lobby of the Hotel Utah, Salt Lake City, and he introduced several strangers to other officers. Later, about six o'clock, he went to the desk at this hotel, trying to get a room. The room clerk was of the opinion that he was drunk. The accused, two other officers, and Miss Norma Anderson had dinner at the hotel. At this time the accused was sober according to one witness and drunk according to

another. The accused, other officers, and some girls left the hotel about 11:30 p.m., or later. The accused was drunk. He and some of the others went to the Aviation Club and remained there until about one o'clock. They then went to the Semloh Hotel, the Utah Hotel, and Kwong Nom Low's. At the place last named the accused engaged in an altercation with two waitresses, called them "whores and prostitutes", threatened two young men, friends of the waitresses, with a knife, tried to get a soldier to join in the difficulty, and was drunk. There were about seventy-five people in Kwong Nom Low's. The party left there about three o'clock a.m. (13 December). The accused then returned to the hotel, drunk, and awakened two officers who had gone to bed (R. 146-147, 169-175, 191-196, 200-216, 225; Exs. 2, 3, 4).

f. Specification 6, Charge I and Specification 6, Charge II: About four o'clock in the afternoon of 14 December, the accused went to the Rebillot's cabin in Brigham City and had several drinks. About seven o'clock the accused and Mrs. Rebillot went to town to buy a steak for dinner. He was drunk at this time. Mrs. Rebillot telephoned her husband to come get her, which he did, and the accused returned to their cabin in the staff car. Mrs. Rebillot had only two plates; the accused put a saucer in his pocket and went back to town to find another plate to match it. He was drunk. The accused went to Peoples Drug Store in Brigham City about 7:30 p.m., asked for a plate to match the saucer, engaged in an altercation with the wife of the manager, embarrassed a sales girl by putting his arm around her and trying to make a date with her, offered whiskey to three enlisted men, made insulting remarks to military policemen who tried to get him to leave, and was intoxicated. There were many people in the drug store. About ten o'clock that evening the accused was seen in the finance office at Bushnell General Hospital by Second Lieutenant Hansford A. Cole, Officer of the Day. Several enlisted men were there at work. The accused took off his coat and blouse and wanted to fight one of the men. The accused grabbed the man, a sergeant, by the shirt or coat collar, but the sergeant did not move. The accused then cursed the sergeant. The accused then made an inspection of the hospitals. He had a bottle of liquor with him and drank from it in the diet kitchen of the maternity ward. As the accused was leaving the hospital, he tried to give a drink to a young lady who was coming in. He then went to the nurses quarters, but the head nurse would not admit him. In the opinion of Lieutenant Cole, the accused was drunk (R. 268-270, 273-295).

g. Specification 7, Charge I, and Specification 5, Charge II: About five-thirty or six o'clock in the afternoon of 15 December, the accused went to the Rebillot's cabin. He had been drinking, and

drank all the time he was there. He remained about two hours. The accused became indignant that Captain Rebillot could not go out to dinner with him, and was drunk when he left. About 8:45 that evening, the accused with another officer and two ladies was seen near the dining room entrance at the Ben Lomond Hotel, Ogden, Utah. The dining room was closed and the accused requested the hotel manager to open it. When the manager stated that it could not be opened on account of the labor situation accused replied "If you were in the army you would God damn soon open it". The accused was observed talking and arguing with several hotel guests in the lobby. He had a quart bottle showing in the pocket of his overcoat. He offered drinks to some soldiers from the bottle. Later the accused engaged in an argument with the night clerk at the desk, called the clerk a "God damn liar", and the manager threatened to call the military police. There were many people present in the lobby. The accused left the hotel for a time, but returned to the lobby about 11:30 p.m., and the argument flared up again. Accused offered to fight the manager and asked the latter to come outside. Finally, Major John C. Hazlett, Corps of Military Police, came to the hotel, and the accused left with him. The accused was drunk while in the hotel on 15 December 1942. He had been assigned room No. 1006, which was found in a condition of disorder after his departure, with various broken articles in it. Broken crockery and glass were in the street below the window. The accused admitted to Second Lieutenant Hansford A. Cole that he had engaged in a "bombing raid" from the tenth floor. He had gone into rooms near No. 1006 and annoyed other guests. Two military policemen left Ogden with the accused about 1:00 a.m. on 16 December, and took him to Bushnell General Hospital. He "acted drunk" at that time, and required the military policemen to go through red lights, pass cars on the road, and drive at about sixty-five miles an hour. They left the accused at Bushnell General Hospital about 1:30 or 2:00 a.m. (R. 220-223, 270-272, 290, 301-322; Exs. 6, 7).

h. Specification 8, Charge I, and Specification 2, Charge III: About 1:15 a.m. on 16 December, the accused awakened Private Thomas F. Barra, Charge of Quarters, 34th General Hospital, and asked for the Officer of the Day. Two military policemen were with the accused. About 2:30 a.m. the accused was seen by Captain Leo F. Marre, Administrative Officer of the Day, Bushnell General Hospital, and the accused was trying to call the Officer of the Day of the 34th General Hospital on the telephone. The accused was drunk at this time, not staggering but not steady. The accused wanted to "review his troops". He had the officers and enlisted men of his organization (about 500)

awakened and assembled, and about 3:30 a.m. they were marching and counting cadence. The troops were marched by some of the officers by order of the accused, who was drunk. Afterward the accused had the men assembled in the mess hall, fed and dismissed. While at the mess hall (for about an hour) the accused had two or three of the officers make talks and tell jokes to the men (R. 128-134, 137, 156-160, 176-179, 196-198, 217-218, 232-233, 295-300, 327-332).

i. Specification 1, Charge III: From 1 December to 16 December the accused was present at the office two or three hours a day--the first part of this period, three or four hours a day, the latter part, after 9 December, about two hours a day. During this period accused had been drinking heavily and as stated above, had been drunk on numerous occasions. On cross-examination Captain Joseph R. Rebillot testified that the accused took charge of the 34th General Hospital about 1 November 1942, while it was at Fitzsimmons Hospital, and that prior to the time when the organization moved to Bushnell General Hospital (1 December), the accused acted in a normal way at the office, was very strict and very much a detail man, worked hard when he worked, was not patient, was offensive at times, was strict about neatness, and was seen to take a drink only on two social occasions. After coming to Bushnell General Hospital, Captain Rebillot did not note much change in the accused at the office. The accused was suffering from sinus trouble and laryngitis. At Fitzsimmons, Captain Rebillot and accused had not associated socially as they did at Bushnell. Between 7 and 16 December, according to Captain Rebillot's observation, the accused knew the difference between right and wrong, but "he didn't care". Captain Rebillot expressed the opinion that when drinking the accused was mentally sick and that when not drinking he was a brilliant man. The accused was "egocentric" (R. 200, 236-248, 324-325).

j. Specifications 1 and 3, Additional Charge: By letter of 18 January 1943, Headquarters Ninth Service Command, the accused was placed in the status of arrest in quarters at Fort Douglas, Utah. The limits of arrest were fixed by a letter of 27 January, and then enlarged by a letter of 1 February. The Station Hospital was not within the limits. By a letter dated 4 February, the accused was advised that it was reported that he had twice visited the Station Hospital, and that this was a violation of the arrest limits. It was stipulated that the accused received the last three letters on their respective dates (R. 334-338; Exs. 8, 9, 10, 11).

On the night of 3-4 February, First Lieutenant Russell J. Lyons, Station Hospital, Fort Douglas, who was Post Officer of the Day,

saw the accused at the main mess about 10:30 p.m., and considered him to be "more drunk than sober". About 1:00 a.m. and after, the accused was seen by two nurses, an officer and a sergeant at various parts of the Station Hospital. A nurse heard a "commotion" in Ward 2, and found the accused there talking to the "Ward boys" and giving them candy bars. At the Station Hospital mess hall, the accused asked a corporal if he had amnesia and told him he "had better have it tonight" and that he (the accused) would "bash his head in". He was staggering, unsteady on his feet, talking loudly, and was drunk (R. 339-351).

k. Specifications 2 and 4, Additional Charge: On the night of 5-6 February, about 12:30 a.m., and later, the accused was observed at the Station Hospital by Captain Lloyd W. Robinson, Officer of the Day, and others. Captain Robinson assumed from his conduct that the accused was drunk. Captain Robinson had gone to bed, and sat on the edge of his bed in his pajamas, while the accused engaged him in an "unusual" conversation about the personal history of the accused. The accused was taken into custody about 1:30 a.m. at the Station Hospital, removed to the guardhouse, and then taken back to the hospital and placed in the prison ward. During this time the accused was drunk. An attempt was made at the hospital to make a blood test, but the accused resisted and refused, offered to "whip" two officers, and stated that he would sign a certificate that he was drunk. On leaving the hospital for the guardhouse, the accused threw away a bottle or flask, which was afterwards recovered. The bottle (Ex. 12) contained alcohol. Mrs. Margaret Milton, histologist, Station Hospital, identified the bottle as one which she had filled with alcohol and left at the laboratory about 4:30 on 5 February. The bottle disappeared from the laboratory during that night (R. 342, 351-374).

4. By stipulation, the defense introduced all of the testimony which had been heard on 17 February in support of a defense motion with respect to the mental condition of the accused on that date, which was denied. This testimony was in substance as follows: Doctor David A. Young, a medical doctor, specializing in neurology and psychiatry, had made a mental survey of the accused, based on history, questioning and examination. He formed an opinion that the accused showed irritability, resentment and lack of consideration of the feelings of subordinates, and was egocentric, self-centered, of a suspicious nature and sensitive. Doctor Young had the opinion further that the accused was not so free from nervous derangement or disease as to be able consistently to distinguish right from wrong and adhere to the right. He stated that such a condition is a gradual development over a period of months or years. On cross-examination of

Doctor Young it was brought out that the accused knew that he was "under court-martial" and who his counsel were; understood the details of the trial and what was taking place; had mental capacity to conduct his defense, without regard to whether it was well conducted or not, and to cooperate in his defense to a limited degree; and had a good memory. Doctor Young stated that there was a reasonable doubt of the sanity of the accused, but would not testify that he was insane; and he thought that it would be inadvisable for the accused to practice medicine at that time and that he should be given treatment in a psychiatric hospital. Major Clin B. Chamberlain, Medical Corps, chief of the neuro-psychiatric special section of Bushnell General Hospital, testified that he had specialized in "nervousness" and mental diseases, and had made a mental survey of the accused, consisting of scrutiny of the chart of physical examination, his own examination, and interviews. He had not formed a "full and entire" opinion of the mental condition of the accused, and could not answer definitely as to insanity or mental irresponsibility, though there were elements which led him to believe that such a condition was developing. He thought, but could not state definitely, that the accused was not able to cooperate fully or conduct his defense as a normal person. He was not able to say definitely whether the accused could "determine right from wrong", and was in doubt as to the sanity of the accused. On 19 January, Major Chamberlain had expressed the view that the conduct of the accused was due to alcoholic excess "in a person of ego-centric personality". On the basis of a more recent examination, he stated that the accused was well oriented, had an excellent memory, was loquacious, and was able to "pursue a goal idea". Colonel Robert W. Hardaway, Medical Corps, Commanding Officer of Bushnell General Hospital, testified that his official observation of the accused was quite limited, as the accused reported for duty about 1 December 1942, Colonel Hardaway was absent from the post from 12 to 22 December, and on his return he found the accused in arrest at the hospital. Colonel Hardaway had received the complete report of Major Chamberlain, and felt that there was reasonable doubt of the sanity of the accused, his mental capacity to "recognize right from wrong", and his ability to conduct himself in connection with the proceedings. His doubts were not based on personal observations but on information from others. He subsequently testified that the conduct of the accused at Fort Douglas had raised a reasonable doubt as to the mental capacity of the accused to judge right from wrong, and that the accused did not have such capacity; that he did not doubt the capacity of the accused to conduct his defense and understand the nature of the proceedings; and that, though he had a reasonable doubt, he would not express an opinion as to whether the accused was sane or insane (R. 4-34, 40-41, 375-376).

Documentary evidence (Ex. A) was introduced by stipulation, showing that the accused was examined and treated on 9, 12, 19 and 29 December 1942 for naso-pharyngitis and similar ailments (R. 376).

Brigadier General Omar H. Quade, Medical Corps, Fitzsimmons Hospital, Denver, Colorado, became acquainted with the accused when the accused reported at Fitzsimmons in July 1941, and observed his conduct very closely. The accused was at first hospital inspector, and on 2 May 1942 became Executive officer when General Quade took command of Fitzsimmons. The accused was promoted twice while at Fitzsimmons. General Quade stated that the accused was always at the office before the required duty hour and left after General Quade did. From his observation, the accused was diffident, far from arrogant, patient, kindly, cooperative, modest, tolerant, careful of the conventions of society, absolutely reliable, of excellent military appearance, neat, careful in judgment, precise in speech, punctual and temperate, and performed his duties in a superior manner. General Quade did not have many social contacts with the accused. On cross-examination, he stated that he was usually in the office from a few minutes before eight to five-thirty or a quarter to six, and that the accused came in before he did and left after he did each day. The accused voluntarily affirmed to General Quade that he would not drink. Colonel George F. Aycock, Medical Corps, first knew the accused as a lieutenant in 1927 at Washington, D.C., and later from 1931 to 1933 in the Canal Zone. The accused was extremely fond of his wife, an attractive, charming and beautiful woman. They had three children. The accused was diffident, sober in his habits, reliable, trustworthy, cooperative, and free from misconduct. While in the Canal Zone, Mrs. Murphy died, after a very short illness. The accused was in a state of depression, there were reports of an alcoholic escapade, and within about a month the accused left the Canal Zone. Colonel Aycock next saw the accused at Fitzsimmons General Hospital. The accused had remarried and was happily married, but stated that he would never get over the loss of his first wife. The accused had a very high regard for General Quade, whose influence brought out the best in him. During approximately a year and a half, prior to 30 November 1942, while Colonel Aycock and the accused were together at Fitzsimmons, the former observed that the accused was kind and courteous, cooperative, modest, tolerant, reliable, neat in appearance, in conformity with the conventions, concise in conversation, punctual and temperate. Doctor David A. Young formed the opinion that on and after 1 December 1942, the accused was not able "in all things" to distinguish between right and wrong, nor always adhere to the right, and it was based upon "knowledge of personality developments, upon the

knowledge of the development of abnormal personalities, warped conditions approaching psychosis" (R. 377-404).

The accused elected to remain silent.

5. By stipulation, the rebuttal testimony heard on 17 February was introduced in evidence. Captain Lloyd W. Robinson, Medical Corps, who had seen and talked with the accused four times after the middle of January, 1943 believed that the accused had mental capacity to conduct his defense, to distinguish right from wrong, and to understand the details of the trial, and that the accused was not insane. Although Captain Robinson was not a trained psychiatrist, he had spent some time at the Colorado Psychopathic Hospital, two months in the department of psychology at Denver General Hospital, and six months in the department of neurology and psychiatry, and had observed mental cases with some frequency in his ordinary practice (R. 34-40, 375-376).

6. a. The evidence shows clearly as to the eight Specifications, Charge I, that the accused was found drunk while on duty as Commanding Officer, 34th General Hospital, Bushnell General Hospital, Brigham City, Utah, on the dates and at the places alleged, except that the offense under Specification 2 was committed in Brigham City, instead of Ogden, which is an immaterial variance.

In the Manual for Courts-Martial it is stated with reference to the 85th Article of War that the commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty (MCM, 1928, par. 145).

b. As to Specifications 1, 4, 5 and 6, Charge II, the evidence shows that the accused was drunk and disorderly while in uniform on the dates and at the public places alleged, and as to Specification 3, that he was drunk and disorderly while in uniform in the presence of other persons at the time and place alleged. The conduct of the accused (including such acts as making loud and profane complaints in a public restaurant, demanding an unjustified apology from a junior officer in his home and pounding on the door, engaging in an altercation with waitresses in which he called them whores and prostitutes and making threats with a knife in a public restaurant, offering drinks to enlisted men from a bottle, and engaging in an altercation with the desk clerk and using profane, abusive and insulting language in a hotel lobby and engaging in an altercation, making improper advances to a sales girl, and offering whiskey to enlisted men in a crowded drug store) was

conspicuously disorderly.

The Manual for Courts-Martial, in stating instances of violation of the 95th Article of War, includes being grossly drunk and conspicuously disorderly in a public place (MCM, 1928, par. 151). According to Winthrop, 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, constitutes a violation of the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 717).

c. As to the Specifications, Charge III, the evidence shows that from 1 to 16 December 1942 the accused was in his office only three or four hours a day at the most, as a result of his drinking and drunkenness during that period of time, and that early in the morning of 16 December, while drunk, he caused his entire command of approximately 500 men to be called out and marched near the hospital at about 3:30 a.m.

d. The evidence shows as to Specifications 3 and 4, Additional Charge, that the accused was, on 3 and 5 February 1943, drunk and disorderly while in uniform in the Station Hospital, at Fort Douglas, Utah.

e. As to Specifications 1 and 2, Additional Charge, it was shown that on 3 and 5 February, the accused, being in arrest, did break the restriction by going to the Station Hospital at Fort Douglas, which was beyond the limits of his restriction.

The offense of exceeding limits of arrest is included by Winthrop as a violation of the 62nd (96th) Article of War, rather than the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 727).

f. On a motion by the defense with reference to the mental condition of the accused at the time of trial, and on the question of the sanity of the accused at the time the offenses were committed, the evidence clearly shows that the accused was not insane, nor unable to understand and cooperate in his defense.

7. Careful consideration has been given to a letter from Mrs. J. R. Rebillot dated 30 March 1943 addressed to The Adjutant General, a letter from Margaret Murphy, sister of the accused, dated 26 May 1943 addressed to the President, and a petition signed by 43 members of the Iowa State Medical Association dated 29 April 1943 addressed to The Judge Advocate General, with reference to the accused.

8. The accused is 46 years of age. The Army Register, 1943, shows his service as follows: "Lt. Col. A.U.S. 1 Feb. 42; Col. A.U.S. 20 Oct. 42.—1 Lt. M.C. 17 Aug. 27; accepted 20 Aug. 27; Capt. 18 Aug. 30; Maj. 18 Aug. 39." During his service as an officer 34 efficiency reports upon him have been rendered. One report, covering about 11 months, shows a rating of superior. Seventeen reports, covering about eight years, show general ratings of excellent. Two reports, covering about 10 months, show ratings of very satisfactory. Four reports, covering about 7 months, show ratings of average. Ten reports, covering about 3½ years, show general ratings of satisfactory. The efficiency reports contain numerous remarks attesting to accused's efficiency and loyalty. Three reports contain adverse remarks relative to the excessive use of intoxicating liquor by accused. He was reprimanded three times (in 1933, 1934 and 1941) and admonished once (in 1936) for disorderly conduct due to excessive use of intoxicating liquor. Attached to his 201 file are three letters containing statements to the effect that prior to the sudden death of accused's wife in February, 1933, he did not drink intoxicating liquor to excess.

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 except as to Specifications 1 and 2, Additional Charge, legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2, Additional Charge, and the Charge as involves a finding of guilty in violation of the 96th Article of War, 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, and mandatory upon conviction of a violation of the 85th (in time of war) and 95th Articles of War.

On Leave, Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 28 JUN 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 Colonel Thomas B. Murphy (0-16974), Medical Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty except as to Specifications 1 and 2, Additional Charge, legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2, Additional Charge, and the Charge as involves a finding of guilty in violation of the 96th Article of War, and legally sufficient to support the sentence, and to warrant confirmation of the sentence.

The accused was found drunk while on duty as Commanding Officer of 34th General Hospital on eight separate occasions from 1 December to 16 December 1942 (Specs. 1-8, Chg. I), in violation of the 85th Article of War. He was drunk and disorderly while in uniform four times in public places, once in the presence of other persons at a private home, and twice in a Station Hospital (Specs. 1, 3-6, Chg.II and Specs. 3 and 4, Add. Chg.), in violation of the 95th Article of War. From 1 December to 16 December 1942, he drank intoxicating liquor to the extent that he rendered himself unfit for duty (Spec. 1, Chg. III), and on 16 December 1942, while under the influence of liquor, wrongfully and to the prejudice of military discipline caused approximately 500 men of his command to be drilled at about 3:30 a.m. (Spec. 2, Chg. III), in violation of the 96th Article of War. He was found not guilty of Specification 2, Charge II. Having been lawfully placed in arrest and restricted to the limits of Fort Douglas, Utah, exclusive of the Station Hospital, he broke the restriction by going to the Station Hospital on two occasions (Specs. 1 and 2, Add. Chg.), which in the opinion of the Board of Review was a violation of the 96th (not 95th) Article of War. I recommend that the sentence be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution. Careful consideration has been given ~~to~~ a letter from Mrs. J. R. Rebillot dated 30 March 1943, a letter from Margaret Murphy, sister of the accused, dated 26 May 1943, and a petition signed by 43 members of the Iowa State Medical Association dated 29 April 1943, with reference to the accused.

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 made above.

Myron C. Cramer.

3 Incls.
Incl.1- Record of trial.
Incl.2- Dft. ltr. for sig. S/W.
Incl.3- Form of Exec. Action.

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. G.C.M.O. 187, 4 Aug 1943)

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

SPJGK
CM 234521

6 JUL 1943

UNITED STATES	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Pickett, Virginia, 15 April 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
	)	
Private ROBERT E. CULBERSON (20833691), Battery B, 189th Field Artillery Battalion.	)	

REVIEW by the BOARD OF REVIEW
LYON, 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 soldier named above.

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

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

Specification: In that Private Robert E. Culberson, Battery "B", 189th Field Artillery Battalion, did, without proper leave, absent himself from his organization at Pine Camp, New York, from about 2130, January 18, 1943, to about 1100, January 19, 1943.

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

Specification 1: In that Private Robert E. Culberson, Battery "B", 189th Field Artillery Battalion, did, at Camp Pickett, Virginia on or about March 4, 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at or near Farmville, Virginia on or about March 5, 1943.

Specification 2: In that Private Robert E. Culberson, Battery "B", 189th Field Artillery Battalion, did, at Camp Pickett, Virginia on or about 0800 March 22, 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at or near South Gardner, Massachusetts

on or about 1630 April 6, 1943.

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

Specification: In that Private Robert E. Culberson, Battery "B", 189th Field Artillery Battalion, having been duly placed in confinement in the 157th Infantry Regimental Guard House on or about March 10, 1943, did, at Camp Pickett, Virginia on or about March 22, 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private Robert E. Culberson, Battery "B", 189th Field Artillery Battalion, did, at Farmville, Virginia on or about March 4, 1943, feloniously take, steal, and carry away, one automobile, described as a 1941 Ford DeLuxe coach, license number Virginia, 1943, 323-531, of some value, the property of C.C. Harvey, Curdsville, Virginia.

Specification 2: In that Private Robert E. Culberson, Battery "B", 189th Field Artillery Battalion, did, at Officers Barracks, Building Number T-1808 or T-1809, Camp Pickett, Virginia, on or about March 22, 1943, feloniously take, steal, and carry away, one uniform, officers, of some value, the property of Second Lieutenant Clifford H. Durrell.

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

Specification 1: In that Private Robert E. Culberson, Battery "B", 189th Field Artillery Battalion, having been restricted to the limits of the battery area, Battery "B", 189th Field Artillery Battalion, did, at Pine Camp, New York, on or about 2130, January 18, 1943, break said restriction by going to Watertown, New York.

Specification 2: In that Private Robert E. Culberson, Battery "B", 189th Field Artillery Battalion, having been restricted to the limits of the battery area, Battery "B", 189th Field Artillery Battalion, did, at Camp Pickett, Virginia, on or about 1830, March 4, 1943, break said restriction by going to Farmville, Virginia.

Specification 3: (Finding of not guilty).

The accused pleaded guilty to Charge I and its Specification; to Specifications 1 and 2 of Charge II, guilty 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, of Charge II, not guilty, but guilty of a violation of the 61st Article of War; to Charges III, IV, and V and their respective Specifications, not guilty. He was found guilty of all Charges and Specifications, except Specification 3 of Charge V, of which he was found not guilty and Specification 1 of Charge II of which he was found not guilty of desertion in violation of Article of War 58 but by exceptions and substitutions guilty of absence without leave, in violation of Article of War 61. Evidence was introduced of two previous convictions: (a) summary court, absence without leave, 2 days in violation of Article of War 61, and (b) special court, breaking restriction in violation of Article of War 96, and absence without leave, 2 days, in violation of Article of War 61. 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 a period of twenty (20) years. The reviewing authority approved the sentence, 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. The evidence shows:

a. With reference to Charge I and its Specification, violation of the 61st Article of War, and Specification 1 of Charge V, breach of restriction in violation of the 96th Article of War: On 18 January 1943 the accused, a member of Battery B, 189th Field Artillery Battalion, absented himself without leave from his organization at Pine Camp, New York, and remained absent until about 11 o'clock A.M. of 19 January 1943. At the time of his unauthorized absence the accused was a garrison prisoner. He had been released from the Camp Stockade, preliminary to the organization move on 20 January from Pine Camp, New York, to Camp Pickett, Virginia. In the interim the accused had been restricted by Captain James E. Tindle, his battery commander, to the limits of the battery area. On his return, 19 January, accused admitted to Captain Tindle that he had gone to Watertown, New York, and that he had no authority to do so (R.10,15, Ex. 1).

b. Specification 1, Charge II, violation of the 58th Article of War, Specification 1 of Charge IV, larceny of automobile, in violation of the 93rd Article of War, and Specification 2, Charge V, breach of restriction, in violation of the 96th Article of War: Captain Tindle, the investigating officer, stated that he went to Farmville, Virginia, on 10 March 1943 to investigate "the case" against the accused who was in the

Farmville city jail. Captain Tindle read to the accused the 24th Article of War, and explained to him his rights thereunder. The accused, in the presence of Mr. C.C. Harvey and three police officers of the City of Farmville, admitted that he and "two others" (presumably soldiers) left the battery area of Battery B, 189th Field Artillery, Camp Pickett, Virginia, about 8 o'clock P.M. on 4 March 1943. They hired a taxicab and went to Farmville, Virginia. About midnight, after they had had several drinks, accused and his companions took an automobile which was parked in front of the Prince Edward Hotel in Farmville and drove it to Burkeville, Virginia, where they were apprehended early the next morning by the police authorities of Farmville and the owner of the stolen car. The car was a 1941 Ford, Virginia license No. 323-531, and was taken from the possession of Mr. C.C. Harvey of Curdsville, Virginia (R.7,8,12-14). Extract copy of the morning report of accused's organization (entry of 5 Mar.) shows that accused was confined in his battery at the time of his unauthorized departure on 4 March 1943 (Ex. II).

c. As to Specification 2 of Charge II (desertion), Charge III and its Specification, escape (69th A.W.), and Specification 2 of Charge IV - larceny of uniform of Second Lieutenant Clifford H. Durrell - Private Lazell E. Bain, Battery B, 189th Field Artillery Battalion, Camp Pickett, Virginia, stated that on 22 March 1943 he and the accused were incarcerated in the 157th Infantry Stockade. About 3 o'clock that morning, while "every one was asleep", witness, accused, and another soldier escaped from the stockade, got a cab, went to Blackstone, Virginia, and from there to Richmond where they spent the night. The accused was dressed in the uniform of a second lieutenant. Second Lieutenant Clifford H. Durrell, 157th Infantry, Camp Pickett, was on company maneuvers from 15 to 31 of March. When he returned he found that his blouse, garrison cap, and wool O.D. shirt were missing. The pockets of the blouse contained a package of "calling cards" and a post exchange credit card from Camp Robinson, Arkansas. Captain Tindle, the investigating officer, testified that the accused, after being advised of his right not to make any statement and that any statement which he made could be used against him, stated that he and two other soldiers escaped from the guard house at Camp Pickett on the morning of 22 March. Accused admitted that at the time of the escape he was wearing the uniform of a second lieutenant; that he got the officer's clothing from Building No. 1809 directly across the street from the 157th guardhouse, and that he found in the pocket of the blouse a package of calling cards and a post exchange credit card bearing the name of Lieutenant Clifford H. Durrell. Accused also stated to Captain Tindle that after making his escape he caught a taxi and went to Richmond. From Richmond he went to some place in Massachusetts where

he stayed in the home of a Miss Winnie Hall and finally to South Gardner, Massachusetts, where he was apprehended by the military authorities (R. 7,9-11,13-14,Ex.II). He was confined at Fort Devens on 6 April 1943 (Ex. III).

The accused declined to testify or to make an unsworn statement and no witnesses were introduced in behalf of the defense.

4. It clearly appears from the uncontradicted evidence that accused on 18 January 1943, having been restricted to the limits of the battery area, broke the restriction and went absent without leave, as alleged in Charge I and its Specification and Charge V and Specification 1 thereunder; that on 4 March 1943 the accused having been restricted to the limits of his battery area, broke the restriction, and without authority went to Farmville, Virginia, where he stole from the possession of C.C. Harvey a 1941 Ford DeLuxe automobile, thus supporting the findings of the court with respect to Charge II and Specification 1 thereof, Charge IV, Specification 1, and Specification 2, Charge V; that on 22 March 1943, the accused while a prisoner in the stockade at Camp Pickett, Virginia, escaped therefrom, stole a blouse of some value, the property of Second Lieutenant Clifford H. Durrell, and, wearing the uniform of a second lieutenant, went to Richmond, Virginia, and thence to Massachusetts. While in Massachusetts he stayed in the home of a Miss Winnie Hall, and was finally apprehended by the military authorities in South Gardner, Massachusetts, on 6 April 1943. This evidence clearly supports the findings of guilty of desertion, escape, and larceny, as alleged respectively in Specification 2, Charge II, Charge III and its Specification, and Specification 2 of Charge IV.

5. The prosecution offered in evidence a paper writing purporting to have been signed by the accused, containing a statement to the military police at Fort Devens. Although the investigating officer testified that he had often seen the handwriting of the accused, that he was familiar with the signature of the accused, that the signature to the paper writing was that of the accused, and that accused had admitted his signature to the instrument, the law member declined to permit the introduction of the statement upon the ground that the genuineness of the handwriting would have to be established by an expert. This ruling was,of course, erroneous. The testimony of the investigating officer that he was familiar with the handwriting of accused, having often seen him write, and that in his opinion the signature in question was that of the accused, was sufficient to qualify

the witness (Wharton's, Criminal Evidence, Vol. 2, secs. 982-985).

The Charge Sheet shows that accused is 21 years of age. Data as to service: "No prior service. Enlisted at Chickasha, Oklahoma, to serve one (1) year".

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. Penitentiary confinement is authorized upon conviction of violation of Article of War 58 in time of war by Article of War 42.

Lynn G. Gow, Judge Advocate.

Wm Rosenstiel, 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 234522

MAY 8 1943

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Pickett, Virginia, April
Private LESTER L. FORD	)	15, 1943. Dishonorable dis-
(20836089), Company A,	)	charge and confinement for
120th Quartermaster Regiment.	)	thirty (30) years. Penitentiary.

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 Charges and Specifications:

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

Specification 1: In that Private Lester L. Ford, Company A, 120th Quartermaster Regiment (now 45th Quartermaster Company) did, at Forney, Texas, at about 6:00 AM on or about August 8, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Carthrage, Missouri, on or about February 21, 1943, at about 5:30 P.M.

Specification 2: In that Private Lester L. Ford, 45th Quartermaster Company, did at Camp Pickett, Virginia, at about 0500 oclock on or about March 22, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Gardner, Massachusetts, at about 1630 oclock on April 6. 1943.

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

Specification: In that Private Lester L. Ford, 45th Quartermaster Company, having been duly placed in confinement in the 157th Infantry Regimental Guard House on or about March 11, 1943, did at Camp Pickett, Virginia on or about March 22, 1943, at about 0500 oclock, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Lester L. Ford, 45th Quartermaster Company, did at Building T-1809, Camp Pickett, Virginia, on or about March 22, 1943, feloniously take, steal and carry away one Officers wool uniform, consisting of one woolen service coat, one pair of woolen trousers, the service coat, of the value of about $40.00, the property of 2nd Lt. Hughey W. Bigham, Company K, 157th Infantry Regiment.

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

Specification: In that Private Lester L. Ford, 45th Quartermaster Company, did at Gardner, Massachusetts, on or about April 6, 1943, represent himself to be an officer of the Army of the United States, to-wit: A Second Lieutenant Infantry, wearing in public an officers uniform with such military insignia attached to said uniform.

The accused pleaded to Specification 1, Charge I, guilty, 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; to

Specification 2 of Charge I, guilty, 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; to Charge I, not guilty of violation of the 58th Article of War, but guilty of violation of the 61st Article of War; and not guilty to Charges II, III, and IV and all the Specifications thereunder. He was found guilty of all Specifications and Charges. 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, Atlanta, Georgia, 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 unauthorized absences by appropriate extract copies of morning reports of the following named organizations, introduced without objection, to wit:

> Company A, 120th Quartermaster Regiment, Camp Barkeley, Texas, for August 8, 1941, showing the accused from "duty to AWOL" on that day, as Prosecution's Exhibit I.
>
> 45th Quartermaster Company, Camp Pickett, Virginia, for March 8, 1943, showing him confined at Camp Pickett, Virginia, on that day, as Prosecution's Exhibit II.
>
> 45th Quartermaster Company, Camp Pickett, Virginia, for March 22, 1943, showing him from confinement to AWOL, as Prosecution's Exhibit III.
>
> Post Guardhouse, Fort Devens, Massachusetts, for April 7, 1943, showing him confined under the 58th Article of War, on that day, as Prosecution's Exhibit IV.
>
> 45th Quartermaster Company, Camp Pickett, Virginia, for April 12, 1943, showing him to confinement on that day as Prosecution's Exhibit V.

Casual Company, Fort Devens, Massachusetts, for April 7, 1943, showing him in confinement on that day, as Prosecution's Exhibit VI.

Provisional Guard Company, 157th Infantry, for March 11, 1943, showing him confined on that day, for March 22, 1943, showing him as escaped on that day, and for April 12, 1943, showing him received on that day, as Prosecution's Exhibit VIII (R. 5-6).

Captain Clement E. Mitchell, 45th Quartermaster Company, who made two investigations in the case, and on each occasion read to the accused Article of War 24, informed him that he did not have to make a statement unless he so desired. On the last occasion, the accused stated he had made a written statement, in longhand, at Gardner, Massachusetts. Captain Mitchell read this statement over with the accused, who identified his signature at the bottom of each page, and it was introduced, without objection, as Prosecution's Exhibit VIII. This statement recites, in substance, that the accused went A.W.O.L. from Camp Barkely, Texas, in August, 1941; that he turned himself in, during January 1943, to the military police at Tulsa, Oklahoma, whence he was taken to Camp Gruber, Oklahoma, where he stayed about a week and then "took off"; he was thereafter apprehended at a small town just outside of Joplin, Missouri, brought to Camp Pickett, and confined awaiting trial. Early on the morning of March 22, 1943, he and three other prisoners slipped out of the guardhouse while the guards were asleep. The prisoners all wore fatigue clothes so the accused and Prisoner Culbertson went inside the officers' quarters and changed into officers' uniforms. There was a box of "Merry Widows" in the pocket of the officer's blouse taken by the accused. The four then caught a taxi, drove to Blackstone, Virginia, hired a room at the Capitol Hotel and stayed until the following evening. From there they went to Philadelphia for an overnight stop, thence to New York, and thence to Gardner, Massachusetts, where they were apprehended in officers' uniforms by a lieutenant of the military police, and taken to Fort Devens, Massachusetts (R. 7-9).

Private Lazell E. Bain, Battery B, 189th Field Artillery, testified that on the evening of March 22, he left the 157th Stockade, where he was then confined, with three other prisoners, one of whom, the accused, wore a second lieutenant's uniform. They took a cab, went

to Richmond and got a room in a hotel (R. 10).

On March 30, on his return to Camp Pickett after an absence of two weeks, Second Lieutenant Hughey W. Bigham, Company K, 157th Infantry Regiment, missed his blouse, pants, shirt and belt, all of which were in his quarters when he left. He had paid $44.50 for the blouse with pants "about the 18th". There was a box of "Merry Widows" in the pocket of the blouse (R. 11).

4. The only evidence introduced by the defense was the testimony of the accused, who, after his rights had been fully explained to him, elected to take the stand and be sworn. He testified, in substance, that on August 8, 1941, after "a little trouble" he left his regiment on maneuvers and went to Idaho where he worked on a farm. He figured in that way he was helping out "during the war". When war broke out, he had a feeling his division was going over, so decided to come back and go across with them; he thought that would be better, because he did not want to desert the army. He came back, turned himself in at Tulsa, and was taken thence to Camp Gruber where he stayed in the guardhouse for thirty days. He was listed there with a casual detachment at the time he "took off". He was apprehended in a small town in Missouri, brought to Camp Crowder, Missouri, then to Camp Pickett, where (he testified) "I broke confinement and went in and got a Lt.'s uniform so I could get by * * * because a Lt. told me I was facing 10 years stretch and I wanted to have one more good time * * *". (R. 13).

5. Specifications 1 and 2, Charge I, allege desertions. In each instance, unauthorized absence is admitted, but intent not to return is denied. The duration of the first absence, from August 8, 1941 to February 21, 1943, and its ultimate termination by apprehension, furnish competent evidence of the intention not to return, as does the accused's own testimony as to the distance — from Texas to Idaho — which he placed between himself and his organization, immediately after his unceremonious leave-taking. Neither the accused's statement, claiming brief interlude of voluntary surrender, nor his self-serving declarations on the witness stand, furnish substantial contravention. The escape, theft, and flight involved in the second unauthorized absence, also terminated by apprehension, furnish competent circumstantial evidence of the intent found. Every element comprised in the offense of desertion was established in both instances, and the accused stands legally convicted of violating Article of War 58, as charged.

6. The Specification, Charge II, alleges escape from confinement in violation of Article of War 69. Every element of the offense charged was proved by uncontradicted testimony, including the accused's. The court's findings of guilty are sustained.

7. The Specification, Charge III, alleges theft by the accused of Lieutenant Bigham's uniform of the value of about $40. The uncontradicted evidence, including the testimony of the accused, establishes his theft of an officer's uniform on the date alleged. There was a box of "Merry Widows" in the pocket of the stolen blouse. Eight days later, Lieutenant Bigham returned to Camp Pickett after a fifteen-day absence, and found one of his uniforms missing from his quarters, about 125 yards from the stockade whence accused had escaped immediately prior to the theft. Lieutenant Bigham had left a packet of "Merry Widows" in the pocket of his missing blouse. This blouse, with pants, had cost the Lieutenant $44.50 "about the 18th" of a month unidentified except by an unchallenged statement, made by the trial judge advocate, that "the witness bought the blouse in November of 1942". (R. 12). While this evidence of identification and value is by no means overwhelming, it is, in the opinion of the Board of Review, susceptible of the reasonable inferences implicit in the court's findings of guilty of Charge III and the Specification thereunder.

8. The accused is 24 years of age. He enlisted in the Oklahoma National Guard for three years, on September 11, 1940; and was inducted into Federal service on September 16, 1940. His record shows no prior service.

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. Such punishment as a court-martial may direct is authorized upon conviction of a violation of Article of War 58, and that prescribed in the Table of Maximum Punishments upon conviction of a violation of Articles of War 69, or 93, or 96.

Silas B. Dresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin P. Sleeper, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General.

SPJGK
CM 234558

14 JUL 1943

UNITED STATES v. First Lieutenant WESTCOTT FIELD (O-1548206), Ordnance Department.	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Fort Lewis, Washington, 10 and 11 April 1943. Dismissal, total forfeitures, and confinement for four (4) years.

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 Charges and Specifications:

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

Specification 1: In that 1st Lt. Westcott Field, 231st Ord. Co. (BD) did at Fort Lewis, Washington, on or about February 15, 1943 present for approval and payment a claim against the United States by presenting to Lt. Col. H.L. Hall, F.D., Finance Officer, 44th Infantry Division, Fort Lewis, Washington, an officer of the United States, duly authorized to approve, allow and pay such claims, a duly executed "Pay and Allowance Account", W.D. Form No. 336, dated February 28, 1943, claiming the amount of $317.30 for base pay, subsistence allowance and rental allowance, which claim was false and fraudulent in that he represented therein that he was and since January 2, 1943 had been married to one Elizabeth Field, his lawful wife, when in fact he was not and had not at any time since January 2, 1943 been married, and which claim was then known by said 1st Lt. Westcott Field to be false and fraudulent.

Specification 2: In that 1st Lt. Westcott Field, 231st Ord. Co. (BD) did, at Fort Lewis, Washington, on or about November 25, 1942, knowingly and willfully misappropriate

approximately forty two gallons of lubricating oil, of the value of about $21.00, property of the United States furnished and intended for the military service thereof, by causing the said forty two gallons of lubricating oil to be delivered at Naches, Washington, to one Stanley Naurosinck, a civilian.

Specification 3: In that 1st Lt. Westcott Field, 231st Ord. Co. (BD) did, at Salem, Oregon, on or about October 17, 1942, knowingly and willfully misappropriate approximately five gallons of gasoline of the value of about 85¢, property of the United States, furnished and intended for the military service thereof, by causing the said five gallons of gasoline to be poured into the gasoline tank of a privately owned automobile driven by one Miss Owen, a civilian.

Specification 4: In that 1st Lt. Westcott Field, 231st Ord. Co. (BD) did, at the 231st Ord. Bomb Disposal Cemetery in the vicinity of Tacoma, Wash., in the middle part of the month of February, 1943, knowingly and willfully misappropriate approximately five gallons of gasoline of the value of about 85¢, property of the United States, furnished and intended for the military service thereof, by pouring the said five gallons of gasoline into the gasoline tank of a privately owned automobile driven by a civilian woman known to him as "Dolly".

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

Specification: (Finding of not guilty).

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

Specification 1: (Withdrawn by appointing authority).

Specification 2: (Withdrawn by appointing authority).

Specification 3: In that 1st Lt. Westcott Field, 231st Ord. Co. (BD) did, at Fort Lewis, Washington, on or about February 6, 1943, borrow the sum of $100.00 from Sergeant Robert Becker, 231st Ord Co (BD), to the prejudice of good order and military discipline.

Specification 4: In that 1st Lt. Westcott Field, 231st Ord Co (BD) did, at Fort Lewis, Washington, in the early part of the month

of December, 1942, borrow the sum of $40.00 from Corporal James W. Alexander, 231st Ord Co (BD), to the prejudice of good order and military discipline.

Specification 5: In that 1st Lt. Westcott Field, 231st Ord Co (BD) did, at Fort Lewis, Washington, on or about December 3, 1942, borrow the sum of $10.00 from PFC Harlan E. Miller, 231st Ord Co (BD), to the prejudice of good order and military discipline.

Specification 6: In that 1st Lt. Westcott Field, 231st Ord Co. (BD), did, at Fort Lewis, Washington, sometime during the month of October, 1942, borrow the sum of $5.00 from PFC Johnson H. Garner, 231st Ord. Co. (BD), to the prejudice of good order and military discipline.

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

Specification 1: (Withdrawn by appointing authority).

Specification 2: In that 1st Lt. Westcott Field, 231st Ord Co (BD) was, at Naches, Washington, on or about January 21, 1943, in a public place, to wit: the Naches Tavern, drunk and disorderly while in uniform.

Specification 3: In that 1st Lt. Westcott Field, 231st Ord Co. (BD), was at Portland, Oregon, on or about December 7, 1942, in a public place, to wit: a public bomb disposal demonstration, drunk while in uniform.

Specification 4: In that 1st Lt. Westcott Field, 231st Ord Co. (BD), was, at Seattle, Washington, on a date between February 2, 1943 and February 7, 1943, in a public place to wit: the Hilltop Tavern, drunk while in uniform.

Specification 5: In that 1st Lt. Westcott Field, 231st Ord Co (BD), did, at Portland, Oregon, on or about December 7, 1942, in a public place, to wit: the 1017 Club, drink intoxicating liquor in the company of enlisted men of the 3rd Platoon, 231 Ord Co (BD).

Specification 6: In that 1st Lt. Westcott Field, 231st Ord Co (BD), did, at Fort Lewis, Washington, on or about February 8, 1943, cause Staff Sergeant John L. Hefner, 3rd Platoon, 231st Ord Co (BD) to make a general solicatation among the

enlisted men of the Third Platoon, 231st Ord Co (BD) for the purpose of borrowing money for the personal use of the said 1st Lt. Westcott Field.

Accused pleaded guilty to Specification 1, Charge I. To Charge I he pleaded "Not guilty, except in so far as it relates to Specification 1". To all the other Charges and Specifications he pleaded not guilty. He was found not guilty of Charge II and its Specification and guilty of all the other 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 four (4) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Accused was in command of a bomb disposal platoon, 231st Ordnance Company, operating throughout Washington and Oregon (R.35,37,131). Among other functions, the unit gave public demonstrations of bomb disposal work in conjunction with civilian defense activity (R.131). Further evidence will be summarized by specifications.

After being advised of his rights in each instance, accused made three statements, two oral and one written, in the nature of confessions and admissions to various Specifications (R.76-78,81,82,86,102-105, 112-116; Pros. Ex. 4). The subject matter of these will be presented in connection with the applicable Specifications.

Specification 1, Charge I.

As noted, accused pleaded guilty. Without regard to the plea of guilty, the evidence, including confessions by accused, shows that at Fort Lewis, Washington, on or about 15 February 1943, accused caused to be prepared a pay and allowance account voucher showing that accused was married and claiming a lawful wife as a dependent. Accused signed the voucher, and, as directed by him, it was filed for payment with the 44th Division Finance Office. Subsequently, relying upon accused's representation of marriage, the Finance Officer, Lieutenant Colonel H.L. Hall, paid him upon that basis. Accused was not married, and knew that his representation was false. He was actuated in part by his need for money (R.11-13,22-24,78,82,87,104,105,114,115; Pros. Exs. 1,2).

Specification 2, Charge I.

On or about 25 November 1942, at Fort Lewis, Washington, accused ordered Staff Sergeant John L. Hefner, 231st Ordnance Company, to transport a steel drum containing lubricating oil to the Naches Tavern, Naches,

Washington, and deliver it to Stanley Naurosinck, a civilian. Private First Class Johnson H. Garner, of the same organization, accompanied Hefner. Garner testified that he thought the oil originally was turned in to the platoon by the Quartermaster Department, and that the drum was outside the oil shed near the barracks at the time he and Hefner took it. The drum held 50 gallons, and, according to Hefner was about three-fourths full, whereas Garner estimated that it contained about 30 gallons (R.24-26,40, 41,44). In his signed statement accused confessed to the allegations of this Specification, and added that the oil was for the personal use of Naurosinck (R.115,116; Pros. Ex. 4). Captain Cornelius Bottomley, Assistant Quartermaster, Northwestern Sector, Western Defense Command, testified by stipulation that during the month of November, 1942, the fair market price of ordinary lubricating oil was 69 cents per gallon, 50 cents per gallon, and 33 cents per gallon, and that the Army contract price was 41½ cents per gallon (R.59,60; Pros. Ex. 3).

Specification 3, Charge I.

On or about 17 October 1942, Private First Class Harold R. Alexander, 231st Ordnance Company, drove a Government reconnaissance car to Portland, Oregon, to deliver some clothes to accused. Under instructions from accused, Alexander then drove to Salem, Oregon, following accused, who was driving a yellow convertible coupe, apparently privately owned. About 6 or 7 p.m., by direction of accused, Alexander met accused at a certain private home. The coupe stood in the driveway, and a young lady was present. Accused told Alexander to get a can of gasoline out of the back of the reconnaissance car and pour the contents into the coupe. Alexander did so. The can was a rectangular "G.I." five-gallon can. Alexander did not know where the can came from or whether the gasoline belonged to the Government (R.45-47,50). In two of the statements previously referred to, accused admitted his guilt under the allegations of this specification (R.78,79,83,105,106,117). Captain Bottomley testified that during October, 1942, the fair market price of gasoline was 17 cents per gallon and the Army contract price 5-86/100 cents per gallon (R.60; Pros. Ex.3).

Specification 4, Charge I.

Around the middle of February, 1943, Private First Class Harlan E. Miller, 231st Ordnance Company, who, with accused, was near Tacoma, Washington, was ordered by accused to drive to the Bomb Disposal Cemetery about seven miles from Tacoma (R.51,59). Miller drove a Government truck to the appointed place. The truck contained about 20 rectangular shaped "GI" cans of gasoline, which had formerly been on another Government truck. Accused arrived at the cemetery in a Buick car, accompanied by a young lady. As directed by accused, Miller poured some of the gasoline into

the Buick. Miller's testimony fails to give the exact amount (R.51,52,59). In two statements, accused confessed to having caused five gallons of Government gasoline to be poured into "Dolly's" car, as alleged (R.83,106). Captain Bottomley testified that during February, 1943, the fair market price of gasoline was 17 cents per gallon and the Army contract price 6-5/100 cents per gallon (R.60; Pros. Ex.3).

Specification 3, Charge III.

Sergeant Robert N. Becker, 231st Ordnance Company, testified that Sergeant Hefner told witness that accused needed money, whereupon witness went to the office of accused, and, in response to accused's assertion that he did need money, loaned him $100. Subsequently, accused offered to pay back the full amount, but witness accepted only $50 at the time (R.61-63). In one of his statements, accused admitted the loan from Becker (R.84).

Specification 4, Charge III.

Corporal James W. Alexander, 231st Ordnance Company, testified that some time before 14 December 1942, he and accused were in Portland, Oregon. Accused discovered that he had left his pocketbook in his hotel room. Rather than cause accused to return to the hotel, which was in another part of the city, witness, pursuant to his own suggestion, loaned $40 to accused. No part of the loan has been repaid (R.63-65). In one of his statements, accused corroborated the testimony of Alexander, except that, according to accused, he has "taken care of" the repayment of the loan (R.84).

Specification 5, Charge III.

Private First Class Harlan E. Miller, 231st Ordnance Company, testified that between 1 and 7 December 1942, witness, complying with a request from accused, loaned accused $10. Part has been repaid (R.52). In one of his statements accused admitted receiving the money from Miller, but said that he did not consider it a loan. Rather, he regarded it as reimbursement for money spent by him for meals and other necessaries while he and Miller were traveling together. He stated that he paid back $5, and that he and Miller considered that a fair amount in settlement (R.84).

Specification 6, Charge III.

Private First Class Johnson H. Garner, 231st Ordnance Company, testified that sometime during the fall of 1942, at the request of accused, he loaned accused $5. Accused turned the $5 plus $10 of his own

money over to witness and asked witness to telegraph $15 to a girl in Portland, Oregon. Witness did so, and paid 62 cents for the telegram. Accused repaid the $5 (R.41-43). In one of his statements accused admitted borrowing the money from Garner. He said that it was necessary for him to send a telegram. He had no cash with him, was working in the office, and did not think he should leave to get a check cashed. Besides, since it was evening, there was no place on the post where he could have a check cashed. Garner was going to the Western Union Office. Accused asked him whether he could spare $5. Garner thereupon loaned accused that amount, which accused repaid within a day or two (R.84,85).

Specification 2, Charge IV.

At approximately 7 p.m., on or about 21 January 1943, at the suggestion of accused, Sergeant Hefner and accused drove to the Naches Tavern, arriving at about 8:30 p.m. Accused was in uniform. They had a few beers (R.28). Later in the evening, when accused was standing behind the bar, the witness, Hefner, heard a commotion. Turning around, he saw that a girl named Mabel, who had been drinking with the crowd at the bar and was directly across the bar from accused, had been cut on the side of her head and was bleeding (R.29). Accused told witness to take the girl home. Accused appeared very angry (R.30). In the opinion of witness, accused was not sober (R.30,33). Although he could talk "all right", did not stagger, and was not boisterous, his face was flushed and his voice somewhat thick (R.34). Also, in the opinion of witness, accused could not have been sober after drinking continuously for such a long period (R.33). Witness took Mabel somewhere for medical treatment and then accompanied her home (R.30). Then he returned to the tavern, and he and accused left about 1 a.m. (R.28).

Technician Third Grade Lynn G. Bradford, 231st Ordnance Company, was also at Naches Tavern on the night in question, having been summoned there by a telephone call from accused. He and Garner arrived about midnight. Accused was in uniform. In addition to accused, there were present the owner and some woman. No other military personnel were there at the time. Accused and the woman were sitting at a table, drinking (R.66). A bottle of whiskey stood on the table, and accused mixed a whiskey and soda for witness. During the three-quarter-hour period while witness was at the tavern, accused was drinking most of the time, and in the opinion of witness was "influenced by drink" (R.67). Accused asked witness and Garner whether they had seen a woman fall down on the ice outside (R.68).

In one of his statements accused admitted that he was drunk and disorderly in a public place at Naches on January 21, 1943, and that he

struck a woman on the head with an ice cream scoop, necessitating her being taken to a doctor (R.108). In another statement, he admitted that he had been drinking, but claimed that he was not drunk or disorderly. In this statement the incident of Mabel and the ice cream scoop was not referred to (R.85).

Specifications 3 and 5, Charge IV.

On 7 December 1942, accused and several enlisted men of his platoon were in Portland, Oregon, for the purpose of giving a public bomb disposal demonstration. The demonstration was scheduled for the evening (R.47,52,53,55,57,68,88,94,95,100). Both before and after lunch some of the enlisted men joined accused and an unidentified woman in his room at a hotel, and a number of rounds of highballs were served, accused participating in the drinking (R.53,54,68,69,95,96). In the opinion of Bradford, one of the enlisted men present, accused at 1 p.m. walked all right, talked "pretty good", and was in possession of his faculties (R. 73). Bradford testified that accused was neither sober nor "really drunk" but his definition of "drunk" entailed inability to move (R.69,73). A person who did not know accused probably would not have realized that he had been drinking, but witness, knowing accused rather intimately, could tell (R.73).

At the suggestion of accused, the party left the hotel and went to the nearby 1017 Club, arriving there during the middle of the afternoon (R.54,55,70). At the club, accused and a number of enlisted men of the Third Platoon stood at the bar, drank highballs, and talked together for several hours, accused apparently paying for the drinks (R. 55,56,70,71,88,89,96,97). Accused was in uniform (R.48,49,55,70,89,97). There were a number of civilians in and out of the club during accused's sojourn there (R.56,70,97).

At one stage of the proceedings an enlisted member of the platoon asked accused how the men would ever be able to remove the bomb, whereupon accused said not to worry, as he could have another squad on the scene in fifteen minutes (R.97).

Accused left the club about 8 p.m. (R.48,55,56,97). At this time he was "under the influence of liquor", according to one of the enlisted men, and his condition as to sobriety was not "too good", according to another (R.56,98). A third said that "you could tell he had been drinking", and that he talked about going after Sergeant Bradford "to beat him up" (R.89,90). Bradford testified that at the club accused was "kind of careless and wild" (R.73), but that his condition at the time he left was

about the same as at the time of arrival (R.71).

In two statements accused admitted drinking liquor with enlisted men of his platoon in his hotel room and at the 1017 Club. He also admitted that he bought the drinks and invited the enlisted men to join him. As a reason, he said that he had learned from experience that the men would drink anyhow and he thought it best to keep an eye on them by taking them with him (R.85,86,111,112). He admitted further that he was not sober at the 1017 Club (R.111).

From the club, accused and those of the enlisted men still willing and able to navigate proceeded to the site of the public bomb disposal demonstration (R.57,92,98). Present was a crowd of civilians variously estimated as between 50 and 100 (R.57,59,90,98). They were about 15 yards from the "hole of entry" of the bomb (R.91,92). During the demonstration neither accused nor any one else was charged with the duty of giving a running commentary or explanation to the audience of the chain of events (R.93,94).

At the demonstration, evidently while the enlisted men were digging, accused said, "'Dig, you dogs, and earn your pay'" (R.57), or words to that effect (R.90,98). It was not customary for accused to talk like that to his men (R.99). Accused also fell into the hole of entry, which was about two and one-half or three feet deep (R.57,90,91,98). He was not staggering at the time (R.92), but was running and "kind of lost his balance" and slipped into the hole (R.99). The area was lighted by street lights, and some automobile lights were shining on the hole (R.91, 99). It had been snowing and the weather was "sloppy" (R.91).

One of the enlisted men testified that accused "was under the influence of liquor" (R.57), and another that he was not "too sober" (R. 98). The conclusion of each was based partially upon accused's language toward the enlisted men (R.57,98).

In his statements, accused admitted having drunk liquor during the day, but he claimed to have been in possession of his faculties (R.85). He admitted that at the demonstration he was "tight and probably out on my feet but still walking", which, by his definition, did not constitute drunkenness (R.109). He admitted that a large number of civilians were at the demonstration. He did not remember whether he said "'Dig, dig, you dogs, and earn your pay'", or words to that effect. However, on many occasions there had been joking references made to the fact that the men did little to earn their pay. He denied falling into the hole of entry. He asserted that a second hole had been dug and only partially refilled.

Furthermore, it was raining. However, he admitted that his condition was one of the causes of his fall into the hole (R.109).

Specification 4, Charge IV.

On or about February 2, 1943, accused and a number of the enlisted men of his platoon were at the Hilltop Tavern, Seattle, Washington (R.30, 31,62,71,72). Accused was in uniform (R.32,72). The Hilltop Tavern is a negro beer parlor and on the evening in question colored people of both sexes were present (R.31,32,71,72,73). Nothing except beer is served (R. 74).

Before dinner, accused told one of the enlisted men that there was no use in going back to camp, and that they might as well stay there and get drunk (R.31). With the exception of a period when he went somewhere for dinner, accused remained at the tavern until midnight (R.31, 72). Accused and his companions continued to drink beer during the evening (R.31-35,72). Part of the time accused sat in a booth with a group which included a white girl and two colored men, and part of the time he drank with various and sundry people at the bar (R.31,72,74).

In Hefner's opinion, accused was drunk, but Hefner admitted that he did not pay much attention to accused (R.31,35). In Bradford's opinion, accused was "high", although his speech and appearance were normal and he was not disorderly. His mind was not operating as it did when he was sober, and he was going around talking to different colored people (R.72-75). Becker, who left the Hilltop early in the evening and returned about 11:30 or 12, testified that he could tell that accused and his companions had been drinking (R.62).

In his statements accused admitted that he drank beer at the Hilltop Tavern on the evening in question, and that he was "tight", but he denied having been drunk or disorderly (R.85,110).

Specification 6, Charge IV.

On or about February 8, 1943, accused and two or three other members of the platoon were in the orderly room. Accused stated that he was in debt to the extent of $250 and he told Hefner to go into the barracks and see how many members of the platoon would contribute in order to relieve him of this debt (R.15-17,20,22,36,39). Thereupon Hefner went into the barracks and told the members present that he wanted to know how many would lend money to accused to make up the $250 indebtedness (R.21,42,43).

A substantial number of the platoon were present at the time (R.21,43). In one of his statements accused said that he did not direct Hefner to solicit the men, but merely asked him to find out how they felt about the matter (R.86). In another statement accused denied causing a blanket request to be made and said that the request for money to cover the loan was limited to one or two enlisted men (R.112).

The defense offered no testimony and accused elected to remain silent (R.118,119).

4. With reference to Specification 1, Charge I, the plea of guilty and the evidence, including the confessions of accused, establish guilt without question. The evidence plus the confessions likewise prove the misappropriations alleged in Specifications 2,3, and 4, Charge I, and the borrowings alleged in Specifications 3,4, and 6, Charge III. In Specification 4 the offense is not of an aggravated nature, since the loan was made to avoid a trip back to accused's hotel, where accused had left his money, but the facts constitute an offense because within the general policy prohibiting officers from borrowing from enlisted men. Similarly, Specification 6, involving the loan for the purpose of sending a telegram, is not an aggravated case, but nevertheless constitutes a violation of Article of War 96.

Specification 4 alleges that the loan transaction occurred at Fort Lewis, Washington, whereas the evidence shows that it occurred in Portland, Oregon. The discrepancy is immaterial.

With reference to Specification 5, Charge III, the evidence of the prosecuting witness proves the loan as alleged. In his statement accused maintained that the money was given to him not as a loan but as reimbursement for necessary expenses. However, admittedly accused paid back $5, so he must have considered that much a loan, and a slight variance in the amount loaned is immaterial. Moreover, the prosecuting witness had no reason to lie about the matter on the witness stand, and his version seems the more plausible.

The evidence and confessions of accused prove that he was drunk and disorderly while in uniform as alleged in Specification 2, Charge IV. Although his drunkenness was not gross, his conduct in hitting a woman on the head with an ice cream scoop, with such force as to require medical attention, was sufficiently disorderly to constitute a violation of Article of War 95.

That accused was drunk at the bomb disposal demonstration, as

alleged in Specification 3, Charge IV, is clear. Indeed, to have remained sober after the grueling day of drinking revealed by the testimony would have been little short of miraculous. However, in the opinion of the Board of Review, accused's condition and conduct fall short of a violation of Article of War 95 and establish violation of Article of War 96 only. His falling into the hole did not amount to a conspicuously disorderly act, and may well have happened to a perfectly sober man. He was not staggering, and so far as appears from the evidence, there was nothing to indicate to the crowd that he was drunk. In this connection it should be recalled that the demonstration took place on a winter evening, after dark. His language to the enlisted men, although reprehensible, is not enough to justify a conviction under Article of War 95, especially since there is no evidence that the audience heard his remarks.

With reference to Specification 4, Charge IV, although accused was drunk in uniform in violation of Article of War 96, his conduct did not amount to a violation of Article of War 95. He was neither grossly drunk nor disorderly, and his mere presence in a colored beer parlor does not evidence the degree of moral unfitness contemplated by that Article.

Specification 5, Charge IV - drinking with enlisted men at the 1017 Club - was proved by the witnesses for the prosecution and by accused's confessions. As an excuse, accused pointed out the necessity of keeping a fatherly eye on his men. But the condition into which he allowed them and himself to sink makes the alleged excuse too inadequate for serious consideration. However, drinking with enlisted men under the circumstances of this case is violative of Article of War 96 only, not of Article of War 95.

The evidence relating to Specification 6, Charge IV, - soliciting funds from enlisted men - clearly proves the facts alleged. The version contained in accused's statements is discredited by the unbiased testimony of the witnesses. Again, however, the conduct of accused does not violate Article of War 95, but violates only Article of War 96.

5. With reference to Specification 6, Charge IV, Private First Class Garner was asked whether he was present in the barracks on or about 8 February 1943, when Sergeant Hefner made an announcement to the platoon. He answered that he was. The next question was, "Will you tell the court what was said?" To this the defense objected, upon the ground that accused was not in the barracks at the time. The objection was overruled (R.42,43). The court's ruling was correct. One of the elements alleged was that accused caused Hefner to make a solicitation among the members of the platoon. The only possible means of proving that Hefner made such

a solicitation was the testimony of Hefner himself and that of persons who heard him. The issue was whether such a statement had been made. The evidence does not partake of hearsay (M.C.M.,1928, par. 113a).

6. War Department records show that accused is 24 years of age, graduated from high school, and attended the University of Washington for two years. He was inducted on 20 June 1941, and served as an enlisted man, until, upon graduation from the Ordnance Officer Candidate School, Aberdeen Proving Ground, Maryland, he was appointed a second lieutenant, Army of the United States, on 27 June 1942. He was promoted to first lieutenant on 23 February 1943. In recommending accused for the Ordnance Officer Candidate School, his commanding officer stated that accused had demonstrated outstanding qualities of leadership and that his character was excellent.

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. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 3, 4,5, and 6, Charge IV, as involves findings of guilty of those Specifications in violation of Article of War 96; legally sufficient to support the findings of guilty of Charges I, III, and IV, and of all the remaining Specifications; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory for violation of Article of War 95 and authorized for violation of Articles of War 94 and 96.

Jerry G. Gay, Judge Advocate.
[illegible], Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 28 JUL 1943 - To the Acting 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 Westcott Field (O-1548206), Ordnance Department.

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 Specifications 3,4,5, and 6, Charge IV, as involves findings of guilty of those Specifications in violation of Article of War 96; legally sufficient to support the findings of guilty of Charges I, III, and IV, and of all the remaining Specifications; and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, that the period of confinement be reduced to two years, that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, 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.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to two years. G.C.M.O. 215, 3 Sep 1943)

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

SPJGK
CM 234561

2 JUL 1943

UNITED STATES V. Second Lieutenant CARLTON E. NELSON (O-668743), Army Air Forces.	CARIBBEAN WING Trial by G.C.M., convened at Morrison Field, West Palm Beach, Florida, 2 April 1943. Dismissal.

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

Specification: In that Second Lieutenant Carlton E. Nelson, Army Air Forces, now attached to Headquarters and Headquarters Squadron, 26th Antisubmarine Wing, Army Air Base, 36th Street Airport, Miami, Florida, did, at the Army Air Base, 36th Street Airport, Miami, Florida, on or about March 6, 1943, feloniously take, steal, and carry away the sum of Two Hundred and Fifty ($250.00) Dollars, lawful money of the United States, the property of Second Lieutenant William Pleus.

CHARGE II: (Finding of guilty of violation of Article of War 96 disapproved by the reviewing authority).

Specification: (Finding of guilty with exceptions disapproved by the reviewing authority).

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

Specification 1: In that Second Lieutenant Carlton E. Nelson, Army Air Forces now attached to Headquarters and Headquarters Squadron, 26th Antisubmarine Wing, Army Air Base, 36th Street Airport, Miami, Florida, did, at the Army Air Base, 36th Street Airport, Miami, Florida, wrongfully borrow the sum of Ten ($10.00) Dollars from Private First Class Sam Slaton, on or about February 23, 1943.

Specification 2: In that Second Lieutenant Carlton E. Nelson, Army Air Forces now attached to Headquarters and Headquarters Squadron, 26th Antisubmarine Wing, Army Air Base, 36th Street Airport, Miami, Florida, did, at the Army Air Base, 36th Street Airport, Miami, Florida, wrongfully borrow the sum of Twenty ($20.00) Dollars from Private Jerome T. Rynkowski, on or about February 23, 1943.

Specification 3: In that Second Lieutenant Carlton E. Nelson, Army Air Forces now attached to Headquarters and Headquarters Squadron, 26th Antisubmarine Wing, Army Air Base, 36th Street Airport, Miami, Florida, did, at the Army Air Base, 36th Street Airport, Miami, Florida, wrongfully borrow the sum of Ten ($10.00) Dollars from Private Conne Garcia, on or about March 2, 1943.

Specification 4: In that Second Lieutenant Carlton E. Nelson, Army Air Forces now attached to Headquarters and Headquarters Squadron, 26th Antisubmarine Wing, Army Air Base, 36th Street Airport, Miami, Florida, did, at a public place, to wit: Frolics Club, Miami, Florida, on or about February 11, 1943, drink intoxicating liquors with Private First Class Sam Slaton and Private Jerome Rynkowski, Enlisted Men, in the military service of the United States.

Specification 5: In that Second Lieutenant Carlton E. Nelson, Army Air Forces now attached to Headquarters and Headquarters Squadron, 26th Antisubmarine Wing, Army Air Base, 36th Street Airport, Miami, Florida, having received a lawful command from Major O.B. Hardy, Jr., Air Corps, his Commanding Officer, to return to the Army Air Base, 36th Street Airport, Miami, Florida, and to report to the said Major Hardy, did, at Army Air Base, 36th Street Airport, Miami, Florida, on or about March 15, 1943, wrongfully fail to obey same.

He pleaded guilty to Charges I and III and the Specifications thereunder, and not guilty to Charge II and its Specification. He was found guilty of

Charges I and III and the Specifications thereunder, guilty of the Specification of Charge II with exceptions, and not guilty of Charge II but guilty of violation of Article of War 96. 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 findings of the Specification of Charge II and of Charge II, approved only so much of the sentence as provides for dismissal from the service, and forwarded the record of trial for action under Article of War 48.

3. As to Charge I and its Specification, the evidence shows that on the night of 5 March 1943 accused, a second lieutenant, Air Corps (R.15), slept in the room of Second Lieutenant William Pleus, Air Corps, at the Army Air Base, Miami, Florida. At five thirty o'clock, the following morning, Lieutenant Pleus left his quarters for patrol duty. At that time and place Lieutenant Pleus had $250 in the pocket of his blouse which he left hanging in his locker. The money was in $10 bills. Lieutenant Pleus returned late in the afternoon, the same day. As he was putting on his blouse, he noticed that his money was missing (R.10,11). Accused was seen in the squadron mess hall on the same morning, 6 March 1943, "with a roll of money" which he stated he had won gambling (R.14). On that morning accused requested Private Jerome Rynkowski, Army Air Base, Miami, Florida, "to hold $220.00 for him". This money was in $10 bills. Accused said he had won it in a card game (R.13).

As to Charge III and its Specifications, accused was commissioned a second lieutenant, Air Corps, 17 December 1942 (War Dept. records). On 23 February 1943, he borrowed $10 from Private First Class Sam Slaton, and $20 from Private Jerome T. Rynkowski. On 2 March 1943, accused borrowed $10 from Private Connie Garcia. These loans were repaid on 6 March 1943 (R.13,14).

On or about 11 February 1943, accused drank liquor, "a few drinks", with Private First Class Slaton and Private Rynkowski, at a public place known as the Frolics Club in Miami, Florida (R.13,14).

Major O.B. Hardy, Jr., Headquarters and Headquarters Squadron, 26th Anti-Submarine Wing, Miami, Florida, apparently accused's commanding officer, gave accused a three-hour pass to go to Miami to file his income tax return. Major Hardy personally delivered the pass to accused and told him that he, Major Hardy, "wanted to be sure that he came back at that time", at 6 o'clock P.M. when the pass expired, "or else suffer the consequences" (R.6). It was not customary to give a pass to an officer, but accused was more or less restricted to the area. "He had been 'AWOL' previous to this" (R.8). Accused did not report back to Major Hardy "as

directed" when the pass expired. Nor was accused in his room the next morning when Major Hardy looked for him there. His bed did not appear to have been used. Accused did not appear for his first class in the navigation school, which started at 8:30 A.M. (R.6,7).

Accused testified in his own behalf. On the night of 5 March, he had been playing cards in Lieutenant Pleus' room and went to sleep there in the early morning of 6 March. Later that morning, while dressing, he noticed a bulge in Lieutenant Pleus' blouse. Curiosity prevailed. He found the money and took it. Accused stated that he could give no satisfactory explanation for the theft. The money seemed a quick way of paying his present debts. Lieutenant Pleus, in turn, would be repaid out of a loan which accused showed he was negotiating with the National Bank of Fort Sam Houston, San Antonio, Texas. Accused told himself, so he testified, that he would repay Lieutenant Pleus and confess after he had paid some of his debts. However, he found himself unable to face the situation, unable to tell Lieutenant Pleus that he had taken his money (R.15,16). Accused testified that he had "borrowed the money from the enlisted men" and had paid them back (R.18). As to "overstaying his leave", accused stated that after filing his income tax return he went to a restaurant to dine. While there he became socially engaged and, engrossed in dinner conversation, overlooked the fact that he was "over" his "pass time". He stated that he went to the phone and called the Headquarters orderly room and asked that he be signed in. Accused added that he "did not get back until the next morning" (R.18,19). On cross-examination, accused said he knew his failure to return in three hours would be a violation of a direct order (R.21).

4. By his plea of guilty, accused was legally found guilty of Charge I and its Specification and of Charge III and its Specifications. The evidence, without regard to the plea of guilty, was sufficient to sustain these findings of guilty.

The theft of the $250 from Lieutenant Pleus on the morning of 6 March 1943 was definitely established. During the same morning accused was in possession of a substantial sum of money which closely resembled the amount stolen and was exactly similar to the denomination of the currency involved, viz., $10 bills. Sudden enrichment following a period of impecuniosity, unexplained, has been held sufficient in theft to establish guilt (Neal v. United States, 102 Fed. 2nd, 643). In addition to his plea of guilty, accused admitted the theft on the witness stand.

There was clear proof that accused had borrowed money from enlisted men and had drunk intoxicating liquor in public with enlisted men, as charged in Specifications 1,2,3, and 4 of Charge III. To this

Charge and these Specifications accused also pleaded guilty. He testified to borrowing the money, on the witness stand.

With respect to Specification 5 of Charge III, accused also pleaded guilty. He is charged with having wrongfully failed to obey a lawful command of his commanding officer in violation of Article of War 96. Accused had been "restricted" to a certain area. Major Hardy was willing to relax the restriction and permit accused to go to Miami for three hours. To emphasize the necessity for accused's return within three hours Major Hardy sent for accused, personally delivered the pass, and told him that "I wanted to be sure that he came back at that time", 6 o'clock P.M., "or else suffer the consequences". From the testimony of Major Hardy, taken as a whole, and that of accused himself, there can be no doubt that Major Hardy specifically and directly ordered accused to "return" at the expiration of three hours. Accused did not return, responsive to the termination period of the pass. Accused was properly found guilty of Specification 5 of Charge III.

5. The trial judge advocate and the court questioned Major Hardy about "conversations" which he had with accused on 16 March (R.7,8). Defense counsel objected. The question involved confession of guilt by accused. The objections were incorrectly based on the ground that the evidence responsive thereto was hearsay (R.8,10). The objections were overruled. The ruling was erroneous. The testimony was not entirely hearsay, but should have been excluded in the absence of a showing that accused had been advised of his rights prior to the making of the confession (M.C.M., 1928, par. 114). However, excluding the testimony which involved confessions of guilt made by accused to Major Hardy, the record is legally sufficient. Accused pleaded guilty and on the stand admitted all the matters covered by his "conversations" with Major Hardy.

6. Accused is now 25 years old. He was inducted into the service 23 April 1941, honorably discharged 7 August 1941, reenlisted 8 August 1941, commissioned a second lieutenant, Air Corps, 17 December 1942. He is single. Other than graded schools, he attended the Interstate Business College for three months.

7. The court was legally constituted and had jurisdiction of the person and of the 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 is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 93 and 96.

Henry E. Eby, Judge Advocate.

John Vanneuville, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 10 JUL 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 Carlton E. Nelson (0-668743), Army Air Forces.

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.

(Sentence confirmed. G.C.M.O. 171, 30 Jul 1943)

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

SPJGH
CM 234591

JUN 9 1943

UNITED STATES ND v. Second Lieutenant JAMES F. KIRKHART (0-1010581) Armored Force.	FORT KNOX, KENTUCKY Trial by G.C.M., convened at Fort Knox, Kentucky, March 30, 1943. Dismissal, total forfeitures and confinement for one (1) year. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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 I: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant James F. Kirkhart, (Inf) Armored Force, Company "B", Demonstration Regiment, Armored Force School, was at Fort Knox, Kentucky on or about February 10, 1943 drunk in quarters.

Specification 2: In that Second Lieutenant James F. Kirkhart, "B" Company, Demonstration Regiment, Armored Force School, enrolled as a student in the Officers Tank Maintenance Course Number 78, Armored Force School, commencing February 8, 1943, did at Fort Knox, Kentucky, without proper leave absent himself from his duties as student in the Officers Tank Maintenance Course Number 78, Armored Force School, from about 6:00 A.M. on or about February 8, 1943 to about 6:30 P.M. on or about February 10, 1943.

Accused pleaded not guilty to and was found guilty of the Charge and the Specifications thereunder. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for one year. 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 48.

3. The evidence for the prosecution shows that by Special Orders of the Armored Force School, Fort Knox, Kentucky, dated February 6, 1943, accused was enrolled as a student in Officers' Tank Maintenance Course No. 78, commencing February 8, 1943. Captain Lowell R. Pfarr, a student in the course, and marcher of the "A.M." section, testified that accused was not present at the formations of that section on February 8, 9 or 10. On cross-examination, Captain Pfarr stated that the section roster which was given to him was made up by someone else, whom he did not name, and that it included only the names of "the men we had on Monday the 8th". The name of accused was not on the roster. Captain Pfarr admitted, however, that he had not reported accused absent, that he did not know accused, and had no independent recollection of him prior to February 15. On that date accused, for the first time, reported to Captain Pfarr and said "I am now in your section from now on". Thereafter accused was always present at formations of the morning section (R. 14-17, Ex. B).

There was a shift or class in the Tank Maintenance Course, in the forenoon and another in the afternoon. In the afternoon class, each student was required to make out and turn in a questionnaire at the first session, the roster was made up from these questionnaires, and the students were then seated in alphabetical order in the classroom. The name of accused was not on this roster and he was not listed as present on February 8, 9 or 10. On cross-examination the class instructor admitted that if a student had failed to make out a questionnaire on the first day, or if the questionnaire had in some way been lost or misplaced, it would not be possible to say definitely that such student was not present. The instructor stated, however, that every day subsequent to the first day the roll had been called and if a student whose name was not on the roster had been present, that fact necessarily would have come to the attention of the instructor (R. 17-19).

There were, in all, eight daily sessions of the morning class. Accused was graded for only the last two, one day of practical work and one day of final examinations. He received a grade of "around eighty"

which was a passing grade. A separate daily grade was not entered up every day for every student in the class. The official attendance records of the morning class were identified by the instructor, under whose direct supervision they were compiled and kept, and were received in evidence (Exs. C, D). They show that accused was absent from the first six sessions, and contain an entry as to accused in the handwriting of the instructor "reported 2-15-43". Each officer attending the morning class was required to make out a questionnaire at the first session. No questionnaire, dated February 8, was turned in by accused so far as the class instructor knew, but accused had filled out one on February 15. It was possible for a questionnaire to become lost or misplaced but the instructor could not recall that such a thing had ever happended. Accused had no permission from competent authority to be absent from his classes on the 8th, 9th or 10th of February (R. 19-28).

When Second Lieutenant Hugh Mollohan, a student officer, went to the room of accused in officers' quarters at about 9:00 a.m., February 10, accused said to him "Molly, I am sick and I have got to go to school". Lieutenant Mollohan then asked accused if he had not gone to school and the latter replied "No" but stated that he "was going". Lieutenant Mollohan visited the room of accused on two subsequent occasions that day, at noon and around 5:00 p.m. At noon he tried to arouse accused, who was on his bunk, but could not "get him to come to". On the second occasion accused was lying on the floor partially covered by a quilt, the window was open, he apparently was very cold, and "was out" (R. 7-8).

A medical corps officer, Captain John M. Coleman, was called by accused at about 8:30 a.m., February 10. Accused was then in his room and apparently had been drinking although Captain Coleman would not say that he was drunk. Accused talked rationally and was "very normal". His name was not entered on the sick book because Captain Coleman considered him able to "go over to the school area". There was a half-pint bottle of whiskey in the room at that time. When, at the request of Lieutenant Mollohan, Captain Coleman returned to the room of accused at about 5:15 p.m., on the same day, the whiskey bottle was empty and accused was on the floor, undressed, uncovered, unable to respond to questioning and, in the opinion of Captain Coleman, under the influence of "alcohol". As he did not know how long accused had lain on the floor, inadequately clothed and covered, Captain Coleman ordered an ambulance and sent him to the hospital (R. 8-11).

Another medical corps officer, Major Philip S. Wagner, whose room was directly across the hall from that of accused, "early in the afternoon" of February 10, at the suggestion of the mess officer, had

gone to look at accused. Major Wagner tried to arouse accused but succeeded only in eliciting from him some unintelligible comment. He again saw accused "late in the afternoon" of the same day and the latter was then in a state of stupor on the floor. Accused was lifted up and placed on his bed. Although Major Wagner had not gone into the matter "too carefully", since he was not medically responsible, he thought he smelled alcohol on the breath of accused and, in his testimony at the trial, expressed the opinion that accused was drunk (R. 6-7).

At approximately 6:30 p.m., February 10, Major R. H. Blemker, a medical corps officer and officer of the day in the hospital, found accused on a litter on the floor in the receiving room totally unconscious, in a state of shock, pulse rapid and face "slightly flushed or ashen rather". Major Blemker examined accused and diagnosed his condition as acute alcoholism. A laboratory test of blood taken from accused at 8:45 p.m. (the delay was due to his having been kept in the receiving room for treatment for shock) showed an alcoholic content of 3.0 milligrams per cubic centimeter. According to the approved medical corps interpretation, that amount of alcohol in the blood of accused indicated that he was in a state of intoxication designated as "drunk and disorderly".

Accused was released from the hospital on February 14. The final diagnosis was "alcoholism, acute, recovered" (R. 11-14).

4. The defense offered no testimony. The accused elected to remain silent (R. 28).

5. With reference to Specification 1 of the Charge, it appears from the undisputed testimony that when a medical officer called on accused, in his room in officers quarters, at about 8:30 a.m., February 10, accused apparently had been drinking but was not drunk; that at noon, when a fellow student officer entered the room, accused was in bed, unconscious, and could not be aroused; and that "late in the afternoon" another medical corps officer found accused lying on the floor in a stupor, unable to respond intelligibly to questions put to him, and, so the medical officer thought, drunk. About 5:00 p.m., accused was found again on the floor, undressed, without adequate covering, in a drunken coma and was sent to the hospital. At approximately 6:30 p.m., he was examined at the hospital receiving room by a third medical corps officer, the hospital officer of the day, who diagnosed his condition as acute alcoholism. Accused was then in a state of shock, his pulse was rapid and he was still totally unconscious. A

laboratory test of blood taken from him at 8:45 p.m., at least three and a half hours after he could have consumed any intoxicating liquor, showed an alcoholic content of 3.0 milligrams per cubic centimeter. The testimony of medical experts showed that the presence of that amount of alcohol in the blood of accused indicated that he was in a stage of intoxication described as "drunk and disorderly". Accused was not released from the hospital until February 14 and the final diagnosis was "alcoholism, acute, recovered". Thus, it was conclusively established by the uncontroverted evidence that at the time and place alleged in Specification 1 of the Charge, accused was drunk in quarters in violation of the 96th Article of War.

Concerning Specification 2 of the Charge, the evidence shows that by special orders dated February 6, 1943, accused, an officer of the Demonstration Regiment, Armored Force School, Fort Knox, Kentucky, was duly enrolled as a student in the Officers Tank Maintenance Course No. 78, commencing Monday, February 8, 1943. There was a shift or class of the course which met in the forenoon and another which met in the afternoon. Accused could not have attended any classes from about noon on February 10, when he was found in his room in an unconscious condition, until his release from the hospital on February 14, following his recovery from acute alcoholism. On the next day, Monday, February 15, he reported for the first time, to the student section marcher of the morning section and stated "I am in your section from now on". He was not on the roster of that section on February 8, 9 or 10. However, it is not clear in what manner or by whom the roster was compiled and the section marcher had no independent recollection of accused. The forenoon class had eight sessions, and accused was graded on the basis of attendance at only the last two of them. The attendance records of the class, which were received in evidence, show that he was absent from the first six sessions and did not report until February 15. Although each student officer was required to turn in a questionnaire at the first meeting of the class, accused did not fill out a questionnaire until February 15.

Accused was not present at the afternoon shift or class of the Officers Tank Maintenance Course on February 8, 9 or 10 according to the testimony of the class instructor. The name of accused was not on the class roster which was compiled from the questionnaires handed in by the students at the first session. Accused may possibly have attended the class without making out a questionnaire, or it may have

been lost or misplaced, it is true, but if that had happened, in all probability the fact that there was a student present whose name was not on the roster would have come to the attention of the class instructor, as the students were seated in alphabetical order and the roll was called at every session after the first one. Accused did not have permission to be absent from any class of the course in which he was enrolled.

The evidence shows that the accused was not present at the afternoon class of the course at any time, and that he was not present at the morning class until February 15, 1943. The record shows beyond any reasonable doubt that accused absented himself without leave from his duties as a student in the Officers' Tank Maintenance Course, for the period alleged in Specification 2 of the Charge.

6. After he had testified that accused was not in the morning section on February 8, Captain Pfarr was subjected to a line of cross-examination designed to elicit the admission that his testimony was not based upon his own personal knowledge. The president of the court, who was also the law member, asked defense counsel what he was "driving at". The latter replied that he wished to show, in view of the state of the records, that Captain Pfarr could not have ascertained from them that accused was absent, and that, since Captain Pfarr had not become acquainted with accused until February 15, he could have had no independent recollection as to whether or not accused was absent on February 8. The law member then remarked:

> "The witness has made an absolute statement that the man was not present on Monday, the 8th of February, and how he arrived at that conclusion is immaterial."

Defense counsel then asked if that was the ruling of the court, the law member answered that it was, and Captain Pfarr was not cross-examined further.

Manifestly, the ruling of the law member was erroneous. An important purpose of cross-examination is to bring to light the extent and character of the knowledge of a witness of facts concerning which he has testified. Such examination may disclose that an unequivocal statement is based upon hearsay or some other incompetent source of information. The cross-examination of a witness as to facts in issue or relevant to the issue is a matter of right, not of discretion (3 Wharton's Criminal Evidence (11 Ed.) 2161).

However, the ruling of the law member was not made on any question then before the court, as Captain Pfarr had answered the immediately preceding question of defense counsel before the ruling was announced. If the ruling be regarded as having cut off further cross-examination, nevertheless, it did not injuriously affect any substantial rights of accused. In his cross-examination of Captain Pfarr defense counsel had covered fully the points which his statement to the law member indicated he wished to bring out. Captain Pfarr had admitted that he did not compile the roster from which the roll was called, that it had been made up by someone else not in his section, that he did not know accused prior to February 15 and had no independent recollection of accused.

7. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from September 17, 1940; appointed temporary Second Lieutenant, Army of the United States, from Officer Candidate School, and active duty June 13, 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 Article of War 96.

Willis T. Kiel Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, 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 Second Lieutenant James F. Kirkhart (0-1010581), Armored Force.

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.

Upon being enrolled as a student in Officers' Tank Maintenance Course No. 78, Fort Knox, Kentucky, accused absented himself without leave from classes for the first three days, and on the third day was found drunk to unconsciousness in quarters at noon and again at about 5:00 p.m., all in violation of the 96th Article of War. He was sent to the station hospital for treatment for acute alcoholism and was not released for duty until four days later. An affidavit of the Registrar, Station Hospital, attached to the report of the investigating officer, among the papers accompanying the record of trial, shows that on November 9, 1942, accused was admitted to the hospital suffering from acute alcoholism, was "cured" November 12, and returned to duty November 16. 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-Drft.ltr. for sig. of Sec. of War.
Incl. 3-Form of Executive action.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 156, 23 Jul 1943)

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

SPJGK
CM 234601

30 JUN 1943

UNITED STATES v. Private SIDNEY C. BLANKENSHIP (36046799), Battery A, 65th Coast Artillery (AA), and Private RAYMOND H. GIARDINA (19050453), Battery F, 65th Coast Artillery (AA).	37TH COAST ARTILLERY BRIGADE (AA) Trial by G.C.M., convened at Sawtelle, California, 23 March 1943. Blankenship: Dishonorable discharge (suspended) and confinement for five (5) years. Ninth Service Command Rehabilitation Center. Giardina: Dishonorable discharge and confinement for fifteen (15) years. Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldiers named above. Inasmuch as the dishonorable discharge was suspended in the case of Blankenship, this review is concerned with Giardina only, and the word "accused" will refer to him.

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

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

Specification 1: (Relates solely to Blankenship).

Specification 2: In that Pvt Raymond H. Giardina, Btry F 65th C.A. (AA), Inglewood, Calif, did, at Inglewood, Calif on or about Mar 10, 1943 desert the service of the United States, and did remain in desertion until he was apprehended at Los Angeles, Calif on or about Mar 11, 1943.

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

Specification 1: In that Pvt Sidney C. Blankenship, Btry A 65th C.A. (AA), Inglewood, Calif and Pvt Raymond H. Giardina, Btry F 65th C.A. (AA), Inglewood, Calif acting jointly and in pursuance of a common intent, did, at Mines Field, Calif, on or about Mar 9, 1943, feloniously take, steal, and carry away one (1) gun, sub-machine,

Cal.45, M1 Thompson, #215504, valued at about one hundred and fifty seven dollars ($157.00), the property of the United States.

Specification 2: In that Pvt Sidney C. Blankenship, Btry A 65th C.A. (AA), Inglewood, Calif and Pvt Raymond H. Giardina, Btry F 65th C.A. (AA), Inglewood, Calif acting jointly and in pursuance of a common intent, did, at Hawthorne, Calif, on or about Mar 10, 1943 by force and violence, and by putting her in fear, feloniously take, steal, and carry away from the presence of Mrs Etta Kish, the property of Mrs. Violet Clark, money in the value of thirteen dollars and seventy cents ($13.70).

Accused pleaded guilty to Charge II and Specification 1 thereof, and not guilty to the other Specifications and Charge. He was found guilty of all the Charges and Specifications. The record of trial states that evidence of one previous conviction was introduced, but Prosecution's Exhibit G shows two previous convictions by special courts-martial: one for absence without leave in violation of Article of War 61, and one for escape from confinement in violation of Article of War 69. Accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifteen 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. Evidence.

Accused absented himself without leave from his station on 10 March 1943 and was confined by the civil authorities in Los Angeles, California, on 11 March 1943 (R.10-12; Pros. Ex. B).

On 10 March 1943 a .45 calibre Thompson submachine gun, serial No. 215504, assigned to Private Harry O. Benson, Battery F, 65th Coast Artillery, was missing from the place where Benson kept it (R.11,35-37). A search of the area proved fruitless (R.11). Subsequently the gun was found concealed in a garage back of an apartment occupied by Blankenship and his wife (R.40-42). The gun was identified by witnesses and admitted in evidence (R.11,13,36,42).

Mrs. Etta Kish testified that she was employed at "The Diner", a cafe in Hawthorne, California. On the evening of 9 March 1943,

accused, whom witness identified, entered the cafe and asked witness for some change to be used in the cigarette machine (R.47,48,49). Accused wore civilian clothes (R.52). Witness opened the cash register and handed accused some nickels, whereupon accused demanded twice that she leave the cash register open. Mrs. Kish turned to her husband, who was sitting some distance away, and asked him what to do. He advised her not to open it and she followed his advice. Apparently she had closed it at some point in the proceedings. Accused then warned witness that he would shoot her if she failed to open the register (R.48-49). Accused produced a "gun". He held it in his pocket, but the barrel was out and apparently pointed at witness (R.48-52). Another man outside the door, evidently Blankenship, advised Mrs. Kish's husband to stay where he was (R.49,51,52). Mrs. Kish then opened the cash register and started to hand accused some nickels. Accused reached into the register, removed the rest of the cash, and left (R.49). Mrs. Kish testified that "she" (evidently referring to the owner or another employee) checked the amount missing and found it to be $13.70 (R.50). (Although this evidence was hearsay, its admission was harmless, since robbery does not depend upon the value of the property taken.)

Sergeant Joseph W. Kish, Company D, 733rd Military Police Battalion, husband of the witness, Mrs. Kish, identified accused as the individual in question, and in substance corroborated his wife's testimony, although he said that from where he was sitting he did not see a weapon in the accused's hand. However, he did notice that accused's hand was in the right-hand pocket of his coat. After accused left the diner, witness heard a car pull away (R.56-58).

David J. Long, a member of the Los Angeles, California, police force, arrested accused and Blankenship on the night of 9 March 1943 in Los Angeles. Both were attired in civilian clothes, and had cap pistols possibly a foot long in their possession (R.59-61).

Second Lieutenant Robert J. DeMund, 37th Brigade Coast Artillery, testified that as investigating officer of the brigade he talked with accused. He first explained that accused had a right to remain silent and that anything accused might say could be used against him. He made no offers, promises, or inducements, and accused's statements were voluntary (R.14,15). Accused told witness that before going "AWOL" he changed into civilian clothes. He confessed that by agreement with Blankenship he entered one of the barracks on the night of 9 March 1943 and took a .45 calibre submachine gun (R.16,17,25). He and Blankenship spent the night at the latter's home. On 10 March 1943 they bought two cap pistols.

Accused confessed to the holdup in the diner on the evening of 10 March 1943 (R.16-19). He said that during the holdup he kept the cap pistol in his pocket with the butt showing (R.34). After the robbery accused and Blankenship went to Blankenship's home and next day they went to Los Angeles, where they were apprehended (R.17). Accused told witness that he and Blankenship planned to leave California and go into business in Minneapolis, Minnesota (R.18,27). On cross-examination witness testified that accused did not say directly that he intended to desert the service (R.28).

Accused also made a statement to Second Lieutenant Dudley U. Yoedicke, 65th Coast Artillery, having first been warned that he had a right to remain silent and that anything he might say could be used against him (R.38,44). Lieutenant Yoedicke testified that he told accused that as a member of the Army he should tell the truth (R.45). Witness made no offers, inducements, or promises, and accused's statement was voluntary (R.38,39). At first accused was evasive, but after witness remarked that Mrs. Blankenship had told witness the story, accused confessed (R.45). He admitted taking the submachine gun from the battery area and concealing it in the garage adjacent to the Blankenship apartment, where, as noted, it was found (R.39-41). The balance of the statement was in substance a repetition of his statement to Lieutenant DeMund (R.39,40,46). Following his oral statement to Lieutenant Yoedicke, accused dictated and signed a written statement, which was admitted in evidence and which contained substantially the same recital of facts (R.43; Pros. Ex. D). In the written statement accused also mentioned being "picked up" by the police in Los Angeles on the day after the robbery.

Lieutenant Yoedicke testified that accused's military clothing was at the Blankenship apartment (R.41).

Accused declined to testify or make an unsworn statement.

4. With reference to Specification 2, Charge I, the evidence proves that accused was absent without leave for approximately a day, that he was apprehended in Los Angeles, that he was wearing civilian clothes, and that he and Blankenship intended to go to Minneapolis to engage in business. This evidence is sufficient to sustain the court's finding of guilty of desertion.

As noted, accused pleaded guilty to Specification 1, Charge II, and no discussion of the prosecution's evidence is necessary.

Specification 2, Charge II, was so clearly proved as to render discussion superfluous. Although there was no evidence of ownership, it is obvious that the money belonged to the owner of the restaurant, and a failure to prove who that owner was does not invalidate the conviction. The gist of robbery is the taking by force and violence, or by putting in fear, of property not belonging to accused. Those vital elements were proved. That the pistol was not real is immaterial, since the victim did not know this and was put in fear.

The testimony reveals some discrepancy in dates, but this defect is not fatal.

5. The Charge Sheet shows that accused is 22 years of age and enlisted on November 8, 1940.

6. The court was legally constituted and had jurisdiction of the person and 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 and sentence.

Judge Advocate.

Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

SPJGK
CM 234613

29 JUN 1943

UNITED STATES v. Second Lieutenant ARTHUR B. MILLER (0-910297), Army Exchange Service.	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Edgewood Arsenal, Maryland, 20 April 1943. Dismissal.

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 Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that 2d Lt. Arthur B. Miller, AES, Edgewood Arsenal, did, at Edgewood Arsenal, Md., on or about April 9, 1943, feloniously take, steal and carry away fifty-six (56 lbs.) pounds of beef of the value of approximately thirteen dollars and forty-four cents ($13.44); ten and a half pounds (10½ lbs.) of cooked ham of the value of approximately five dollars and twenty-five cents ($5.25); and thirty-two pounds (32 lbs.) of butter of the value of approximately fifteen dollars and sixty-eight cents ($15.68); the property of the Officers' Mess, Edgewood Arsenal, Md.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48.

3. The prosecution introduced no evidence. Accused testified, admitting that he had taken the property as alleged (R.11). He testified that he was 39 years old, married, and had one son. For 18 years he managed an S.S. Kresge Company Store and for one year he was supervisor over 28 stores for Butler Brothers Company. For the ten years preceding his entrance into the Army his salary was $5200 a year, but during the year with Butler Brothers Company he made more by reason of bonuses. He never had any trouble with his employers and left his position voluntarily through a desire to aid the war effort. He knew that his entrance into the Army involved financial sacrifice (R.5). When he entered the Army his son was two weeks old. In the Army he became Assistant Exchange Officer, in which capacity he supervised the soda fountain, restaurant, and Branches No. 1, 2, and 3 of the Post Exchange. The soda fountain had lost $1300 at the time accused assumed supervision over it, and during the first month of his supervision it showed a profit of $200 or $300. On 9 April 1943, accused and Mr. Charles Minton, manager of the exchange, sanded and oiled the floor at Branch No. 2. Accused did most of the sanding himself, operating a sanding machine weighing 175 to 200 pounds. The machine did not function properly, which added to the ardor of the labor (R.6,7). The job was completed about 4:30 P.M., and accused was quite tired. He and Minton had a sandwich and a beer and played the pinball machine. They were joined by "Philip", in charge of the soda fountain under the supervision of accused, and a Sergeant Moore, apparently a mess sergeant at the Officers' Mess (R.7,8,11). Accused had no previous relations with Moore (R.11). They played the machine until 7:30 or 7:45 P.M., during which time accused drank five or six beers and a couple of whiskey drinks (R.7). Out of a clear sky and without previous planning, Moore suggested taking some food from the mess (R.7, 9,10). Accordingly, they drove to and entered the officers' mess hall (R.7,9). There were no lights on and Moore lighted matches to enable them to see (R.9). Moore opened the refrigerator and accused removed a 56-pound piece of beef and put it in Philip's car (R.8-10). At the time, accused "didn't have * * * in mind" to whom the meat belonged (R.10). At Moore's suggestion the group then went to another mess building, apparently close by, where Moore opened the refrigerator and accused took 32 pounds of butter and a ham weighing eight to ten pounds, and placed them in his car (R.8,10). Accused next transferred the meat from Philip's car to his own. The party did not enter the mess hall in a stealthy manner and accused's car was parked under the lights (R.8). Accused knew that he was entering a mess hall, but he had no particular intentions about what to do with the food and was "in a carefree mood without any regard as to what trouble" might result (R.10). He had access to all the food in his own exchange (R.10).

Subsequently accused took his car, picked up Mr. and Mrs. Minton and a bartender outside the post theater, and drove them through the gate outside the post. The guard permitted them to pass. The meat was in the back of the car next to the bartender. Mr. and Mrs. Minton and the bartender left the car at a diner, and accused drove toward Baltimore. Accused was not worried. He was not thinking that he had committed a crime. Otherwise he did not believe that he would have taken the people in the car (R.8). On the way to Baltimore accused ran into another car (R.9). He felt that he was under the influence of liquor at the time (R.10).

Mr. Minton testified that as manager of Post Exchange No. 2 he had known accused for eight or ten weeks, had never experienced any difficulty with him, and had never known him to be dishonest (R.11,12). He corroborated the testimony of accused with reference to the sanding of the floor (R.12,13). He remained with accused until about 6:30 P.M., and accused picked him up about 9:30 P.M. at the post theater and drove him to the Campus Diner. When he picked up witness, accused appeared to know what he was doing and talked "like always" (R.13).

First Lieutenant Harold P. Whitenight, Ordnance Department, Edgewood Arsenal, Ordnance Assembly Plant, testified that he had known accused for about eight months, during three of which they were roommates. Accused was sincere, and witness never knew him to be dishonest (R.14).

4. The pleas of guilty and the evidence leave no doubt of accused's guilt. The intimations of slight intoxication and failure to fully comprehend the seriousness of his actions do not exculpate him.

5. War Department records show that accused is 39 years of age and a high school graduate. He was appointed a second lieutenant, Army of the United States, on 26 June 1942 and entered upon active duty on 4 July 1942.

6. 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 is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is authorized.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 1 - JUL 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 Arthur B. Miller (0-910297), Army Exchange Service.

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. Consideration has been given to a letter written by the accused requesting clemency addressed to the President of the United States.

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.

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4-Let. of accused to Pres., 28 Apr 1943.

(Sentence confirmed. G.C.M.O. 184, 4 Aug 1943)

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

(79)

SPJGQ
CM 234622

MAY 21 1943

UNITED STATES	)	THIRD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Headquarters, Third Infantry Division, APO #3, December 10 and 11, 1942. Dishonorable discharge and confinement for life. Penitentiary.
Staff Sergeant SAMUEL PANETTIERE (6710425), Company E, 15th Infantry.	)	

REVIEW by the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, 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 92nd Article of War.

Specification: In that Staff Sergeant SAMUEL PANETTIERE, Company "E", 15th Infantry, did, at Boulhaut, French Morocco on or about 29 November 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private ANLOZO I. PICKETT, Company "F", 15th Infantry, a human being, by shooting him with a .45 caliber Thompson Sub-Machine Gun.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. All members of the court present concurring, 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, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

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

Effective 1630 (4:30 p.m.) November 28, to 1630 (4:30 p.m.) November 29, 1942, Company E, 15th Infantry, was detailed as the regimental guard for the Boulhaut Camp and the military police detail in

the City of Boulhaut, French Morocco, North Africa. First Lieutenant Clayton C. Craig of E Company was the officer of the day and Second Lieutenant Emil J. Path, also of E Company, was the officer in charge of the military police detail. The accused, a sergeant of the 2nd platoon, E Company, was detailed as sergeant of the guard of the military police detail in the City of Boulhaut (R. 8, 9, 17). About noon of November 29, 1942, Lieutenant Craig visited the post of the accused, who at that time was on duty at the hotel in Boulhaut. He noticed that the accused had had a drink--and on returning to camp mentioned it to Captain Emil S. Bitar, Company Commander of E Company. Captain Bitar told the lieutenant to have accused relieved. Accused was not relieved because he was drunk or disorderly--but for his own protection, "* * * he being one of our best platoon sergeants, and we didn't want him to get in any trouble * * *". (R. 10, 13-15). Accordingly, about 1245 Lieutenant Craig sent Sergeants Rhinehart and Madden to notify the accused that he had been relieved from the guard and to return to camp. The accused returned to camp with Sergeant Stanley E. McGinnis who was also on military police duty in Boulhaut. Upon arrival at camp about 1330 Sergeant McGinnis reported to Lieutenant Craig, who then ordered the sergeant to notify accused that he had been relieved and that he was to remain in camp and clean his equipment. This order was communicated to the accused. Notwithstanding the order, accused returned to Boulhaut with Sergeants McGinnis and Lindsay. When accused got in the car Sergeant McGinnis again warned him that he had been relieved, but accused persisted in returning to Boulhaut (R. 14, 22-25). About 3 o'clock p.m. Lieutenant Path learned that accused had been relieved of the guard and replaced by Sergeant McGinnis (R. 17, 20).

On the afternoon of November 29, 1942, First Lieutenant Daniel W. Pratt, Company K, 15th Infantry, went to the hotel in Boulhaut to take a shower bath. After his bath he walked down stairs and sat down. About 5 o'clock the accused came in dressed as a member of the guard, carrying a sub-machine gun, and began giving instructions to the men to guard the building. Lieutenant Pratt was about ten feet from accused. Accused told the guard to keep the doors closed and keep out all civilians. "He talked very rapidly, not very coherently". In the opinion of Lieutenant Pratt the accused was "slightly intoxicated" and did not have control of his senses -

> "Because he made motions with his hands and, during the time he was giving the instructions to the guard, a civilian came to the door and the Sergeant (accused) eased him out and said, 'that's the way to do it'. He repeated the instructions several times to the guards and that was one of the things that lead me to believe that he wasn't in complete control of his senses. *** After speaking to the sentries on their duties, the Sergeant (accused) entered the cafe through the side door. I didn't see him again until later. I sat there for seven or eight minutes and then heard a sort of explosion. I couldn't distinguish the report - it was muffled. Well, three or four minutes later, two members of the guard came in and asked for a medical man * * * and * * * said a man had been shot and * * * said he was in the back of the

cafe" (R. 76, 77).

Lieutenant Pratt followed the guard, and found a man lying face down in the dirt. The accused was standing beside him with his "tommy-gun" under his arm. A few members of the guard and one or two other soldiers stood near the entrance to the cafe. The injured soldier was identified as Private Alonzo I. Pickett, Company F, 15th Infantry. Lieutenant Pratt asked the accused what had happened. His reply was that "the man" had tried to take his gun away from him and that he had shot him in the shoulder. The lieutenant tried to administer first aid but upon discovering three bullet holes in his back and seeing that the injured soldier was bleeding from the mouth it was realized that first aid was of no avail. A large crowd quickly gathered. All of them were "more or less inebriated" (R. 80).

The accused was disarmed, but did not willingly surrender his weapon (R. 78). Lieutenant Path, Officer of the Guard, arrived as the deceased was being carried out on a stretcher. He saw the accused, Lieutenant Pratt, and some soldiers from F Company. The accused was armed with a .45 caliber Thompson sub-machine gun, but was disarmed by Lieutenant Path and turned over to the new officer of the day (R. 19).

Private First Class Harvey L. Champlin, 3rd Medical Battalion, attached to Company G, 15th Infantry, while standing on the outside of the hotel heard four or five shots from the inside of the hotel. Responding to a call he entered the building and saw the accused with a tommy-gun standing about ten feet from Private Pickett - who was lying on the floor face down. Champlin saw that the injured soldier was "pretty near dead". Upon examination he found what appeared to be five bullet wounds, one in the shoulder, three in the back, and what appeared to be one in the throat. The soldier died within twenty minutes. The body was taken to the French hospital in Boulhaut (R. 58-62), where an examination was made by Claude Bernard, Chief Doctor of the Chantier de Jeunesse, Boulhaut, French Morroco. It was the opinion of Dr. Bernard that the death of Private Pickett was caused by "a bullet discharged from a firearm". No complete examination or autopsy was made; however, Dr. Bernard identified his certificate of death, which was introduced in evidence and is attached to the record of trial as Exhibit I (R. 56-58).

Private Thomas J. Munos, Company F, 15th Infantry, testified that about 2 o'clock on the afternoon of November 29, he and Private Leal went to a hotel in Boulhaut known as the "Hostellerie du Panier", for the purpose of buying some wine, but saw the accused standing at the door so they left and went up town for awhile and then came back. Leal went in. A little later Munos went in and joined Leal who was in the back eating a sandwich. Then Pickett (the deceased) and some others from F Company came in to buy some wine. Pickett came into the

room from the warehouse and was standing a little ways from the warehouse door. The accused entered the room from the front and ordered Pickett and the other members of F Company out of the place. Pickett questioned the accused as to his authority saying "who are you to order us out" and the accused "butt-stroked" Pickett on the helmet - "* * * and we all scattered, most of us going to the left and Pickett to the right-away from Panettiere and Sergeant Panettiere (accused) took his gun and fired a burst at Pickett and he fell on his face * * *" (R. 29). Pickett was staggered by the "butt-stroke". Deceased was approximately ten feet from accused and had his back to accused when the shots were fired. Munos was about six feet from accused when deceased was "butt-stroked" and could hear everything going on. Prior to the shooting Pickett had not created any disturbance or disorder. He did not strike accused or attempt to take the tommy-gun from accused, nor did he draw any weapon or threaten accused in any manner (R. 28-34). On cross-examination the witness, at the request of the defense counsel, used a Thompson sub-machine gun and illustrated the manner in which accused butt-stroked and shot the deceased (R. 34, 35).

Private Arthur V. Larkin, Company F, 15th Infantry, stated that he, Privates Hanmer and Pickett were together in Boulhaut about 11 o'clock a.m., November 29, 1942. They ran across a French friend of Pickett's who invited them to his ranch for dinner. Wine was served with the dinner and after eating they sat around and talked until about 3:50 in the afternoon and then returned to Boulhaut. -

> "* * * to this hotel where this Frenchman was supposed to get us some drink. We were out around the back door of the warehouse * * *. Panettiere (accused) came up and ordered us away from there and we started to go and Leal hollered at him that we were his buddies and Panettiere told us to go inside * * *. We went on inside and started talking and kidding Leal and a couple of more of the boys there and we had quite a time, and pretty soon Panettiere came in through the building and came out and told us to get out again and we all started going and he pulled his gun off his shoulder and either <u>unlocked his piece</u> or <u>put it on 'automatic'</u> and Pickett stepped up to him and said, 'wait a minute, Sergeant', and he gave him a butt-stroke and knocked him down and he started out the door and then Panettiere shot him * * * he fired a burst * * *. Around four or five". (Underscoring supplied.)

Pickett did not draw any weapon, did not threaten accused, did not strike accused and did not attempt to take the piece away from accused. At the time of the shooting, Pickett had started out and was going away from accused (R. 36-38).

Privates First Class Douglas R. Hanmer (R. 43-46), Talmadge M. King (R. 51-53) and Louis Sauceda (R. 64-66) all of Company F, 15th Infantry, were eyewitnesses to the shooting. Their testimony is substantially the same as the testimony of Munos and Larkin, except that Sauceda also stated that, while at dinner with the Frenchman, Pickett showed him a .38 caliber loaded pistol which he was carrying underneath his shirt and field jacket. The gun could not be seen from the outside. Sauceda also stated that the party of seven drank four quarts of wine at the Frenchman's house (R. 67).

Captain Bitar, when recalled as a witness for the prosecution, stated that prior to November 29, 1942, he had personally informed his platoon leaders of orders against taking arms into a town or when on pass and that they would see to it that weapons were not carried (R. 83).

4. For the defense, Sergeant Elmer H. Lindley, Company E, 15th Infantry, testified that he was on military police duty in Boulhaut on November 29, 1942. He stopped by the hotel in the afternoon around 2 or 3 o'clock. The accused was on duty there and was having a little trouble with the fellows at the bar. He saw the accused and McGinnis together that morning just before dinner. He did not hear McGinnis give accused any orders, but did hear McGinnis tell accused that Lieutenant Craig wanted him (accused) to come back to camp, and remain there. The accused replied that he did not want to and McGinnis said if he did not want to, he didn't have to stay (R. 84, 85).

Captain Bitar, the accused's company commander, stated that he had known the accused since March, 1942.

> "When I came to E Company, Panettiere was a private * * *. In May, I believe, he was made sergeant by my own recommendation. He is, in my opinion, one of the best qualified soldiers in E Company".

Captain Bitar had observed the accused in battle in French Morocco, concerning which he stated:

> "Naturally, being a platoon sergeant in my Company, I did observe him in battle. I can sincerely say he far excelled any of my other NCO's in battle. I saw him pick a sniper out of a tree that no one else could locate. In the field his platoon, under his platoon leader's generalship, was actually far above the others. When called upon to do something, his platoon was better than the others".

On cross-examination Captain Bitar, with the consent of the defense counsel, stated that accused had recently informed him that he was once tried by summary or special court for striking a private.

Captain Bitar stated that he understood accused had been a ranking noncommissioned officer in the "Islands" and

> "took a voluntary bust to come to the United States. That is why he was a private in E Company. In my opinion, he is the best soldier I have in my Company".

In response to a question by the court if the drinking of accused had come to his attention, Captain Bitar stated that accused never drank much in his company. He had a delinquency report on him at Camp Pickett but at that time accused was not on duty (R. 88-92).

The accused testified that on November 28, 1942, he was detailed as the senior noncommissioned officer with five other sergeants for military police duty in Boulhaut. Accused went on guard at 4:30 p.m., November 28, and remained on guard until 4:30 p.m. of November 29, 1942. His duties consisted of patroling the town, keeping all troops out of the Arabian district, seeing that everybody was in proper uniform and that no one was under arms.

Sunday morning (November 29) about 10 o'clock, he and McGinnis ran into Sergeant Rhinehart. Rhinehart told accused that Lieutenant Craig, the Officer of the Day, wanted to see accused at the camp. Accused went to camp with McGinnis but could not find Lieutenant Craig, so he told McGinnis to find the lieutenant and see what he wanted. In the meantime accused talked with the first sergeant about the parade the next morning. McGinnis returned and said that Lieutenant Craig

> "* * * didn't want us - just wanted me to stay in camp. He said I didn't have to go back to town but stay in camp and clean my equipment for the parade. I told him, 'If I am not relieved, I might as well go back and get my raincoat', and McGinnis and I got back in the jeep with Sergeant Price and went back to town" (R. 93, 94).

After returning to Boulhaut accused went to the hotel. The bartender told him there was a man

> "out in the kitchen bothering the cook and I went out and found this man (Pickett) over there and asked him what he was doing, and he said . . . He called me a chicken-shit son of a bitch and said he would show me. I told him to stop bothering the cook and to leave him alone * * *" (R. 94).

Accused then left and after making a report at the station and patroling the Arabian section, came back to the hotel. This time the bartender told accused he was not going to serve any more drinks because

there were too many soldiers present. After trying to push some of the men away from the bar, the bartender again told accused someone was "fooling around" with the cook -

> "* * * I went back and told him to get his ass out of there and he said, 'what the fuck do you care', and came up to me. I pushed the man and I kind of lost my step and shoved him with both hands and, with his right hand, he was reaching for his waist. When I pushed the man with my hands, my gun slipped off my shoulder and I made a grab at it to keep it from falling and it went off and I saw him lying there and told one of the soldiers there to get Major Bambace and Major Bambace wasn't there and Lieut. Pratt came out and Lieut. Path came out, and asked me what had happened. I told him I had shot this man and he took my gun and turned me over to the new officer of the day" (R. 94, 95).

Accused stated that he did not give up his gun willingly, that a sergeant had tried to disarm him, but that he was still a member of the guard, and refused to surrender his piece. However, when Lieutenant Path asked for the gun he gave it to him. He denied that McGinnis had told him on the return from camp that he had been relieved from the guard or that he was told to go back to camp and stay there. It was pretty close to 2 o'clock when accused first spoke to Pickett about bothering the cook. Accused did not remember seeing Munos and Sauceda at the cafe, but most of the men there were from F Company. He had had trouble with them the night before. Most of them were drunk and "hollering". Accused had seen Pickett in the next company but did not know him. He had no reason for shooting Pickett. When asked if deceased offered to do him any bodily harm, accused replied:

> "He stepped up and was coming toward me and I shoved him away * * *. I shoved him pretty hard and he bent over and reached for his waist".

Accused did not think his gun was on safety because it went off. He admitted that he was negligent in not having the gun on safety. A burst of four shots was fired, after which he told a sergeant to go for the major, and knelt down and tried to help the injured soldier with some first aid pills. Accused had not had much training with that type of weapon, but had used it in battle. Accused was positive that he didn't "fly off the handle and deliberately shoot" the deceased, because the deceased came at him and called him "such names" (R. 95-99).

On cross-examination the accused denied telling Lieutenant Pratt that he had shot the deceased because the deceased attempted to take his gun. He was asked to demonstrate how the shooting occurred and said:

"Well, I had one of them leather slings on it and it wasn't as long as this one. When I pushed the man, the gun fell off on to my elbow and I grabbed it like this (demonstrating) and it went off when I got my hand on the trigger guard. My fingers must have got inside the trigger guard".

He stated that the gun was in an "upside down" position when it went off and that when he heard the noise of the shots he dropped the gun. He denied hitting or butt-stroking the deceased. The only alcoholic drink which accused had during the day was a small bottle of wine with his meal (R. 95-103).

At the request of the court Private King, a witness for the prosecution was recalled and testified that he was within four feet of the accused at the time of the shooting. He stated that accused did not push or shove Pickett. He definitely saw accused take the rifle from his shoulder. -

"He took it off his right shoulder and I was standing at his side and he took it off of safety or put it on 'automatic' - I don't know which. Anyway, it clicked. Then he butt-stroked him on the left side of the helmet. I could see him give him the butt-stroke over his left shoulder. Pickett was facing him and Pickett ducked his head and he caught him on the left hand side of the head - more toward the front".

King stated that he was with the deceased at the Frenchman's ranch and from 12 to 3:30 or 4:30 o'clock the party drank four quarts of wine (R. 103-105).

Private First Class Sauceda, recalled by the court, stated that he did not see accused remove the gun from his shoulder. He did not see him remove the safety. "He came in and went like this" - (demonstrating butt-stroke). However, he did see accused butt-stroke the deceased (R. 105, 106).

Private First Class Champlin was recalled by the court and stated that he saw four bullet holes in the body of the deceased - two in his shoulder (left, rear) and two in his back (center). There was a mark on his throat but he could not tell whether it was a bullet mark. When Champlin first saw deceased he was lying face down. His right hand was underneath his chest. When he was turned over, there was nothing in his hand. After taking his body to the hospital, it was discovered on unbuttoning his field jacket and shirt that he had a pistol inside his shirt (R. 106-108).

5. The undisputed evidence shows that Private Alonzo I. Pickett, Company F, 15th Infantry, came to his death on November 29, 1942, as the direct result of gunshot wounds from a .45 caliber Thompson submachine gun in the hands of the accused. The shooting occurred between

4:30 and 5 o'clock on the afternoon of November 29, 1942, at the Hostellerie du Panier in the town of Boulhaut, French Morrocco. Four bullet holes were found in the body of deceased - two in his shoulder (left, rear) and two in the center of his back. Death was almost instantaneous. The accused had been detailed as sergeant of the guard of the military police detail in the City of Boulhaut for the period from 1630 November 28 to 1630 November 29, 1942. About noon of November 29, Lieutenant Craig, Regimental Officer of the Day, saw the accused at the hotel and noticed that accused had been drinking. Returning to camp he reported the matter to Captain Bitar, the company commander. It was then decided to relieve the accused as a member of the guard - not because he was drunk or disorderly, but for his own protection. Although the accused testified that he was never relieved from the guard, the evidence very clearly shows that he was notified to return to camp and report to Lieutenant Craig; that he returned to camp with Sergeant McGinnis, and that about 1330 while in camp, he was notified by Sergeant McGinnis that Lieutenant Craig had relieved him from the guard - and had ordered him to remain in camp and clean his equipment. In disregard of this order and in the face of a second warning by Sergeant McGinnis, the accused returned to Boulhaut with Sergeant McGinnis and apparently assumed to exercise the duties of the office from which he had been relieved. About 5 p.m., Lieutenant Pratt of K Company, 15th Infantry, saw the accused enter the hotel in Boulhaut, dressed as a member of the guard, carrying a sub-machine gun. The accused immediately began giving instructions. "He talked very rapidly and not very coherently". In the opinion of Lieutenant Pratt, the accused was "slightly intoxicated" and because of his manner in repeating instructions to the guards, the lieutenant thought he was not in complete control of his senses. After speaking to the sentries as to their duties, the accused entered the cafe through the side door - and in a few minutes Lieutenant Pratt heard a muffled explosion. Lieutenant Pratt followed two members of the guard to the back of the cafe and found the deceased lying face down in the dirt - groaning. The accused was standing beside him with his tommy-gun under his arm. When Lieutenant Pratt asked accused what had happened the accused replied that "the man" had tried to take his gun and that he had shot him in the shoulder. Five eyewitnesses to the actual shooting, Privates Munos and Larkin, and Privates First Class Hanmer, Sauceda and King, each testified in substance that accused entered the room and ordered them to leave. The deceased questioned the accused as to his authority - saying "who are you to order us out?", or words to that effect, and the accused thereupon took his .45 caliber Thompson sub-machine gun and "butt-stroked" the deceased against the left side of his helmet, staggering the deceased. The crowd scattered, most of them to the left, but the deceased to the right - away from and with his back to the accused. The accused then, with his piece leveled from the waist, fired a burst of several shots at the deceased and deceased fell to the ground - face down. Each of these witnesses stated categorically that prior to the shooting the deceased did not create any disturbance or disorder, did not strike or attempt to strike accused, did not draw any weapon or threaten accused in any manner and that the deceased did not attempt to take the tommy-gun away from the accused.

The accused testified that the shooting was entirely accidental, that he hardly knew the deceased and had no reason for shooting him, that he went to the rear of the cafe to admonish the deceased about bothering the cook, that while so doing the deceased made a vulgar and disrespectful remark and came towards him, that he pushed deceased with both hands and in doing so the gun slipped from his shoulder, and that in grabbing at the gun to keep it from falling the gun went off with a burst of four shots, fatally wounding the deceased.

There is a complete and irreconcilable conflict in the evidence as to the way and manner in which the shooting occurred. According to the testimony of all the disinterested eyewitnesses, the shooting was unprovoked, deliberate and intentional. According to the unsupported statement of the accused, it was a sheer accident. While the record of trial shows that the deceased at the time had a pistol concealed underneath his field jacket and shirt, there is not a scintilla of evidence tending to show any attempt on his part to draw the weapon or any knowledge on the part of the accused that the deceased possessed the weapon.

The admission of accused that he had no cause or reason for shooting the deceased and his testimony that the shooting was wholly unintentional render it unnecessary to consider the question of self-defense, other than to say that there is no evidence in the record which would support such a theory. For the same reason the question of whether or not the accused had been relieved from the guard becomes irrelevant and immaterial.

Viewing the record in the light of all the evidence, the Board of Review is of the opinion that the court was fully justified in rejecting the theory of the defense, to wit, accidental homicide, and in finding that at the place and time alleged the accused with malice aforethought, willfully, deliberately, feloniously and unlawfully and with premeditation did kill Private Alonzo I. Pickett. This conclusion is supported by an overwhelming mass of evidence embodying every element of murder as defined by the Manual for Courts-Martial (par. 148a, 1928) and as denounced by Article of War 92. Malice is shown, not only by the intentional use of a deadly weapon but by the testimony of the accused himself. His statement that the deceased about two hours before the tragedy had called him "a * * * son of a bitch", not only warrants an inference of actual malice but may be considered as bearing upon the question of motive and intent.

6. Before the arraignment, the defense counsel objected to the presence of the assistant trial judge advocate for the reason that "* * * he served as investigating officer on this case and, in view of the seriousness of the case, he should not be allowed to assist in prosecution of this man". Following this statement the prosecution announced the presence in court of the staff judge advocate and stated:

"* * * I was in doubt on this question and asked the advice of higher authority and got the written opinion of higher authority to the effect that the present assistant trial judge advocate could act as such without prejudice to the accused. If the court desires to ask the Staff Judge Advocate, it may do so".

The staff judge advocate remained silent. The law member, without objection by any member of the court, overruled the objection (R. 5).

It is the opinion of the Board of Review that the ruling of the law member was correct and proper. In the first place the trial judge advocate is not subject to challenge (sec. 375 (1) Dig. Ops. J.A.G., 1912-40). The mere fact that the assistant trial judge advocate served as the investigating officer cannot be considered ipso facto reversible error or as injuriously affecting any substantial right of the accused. There is no statutory or other legal inhibition against an investigating officer, serving as trial judge advocate or assistant trial judge advocate. The Board of Review has held repeatedly that the presence of the investigating officer on the court is not jurisdictional error invalidating the proceedings but procedural error only and hence curable under the provisions of the 37th Article of War, where after an examination of the entire proceedings, the reviewing or confirming authority is of the opinion that the substantial rights of the accused have not been adversely affected (CM 210612, Maddox; CM 203802 Braman). The record of trial in this case has been given the most careful consideration. The accused appears to have had an absolutely fair and impartial trial. There is nothing in the entire proceedings which in the slightest degree reflects any hostility, bias or prejudice against the accused on the part of the trial judge advocate or assistant trial judge advocate. If the presence of an investigating officer upon the court is procedural error only and curable under the provisions of the 37th Article of War, a fortiori the presence of the assistant trial judge advocate who has no voice in determining the guilt or innocence of an accused does not constitute reversible error.

Accordingly, it is held that the objection to the presence of the assistant trial judge advocate is without merit.

It is to be noted that in the Specification as set forth in the original charge sheet attached to the record of trial the name of the deceased is denominated "Anlozo I Pickett, Company 'F', 15th Infantry", whereas the Specification as copied into the record of trial (R. 6), the testimony of the witnesses (R. 37, 45, 60, 65, 77), as well as the certificate of death (Ex. I), show that the deceased was in fact "Alonzo I. Pickett", of Company F, 15th Infantry. It is perfectly obvious that the conflict is the result of a typographical error, and was so considered by the accused, his counsel, the prosecution and the court (CM 210963, Powers; CM 210965, King).

7. The charge sheet shows that the accused is 31 years of age; that he enlisted in the 33rd Infantry in Panama in 1931, with continuous service to date of current enlistment in 1939 in the 35th Infantry, Hawaii. Transferred to 15th Infantry, August, 1941.

8. The court was legally constituted, and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record is legally sufficient to support the findings and the sentence. A sentence either of death or of imprisonment for life is mandatory upon 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, Criminal Code of the United States (18 U.S.C. 452, 454).

William G. Lounds, Judge Advocate.

Guy E. Fox, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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

SPJGN
CM 234630

20 JUL 1943

UNITED STATES	92ND INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Breckinridge, Kentucky, 10 April 1943. Dismissal and total forfeitures.
Second Lieutenant HAROLD W. MILES (0-1301185), 370th 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 1: In that Second Lieutenant Harold W. Miles, Company B, Three Hundred and Seventieth Infantry, Camp Breckenridge, Kentucky, did without proper leave, absent himself from his organization and duties at Camp Breckenridge, Kentucky, from about 0730 March 5, 1943 to about 0730 March 6, 1943.

Specification 2: In that Second Lieutenant Harold W. Miles, Company B, Three Hundred and Seventieth Infantry, Camp Breckenridge, Kentucky, did without proper leave, absent himself from his organization and duties at Camp Breckenridge, Kentucky, from about 1300 March 9, 1943 to about 0730 March 12, 1943.

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

Specification: In that Second Lieutenant Harold W. Miles, Company B, Three Hundred and Seventieth Infantry, Camp Breckenridge, Kentucky, did at Camp Breckenridge,

Kentucky, on or about March 9, 1943, with intent to deceive First Lieutenant Eugene L. Holland, officially state to the said First Lieutenant Eugene L. Holland that "It is alright for me to go", implying that he had received permission from Lieutenant Colonel Dale C. Marlin, Commanding Officer, First Battalion, Three Hundred Seventieth Infantry to be absent from his organization, which statement was known by the said Second Lieutenant Harold W. Miles to be untrue in that he had, in fact, received no such permission.

He pleaded guilty to Charge I and the two Specifications thereunder and not guilty to Charge II and the Specification thereunder. He was found guilty of all Charges and Specifications and 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. Concerning Specifications 1 and 2, Charge I, to which the accused pleaded guilty, the evidence for the prosecution shows that he was absent without leave from his organization and duties at Camp Breckinridge, Kentucky, from 5 March 1943 to 6 March 1943, and again from 9 March 1943 to 12 March 1943 (R. 6-8, 12).

Concerning the Specification, Charge II, the evidence for the prosecution shows that on 8 March 1943, the accused asked First Lieutenant Eugene L. Holland, his company commander, for permission to go to town; he had broken his glasses and wanted to get them repaired. Lieutenant Holland told him it was all right with him, but that the accused would have to get permission from Colonel Marlin, the battalion commander. That evening the accused again mentioned the matter to Lieutenant Holland, who volunteered to "see Colonel Marlin for him that night". The next morning, the accused asked Lieutenant Holland if he had seen Colonel Marlin. Lieutenant Holland replied that he had forgotten to, telling the accused "he had better get permission himself". The accused came back into the orderly room around 11:20 of that same morning, and stated, "It's all right for me to go." The remark was made in the form of a statement - not a question; and, relying on his construction of it as a report that the accused had requested and received Colonel Marlin's permission to go to town, Lieutenant Holland rejoined, "All right, take off"; which the accused did. On the occasion of one of their conversations, concerning which he testified on the trial, Lieutenant Holland had suggested to the accused that he might do him a favor by returning some keys for him while he was in town, but never actually gave the keys to the accused, who "went in only on his own business". "He was instructed", Lieutenant Holland testified, "to receive a VOCO through the regular channels" (R. 7-11, 14, 15).

The accused never at any time asked Colonel Marlin for permission to be absent from his organization, and was never given a VOCO to be absent (R. 12).

4. The accused, after his rights as a witness had been explained to him, elected to make an unsworn statement as follows:

"Concerning the second charge that is against me, I would like to say, that when I asked Lt. Holland for the VOCO two days before my departure from camp, he said, you may get a VOCO by seeing Colonel Marlin first. Later that day, one day before my departure, I saw Lt. Holland in the hallway of Building 1168, waiting for a phone call. Lt. Holland says 'Lt. Miles I have my girl friend's keys, I will see Colonel Marlin. He should be in his room now and I will see him and you can take my keys in when you go in to get your glasses fixed. I said 'O. K.'. The next morning I came in, went to drill without even saying more than good-morning. That afternoon I came in, went to dinner, and started then to put my clothes on. I came back to the orderly room, running most all the way as I wanted to catch the 1:10 bus. I asked Lt. Holland where his keys were, and he said 'Thanks a lot, but I will take them in. Thanks, I am going into town tonight'. I said 'O.K. I am cutting out'. I turned and left the orderly room came back to my quarters, changed my clothes and left the camp. That is all." (R. 13).

5. The absences without leave, alleged in Specifications 1 and 2 Charge I, are established by competent and uncontradicted testimony, corroborating the accused's pleas of guilty.

6. The Specification, Charge II, alleges a false official statement with intent to deceive Lieutenant Holland, such statement implying that the accused had received his battalion commander's permission to be absent from his organization, knowing that he had, in fact, received no such permission. The accused's company commander had told the accused positively that it would be necessary for him to personally obtain his battalion commander's permission, to authorize the leave of absence from his organization which the accused had requested; also that if the accused should obtain such VOCO from his battalion commander, Lieutenant Holland - his company commander - had no objection to his going. The accused thereafter reported to his company commander, "It's all right for me to go", from which report the company commander inferred - as the court determined by its finding of guilty that the accused intended him to infer - that the accused had personally obtained the permission which his company commander had informed him was a necessary prerequisite to the legality of his departure. According to the court's construction of the statement, it was both false and official. In the opinion of the Board of Review, the evidence is reasonably susceptible of the inference which was the basis of the court's determination, and so sustains the findings of guilty of Charge II and its Specification.

7. The accused is 23 years of age. Records in the office of The Adjutant General show enlisted service commencing 22 April 1941, terminated by discharge 25 November 1942 for the convenience of the Government. He was commissioned second lieutenant, Infantry, A.U.S., 26 November 1942, which was also the date of his entry upon active duty.

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 61, and mandatory upon conviction of violation of Article of War 95.

Glass L. Gresson, Judge Advocate

Abner E. Lipscomb, Judge Advocate

Benjamin R. Geiger, Judge Advocate

SPJGN
CM 234630

1st Ind.

War Department, J.A.G.O., 30 JUL 1943 - To the Acting 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 Harold W. Miles (0-1301185), 370th 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. 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 such action meet with your approval.

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

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

(Sentence confirmed. G.C.M.O. 254, 21 Sep 1943)

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

(97)

-9 JUL 1943

SPJGH
CM 234644

UNITED STATES	)	MILITARY DISTRICT OF WASHINGTON
v.	)	Trial by G.C.M., convened at Fort Myer, Virginia, 12, 13, 14 and 15 April 1943. Dismissal, fine of $5,000 and confinement for two (2) years.
Lieutenant Colonel AUGUST J. CAYOUETTE (0-411914), Ordnance Department.	)	

OPINION of the BOARD OF REVIEW,
HILL, DRIVER and LOTTERHOS, 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 Lieutenant Colonel August J. Cayouette, Ordnance Department, then Major, Ordnance Department, being assigned to duty in the Office of the Chief of Ordnance during the period from about May 9, 1941, to about January 20, 1943, and well knowing that the American Manufacturing Company, a corporation of which one W. J. Gourley was president, was then engaged in transactions and contractual undertakings with the United States, and that he, then Major August J. Cayouette, had official duties to perform for the Ordnance Department and in the interest of and for the benefit of the United States in connection with the proper performance by the American Manufacturing Company of its said transactions and contractual undertakings, did, at Washington, D. C., on or about August 15, 1941, wrongfully, dishonorably and to the discredit of the military service, receive and accept as a gift a check in the sum of $500, dated August 15, 1941, drawn on the First National Bank of Weatherford, Texas, payable to his order

in the sum and value of $500 and signed "Amer. Mfg. Co. by W. J. Gourley", which said check and proceeds thereof he applied to his own use and benefit.

Specification 2: In that Lieutenant Colonel August J. Cayouette, Ordnance Department, then Major, Ordnance Department, being assigned to duty in the Office of the Chief of Ordnance during the period from about May 9, 1941 to about January 20, 1943, and well knowing that the American Manufacturing Company, a corporation of which one W. J. Gourley was president, was then engaged in the performance of existing contracts and business transactions with the United States, and that he, then Major August J. Cayouette, had official duties to perform for the Ordnance Department and in the interest of and for the benefit of the United States in connection with the proper performance by the American Manufacturing Company of such of its said contracts and transactions as related to the War Department, did, at Washington, D. C., during the period from on or about September 5, 1941, to March 5, 1942, wrongfully, dishonorably, in violation of paragraph 2e (9) and paragraph 2e (10), Army Regulations 600-10, December 6, 1938, contrary to his duties as an officer and to the discredit of the military service, receive and accept four checks, all drawn on the First National Bank of Weatherford, Texas, and each signed "Amer. Mfg. Co. by W. J. Gourley", one dated September 5, 1941, in the sum of $500; one dated September 20, 1941, in the sum of $500; one dated January 10, 1942, in the sum of $500; and one dated March 5, 1942, in the sum of $200; and one check drawn on said bank, dated December 3, 1941, and signed "W. J. Gourley", in the sum of $300, which said checks and the proceeds thereof of the total amount and value of $2000 he applied to his own use and benefit, all of which said checks and the proceeds thereof were given and delivered to the said Lieutenant Colonel, then Major, Cayouette, by the said W. J. Gourley, President of the American Manufacturing Company, as payment and compensation for services rendered by the said Cayouette as consultant and advisor to the said American Manufacturing Company and to W. J. Gourley in connection with the performance of the said American Manufacturing Company's said contracts and transactions with the United States.

Specification 3: In that Lieutenant Colonel August J. Cayouette, Ordnance Department then Major, Ordnance Department, and an

officer in the employ of the United States, assigned to duty in the Office of the Chief of Ordnance, and well knowing that the American Manufacturing Company, a corporation of which one W. J. Gourley was president, had been awarded and was engaged in the performance of contracts for forging and machining shells for the United States, and that he, then Major August J. Cayouette, had official duties to perform for the Ordnance Department and in the interest of and for the benefit of the United States in connection with the proper performance by the American Manufacturing Company of such of its said contracts as related to the War Department, did, at Washington, D. C., during the period from on or about September 5, 1941, to on or about March 5, 1942, wrongfully, contrary to his duties as such officer in the employ of the United States, feloniously and unlawfully, in violation of Section 113, Federal Criminal Code (Sec. 203, Title 18, U.S.C.), receive and agree to receive for services rendered and to be rendered to the American Manufacturing Company and to W.J. Gourley, its President, in relation to the said contracts between the United States and said American Manufacturing Company, to which the United States was a party and in which it was directly interested, and which were then pending before and with the Ordnance Department of the United States Army, and the Bureau of Ordnance of the United States Navy compensation in the total amount of $2,000, which said compensation was paid to the said, then Major, Cayouette, by and in the form of five checks of the total value of $2,000, drawn on the First National Bank of Weatherford, Texas, four of which were signed "Amer. Mfg. Co. by W. J. Gourley", on the dates and in the amounts as follows, to wit: One check dated September 5, 1941, for $500; one check dated September 20, 1941, for $500; one check dated January 10, 1942, for $500; one check dated March 5, 1942, for $200; and one check dated December 3, 1941, for $300, signed "W. J. Gourley", all of which said checks and the proceeds thereof he applied to his own use and benefit.

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

Specification: In that Lieutenant Colonel August J. Cayouette, Ordnance Department, then Major, Ordnance Department, being assigned to duty in the Office of the Chief of Ordnance during the period from about May 9, 1941 to about January 20, 1943, and well knowing that the American Manufacturing Company, a corporation of which one W. J. Gourley was president, was then engaged in the performance of existing

contracts and business transactions with the United States, and that he, then Major August J. Cayouette, had official duties to perform for the Ordnance Department and in the interest of and for the benefit of the United States in connection with the proper performance by the American Manufacturing Company of such of its said contracts and business transactions as related to the War Department, did, at Washington, D. C., on or about February 2, 1942, while still so assigned to duty in the Office of the Chief of Ordnance for the performance of official duties for the Ordnance Department in the interest of and for the benefit of the United States in connection with the performance by the American Manufacturing Company of such of its said contracts and business transactions as related to the War Department wrongfully, dishonorably and to the scandal and disgrace of the military service, solicit, request, obtain and accept from the said American Manufacturing Company and the said W. J. Gourley, a check in the sum of and value of $3,000 dated February 2, 1942, drawn on the First National Bank, Weatherford, Texas, payable to his order and signed "Amer. Mfg. Co. by W. J. Gourley", which said check and the proceeds thereof the said Lieutenant Colonel, then Major, Cayouette, applied to his own use and benefit.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications with the following exceptions: He was found guilty of Specification 2, Charge I, except the word "four" and the figure "$2000", substituting therefor, respectively, the word "three" and the figure "$1800", and except the words "and one dated March 5, 1942, in the sum of $200"; and guilty of Specification 3, Charge I except the figures "$2,000" and "$2,000" and except the words "five" and "Four", substituting therefor, respectively, the figures and words "$1,800", "$1,800", "four", and "three" and excepting the words "one check dated March 5, 1942, for $200". He was sentenced to dismissal, payment of a fine of $5,000 to the United States, and confinement 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. The evidence for the prosecution shows that accused entered upon active duty on 9 May 1941, with no prior military training or

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NAVY DEPARTMENT

experience. He was a machine tool expert and was assigned to the Metal Components Section, Ammunition Division, Ordnance Department, as a consultant in that field. As the Ordnance districts were still in the process of expansion many contractors came to Washington for information, and were referred to accused for advice. It was his duty to advise them of the makes and types of machine tools they would need to perform their Government contracts for the manufacture of ammunition and where such tools could be procured. Normally it was the responsibility of the contractors to design their own tools and fixtures but with many new facilities coming into operation it was necessary, in order to get production under way, to assist the contractors by giving them information on plant layout and all sorts of production advice. Although he had one or two civilian assistants, from the time of his entry upon active duty in May 1941 until the end of that year accused was the only officer assigned to the Ammunition Division as a machine tool consultant (R. 5-6, 18, 22).

Through the St. Louis Ordnance District, the American Manufacturing Company of Texas was awarded an order for the forging of 750,000 high explosive 105 millimeter shell at a unit price of $3.40 each and a total contract price of $2,550,000, by letter of intent dated 19 July 1941 and indorsement thereon of acceptance by the contractor dated 30 July 1941. Shortly after the award had been made W. J. Gourley, the president of the company and its principal stockholder, came to Washington and met Colonel Merle H. Davis, who was then in charge of the Metal Components Section, a position which he held until about 1 January 1942. Colonel Davis suggested that Mr. Gourley's company undertake to machine a small number of the shell forgings which it had contracted to produce. It was the policy of the Ordnance Department to give small educational, machining orders to forging plants in order that, eventually, the complete process of manufacturing shell could be accomplished in such plants. For a number of reasons it was considered advantageous to the Government to have the shell forged and machined by the same contractor. Colonel Davis turned Mr. Gourley over to accused, with the request that accused advise and counsel Gourley as to the nature of the process of machining shell and the character of machine tools that would be required (R. 7, 19, 67, Ex. 2).

Thereafter The American Manufacturing Company was awarded the following contracts for the machining of high explosive 105 millimeter shell for the Army: Letter of intent dated 11 August 1941, for 100,000 shell, unit price $2.80 each, total price $280,000; letter of intent dated 30 December 1941 for 50,000 shell, unit price $3.25 each, total

price $162,500; and contract dated 18 April 1942 for 250,000 shell, unit price $3.25 each, total price $812,500. Subsequently the company entered into additional contracts as follows: Letter of intent dated 8 May 1942, for forging 1,200,000 high explosive, 90 millimeter shell, unit price $2.30 each, total price $2,764,600; contract dated 2 June 1942 for 102,600 high explosive 105 millimeter shell (complete) unit price, $6.65 each, total price $682,290; contract dated 9 November 1942 for 770,000 high explosive 75 millimeter shell (metal parts assembly) unit price $3.60 each, total price $3,103,759.70; and contract dated 10 December 1942 for machining 113,413 high explosive 75 millimeter shell, unit price $3.25 each, total price $368,592.25. The orders covered by letters of intent eventually were embodied in formal contracts, changes were made in some of the terms thereof and supplemental contracts were executed from time to time. The company also had "six or seven" contracts for the manufacture of shell for the Navy (R. 8, 67, Exs. 3, 4, 5, 6, 7, 8, 9).

It was stipulated that the accused had received from Mr. Gourley on or about the respective dates stated therein, the following checks drawn on The First National Bank of Weatherford, Texas, payable to the order of accused, and that the proceeds thereof had been applied to the use and benefit of accused: (1) check dated 14 August 1941 (the date of the check as shown by photostatic copy Ex. 19 was "8/15, 1941"), for $500, bearing on its face the notation "Wedding gift"; (2) check, dated 5 September 1941, for $500 (Ex. 21); (3) check dated 20 September 1941 for $500, bearing on its face the notation "Engineering Service" (Ex. 22); (4) check dated 3 December 1941, for $300 (Ex. 31); (5) check dated 10 January 1942, for $500 (Ex. 23); and (6) check dated 2 February 1942, for $3000 (Ex. 24). The drawer of each of the checks listed above was American Manufacturing Company "by W. J. Gourley" except check (4) which was signed by W. J. Gourley as drawer thereof. All of such checks were endorsed by accused, and, except checks (4) in the amount of $300 and (6) in the amount of $3000, were endorsed also "Ethel Schmidt" or "Ethel R. Schmidt", the name of the wife of accused prior to her marriage to him on 14 August 1941 (R. 10-11, 25-27, Ex. 16, Ex. 20).

Accused was not a contracting officer, it was not a part of his duties to act for the Government in the negotiation of contracts and he was not at any time in a position to secure awards for contractors (R. 19-20).

It appears from the record, however, that in his official capacity as an officer assigned to the Ordnance Department accused acted

with reference to the following transactions growing out of or related to the performance by the American Manufacturing Company of its contracts with the Government for the manufacture of shell:

a. The letter of intent of 11 August 1941 (Ex. 3) covering the machining of 105 millimeter shell provided that new machine tools were to be purchased for Government account, for the use of the contractor, to a value not to exceed $175,000. Subsequent to the letter of intent, Mr. Gourley submitted a request for an additional $100,000 to the St. Louis District Ordnance Office, which forwarded the request to the Washington Ordnance Office with a recommendation that it be granted. Mr. Gourley immediately went to Washington, where he conferred with Colonel Davis, and explained that, with the exception of one or two additional machines, the request covered the amount by which the actual cost of the requisite machinery exceeded the estimated cost included in the letter of intent. Colonel Davis told Mr. Gourley to "sit down" with accused and explain why more money would be required "to do this contract for shells". According to the testimony of Mr. Gourley, he and accused took the actual prices of the necessary equipment, added thereto the estimated freight and cost of installation and found that the sum of these items exceeded the figure in the letter of intent by approximately $75,000. However, since his first estimate had been too low, "it was suggested" that Mr. Gourley "put in for" $100,000 and whatever was left over after the job was completed would be turned back to the Government anyway. In collaboration with Mr. Gourley, accused prepared an intra-office memorandum (Ex. 15) dated 14 October 1941, directed to Colonel Davis containing a detailed analysis of the requested increase. This memorandum, signed by accused, shows that while the cost of some items had been slightly over-estimated in the original bid others had been under-estimated, that it was considered advisable to procure heavier and more practical shell lathes and a heavier shell nose press, that it was necessary to purchase two additional lathes at an aggregate cost of $20,202 because the production rate of the lathes originally planned had been overrated, and that a new item of $25,000 was added to cover 20 mechanical aids and installation of equipment. According to the memorandum the "total increase cost" was $98,329 and the requested authorization was justified. The increase was granted and embodied in the contract. About $60,000 of the additional $100,000 was actually expended (R. 9-10, 79-80, Exs. 3, 14, 15).

b. On the day after Pearl Harbor the British Government offered to turn over to the Government of the United States certain

machinery for the forging and machining of projectiles. For the most part the machinery was new and consisted of machine tools designed for the production of British high explosive shell. Colonel Davis, then executive assistant for the Ammunition Division who had the initial responsibility, advised his superiors that the offer be accepted. The equipment was suitable for the production of 75 millimeter, 90 millimeter and 105 millimeter shell. Although at least one shipment was lost at sea, nearly all of it consisting of over 400 separate machine tools, arrived safely in this country. It was the desire of the officials of the Ordnance Department to get these tools off of the docks and into production as soon as possible but most of the American contractors were reluctant to use them because of unfamiliarity with their design and lack of knowledge of their efficiency. The fact that they were not standard American design increased the difficulties of maintenance. Accused had the duty of placing these tools for the Ammunition Division and the disposition of them was handled "completely" by him. Most of them (20 or 30 carloads) were turned over to the American Manufacturing Company for storage or for use under lease from the Government. On 3 March 1942 accused prepared for Colonel Davis an intra-office memorandum (Ex. 17), directed to the Chief of the Ammunition Division. It stated in part that efforts had been made to put into operation the machinery shipped from Great Britain; that preliminary negotiations had been entered into with two facilities, one of which was the American Manufacturing Company; that this company "is one of our present experienced shell forgers" and has "necessary plant space and manufacturing facilities, organization, labor market and personnel for efficient high production of shell—(Forging and Machining)"; and that arrangements were being made to have the company engage in the manufacture of urgently needed 75 millimeter shell. Article 30 of the contract of 9 November 1942 awarded to the American Manufacturing Company for 770,000 high explosive 75 millimeter shell at a unit price of $3.60 each (Ex. 8) provided that in the manufacture of such shell "the use of equipment acquired by the government from the British Purchasing Commission as set forth in Schedule 'B' hereof and now in Contractor's plant is hereby approved and agreed upon, and the price of this contract is predicated upon such use." Schedule "B" mentioned in the foregoing quotation was a list of 158 pieces of 27 kinds or types of equipment (R. 12-16, 29, 39-41, 47-48).

c. On 26 May 1942, Mr. Gourley, as president of American Manufacturing Company, wrote a letter to General R. E. Hardy of the St. Louis Ordnance District in which he suggested that General Hardy

get accused to make a trip to Fort Worth, as "I believe he could do us a lot of good here for a day or so" (Ex. F for identification received in evidence as Def. Ex. 1). Accused and his wife went to Fort Worth the latter part of June 1942 and Mr. Gourley took them on a trip by automobile to San Antonio, thence to Corpus Christi and back to Fort Worth. The party, which included Mrs. Gourley, stayed in San Antonio the night of 24 June and in Corpus Christi the night of 25 June. The travel orders of accused did not cover either city. Mr. Gourley paid all expenses including hotel bills. After their return to Fort Worth accused and his wife stayed for two nights, 26 and 27 June, at the home of Mr. Gourley. The prosecution introduced in evidence a letter dated 27 June 1942 directed to accused "C/o Chief of Ordnance Office" from the American Manufacturing Company containing a proposal relative to four forging plants furnished by the British Purchasing Commission (2nd sheet, Ex. 33). The name "W. J. Gourley" was typed below that of the company but the letter was not signed by Mr. Gourley. He testified that he thought he had one of his engineers "get up this data and sit down with Major Cayouette". The proposal was that the company would unload, uncrate, clean, recondition, construct foundations for and assemble the four forging plants for $79,525.67 each. By letter dated 7 July 1942 Mr. Gourley, as president of his company submitted the same proposal to the St. Louis Ordnance District (Ex. 26). That District requested of the Washington Ordnance Office a detailed "breakdown" of the figure of "$80,000 per line" for the forging machinery (Ex. 28). On 16 July, accused wrote a letter to the St. Louis office, which he signed "By order of the Chief of Ordnance" (Ex. 27) setting forth a detailed estimate of the cost of setting up and installing the four plants and showing such cost to be $79,525 per plant. The letter stated that considering the amount of work that had to be done and from surveys made of the problem by "this office" and representatives of the St. Louis Ordnance District a cost of $80,000 for the installation of each plant was "in the opinion of this office, fair". The proposal was not accepted by the Government (R. 56-60, 81, Ex. 36).

d. Under date of 5 August 1942 the St. Louis District Ordnance Office wrote to the Chief of Ordnance, attention of the accused, that a lease was being prepared covering certain British tools then in use at the plant of the American Manufacturing Company; that the basis of rental would be 12½ percent per year of the value of the equipment; and that the St. Louis office had no way of accurately determining such value. Information was requested as to the fair value of the tools (2nd sheet, Ex. 29). In response to the request, by letter of 11 September 1942 (1st and 3rd sheets, Ex. 29) accused stated that the Washington office had no information as to the original cost or valuation

of the machinery but the cost of similar new American built machines less 25 percent depreciation was considered a fair estimate. An itemized list of valuations computed on that basis was attached to the letter. These valuations were not adopted by the St. Louis office. With several exceptions the British machines listed by accused can be identified as the same machines covered by the lease of 14 December from the Government to the American Manufacturing Company (Ex. 12). The aggregate valuation placed upon them in the lease was considerably higher than their total value as estimated by accused. The annual rental returned the Government on the basis of the lease valuations amounted to several thousand dollars more than it would have been on the basis of the estimated valuations of accused (R.132-133, Ex. 29).

The four instances related above (par. a, b, c and d) in which accused acted in his official capacity with reference to the Government contracts of the American Manufacturing Company were shown principally by documentary evidence. Mr. Gourley was called to testify for the prosecution but obviously he was not a friendly witness and much of his testimony with reference to his transactions with accused was elicited by the defense on cross-examination. He testified that he first met accused "around April or May 1941" but also stated that the meeting was subsequent to the award to his company of the contract for forging 105 millimeter shell. He called at the Washington Ordnance Office and was introduced to accused by Colonel Davis. Accused informed Mr. Gourley where he could purchase equipment for machining 105 millimeter shell. Gourley asked accused for assistance as he did not have many engineers on his roster and needed all the help he could get. Accused went to the hotel room of Mr. Gourley, who proceeded to obtain "a lot of good engineering data from him". Accused worked after his Government office hours for Mr. Gourley on the engineering problems of the American Manufacturing Company in connection with its contracts for the manufacture of shell for the Army and Navy. The work consisted of designing and making sketches of dies, jigs, fixtures, gauges, and lathes. For these engineering services which continued over a period of about eight months, Mr. Gourley paid accused $1500 by three checks, each in the amount of $500, dated 5 September 1941 (Ex. 21), 20 September 1941 (Ex. 22) and 10 January 1942 (Ex. 23). Mr. Gourley was of the opinion that the amount paid was inadequate, as it represented only from ten to twenty-five percent of the actual value of the services performed by accused. No arrangement or agreement was made as to the amount of compensation accused was to receive. It was left entirely to the judgment and discretion of Mr. Gourley who gave "whatever I thought for the services he rendered" (R. 52, 67-70, 77).

After their first meeting Mr. Gourley was with accused "a great deal" and developed "very much of a liking to him". On 14 August 1941 accused was married and Mr. and Mrs. Gourley attended the wedding. They were the only guests present. Mr. Gourley gave accused and his bride the $500 check dated 15 August 1941 (Ex. 19) as a wedding present. He had given a number of checks in substantial amounts as anniversary, Christmas and such-like gifts to various close friends. With reference to his use of company funds for the wedding present to accused, Mr. Gourley stated that he always made his gifts in that manner, as he considered it good business policy (R. 70-72, 85).

Concerning the check in the amount of $300 dated 3 December 1941 (Ex. 31), Mr. Gourley testified that it had been advanced as a loan. There was no agreement or discussion with reference to repayment "at that particular time". He was unable to give the "exact circumstances" of that transaction, but according to his best recollection he and accused had been looking at some houses and he offered to help accused make a down payment for one. Mr. Gourley gave accused the $300 check and "thought that he might need to make a payment to hold the house for a reasonable length of time". The $3000 check dated 2 February 1942 (Ex. 24) also was given to accused as a loan. He received no note from accused and at the time the check was given nothing was said as to repayment. No arrangement was made for the payment of interest. The check was paid with company funds but the company charged it to Mr. Gourley. At that time the company owed him $20,000 and he "naturally considered" that it was deducted from his account. Later he borrowed considerable money and at the time of the trial was indebted to the company. He had not looked on the books of the company to see whether the $3000 was still carried as a charge against him. He admitted that the statement which he had made when questioned by Lieutenant Colonel Percy B. McCoy, of the Inspector General's Department, to the effect that he did not know or remember how the loan occurred, that accused needed some money to buy his home and he (Gourley) had said "I will let you have the money" was correct "to the best of my ability". However, he explained that after reviewing all of his "thoughts" and going over them again he could now recall that he had "volunteered" the loan. He had suggested that accused buy a home, that he (Gourley) would make the down payment and accused could repay the loan when he sold the house and left Washington. No payment of principal or interest on either the $300 loan or the $3000 loan had been made by accused (R. 49-56, 78, 88, 90).

With reference to his taking accused on the trip from Fort Worth to Corpus Christi, Mr. Gourley testified that he was proud of

his state, it had been a source of pleasure to him to take outside guests on sightseeing tours around Texas, and, on such occasions he had always paid the bills. He also stated that he had no particular desire to get the British machine tools and did not ask for them. He knew the machines were on the docks, "they" wanted some place to put them and, since there was ample ground space at his plant, he had offered to take them to assist the Government. He had never been paid anything for keeping this equipment in storage. He had not paid or agreed to pay any compensation for work which he considered to be in the line of official duty of accused, he had not intended to influence any official actions of accused, nor had he intended to increase the machine tool allotment, or obtain Government contracts by the payment of money (R. 82-84).

While accused was on duty with the Metal Components Section there was circulated therein an Ordnance Department Order which stated that it was considered contrary to the best interests of the United States for any Government employee to accept employment outside of office hours with a contractor and that the personnel of the Ordnance Department should refrain from entering into any agreement whatsoever of that nature. Attached to the order was a slip of paper bearing a number of typed names, including the name of accused, with directions to "Please initial * * *". Accused inscribed his initials in blank space opposite his name on this slip. Prior to January 1943, accused did not disclose to his superiors or associates in the Ordnance Department that he had received any money from Mr. Gourley or from the American Manufacturing Company (R. 17, 23-25, 36, 41, Ex. 18).

On 18 January 1943, after the 24th Article of War had been read to him, accused was questioned under oath by Colonel McCoy and several representatives of the Department of Justice. With the exception of certain passages which were eliminated, the transcript of this statement was received in evidence. Its material portions were substantially the same as the testimony of accused in the instant case, except that a number of admissions made by accused in the statement were repudiated by him at the trial. To avoid repetition these admissions will not be detailed here since they will appear in the summary of the testimony of accused hereinafter set forth (R. 41-46, 91-105, Ex. 30).

4. For the defense the accused testified that after graduating from high school about the year 1914, he took an engineering course in a General Electric Trade School. That was the extent of his formal

education. He never received a degree of any kind but had been granted a license by the State of Ohio to operate as an industrial engineer. From 1917 until 1941, by working for various employers, by conducting his own business enterprises and by acting as a consulting engineer, he acquired experience as an engineer in the field of production, including planning, purchasing machinery, and the designing of machine tools, jigs, gauges and fixtures. During the first World War he was employed in the Gauge Section, Ammunition Division, Army Ordnance Department (R. 114-119).

Prior to his entry upon active duty accused had no military education, service or training. Upon reporting at the Ordnance Department he was immediately assigned to a desk and his first task was to assist in the compilation of an estimate of machine tool requirements so that provision could be made for their manufacture. All problems with reference to machine tools were referred to him and when contractors came in with lists of such tools he determined whether they were suitable for the production of ammunition. He had been given no instruction in military courtesy or procedure and had never read the Articles of War (R. 119-121).

Accused first met Mr. Gourley when the latter was referred to him by Colonel Davis. Accused was directed to prepare, within a few hours, a list of machine tools that would be suitable for the manufacture of shell by the American Manufacturing Company and he proceeded to make such a list, including therein some Curtiss type machine tools designed by the Ordnance Department. Private industry as a rule was not accepting the Curtiss machines and the Department wanted to get rid of them. The "instructions" were that the cost of the machine tools for that type of contract should not exceed $200,000 and to keep within that limitation it was necessary to resort to Curtiss type and other inexpensive machines. The maximum ceiling cost of the tools listed in the memorandum prepared by accused and submitted to Colonel Davis was $175,000. Mr. Gourley claimed that the actual cost of the machinery which he found it necessary to purchase was in excess of that amount and the St. Louis Ordnance Office wrote to the Washington office requesting that authority be granted to increase the allowance from $175,000 to $275,000. Colonel Davis referred the request to accused, who was directed to compile the data that Mr. Gourley "had with him" so that Colonel Davis could determine whether or not the proposed increase was justified. Accused then took the figures, purchase orders and quotations submitted by Mr. Gourley and "made a record of what the facts were". The requested increase seemed to accused to be proper. There was no possibility that the contractor could make any profit from

the transaction. A special account was set up for the purchase of the tools and payments were made from the account only upon invoices submitted to the District office. The machine tools thus purchased became the property of the Government (R. 121-126).

After meeting Mr. Gourley in June 1941 accused "got really friendly with him". Both Mr. Gourley and his wife met the fiancee of accused, Ethel Schmidt, who operated a beauty parlor in Baltimore. She and Mrs. Gourley went shopping, and to lunch and spent much time together. Mr. Gourley at first addressed accused as "Major" but later found out that his nickname was "Kay". The latter part of June 1942, after his marriage, accused went to Fort Worth, Texas, and his wife accompanied him. He made the trip after he had received at his home a copy of the letter written by Mr. Gourley to General Hardy (Def. Ex. 1), suggesting that the accused be sent to Fort Worth. The principal purpose of accused in making the trip was to inspect the surplus British equipment (R. 126-128).

The ammunition division experienced considerable difficulty in placing the machine tools turned over to the United States by the British Government. No one knew of what the machinery consisted and there were no specifications. Nobody wanted it. However, the equipment was shipped to this country and it was necessary to find a place for it in order to keep it from clogging up the docks. Then "came the time when it was suggested among the personnel of the Ammunition Division" that the logical place to send it would be the American Manufacturing Company since that company was "in the picture" with reference to the manufacture of a quantity of 75 millimeter shell allocated to the St. Louis District. As a result of the "negotiations and the consensus of opinion" it was decided to send the equipment to that company. Accused "officially made a memorandum of that" (Ex. 17). The company was selected as the recipient of the British machine tools by the personnel of the Ammunition Division. Accused had no part in making the selection other than the preparation of the memorandum. Later, accused made an estimate of the value of thirty of the British machines then at the plant of the American Manufacturing Company (Ex. 29). These values were based on the prices of comparable machine tools made in this country less 25 percent depreciation. Accused had seen the machinery. No one knew the British prices. Accused used his best judgment in making his estimates of values (R. 128-131).

About a week or ten days after their first meeting, Mr. Gourley asked accused to do some work for him. The subject of compensation was

not discussed. Accused performed services through the "balance of 1941" and until about March 1942, after office hours, at home, and at Mr. Gourley's hotel room. Accused spent between 600 and 700 hours on this work which consisted of laying out a sequence of operations for the production of shell, designing machine tools and equipment of various kinds to be used in the process, designing gauges, working out plant layout problems, and planning for the flow of work from one machine to another in the most efficient manner (R. 137-139).

On 14 August 1941 accused married Ethel Schmidt and Mr. and Mrs. Gourley attended the wedding. Afterward Mr. Gourley gave accused a $500 check (Ex. 19) as a wedding gift. The $500 checks dated 5 September 1941 (Ex. 21) and 20 September 1941 (Ex. 22) which accused received were for engineering work for Mr. Gourley. The $3000 check (Ex. 24) was a loan. Accused did not ask for the loan. Mr. Gourley knew he was looking for a house and "there was one we decided on getting. I presume he gave me this to help to make the initial deposit". With reference to the $300 check (Ex. 31), when asked by defense counsel whether he had heard Mr. Gourley testify that it was given as a loan, accused answered that he did not recall what the understanding was, whether it was a loan or for engineering services. In response to the question "Did you expect to pay back any of those sums", accused replied that he expected to pay back the loan of $3000. In accepting the wedding gift and in doing the engineering work for Mr. Gourley accused did not feel that he was doing anything prejudicial to the interests of the United States (R. 138-140).

The checks bearing the endorsement of the wife of accused and also the $3000 check which she did not endorse were deposited in her separate account in a bank in Baltimore, Maryland, within a block from her place of business. Accused had a bank account in the Riggs National Bank, in Washington, but the wedding check which he turned over to his wife "more or less set a precedent". He had in mind buying a house and he knew that she wouldn't spend the money. Moreover, he did not keep any more money than was necessary in his personal account. A few years back he had become involved in litigation and feared that if he had too much in his bank account it would be attached and he would be without funds (R. 141-142).

Accused further testified that he had initialed the memorandum of the Ordnance Department, Exhibit 18 (with reference to outside

employment by contractors of employees of the department) but he never became acquainted with its terms. "A lot of this matter" was initialed without reading it. So many revisions of Army Regulations were circulated that there wasn't time to read them and he just initialed them and passed them along. He first learned that he might be criticized for his dealings with Mr. Gourley and the American Manufacturing Company about November 1942. Accused and his wife came upon the "Officer's manual" in a bookstore and he bought it at her suggestion. He did not read it all but he looked through it, found the regulation and restriction against dealing with outside firms and realized that probably he had done something he "was not supposed to do". He had nothing to do with the negotiation or award of contracts, he did not act or attempt to act as a representative of Mr. Gourley or his company in the transaction of business affairs in the Ordnance Department of either the Army or the Navy and he had never knowingly committed any act which he felt might prejudice the interest of the United States (R. 142-144).

On 18 January 1943, one of the officers in the Ammunition Division told accused to call that afternoon at a certain office in the Inspector General's Department. He went as directed. Colonel McCoy did not advise him as to the nature of the proceedings but "read a paragraph out of a book" (the 24th Article of War). Although, in response to a question whether he fully understood his rights as a witness accused had answered "I don't know I think I do", he did not in fact understand them. He thought that it did not make any difference. He knew somebody was being investigated and he was willing to give his questioners any information they wanted. He thought that, since he was in the Army, he had to answer their questions. He had read the testimony which he gave before the "Inspector General" and it was not in all respects true (R. 144-146).

Accused was then asked to go through the transcript of his statement to Colonel McCoy on 18 January 1943 (Ex. 30), and to point out any answer therein which was not correct. Accused proceeded to do so and indicated seventeen separate instances in which answers given by him under oath in that statement were not true or correct. Some of them were patent inaccuracies and others pertained to relatively minor matters. Those which appear to bear materially upon issues of the present case are as follows: Accused was asked by Colonel McCoy whether "they" (American Manufacturing Company) were "enabled" through any of the engineering services of accused to obtain contracts "from Ordnance" and accused answered "Yes, Colonel, they were". At the trial accused testified that his answer was not correct. He stated that it was a misunderstanding, as "I thought they said unable". On 18 January 1943

upon being asked why he did not deposit the checks which he received from Mr. Gourley in his own bank account, accused stated that he had no reason for putting them there, he and his wife had no joint account, each of them had an account and one place was as good as another. At the trial he stated that this was not strictly in accordance with the truth as he had the "additional" reasons which he had recited in his testimony. In his statement to Colonel McCoy accused asserted that, as he wanted to own a home and had a chance to get one, he "asked him /Mr. Gourley/ if he would loan me $3,000". He testified that the foregoing statement was not true, that in fact there had been no request but that "the money was made available to me". He thought "the answer didn't make any difference". Defense counsel then called his attention to the following question and answer appearing in his statement of 18 January 1943: "Question: Was this definitely requested as a loan? Answer: Yes, sir". Accused testified that he thought he had been asked if it was a loan; that he had understood his questioner to say "Was this definitely a loan?" In his statement accused was asked this question "All right, now Mr. Gourley who had been dealing with you thought that you could be influential in helping him to secure some business in his plant at Fort Worth, Texas, and for that reason loaned you the $3,000?" and answered "Yes, sir". Accused testified that his answer was not true. He had never told Mr. Gourley that he would get him any business and Mr. Gourley did not believe that accused might be influential in so doing. Accused had just answered the question "any way possible. I agreed it was possible that anybody who loaned money might want something in return". On 18 January 1943 accused had stated that with the exception of the $3000 loan and the $500 wedding gift all of the money which he received from Mr. Gourley was for engineering services. At the trial accused testified that this was not entirely true, as one check of $200 "was for cash. I cashed a check for him /Gourley/". The court indicated by its findings that it accepted the explanation of accused as to the $200 check but it should be noted that in qualifying his prior statement accused did not mention the $300 check of 3 December 1941 (Ex. 31), which Mr. Gourley positively testified was a loan and not compensation for services. In the statement accused asserted that he had worked over a period of 200 or 300 hours for Mr. Gourley. He testified that in fact he had worked more than 600 hours. His explanation was that he had answered the questions quickly and did not have a chance to "figure it out". In the statement in answer to a series of questions relative to the memorandum (Ex. 15) which he had prepared approving the requested increase in the maximum allowance for machine tools from $175,000 to $275,000, accused had said, in effect that he had not discussed the matter with Mr. Gourley and that Gourley had no intimation as to what action accused had taken. Accused testified that his prior statements

were not correct and that in fact, as related by him at the trial, he and Mr. Gourley had been together when the memorandum was prepared. Colonel McCoy asked accused in what manner the regulation pertaining to the employment of officers by Government contractors came to his attention and accused replied that a general memorandum came over "our desk pointing out some loan of that nature, and I found it out". Accused testified that his answer was not correct as he had, in fact, first seen the regulation in the Officer's Guide. Accused also testified that in making all of the untrue and incorrect statements on 18 January 1943, it had not been his intention to deceive Colonel McCoy or the representatives of the Department of Justice (R. 146-153).

On cross-examination accused admitted that he had deposited his Army pay checks in his own account in the Riggs National Bank and that for two or three months prior to his purchase of a House and for six to eight months thereafter (from early in 1942 until 1943) his account in that bank had been in excess of $1,000. He testified that he regarded the compensation he had received for his work for Mr. Gourley the same as any other pay for engineering services and that he considered he had fairly earned it but admitted that in making out his income tax return for the year 1941 he had not included such compensation therein as income. The prosecution specifically directed his attention to the check in the amount of $500 dated 20 September 1941 (Ex. 22) and asked whether he had returned that check as income for 1941. Accused answered "No, at that time I considered that as a gift". The prosecution then called his attention to the fact that the check was "marked for engineering services" to which accused replied, "No it is a gift" (R. 155, 156, 161, 162).

5. a. Specification 1, Charge I (Wedding gift check of $500, dated 15 August 1941). The evidence shows that on 14 August 1941 accused married Ethel Schmidt, that W. J. Gourley and his wife attended the wedding as the only guests, and that Mr. Gourley gave accused a wedding present in the form of a bank check of $500 drawn on the account of the American Manufacturing Company of Fort Worth, Texas, of which Mr. Gourley was the president and principal stockholder. The company had been awarded a contract by letter of intent dated 19 July 1941, to make 750,000 shell forgings (105 mm) for the Army for a total price of $2,550,000 and Mr. Gourley had called at the Washington Ordnance Office in connection with that transaction. Colonel Davis, who was in charge of the Metal Components Section of the Ammunition Division suggested the possibility of his taking a contract to machine some of the shell which

his company had contracted to produce. It was then the policy of the Ordnance Department to place small machining orders in forging plants so that eventually completed shell could be manufactured in each plant. Colonel Davis turned Mr. Gourley over to accused, then assigned to the Ammunition Section as an expert and consultant on machine tools, and directed the latter to explain to Gourley the nature of the process of machining shells and advise him what tools and equipment would be required. That was the first time Gourley and accused had met and the record does not show just when it occurred. Gourley testified that it was in April or May, accused stated that it was in June, and Colonel Davis placed it in the summer of 1941. However, the testimony of all of them was to the effect that it was subsequent to the award of the first contract for the forging of 105 millimeter shell. The date of the letter of intent covering the award is 19 July 1941 and the date of the endorsement of acceptance thereof by the contractor "by W. J. Gourley Pres." is 30 July 1941. It is apparent therefor that accused and Mr. Gourley were strangers to each other until sometime after 19 July 1941.

An order for machining 100,000 of the 105 millimeter shell to be produced in its plant was awarded to the American Manufacturing Company by letter of intent of 11 August 1941 which was accepted by the company 25 August 1941. The letter provided that the Government would furnish new machine tools required by the contractor to a value of not to exceed $175,000. That figure was based upon the list of machine tools and the estimate of the cost thereof prepared by accused at his first meeting with Mr. Gourley. The order for the machining of 100,000 shell was a comparatively small educational order. It was contemplated that it would be followed, as it was followed, by other and larger orders. The contractor was inexperienced in the machining of shell and it was necessary that its plant be equipped and tooled for the process. Accused was the only machine tool expert in the Ammunition Section and it must have been apparent to him that in all probability he would be called upon at some future time for advice or action in his official capacity in connection with the problems arising out of the performance of the contract. So far as the record discloses accused, who was then a Major, had no income other than his compensation as an officer in August 1941 and the wedding present of $500 was the equivalent of his base pay for two months. Both accused and Mr. Gourley in their testimony stressed the close and intimate friendship which grew up between them but, as has been pointed out, the documentary evidence of record indicates that the period of their acquaintance prior to the making of the gift was less than 30 days. Even according to the statement

of accused that they met in June 1941, it was only about two months. The acceptance by accused of a gift of $500 from a Government contractor under such circumstances was flagrantly improper and constituted a violation of the 96th Article of War.

b. Specifications 2 and 3, Charge I. Both of these Specifications cover receipt by accused of the same four checks, namely, three, each in the amount of $500, dated, respectively, 5 September 1941, 20 September 1941, and 10 January 1942 and one in the amount of $300 dated 3 December 1941 (a fifth check in the amount of $200 mentioned in these Specifications has been eliminated from consideration by the findings of the court). It is alleged in Specification 2 that the checks were received and accepted by accused in violation of paragraph 2e(9) and paragraph 2e(10), Army Regulations 600-10, 6 December 1938, as compensation for his services as consultant and advisor to the American Manufacturing Company and W. J. Gourley in connection with the performance of contracts of the company with the United States. It is alleged in Specification 3 that accused received and agreed to receive the same checks in violation of Section 113, Federal Criminal Code (Sec. 203, Title 18 USC) as compensation for services rendered and to be rendered to the American Manufacturing Company and W. J. Gourley in relation to contracts between the United States and the company in which the United States was interested and which were then pending before the Ordnance Department of the United States.

(1) As to Specification 2, it is not disputed that accused received the checks under consideration and that he applied the proceeds thereof to his own use and benefit. Both Mr. Gourley and accused testified that the three $500 checks were paid to accused as compensation for services which consisted of planning the production layout and designing tools and fixtures required by the American Manufacturing Company in connection with the performance of its contracts with the Government for the manufacture of shell. They were not in accord as to the $300 check. Mr. Gourley testified positively that it was a loan. When he was questioned under oath by Colonel McCoy of the Inspector General's Department, accused had stated that the check was given for engineering services. At the trial he could not recall whether it was a loan or for engineering services. He testified, however, that he did not expect to pay it back.

The Army Regulation cited above in part provided that no member of the military establishment on active duty should act as a

consultant for a private commercial enterprise with regard to any matter in which the Government was interested (see 2e(10), AR 600-10, 6 Dec. 1938).

According to the uncontradicted testimony and his own admissions accused, while on active duty as an officer, acted as a consultant for the American Manufacturing Company with respect to matters in which the Government was interested, namely, the contracts of the company for the manufacture of shell for the Army. Clearly the record is sufficient to support the finding of guilty of Specification 2, Charge I.

(2) Concerning Specification 3, Charge I, the Federal Statute therein alleged to have been violated by accused makes it unlawful for any officer in the employ of the United States to receive or agree to receive any compensation for services rendered or to be rendered to any person in relation to any proceeding, contract or other matter or thing in which the United States is a party or directly or indirectly interested before any department, bureau or officer.

In the case of United States v. Booth (148 F. 112), involving the construction of this statute, the court commented on its broad language as follows:

> "* * * Any officer—any clerk, no matter how subordinate may be his clerical position, if he be in the employ of the government—is expressly included, and forbidden to do those things which are made unlawful by the comprehensive language of the law. Congress proceeded evidently in recognition of the principle that 'No man can serve two masters', and that it was not right that an officer should agree to accept fees for doing services in matters where the United States is interested before any officer of the government. The performance of duty by an officer is compensated by the salary or fees regularly allowed by law. To permit agreements for other compensation for services, to be paid by those interested in matters before government officers, would be to countenance the rendering of services oftentimes inconsistent with fidelity to the best interests of the government, to which the employee owes his first and highest obligation."

It appears from the evidence for the prosecution, which was largely documentary, that accused, in his official capacity as an officer,

rendered valuable service to the American Manufacturing Company with reference to its contracts with the Government and that, in several instances, he placed himself in the position of being obliged to serve two masters whose interests were adverse. In the first order for machining 105 millimeter shell, which the company received on 11 August 1941, it was given an allowance of not to exceed $175,000 for the purchase of machine tools at Government expense. That figure was based upon a list of tools with estimated costs thereof prepared by accused at the direction of the chief of his section on the occasion of his first meeting with Mr. Gourley. Shortly after that meeting, without the knowledge of anyone in the Ordnance Department, accused entered the employ of the company as its machine tool expert. After Mr. Gourley had definitely ascertained what equipment would be required to efficiently perform the work contemplated by the contract, he applied to the St. Louis Ordnance Office for an increase of the maximum allowance for machine tools to $275,000. That office asked the Washington office for authority to grant the application and Colonel Davis referred the matter to accused who, in collaboration with Mr. Gourley, prepared a memorandum which set forth a detailed analysis of the requested increase of $100,000 and recommended that it be allowed. The date of the memorandum was 14 October 1941. By that time accused had received from Mr. Gourley a wedding gift of $500 and $1000 for "engineering services".

Both accused and Mr. Gourley testified that, since the American Manufacturing Company did not receive any of the additional allowance of $100,000 but that the fund was placed in a special account from which it was paid directly to the vendors of the machine tools purchased for the use of the contractor, the company derived no benefit from this transaction. Manifestly, the increase did benefit the company. If it had not been granted the company would have been obliged either to advance from its own funds the additional amount required or to undertake performance of the contract with the inadequate and unsuitable machinery as originally planned. Moreover, it appears that one of the reasons assigned for granting the additional allowance was that it would result in an increase in the rate of production of shell by the contractor.

Accused also testified that the preparation of the memorandum was in the nature of a clerical task not involving the exercise of any discretion on his part, that he merely put down the costs of the various articles as originally estimated and the actual costs as given to him by Mr. Gourley. The memorandum shows on its face that such was not the case. Among the reasons therein stated for the increase in the allowance for machine tools was that some of the items on the original list were too light and heavier or larger machines were considered desirable,

that the cost of tooling other items had not been included, that the production rate of the lathes originally listed had been overrated, and that two additional lathes not formerly listed had been ordered. A new item of $25,000 was added to cover "mechanical aids and installation of equipment" originally "over-looked".

Immediately after Pearl Harbor the British Government made available to the United States a large quantity of machine tools for the production of munitions. According to the testimony of several disinterested and credible witnesses, civilian and military employees of the Ordnance Department, the task of placing this machinery was delegated to accused (he testified to the contrary) and it was handled "completely" by him. On 3 March 1942, accused prepared for the signature of Colonel Davis a memorandum highly recommending the American Manufacturing Company as a recipient of the British equipment. Ultimately most of it was shipped to that company for storage and much of it was leased to the company for use in the performance of its contracts for the production of shell for the Army and for the Navy. American contractors were not familiar with the British machinery, it was non-standard in this country and they were very reluctant to take it, it is true, but it was a factor in the award to the American Manufacturing Company of its largest Army contract. On 9 November 1942 a contract amounting to more than $3,000,000 for the manufacture of shell (75mm) was awarded to the company. The contract provided that in its performance the use of the British equipment, a large quantity of which was listed in a schedule attached thereto, was approved and agreed upon and that the contract price was predicated upon such use.

Pursuant to a request of Mr. Gourley directed to General R. E. Hardy of the St. Louis Ordnance District, accused went to Fort Worth, Texas, the latter part of June 1942 to inspect the surplus British equipment. After remaining there several days during which time he and his wife went on a two-day sightseeing trip by automobile to San Antonio and Corpus Christi with Mr. Gourley at the expense of the latter, accused returned to Washington. The prosecution introduced in evidence a letter addressed to accused, from the American Manufacturing Company, dated 27 June 1942, the last day of his stay in Fort Worth. It contained a proposal that the company clean, assemble, and install four British forging plants at a cost of $79,525.67 per plant. The company submitted the same proposal to the St. Louis Ordnance District by letter dated 7 July 1942, and that District wrote to the Washington Ordnance office requesting a "breakdown" of the figure "of $80,000.00 per line". Accused sent to the St. Louis office, by letter dated 16 July 1942, a detailed estimate showing the cost of installing each of the forging

plants as proposed by the American Manufacturing Company to be $79,525. The letter stated that $80,000 per plant was "in the opinion of this office, fair". The proposal was not accepted by the Government. It is significant that although the letter from the company to accused did not itemize the proposed cost per plant of $79,525.67 the detailed "breakdown" of the estimated cost submitted to the St. Louis Ordnance Office by accused shows a cost per plant of $79,525, a difference of only 67 cents.

In the process of leasing the British machine tools to the American Manufacturing Company the St. Louis office requested of the Washington Ordnance office information as to their fair value in order that the annual rental of 12½ percent of such value could be computed. In response to this request, accused wrote the St. Louis office under date of 11 September 1942, transmitting a detailed estimate of the value of the British equipment based upon the new price of comparable American machines less depreciation of 25 percent. In the lease subsequently executed the Government did not accept the estimates of accused but adopted valuations considerably higher. Throughout all of the transactions related above accused did not disclose to anyone in the Ordnance Department that he had received any payments from Mr. Gourley or his company.

Both Mr. Gourley and accused testified that the services of the latter performed for the American Manufacturing Company were separate and apart from his official duties, that the payments made to accused were not intended to and did not in fact influence his official acts, and that their transactions did not in any way prejudice the interests of the United States. Considered in the light of the entire record these protestations of good faith are far from convincing. Accused not only concealed from his associates and superiors in the Ordnance Department the fact that he was in the employ of a Government contractor but he turned over all of the checks which Mr. Gourley gave him, with the exception of the $300 check, to his wife who deposited them in a separate account maintained by her in a Baltimore, Maryland bank in her name prior to her marriage to accused. In his sworn statement to Colonel McCoy accused asserted that there was no particular reason for depositing the checks in that manner. At the trial he testified that there had been a reason. He had at one time been involved in litigation and tried to keep his own bank account as low as possible for fear it would be attached. On cross-examination, however, he admitted that he deposited his Army pay checks in his account in a Washington bank and that from early in 1942 until 1943 the balance in such

account was in excess of $1,000. Accused and Mr. Gourley could not agree as to why accused had been paid $300 in December 1941. Accused stated to Colonel McCoy that it was for engineering services. Mr. Gourley testified that it was a loan. At the trial accused could not recall whether it was a loan or for services although he testified that he did not intend to pay it back. Moreover, although accused maintained that the two checks each in the amount of $500 which he received in September 1941 were for services which he performed in good faith and that he did not learn until about November 1942 that his acceptance of them might be improper or in violation of Army regulations, he admitted on cross-examination that he had not listed them as income in his 1941 income tax return. Apparently in an effort to reconcile this inconsistency he found it necessary to take the position, near the close of his testimony, that the check dated 20 September 1941, on the face of which was inscribed "Engineer services" was a gift and not compensation for services.

In the opinion of the Board of Review, the evidence reasonably warrants the inference that by actual arrangement or by tacit understanding with Mr. Gourley, accused accepted compensation for which he used his position with the Ordnance Department for the benefit and attempted benefit of the American Manufacturing Company in connection with its contracts pending before the Ordnance Department in violation of the Federal Statute cited above.

c. The Specification, Charge II. On 2 February 1942, accused received a check in the amount of $3,000 drawn by the American Manufacturing Company, "by W. J. Gourley", and applied the proceeds to his own use and benefit. The transaction was a loan from Mr. Gourley to accused, according to their testimony, but the attendant circumstances were not those of an ordinary loan. No security for repayment was given and accused did not execute any note or other evidence of indebtedness. There was no agreement as to what rate of interest would be charged and no understanding as to when the loan would fall due. In his statement under oath to Colonel McCoy accused unequivocally asserted that he had asked Mr. Gourley for the loan, but after the latter had testified that he "volunteered" to lend the money accused testified that his statement to Colonel McCoy was not true and that "the money had been made available" to him. He stated that he borrowed the money to make a down payment on a house which he desired to purchase but instead of depositing it in his own bank account he arranged to have it deposited in a separate bank account of his wife.

At the time the check was given, accused was still in the employ of the American Manufacturing Company as the performance of his engineering services for that company, according to his own testimony, was not concluded until March 1942. At that time the British machine tools which had been turned over to the Government had not been disposed of and accused had charge of placing them for the Ordnance Department. The American Manufacturing Company had been awarded three contracts for the manufacture of shell for the Army and four more were to follow. The largest of those contracts, an order for 75 millimeter shell amounting to more than $3,000,000, was based upon the use of the British equipment leased to the company upon the recommendation of accused.

It is the opinion of the Board of Review that the $3,000 check under consideration was not a bona fide loan and that such an amount would not have been advanced to the accused by Mr. Gourley if the accused had not been in a position, as an officer of the Ordnance Department, to benefit the American Manufacturing Company in connection with the performance of its contracts with the United States. Under the circumstances the acceptance of the check by accused was not merely indiscreet or improper but was dishonorable and constituted a violation of the 95th Article of War.

6. Careful consideration has been given to a brief submitted to The Judge Advocate General by defense counsel on 5 June 1943.

7. The accused is 45 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed Major, Ordnance Department-Res., 14 April 1941; extended active duty 9 May 1941; appointed temporary lieutenant colonel, Army of the United States, 5 January 1943.

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 a violation of the 96th Article of War and is mandatory upon conviction of a violation of the 95th Article of War.

Arthur S. Ikes Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Poltrichos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 22 JUL 1943 -To the Acting 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 Lieutenant Colonel August J. Cayouette (0-411914), 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 of guilty and the sentence, and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

3. I also recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, 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

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

3 Incls.
Incl.1- Record of Trial.
Incl.2- Drft. ltr. for sig. of Sec. of War.
Incl.3- Form of Executive Action.

(Sentence confirmed. G.C.M.O. 210, 2 Sep 1943)

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

SPJGK
CM 234706

30 JUN 1943

UNITED STATES v. Private EDMUND J. LaBRECQUE (31126944), 478th Base Headquarters and Air Base Squadron, Detached Service, attached to 766th Technical School Squadron.	FOURTH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Buckley Field, Colorado, 23 April 1943. Dishonorable discharge and confinement for twenty-five (25) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
LYON, HILL and ANDREWS, 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 Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Edmund J. LaBrecque, 478th Base Headquarters and Air Base Squadron, Detached Service, Buckley Field, Colorado, attached to 766th Technical School Squadron, did, at Denver, Colorado, on or about February 28, 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Frank Primavera $110, the property of J. Fred Doyle, a sole trader doing business as Doyle's Pharmacy.

Specification 2: In that Private Edmund J. LaBrecque, 478th Base Headquarters and Air Base Squadron, Detached Service, Buckley Field, Colorado, attached to 766th Technical School Squadron, did, at Denver, Colorado, on or about March 4, 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of A. H. Bomash, $35, the property of Thrifty Drugs, Inc., a Colorado Corporation.

Specification 3: In that Private Edmund J. LaBrecque, 478th Base Headquarters and Air Base Squadron, Detached Service, Buckley Field, Colorado, attached to 766th Technical School Squadron, did, at Denver, Colorado, on or about April 2, 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Paul Schneider, $11, the property of J.E. Hankey, a sole trader doing business as Capitol Drug Company.

Specification 4: In that Private Edmund J. LaBrecque, 478th Base Headquarters and Air Base Squadron, Detached Service, Buckley Field, Colorado, attached to 766th Technical School Squadron, did, at Denver, Colorado, on or about April 11, 1943, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of H.C. Fisk and Alta Cox, $65, the property of Walgreen Co., an Illinois corporation.

Specification 5: In that Private Edmund J. LaBrecque, 478th Base Headquarters and Air Base Squadron, Detached Service, Buckley Field, Colorado, attached to 766th Technical School Squadron, did, at Denver, Colorado, on or about April 11, 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Fred Weiss, $63, the property of Fred Weiss, a sole trader doing business as Weiss Drug Co.

He pleaded guilty to and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances 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 twenty-five (25) years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution discloses.

Specification 1, robbery of $110, property of J. Fred Doyle. Mrs. Anna May Doyle of 1671 Logan Street, Denver, Colorado, stated that her husband, J. Fred Doyle, was the sole owner of the business conducted at 17th and Grant Streets in the City of Denver, Colorado, under the name

of Doyle's Pharmacy. As Mrs. Doyle entered the place of business on the night of 28 February 1943 she saw the accused sitting near the fountain. Accused was wearing a light coat, hat, dark glasses, and a white muffler around his neck. About 10:55 when there were no customers in the store, the accused stepped over to the cash register and said to Frank Primavera, the clerk behind the cash register, "Empty that register" or "Give me that in the register". The clerk was slow in obeying the order, and accused said "make it snappy". The clerk withdrew from the register all one dollar bills and handed them to accused. Accused then, with a gun in his hand, reached into the register where the larger money was. Mrs. Doyle attempted to close the drawer and as she did so the accused withdrew from the register a large number of bills and left the building. A check of the cash register disclosed that accused had taken $126. Mrs. Doyle affirmatively stated that the cash register was opened and the money was taken by the accused "at the point of a gun" (R.6-8).

Specification 2, robbery of $35, Thrifty Drugs, Inc. Mr. A. H. Bomash of 2052 Kramerica Street, Denver, Colorado, Treasurer of Thrifty Drug Store, Incorporated, of 248 East 20th Avenue, Denver, Colorado, testified that at about a quarter of ten (just before closing time) on the night of 4 March 1943, as he was in the process of counting the cash, the accused entered the store, wearing a brown hat, tinted glasses and gabardine coat. Accused stood near the magazine department close by until the one remaining customer had entered the telephone booth. Just as she did so, accused stepped behind the cigar case and said, "This is a hold-up", or "This is a stick-up" or words to that effect. Accused had in his hand "an automatic" which he pointed at the witness. Mr. Bomash gave accused what money there was in the register. As accused walked out of the store he stated that he would pay back the money sometime but that he needed it worse than witness did. He also ordered witness not to follow him. Witness estimated that accused got about $35, and stated that the money was the property of Thrifty Drug Company, a Colorado corporation. (R.9-11)

Specification 3, robbery of $11 from Paul Schneider, property of J. E. Hankey, trading as Capitol Drug Company. Paul O. Schneider testified that on 2 April 1943 he was employed by J. E. Hankey, the sole proprietor of a drug business conducted at 2400 East Colfax Street, Denver, Colorado, under the name of Capitol Drug Company. Between 10:45 and 11 o'clock on the evening of 2 April, while Mr. Schneider was standing by the cash register, the accused came around the counter with a gun in his hand and said, "Step back; I want the money in the cash register". Witness stepped back and accused tried unsuccessfully to open the register. He then ordered witness to open it. Accused had

a black automatic pistol and Mr. Schneider was afraid of him. Witness opened the register. The accused withdrew all the money therefrom and then "backed away and went out". Accused was wearing a brown reversible jacket. Witness did not check the register to determine how much money was taken, but he knew that accused got at least "one ten dollar bill, a five dollar bill, silver dollars and loose change - silver quarters, nickels and dimes", the property of Mr. J. E. Hankey, trading as Capitol Drug Store (R.12-14).

Specification 4, robbery of $65, property of Walgreen Company. Mr. Herman C. Fisk stated that on 11 April 1943 he was employed as pharmacist of Walgreen Company (an Illinois corporation) at its place of business, 2260 East Colfax, Denver, Colorado. About 8:30 on the evening of that date, while witness was waiting on a customer, accused ran behind the counter and, pointing at witness an "automatic gun", said, "Open it up, buddy". Accused was wearing a trench coat, dark brown hat, dark sun glasses with leather or plastic covers over the ears. Witness opened the cash register. Accused looked into the drawer and said, "Is there any more", and took all that was there, to wit, seven half dollars, property of the Walgreen Company (R.15-16). Accused then went out the door. Mr. Fisk stated that there were two cash registers in the store. On the same night, in the same store, and immediately before this incident, the accused at the point of a gun forced Miss Alta Cox, one of the cashiers in Walgreen's store to open the cash register of the cigar department. Accused kept the pistol pointed at Miss Cox until he had withdrawn $57 from the cash register, after which he backed out and made a dash to the drug department, where he robbed the cash register which was under the supervision of Mr. Fisk (R.16-20).

Specification 5, robbery of $63, property of Fred Weiss. Mr. Fred Weiss, sole proprietor of Weiss Drug Company, 5001 Colfax, Denver, stated that on 11 April 1943, while he was waiting on a customer, the accused entered the store. The delivery boy offered to wait on accused. Accused reached in his pocket, pulled out a .32 or .38 caliber pistol and said, "Open up the register". Mr. Weiss stated that he was "afraid of guns", so he opened the register and accused took $63 therefrom. Accused kept the pistol pointed at witness and the customer until he reached the door (R.20-22).

The accused declined to testify or to make an unsworn statement and introduced no witnesses in his behalf.

4. The undisputed evidence confirms the accused's plea of guilty of the Charge and each and every Specification thereunder. Every element

of the offense of robbery as alleged is shown beyond any reasonable doubt. With respect to Specification 4, which alleges the robbery of $65, the evidence shows the actual amount of money taken by the accused to be $60.50. This slight variance is, of course, immaterial.

The accused was found guilty of robbery in violation of Article of War 93 under five separate and distinct Specifications. Under the Table of Maximum Punishments (M.C.M. 1928, par. 104 c), the authorized period of confinement under each Specification is ten years.

5. The Charge Sheet shows that the accused is 26 years of age and was inducted on July 3, 1942. The defense counsel in his address to the court, and without any objection by the prosecution or the court, read into the record of trial three purported testimonials addressed "To whom it may concern", one from "Helen B. Divily" of Holyoke Hospital, one from a school teacher, "A. Esther Barry" of Holyoke High School, and one dated 14 October 1942 from "Rev. Walter C. Connell", Blessed Sacrament Rectory, Holyoke, Massachusetts, all testifying to the previous good character of the accused.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 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, of the United States Code.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 234711

JUN 13 1943

FIRST ARMY

UNITED STATES v. Colonel ERLE O. SANDLIN (0-5152), 144th Infantry.	Trial by G. C. M., convened at Jacksonville, Florida, April 6, 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 Charge and Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that Colonel Erle O. Sandlin, 144th Infantry, was, at Combat Team Camp, Atlantic Beach, Florida, on or about February 18, 1943, found drunk while on duty as Commanding Officer, Jacksonville Local Sector, Southern Sector, Eastern Defense Command.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, forwarded the record pursuant to the provisions of Article of War 48, and submitted the following recommendation for clemency: "On the unanimous recommendation of the court to clemency, and in view of the excellent services of accused and his value to the Government, it is recommended that the sentence be commuted by the President to a reprimand and forfeiture of Fifty Dollars ($50.00) of the officer's pay per month for six (6) months."

3. The evidence shows that the Eastern Defense Command was established by virtue of orders issued by the War Department on December 20, 1941, and March 15, 1942. The Eastern Defense Command on February

18, 1943, embraced fifteen states, part of another state, and the District of Columbia, a territory inhabited by millions of citizens of the United States and constituting the entire Atlantic Coast and a portion of the Gulf Coast of the United States. By its geographical location it was particularly subject to attack and, in connection therewith, was subject to espionage and acts of sabotage thereby requiring the adoption of military measures necessary to establish safeguards against such hostile operations. (Public Proclamation No. 1, Headquarters Eastern Defense Command, May 16, 1942. Fed. Reg. 3830, May 22, 1942). The territory of the Eastern Defense Command had also been prescribed as a military area established to provide every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in section 4, act of April 20, 1918 (40 Stat. 533), as amended by the act of November 30, 1940 (54 Stat. 1220), and the act of August 21, 1941 (55 Stat. 655; 50 U.S.C. 104),(Ex. Order 9066, Feb. 19, 1942; Public Proclamation No. 1, Headquarters Eastern Defense Command, May 16, 1942).

On February 18, 1943, the Eastern Defense Command maintained its headquarters at Governor's Island, New York, and was commanded by Lieutenant General H. A. Drum, U.S.Army (S.O. No. 74, Headquarters Eastern Defense Command, Mar. 20, 1943); Southern Sector, Eastern Defense Command, maintained its headquarters at Jacksonville, Florida, and was commanded by Brigadier General Harold F. Loomis, U.S. Army (R.6,7); and the Jacksonville Local Sector, previously designated by the Commanding General, Southern Sector, Eastern Defense Command (Annex No. 7 to Field Order No. 9, Southern Sector, October 14, 1942, Ex.A), maintained its headquarters at Jacksonville, Florida, and was commanded by the accused, Colonel Erle O. Sandlin, 144th Infantry, he being the senior line officer of the organizations comprising the troops assigned to the Jacksonville Local Sector (R.7,9,15).

The boundaries of the Jacksonville Local Sector embraced Nassau Sound, Dinsmore, Jacksonville, Orange Park, St. John's River, Crescent Lake, DeLand (all inclusive) Ponce DeLeon Inlet (exclusive) (R.7,Ex.A). The purpose of its designation was to provide for the defense of the Jacksonville area, hence its mission was expressly declared to be:

> "a. Defend the Jacksonville Local Sector against land or sea attacks and support naval operations under category of Defense 'C'.
>
> "b. Be prepared to assist, on orders from this (Southern Sector) headquarters in the defense of Army and Navy airfields

and other important installations in the Jacksonville Local Sector.

"c. In furtherance of the execution of the assigned mission:

(1) Establish beach patrols and outposts during periods of darkness and fog to discover and repel enemy landings or infiltration by enemy agents.

(2) With the personnel, armament and equipment assigned, organize the Temporary Harbor Defenses of Jacksonville.
(a) to cover the entrance to the St. John's River.
(b) to support beach defense within the range and sector of fire of the armament." (R.7, Ex.A)

About January 20, 1943, elements of the 144th Infantry were attached to the Jacksonville Local Sector (R.9,17) and accused, by virtue of seniority (R.9) was verbally designated by General Loomis as commanding officer of the Jacksonville Local Sector. This designation was subsequently, January 25, 1943, confirmed by written amendment to Field Order No. 9 (R.9; Ex. B). Accused was commanding officer of Jacksonville Local Sector until he was relieved on February 18, 1943, by verbal order of General Loomis (R.13,21). On several occasions during the period between January 20, 1943, and February 18, 1943, accused discussed matters pertaining to the mission of Jacksonville Local Sector and his duties as its commanding officer with General Loomis (R.10,13), with Colonel Ralph E. Hill, Headquarters Southern Sector (R.15,16), and with Major Hugh L. Wilcox, Adjutant and S-3 of Jacksonville Local Sector (R.20,22) and had directed Major Wilcox to issue Special Orders No. 2 for Jacksonville Local Sector, January 25, 1943 (R.20,21,22; Ex. C).

Shortly after 5 o'clock P.M. on February 18, accused went to his quarters, which were in a hutment at Atlantic Beach Camp, in the Jacksonville Sector (R.10,14). At that time he was sober but had the odor of alcohol on his breath (R.25,57). Between then and 6 P.M. accused and three junior officers of his command consumed about half a pint of whiskey (R.27,29,59), accused taking two or three drinks (R.26,28) directly from the bottle (R.29,59). At 6 o'clock P.M. General Loomis went to accused's quarters, found accused sitting down (R.11). General Loomis testified that as he entered "He (accused) had difficulty in rising when I came in, when he stood up and saluted he was rather unsteady on his feet, his hands shook, his eyes had the look of a drunk man, and he seemed to be mentally confused or dull and his talk was not clear" (R.14). The witness then made the statement to accused, "You are drunk"; accused answered, "Yes, sir". Witness then said: "I am sorry to see this and you are hereby relieved from command and placed in arrest in quarters"(R.11). The witness immediately thereafter confirmed this verbal order by a written order (R.12). The witness stated without reservation that at that time accused was commanding officer of Jackson-

ville Local Sector (R.16) and was drunk (R.11).

Major Gaston M. Wood, 144th Infantry, was with accused in his quarters when General Loomis entered at 6 o'clock P.M. and testified that at that time accused was commanding officer of Jacksonville Local Sector (R.27) and was under the influence of liquor (R.26) but not drunk under the definition, "when a man has lost possession of his faculties he is beyond any measure of thought or anything else"(R.28). After obtaining permission from General Loomis witness assisted accused to get on his bed (R.27).

Captain Lucius C. Moody, Dental Corps, 144th Infantry, was also with accused in his quarters when General Loomis arrived. He testified that there was whiskey present (R.31), that "maybe" accused's tongue was "a little thick" (R.32), but that his speech was normal (R.30). Witness did not know that accused was drunk (R.32).

General Loomis sent two medical officers of his command to accused's quarters. Both pronounced accused drunk (R.33,35,36). Lieutenant Colonel Ralph A. Getchell, Medical Corps, Surgeon, Southern Sector, testified that he examined accused in his quarters at about 6:30 o'clock P.M. February 18, 1943 (R.32,33).

> "I went in his quarters and he was stretched out on his bed and could not be aroused, had the odor of alcohol on his breath, a pint bottle of whiskey sitting on the table by his bed approximately two-thirds full, and I tried to arouse him and was unable to do so. Upon these findings, I made the diagnosis that he was drunk" (R.35).

The witness also testified that the pupils of accused's eyes were dilated, and that his eyes did not glisten (R.34). Lieutenant Colonel Robert H. Coleman, Medical Corps, 144th Infantry, testified that he saw accused about 6:15 o'clock P.M., February 18, 1943, found him drunk, with a thick tongue and speech, flushed face and eyes that indicated accused had been drinking (R.37,38).

Accused was then, at about 6:15 P.M., by orders of General Loomis (R.35), taken by ambulance from accused's quarters in Atlantic Beach to Camp Blanding Station Hospital, a distance of fifty-two miles (R.36), arriving between 9:00 and 9:30 o'clock P.M. (R.39,42). Accused walked and got up into and got down from the ambulance without assistance (R.37,52), and sat on the front seat beside the driver (R.37,52), while Lieutenant Colonel Coleman rode behind the front seat of the ambulance (R.37). During the three hour drive accused's condition as to sobriety changed "to a degree, a little bit" (R.36).

On arrival at the Station Hospital, Camp Blanding, accused was admitted to the hospital by the surgical officer of the day, on the transfer slip which contained a diagnosis of acute alcoholic intoxication (R.39). Because of this diagnosis at 10:15 P.M. a blood alcohol test was made. The report of the clinic on the blood alcohol test disclosed that the alcoholic content of the blood was then 1.5 milligrams per cubic centimeter of blood (R.40,43; Ex.D). Major John Ragan Stewart, Medical Corps, Captain John T. Cuttino and Captain Hugh B. Goodwin, Medical Corps, all of Station Hospital, Camp Blanding, Florida, testified that the results of the blood alcohol test indicated that accused was not in a state of acute alcoholic intoxication or drunk at the time of the test (R.40,46), but had been consuming alcohol (R.46,44). Major Stewart testified that accused was cooperative, able to walk and talk, he answered all questions sensibly and gave every indication of being sober (R.39). Captain Cuttino testified that a blood alcohol test taken at 10:15 P.M. would not be an indication of the alcohol in the blood at 6 P.M. and he knew of no standard rate at which alcohol is oxidized in the blood (R.44).

4. Accused produced various witnesses who were in contact with him on the evening of February 18, 1943, after 6 P.M. or the next morning, all of whom testified that accused appeared sober when observed. Captain Hugh B. Goodwin, Medical Corps, testified that he saw accused at Station Hospital on the morning after his admission, at which time he found no record of alcoholism (R.46) and no symptoms or residual of alcohol (R.46); that a concentration of blood alcohol of 1.5 milligrams per cubic centimeter of blood would not indicate drunkenness (R.46) or alcoholic intoxication, but would indicate a "social aspect of drinking" (R.47). The witness testified that if the blood alcohol test taken at 10:15 P.M. showed an alcoholic content of 1.5, the content at 6 P.M. before would depend upon when the alcohol was taken by mouth (R.48), that blood alcohol tests are "certainly not infallible" (R.48), and that the amount of alcohol oxidized and the rate of oxidization vary in different people and under varying conditions (R.48). Second Lieutenant Gertrude Libal, Army Nurse Corps, testified that she was night nurse on duty when accused was admitted to Station Hospital, that he was cooperative and got into bed by himself without help, but she did smell liquor on him (R.49,50). Technician Fifth Grade Charles A. Kelly, Station Hospital, testified that he assisted Major Stewart in taking blood from accused for the blood alcohol test and found accused able to sit up in bed, cooperative and apparently sober (R.50,51). Private N.H. Liukeo, 677 Medical Collecting Company, who drove the ambulance that carried accused to the Station Hospital, testified that accused had a little liquor on his breath, but did not appear drunk (R.52,53); Private John C. Tyre, Medical

Detachment, 104th Infantry, and Private First Class Victor L. Gordon, 677th Medical Collecting Company, testified that they rode in the ambulance that carried accused to Station Hospital and observed accused. Accused walked normally, got in and out of the ambulance "under his own power", "like any ordinary person would" (R.54,55).

Captain John H. Huspeth, 144th Infantry, testified that he was with accused at different times in the late afternoon of February 18, 1943, the last such occasion being at about 5:45 P.M., and at all those times in his opinion accused was sober (R.58). He saw accused and other officers present take drinks of whiskey from a bottle in accused's quarters and he himself had one drink (R.58,59).

For the purpose of proving accused's worth to the service commendatory letters concerning accused signed by Lieutenant General Walter Krueger, Commanding General, Third Army, Major General Walter K. Wilson, Commanding General, Northern California Sector, Western Defense Command, Major General George VanHorn Moseley, Commanding General, Fourth Corps Area, Colonel George Dillman, Commanding Officer, Fort Oglethorpe, Georgia, were introduced in evidence and marked Defense Exhibits 1,2,3,4,5,6, and 7.

Accused did not testify or make an unsworn statement.

5. The evidence clearly establishes without conflict that before 5 o'clock P.M. on February 18, 1943, accused carried the odor of alcohol on his breath. From this, the inference that he had been drinking before that hour is inescapable. The quantity of liquor consumed or the time of consumption do not appear in the record but such drinking was necessarily of recent occurrence. Between 5 and 6 o'clock P.M. on February 18, 1943, accused was in his quarters drinking whiskey with subordinate officers of his command. During that hour he was observed to take two or three drinks from the bottle. Four witnesses for the prosecution who saw accused at 6 P.M. testified that at that time he was drunk, a fifth prosecution witness testified that at that time accused was under the influence of liquor.

Accused unqualifiedly acknowledged being drunk when found by General Loomis at 6 P.M. in that apparent condition. Accused did not then or thereafter withdraw, repudiate or modify that confession.

That the rational and full exercise of the mental and physical faculties of accused were sensibly impaired was clearly proved by positive evidence that accused was unsteady on his feet, his hands shook, his eyes had the look of a drunken man, were glassy, the pupils were dilated, he seemed mentally confused or dull, his tongue and speech were thick and

his talk not clear.

There was conflicting evidence on the issue of the state or degree of accused's sobriety. Opinion evidence on the subject, introduced by the prosecution and by the defense was contradictory.

6. It was no defense that, notwithstanding accused's mental or physical impairment resulting from the use of intoxicating liquor, various witnesses testified that they would be willing to have accused lead them into battle at that particular time. Any intoxication, no matter of what degree or how manifested, which is sufficient to sensibly impair the mental and physical faculties is drunkenness within the meaning of Article of War 85. It still remains drunkenness, even though some soldiers are willing to waive the impairment and be led into battle by one so handicapped. The reason for this rule was well stated by the Judge Advocate General in an opinion rendered in 1875.

> "The object of the article is manifestly to enforce that measure of sobriety which is essential to the full and calm control of both the mental and physical faculties, and thus to protect the military administration from the great mischief to which it may be liable from the blunders and excesses of officers attempting to perform their duties under the influence of drink. Any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article; and should the condition of an officer accused of that offense not have partaken of this description, it is better that he be acquitted than that courts by endeavoring to mark degrees of drunkenness should attempt distinctions, which in practice would tend to defeat, in great measure, the purpose of the article." (Dig. Op. JAG, 1912, p. 540)

7. The court, as trier of the facts, had an opportunity to see the witnesses, observe their manner of testifying, hear their testimony, and had the right and duty to weigh the evidence, reconcile the variances, believe and accept that evidence which it found to be most credible under all the circumstances. The court was amply warranted in finding that, at the time and place alleged in the Specification, accused was drunk.

8. The evidence establishes without conflict that at the time accused was found drunk by General Loomis he was the commanding officer of:

(a) 144th Infantry; and
(b) Jacksonville Local Sector, Southern Sector, Eastern Defense Command.

Jacksonville Local Sector had geographical boundaries, embraced elements and troops assigned to it for duty, and had a definite military mission to perform. The performance of his duties, competently, at all hours and at all times as commanding officer of the regiment and the sector was vital to the security of the republic and the successful prosecution of the war.

> "The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty." (par. 145, M.C.M., 1928)

Accused was the commanding officer of a command or detachment in the field in the exercise of command within the meaning of the provisions of the Manual for Courts-Martial above quoted and as such was "on duty" as that term is used in the 85th Article of War when found drunk as alleged.

The court's finding that accused was guilty of violation of Article of War 85, finds sufficient legal support in the evidence.

9. The record of trial shows that the orders appointing the court and the action of the reviewing authority bear the caption: "Eastern Defense Command and First Army". The Commanding General, First Army, is empowered by Article of War 8 to appoint general courts-martial. The Commanding General, Eastern Defense Command, has not been empowered to appoint general courts-martial. It is presumed that in appointing the court and approving the sentence, the commanding general was acting only in his capacity as commanding general of the First Army and did not, in fact, act in his capacity as commanding general of the Eastern Defense Command.

10. All members of the court present at the trial signed the following recommendation for clemency:

> "This Court, on the evidence as submitted, has no option but to reach a sentence of dismissal of the accused from the service of the United States; at the same time it is strongly felt by each and every member of this Court that the Army of the United States is losing an exceptionally efficient officer by such dismissal. He has proved his capability through a period of years. It is probable that if the particular period and circumstances under which the charges were made had not occurred, Colonel Sandlin would continue to demonstrate his outstanding and actual superior ability. With such a belief,

the Court strongly and unanimously recommends that clemency be considered by the proper reviewing authority, such clemency to include remittal of the sentence."

11. Accused is 50 years of age. He graduated from Alexandria City High School, Alabama, and attended Alabama Polytechnic Institute for two years. The Army Register shows his service as follows:

"(Non-Federal: 2 lt. Inf. Ala. N.G. 10 July 10; 1 lt. 27 Apr. 14; capt. 31 Dec. 15 to 18 June 16.) - Capt. Fld. and Staff and M.G. Co. 2 Inf. Ala. N.G. 19 June 16; hon. dis. 30 Oct. 19; col. A.U.S. 11 Dec. 41; accepted 14 Dec. 41. - 1 lt. of Inf. 1 July 20; accepted 21 Sept. 20; capt. 1 July 20; maj. 1 Dec. 31; lt. col. 1 Feb. 40."

During his service as an officer 41 efficiency reports upon him have been rendered. Nineteen reports, covering aggregate periods of about 10 years and 1 month, show ratings of superior. Eighteen reports, covering about 7 years and 5 months, show ratings of excellent or above average. Two reports, covering about 1 year and 3 months, show ratings of very satisfactory or average. Two reports, covering about two years while accused was a student at the Command and General Staff School, show ratings of satisfactory "based on academic work". The efficiency reports contain numerous remarks attesting to accused's general efficiency and devotion to duty. He has been specially commended on three occasions. In 1925 he was admonished and reprimanded under Article of War 104 for using unnecessary violence in the arrest of a disorderly female colored servant employed on a military post.

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 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 85.

Andrew Copp Jr., Judge Advocate.

Wm Vanmatre, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 17 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 Colonel Erle O. Sandlin (O-5152), 144th 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, but commuted to a reprimand to be administered by the reviewing authority and to forfeiture of fifty dollars of accused's pay per month for six 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. to President.
Incl. 3 - Form of action.

(Sentence confirmed but commuted to reprimand and forfeiture of fifty dollars pay per month for six months. G.C.M.O. 125, 26 Jun 1943)

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

SPJGH
CM 234712

26 JUL 1943

UNITED STATES v. Second Lieutenant RALPH L. MEADOWS (0-1306621), Company B, 78th Infantry Training Battalion, 16th Infantry Training Regiment.	CAMP ROBERTS, CALIFORNIA Trial by G.C.M., convened at Camp Roberts, California, 16 April 1943. Dismissal.

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 Ralph L. Meadows, Company "B", 78th Infantry Training Battalion, Camp Roberts, California, did, without proper leave, absent himself from his organization at Camp Roberts, California from about March 27, 1943, to about March 29, 1943.

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

Specification 1: In that Second Lieutenant Ralph L. Meadows, Company "B", 78th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about March 30, 1943, with intent to deceive his Company Commander, officially state to the said Company Commander, that his duties in connection with paragraph 1, Special Orders No. 69, Headquarters Camp Roberts, California, had not been completed and that he was at the main Post Exchange Office on March 29, 1943, which statement was known by the said Lieutenant Meadows to be untrue in that he (Lieutenant Meadows) completed the inventory of Exchange Number 16, on or about 1145, March 27, 1943.

Specification 2: In that Second Lieutenant Ralph L. Meadows, Company "B", 78th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about March 30, 1943, with intent to deceive his Battalion Commander, officially state to the said Battalion Commander, that he (Lieutenant Meadows) returned to Camp Roberts, California, Monday morning, March 29, 1943 on the "Daylight" getting off the "Daylight" at King City, California, and returning therefrom via bus, arriving at Camp Roberts, California before noon, which statement was known by the said Lieutenant Meadows to be untrue.

He pleaded not guilty to and was found guilty of all Charges and Specifications and 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 relative to Charge I and the Specification thereunder is, in brief, as follows. The accused was in San Francisco, California, on 27 March and 28 March 1943, returning thence to Camp Roberts, California, "sometime during the

day" of 29 March 1943. When he failed to report on Monday morning 29 March 1943, Captain Percival M. Bliss, his company commander, after an unsuccessful search, reported him absent to Major Ernest S. Brown, his battalion commander. Captain Bliss did not see the accused until the following day when he appeared for duty in the company orderly room. Between 27 and 30 March 1943, the accused did not sign the register either out or in, as required of officers leaving and returning to the post; nor request nor receive a VOCO to be absent for that period (R. 13, 14, 22-25, 28, 30).

The evidence relative to Charge II and the two Specifications thereunder shows that the accused, in accordance with orders, assisted in taking an inventory of Post Exchange 16, which was completed and turned in on Saturday, 27 March, to E. J. Blair, Camp Roberts Exchange manager, who neither saw nor communicated with the accused on the following Monday. All necessary corrections were thereafter made by Lieutenant Aaron, who had assisted the accused in preparing the inventory (R. 6-12).

When, on 30 March 1943, Captain Bliss asked the accused where he had been on the previous day, the accused replied, very busy on his post exchange audit, for which reason he had not reported for company duty. On the same day, Captain Bliss participated in an interview between the accused and his battalion commander. In response to Major Brown's questions, the accused first stated he had been on the post on 29 March, working with Lieutenant Aaron to complete the audit. When Major Brown told the accused an investigation had disclosed his absence from the post on that day, the accused admitted that he had left the camp area during the afternoon of the 27th, and returned on the 29th, on the "Daylight", a Southern Pacific train which passes camp in the morning but does not stop; he therefore got off at King City and took a bus to camp, arriving around noon. He also admitted that he did not have the customary VOCO to be absent from the camp area over the weekend. The rule has been that officers will secure the verbal order of the commanding officer before leaving camp to go more than twenty-five miles; for a less distance, permission of the battalion commander is necessary; and officers living on the post, as the accused did, must sign out and in on the battalion register. It was stipulated that "Accused did not travel any part of the way on his return from San Francisco to Camp Roberts on the 'Daylight'", a Southern Pacific train which passes through King City en route from San Francisco to Los Angeles (R. 13-21, 24; Ex. B).

Major Brown stated, as did Captain Bliss, that the professional reputation of the accused had been excellent (R. 25-30).

4. The evidence for the defense shows that Second Lieutenant Abraham J. Aaron, along with accused, was ordered to take inventory at Exchange No. 16. He and the accused began on the afternoon of Thursday, 25 March 1943, and, about noon on Saturday, the 27th, left the completed inventory with Mr. Blair, who told them that probably on the Monday following, 29 March 1943, the post exchange records would be ready for comparison with theirs. Blair also stated that he would call the accused in the event he should need one of the officers who had prepared the inventory, in connection with his audit. Lieutenant Aaron later received a telephone call to make certain corrections, which he did on 31 March, finding then that no work had been done on the inventory which he and accused had prepared, after 11:45, 27 March 1943 (R. 30-34).

5. After being fully advised of his rights as a witness, the accused elected to make a short, unsworn statement and explanation through counsel, as follows:

> "'I missed the train leaving San Francisco at 1905 Sunday, March 28. There was no other train leaving there until the following morning, and that was the Daylight, which does not stop at camp. It stops only at San Luis Obispo and King City, so I had to catch a bus, and it delayed my arrival'. I am stating that this in substance is his statement of the occurrence of his return to camp from that week end and is his statement also as to the charges in Specification 2 of Charge II."

6. It was clearly established that the accused was absent without leave from Camp Roberts for two days, as alleged in the Specification, Charge I, in violation of Article of War 61. It is also shown that he made the two false statements set forth in the two Specifications under Charge II. However, these were both made at the same time in connection with the same facts, so virtually were parts of one statement. Although both charges are of grave offenses, still the accused had eighteen years of good prior service; no evidence of prior convictions was introduced, and a recommendation for clemency

was submitted by eight of the nine members of the court.

7. War Department records show the accused is 37 years of age. After eighteen years of prior enlisted service he attended the Officer Candidate School at Camp Rucker, Alabama, from 7 September 1942, until 2 January 1943, when he was commissioned a Second Lieutenant, 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 is authorized upon conviction of a violation of Article of War 61, and is mandatory upon conviction of a violation of Article of War 95.

Edward Dresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

SPJGN
CM 234712

1st Ind.

War Department, J. A. G. O., 31 July 1943 - To the Acting 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 Ralph L. Meadows (O-1306621), Company B, 78th Infantry Training Battalion, 16th Infantry Training Regiment.

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 of dismissal be confirmed, but 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 foregoing recommendation, should such action meet with your approval.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 232, 14 Sep 1943)

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

SPJGN
CM 234716

UNITED STATES	FORT KNOX, KENTUCKY
v.	Trial by G.C.M., convened at Fort Knox, Kentucky, February 16, 1943. To be shot to death with musketry.
Private HARRY STINSON (35100930), Company F, 2nd Infantry.	

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, 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. The accused was tried upon the following Charges and Specifications:

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

Specification: (Finding of not guilty.)

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

Specification: In that Private Harry (NMI) Stinson, Company F, 2nd Infantry, attached to Post Casual Detachment, Fort Knox, Kentucky, did, at Fort Knox, Kentucky, on or about October 29, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Scottsville, Kentucky, on or about December 1, 1942.

The accused pleaded not guilty to Charge I and the Specification thereunder. He pleaded guilty to the Specification, 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 of Charge II but guilty of violation of Article of War 61. He was found not guilty of Charge I and its Specification, and guilty of Charge II and its Specification. He was sentenced to be shot to death with musketry. 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 August 5, 1942, the accused, who was then a garrison prisoner, executed a written "parolee" agreement with the post prison officer under which he was permitted to work without an armed guard. This agreement contained the following provision:

> "The penalty for escape from confinement and desertion has been explained to me and I realize that if I escape or desert, I may be given a sentence of two and one-half years confinement at hard labor."

The prison officer testified that "orders were sent" for the accused to go to another post, "but he left before the orders -- before he actually understood the orders. He asked to go visit the Chaplain, I believe, prior to his going out on the orders and he just kept going. * * * He was still a Parolee when he was given permission to go visit the Chaplain and without guard by reason of the Parolee Agreement". The accused did not return to the stockade (R. 7-8; Ex. B).

The morning report of the Post Casual Detachment, dated January, 1943, shows that the accused absented himself without leave from confinement on October 29, 1942 (R. 7; Ex. A).

On December 1, 1942, the chief of police - to the introduction of whose deposition both the defense counsel and the accused stated they had no objection - apprehended the accused at his home in Scottsville, Kentucky. The accused had removed his uniform, put on his night clothes, and gone to bed. With reference to his intention to remain permanently absent from the service, the accused, at the time of his apprehension, told the arresting officer that "he was going back in a few days". He was wearing his uniform when, shortly after his arrest, he was turned over to the military authorities (R. 8; Exs. C, D).

A statement made by the accused to the investigating officer recites that the accused separated himself from the military service on June 27, 1941. This obviously refers to a former desertion for which the accused had previously been tried and sentenced on June 24, 1942. The same statement recites that the accused surrendered to the chief of police at Scottsville, Kentucky, on December 1, 1942, and that he was wearing his night clothes when taken into custody; further, that while separated from the military service "the second time", the accused was in uniform (R. 9; Ex. E).

4. The accused, after the president of the court had explained to him his rights as a witness, elected to make the following unsworn statement:

> "I am accused of breaking my parole but I am not guilty of that because my time was out on the 28th. I went 'over the hill' on the 29th and the reason why I went over the hill was on account of my baby being sick and I couldn't get no pass to go see him so I went 'over the hill' to see him. They didn't have a ticket made out for me to leave on so I went back to the Stockade and stayed over there until the 29th and then was when I left on the 29th, about ten o'clock in the morning" (R. 10).

Following the presentation of the unsworn statement of the accused, the defense rested. Thereafter the defense counsel made a closing argument and the court was closed. When it was re-opened "the president announced that the court desired further evidence as to the order given the accused to report at some other station". The defense thereupon recalled the prison officer who had previously testified for the prosecution. He then testified that on October 28, 1943, he had given the accused the following order:

> "THE PRISON OFFICE
> Fort Knox, Kentucky
>
> Oct 28 1942.
>
> WRITTEN ORDER
>
> "You, Pvt Harry Stinson ASN 35100930 will report to the Commanding Officer, NYPE New York City N.Y. without delay. Refusal or failure to obey this order will render you liable to trial by court-martial therefor.
>
> "The 58th and 96th Articles of War have been read and explained to the soldier named above.
>
> (signed) John L. Warrick
> JOHN L. WARRICK CAPT INF
> Prison Officer."

The accused signed a receipt at the bottom of the sheet of paper on which the original order was written, as follows:

> "I, the undersigned, acknowledge to have this date received from: Captain Warrick Inf, the above order, a copy of which was furnished me, and the contents of which I understand clearly.
>
> (signed) Harry Stinson
> HARRY STINSON
> Pvt. Co F 2nd Inf".

The prison officer, recalled, testified that he was under the impression that the accused knew where he was going "in that he had been given a copy of the order to read and sign"; following which, in response to a question by a member of the court, he testified he was certain the prisoner knew he was going to a port of embarkation.

5. The credible evidence shows that the accused left his station, without authority, following his receipt of orders directing him to "* * * report to the Commanding Officer, NYPE New York City N.Y. without delay", and remained absent without leave for 33 days, until apprehended in bed at his home, some sixty or seventy miles away. Whether he knew the initials "NYPE", appearing in his orders, stood for New York Port of Embarkation or not, is a question not resolved by the evidence; but his signed receipt and unsworn statement - "they didn't have a ticket made out for me to leave" - show that he knew these orders involved prompt departure for New York City, and the procurement of a ticket for his transportation there. His unsworn statement, moreover, is insufficient to account for his 33 days absence. This case is clearly distinguished from CM 124248 (1919) (p. 269, Dig. Ops. J.A.G., 1912-40) wherein it was held, "If the burden was on the accused to explain his absence without leave for 33 days, he met it fully", in that the undisputed evidence there showed that the seriously ill wife, to whose bedside in Kansas City he had gone absent without leave from Fort Leavenworth was sick for the duration of such absence; whereas here there is merely the assertion, in an unsworn statement, that the accused left "on account of my baby being sick and I couldn't get no pass to see him so I went 'over the hill' to see him". While it would not be fair to construe the expression "went over the hill" into an admission of an intent to desert, particularly in view of the accused's plea in this instance, the unsatisfactorily explained absence of 33 days, following orders of transfer to a distant post, terminated by apprehension, supply a legitimate basis for the inference that accused intended permanently

to abandon the service. Further, the explanation presented by the accused concerning the reason for his absenting himself is in no way corroborated.

The apparent inconsistencies in the testimony of the prison officer in testifying first that the accused did not understand the order to report to a port of embarkation and later testifying that he (the prison officer) was "quite certain" that the accused understood that he was to report to a port of embarkation, is scarcely material in view of the fact that the order in question bears the signature of the accused acknowledging the receipt of the order to report to the "NYPE New York City, N.Y. without delay", and the statement of the accused that "they didn't have a ticket made out for me to leave on so I went back to the Stockade and stayed over there until the 29th * * *.

Considered in its entirety, the evidence, beyond a reasonable doubt, supports the findings of guilty.

6. The order directing the accused to report to NYPE, New York City, N.Y. was placed in evidence by the defense counsel. Since this item of proof tends strongly to show a reason for the accused to desert the service, the action of the defense counsel in introducing it may be criticized. On the other hand, although the defense counsel may have erred in the exercise of his court-room judgment, the evidence in question at least tends to show that the accused had been officially released from the stockade prior to his departure. This fact in turn apparently caused the court to find the accused not guilty of the alleged breach of his Parolee Agreement.

In connection with the Parolee Agreement, it must also be observed that the provisions in that agreement which state that the accused might, by desertion, subject himself to confinement at hard labor for 2½ years, may have resulted in the accused being misinformed as to the maximum legal consequences of his offense. In view, however, of the legal principle that ignorance of the law excuses no man, the statement in the Parolee Agreement cannot be said to affect the legal sufficiency of the sentence. It does, however, suggest to the confirming authority the desirability of commuting the sentence of the accused to 2½ years.

7. The accused is 31 years of age. The charge sheet shows that he was inducted into the service in Louisville, Kentucky, on February 13, 1941. 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 of guilty and the sentence. A sentence of death, is authorized upon conviction in time of war of violation of Article of War 58

Chas. L. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 JUL 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 Harry Stinson (35100930), Company F, 2nd 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. 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 2½ years. I also recommend that the dishonorable discharge be suspended and that a rehabilitation center 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 foregoing recommendations, should they meet with your approval.

Myron C. Cramer

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

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

(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 2½ years. Execution of that part adjudging dishonorable discharge suspended until soldier's release from confinement. G.C.M.O. 179, 3 Aug 1943)

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

26 JUN 1943

SPJGH
CM 234756

UNITED STATES v. First Lieutenant HAROLD A. MERRILL (O-265847), Corps of Military Police.	)	NINTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Florence Internment Camp, Florence, Arizona, 25 and 29 March 1943. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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: Violation of the 61st Article of War.

Specification 1: In that 1st Lt. Harold A. Merrill, CMP, 379th Military Police Escort Guard Company, did, without proper leave, absent himself from his station at Florence Internment Camp, Florence, Arizona, from about 0900 on or about November 22, 1942 to about 1100, on or about November 25, 1942.

Specification 2: In that 1st Lt. Harold A. Merrill, CMP, 379th Military Police Escort Guard Company, did, without proper leave, absent himself from his station at Florence Internment Camp, Florence, Arizona, from about 0730, January 4, 1943, to about 0630, January 5, 1943.

ADDITIONAL CHARGE I: Violation of the 63rd Article of War. (Finding of Not Guilty)

Specification: (Finding of Not Guilty)

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

Specification: In that 1st Lt. Harold A. Merrill, SCU 1920, Florence Internment Camp, Florence, Arizona, did at Florence Internment Camp, Florence, Arizona, on or about January 31, 1943, draw and lift up a weapon, to wit: a revolver against 1st Lt. Samuel L. Woodard, his superior officer, who was then in the execution of his office.

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

Specification: In that 1st Lt. Harold A. Merrill, SCU 1920, Florence Internment Camp, Florence, Arizona, did, at Florence Internment Camp, Florence, Arizona, on or about January 31, 1943, conduct himself in a manner unbecoming an officer and gentleman, in this, that he then and there did use insulting and defamatory language toward and in the presence of another officer, to wit: 1st Lt. Samuel L. Woodard, by calling him, "You yellow-bellied son of a bitch", "You bastard", "You cock-sucker," or words to that effect, and did then and there draw a revolver and point said revolver at said 1st Lt. Samuel L. Woodard, and then and there say to said 1st Lt. Samuel L. Woodard, "Your number is up", or words to that effect.

He pleaded not guilty to all Charges and Specifications, and was found not guilty of Additional Charge I and the Specification thereunder, and guilty of all other 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 the 48th Article of War.

3. The evidence for the prosecution:

a. Specifications 1 and 2, The Charge: The morning report of 379th Military Police Escort Guard Company for November 1942 (Ex. B) and January 1943 (Ex. C) showed the accused from duty to absent without leave 23 November, from absent without leave to duty 25 November, from duty to absent without leave 4 January, and from absent without leave to duty 5 January. First Lieutenant Samuel L. Woodard, Company Commander, gave the accused oral permission to go to Tucson over the week end after completing work on Saturday, 21 November:

He did not see the accused from 21 November to 25 November. The accused did not have leave on either occasion (R. 14, 17-23).

b. Specification, Additional Charge II and Specification, Additional Charge III: First Lieutenant Samuel L. Woodard was ordered to active duty by Special Orders (Ex. A) fixing his date of rank as 2 July 1942, and the accused was ordered to active duty by Special Orders (Ex. D) fixing his date of rank as 12 July 1942. The accused and Lieutenant Woodard were assigned to 379th Military Police Escort Guard Company and the accused placed in command of that organization by Special Orders, Ninth Service Command. About a week later, the post commander discovered that Lieutenant Woodard was the senior officer, and on 22 October 1942 issued a verbal order relieving the accused as company commander. Lieutenant Woodard assumed command on that date. On 23 October Lieutenant Woodard issued a Company Order (Def. Ex. 1) by which he assumed command and the accused was relieved of command. The accused became Executive Officer. On 5 January 1943 an order (Ex. F) was issued by the camp commander by which the accused was placed in arrest in quarters. On 31 January 1943 the accused was in arrest in Bachelor Officers Quarters No. 2 on the second floor. The quarters occupied by the accused were next to the room of Lieutenant Woodard, which adjoined that of Second Lieutenant Neal A. Broyles. The entrance to Lieutenant Woodard's room was through Lieutenant Broyles' room. The partition between the rooms of Lieutenant Woodard and the accused was of plasterboard, through which voices could be heard (R. 14-17, 22, 25, 29, 34, 39, 41, 52-53).

On Sunday, 31 January 1943, Lieutenant Broyles stopped in the room of accused for a few minutes about 7:15 p.m. on his way to his own room. The accused was not drunk, but decidedly under the influence of intoxicating liquor of some kind, and was "under the impression that he was being unduly punished by having to stay in quarters for as he termed it twenty-six days without being tried". Lieutenant Broyles had been in his own room thirty or forty minutes when Lieutenant Woodard passed through to his room. About 8:25 p.m. Lieutenant Woodard heard the voices of two noncommissioned officers in the room of the accused, and heard the accused say he would go downstairs and order some beer. The three men were talking in a moderate tone of voice and were not disturbing Lieutenant Woodard's "peace". Lieutenant Broyles heard the voices but they did not disturb him in any way. Lieutenant Woodard then stepped into the hall and saw the accused and the two noncommissioned officers going downstairs. He followed them until the accused picked up the telephone

on the first floor. Lieutenant Woodard then asked the two noncommissioned officers what they were doing in the room of the accused, told them to return to their quarters immediately, and said to the accused, "If you are smart, Merrill, you will go back to your room". When Lieutenant Woodard and the accused reached the top of the stairs on the way back to their rooms, the accused called Lieutenant Woodard a "God Damn Son of a Bitch" and said "you caused me a hard time". Lieutenant Woodard said "Merrill, you would like for me to take a poke at you wouldn't you", to which the reply was made, "I sure would". Lieutenant Woodard then said "If I did I would be as big a fool as you are"; and they went to their rooms. Lieutenant Broyles heard the conversation and heard the accused use profane language addressed to Lieutenant Woodard, but could not remember the exact wording. The accused kept telling Lieutenant Woodard that he "didn't think it was fair and just, the punishment he was being subjected to, being confined to his room" and said "I will get even with you if it is the last thing I do". After returning to his room the accused started talking to Lieutenant Woodard through the plaster-board partition, called him a "No good cock-sucker" and "a yellow son-of-a-bitch" and said "One of these days I am going to get you. You caused me a hard time". Lieutenant Broyles testified that the accused was in his room "muttering to himself". He could not give the language used, but the accused seemed to be expressing protests and dissatisfaction. Then Lieutenant Broyles heard the accused raise his voice and say "I am going to kill you". Lieutenant Woodard then came through Lieutenant Broyles' room, motioned him to follow, and they went to the room of the accused (R. 25-26, 33, 40-42, 44).

As they entered, the accused appeared in the doorway between his room and that of First Lieutenant William R. Bond, which adjoined, and had in his hand a small colt .32 calibre revolver (Ex. E) Unknown to Lieutenants Woodard and Broyles, it was unloaded. Lieutenant Woodard advanced to about three feet from the accused, who kept the revolver pointed at the stomach of Lieutenant Woodard, and the accused said "You yellow cock-sucker, I am going to kill you", according to Lieutenant Woodard, and "You yellow son-of-a-bitch, I am going to kill you right now", according to Lieutenant Broyles. The latter said "For God's sake, Harold, put that gun away", and the accused replied "No, I am going to kill the bastard", according to Lieutenant Woodard, and "No, I have a chance to use it and I am going to", according to Lieutenant Broyles. The accused took a fresh grip on the revolver and "shoved" it forward two or three inches. In a few seconds, Lieutenant Woodard struck the accused in the face with his right fist and knocked

him off balance; they grappled and fell to the floor. Lieutenant Broyles disarmed the accused, who was then permitted to get up. Lieutenant Woodard was in fear of his life, but Lieutenant Broyles was not. During the occurrence the accused did not raise the gun up to strike Lieutenant Woodard nor Lieutenant Broyles (R. 26-28, 36-37, 42-43, 46, 48).

4. The evidence for the defense showed that by Special Orders, Ninth Service Command (Def. Ex. 2), the accused was on 7 January 1943 relieved from assignment and duty with 379th Military Police Escort Guard Company and assigned to Service Command Unit 1920, and that on 31 January 1943 the accused was under the command of the commanding officer of the camp. On the evening of 31 January, Captain Grosvenor A. Morse was in Officers' Quarters during the events in evidence, but heard and saw nothing of consequence. First Sergeant John I. Pierce and "Corporal Ellis" went to the room of the accused on the evening of 31 January. When they had been there about ten minutes, they and the accused started downstairs to the telephone. Lieutenant Woodard then appeared and ordered Sergeant Pierce and Corporal Ellis to their quarters, and they left. First Lieutenant William R. Bond testified that the revolver (Ex. E) belonged to him and that it was a starting pistol in which he used blanks. He was the roommate of the accused and never knew the accused to be anything other than "a gentleman and an officer". Lieutenant Colonel Alvin Kirmse, Medical Corps, observed the accused while confined in the hospital and testified that the accused had not been unruly in any way, that "there never has been any fault", that the accused had been an officer and a gentleman, that he (Colonel Kirmse) would, if it were possible, assign the accused to duty in his office, and that he had no complaints about accused, either from nurses or others (R. 51-55, 58-63).

The accused was properly informed of his rights. The President, who was the law member, then instructed the accused to take time to consult with his counsel, and stated that an officer on trial by court-martial "should take the stand and face his fellow officers" and that this was "one of the old customs of the service". There was a five minute recess, after which the accused elected to make a "sworn statement". His testimony was in substance as follows: He had had nearly fourteen years in military service, of which nearly nine years was commissioned. His service began in 1917, when he enlisted in the Aviation Section of the Signal Corps. He served more than eighteen months overseas. He had never before been charged with violation of the Articles of War. He had always attempted to do his duty in a soldierly manner, even after being relieved of command of 379th Military Police Escort Guard Company. He observed all commands promptly and to the best of his ability. He had never shown and "did not at that time disrespect to my known superiors either on or off duty". He may at times have been "a little indiscreet" or used bad judgment, but was never intentionally

disobedient or disrespectful. He volunteered his service "for this war" and desired to be returned to duty so that he might have an active part in the war effort. On cross-examination it was brought out that his service between 12 July 1919 and 12 July 1942 was with the National Guard. He accepted the order naming Lieutenant Woodard as commanding officer, as written (R. 64-68).

5. a. Specifications 1 and 2, The Charge: The evidence shows that the accused was absent without leave from 23 November to 25 November 1942 and from 4 January to 5 January 1943.

b. Specification, Additional Charge III: The evidence shows that on 31 January 1943 the accused used language in the presence of and with reference to First Lieutenant Samuel L. Woodard substantially as alleged and at or about the same time pointed a revolver at Lieutenant Woodard. Among instances of violation of the 61st (95th) Article of War, Winthrop includes using insulting and defamatory language, without justification, to another officer, or of him in the presence of other military persons, or behaving towards him in an otherwise grossly insulting manner, as well as making a violent assault without due cause upon another officer (Winthrop's Military Law and Precedents, reprint, p. 714). There is no justification shown in the evidence for the grossly insulting language used by the accused, or for the assault committed in pointing a revolver at Lieutenant Woodard in the manner shown.

c. Specification, Additional Charge II: Lieutenant Woodard was the superior officer of the accused since they were of the same grade and Lieutenant Woodard's date of rank was prior to that of the accused. Lieutenant Woodard was Company Commander of 379th Military Police Escort Guard Company, but the accused had not been assigned to that organization since 7 January 1943. The evidence does not show any military control exercised over the accused by Lieutenant Woodard on 31 January 1943, and indicates clearly that the difficulty between them was personal rather than official.

A necessary element of the offense of violating the 64th Article of War by lifting up a weapon against a superior officer is that the superior officer is at the time in the execution of his office (MCM, 1928, par. 134a). Where a superior officer has no official relation to an accused at the time when the accused strikes him, the officer is not in the execution of his office within the meaning of the 64th Article of War (Bull. JAG, Jan.-June 1942, sec. 422 (1)). It follows that a violation of the 64th Article of War is not shown. It is unnecessary to consider whether the accused was guilty of a lesser included offense of assault under the 96th Article of War inasmuch as

he was found guilty of a violation of the 95th Article of War, based in part on the same facts (Spec., Add. Chg. III).

6. The action of the President and law member in advising the accused that he "should" take the stand is clearly error. However, the accused was fully and properly advised of his rights, he stated that he understood the explanation, and a recess was taken in order that the accused might consult with his counsel. The testimony of the accused as given, was not prejudicial to his interests. In view of these circumstances the Board of Review is of the opinion that this error did not affect the substantial rights of the accused.

7. Careful consideration has been given to Defense Brief by Captain Nat W. Washington, Air Corps, and letter of 15 January 1943 by First Lieutenant William G. McAllister, Corps of Military Police, letter of 29 January 1943 by Captain Donald E. Casey, Infantry, and letter of 5 April 1943 by First Lieutenant George O. Hamrick, Corps of Military Police, with reference to the accused.

8. The accused is 43 years of age. The records of the Office of The Adjutant General show his service as follows: appointed temporary first lieutenant, Army of the United States, 19 June 1942, and active duty 12 July 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 insufficient to support the findings of guilty as to Additional Charge II and the Specification thereunder, legally sufficient to support the findings of guilty of all other 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 Article of War, and mandatory upon conviction of a violation of the 95th Article of War.

On Leave, Judge Advocate

Samuel M. Driver, Judge Advocate

T. J. Lottuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 13 JUL 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 Harold A. Merrill (0-265847), Corps of Military Police.

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 of Additional Charge II and the Specification thereunder, legally sufficient to support the findings of guilty of all other Charges and Specifications, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused was absent without leave from 23 November to 25 November 1942 and from 4 January to 5 January 1943 (Specs. 1 and 2, Chg.), in violation of the 61st Article of War, and stated of and to another officer "You yellow-bellied son of a bitch", "You bastard", and "You cock-sucker", or words to that effect, and pointed a revolver at the other officer (Spec., Add. Chg. III), in violation of the 95th Article of War. The accused was found not guilty of Additional Charge I and the Specification thereunder. I recommend that the sentence be confirmed but in view of all of the circumstances, that the execution thereof be suspended during the pleasure of the President, 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 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- Drft. ltr. for sig. Sec. of War.
Incl.3- Form of Executive action.

(Findings of guilty of Additional Charge II and Specification thereunder disapproved. Sentence confirmed but execution suspended. G.C.M.O. 194, 6 Aug 1943)

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

JUN 5 1943

SPJGH
CM 234787

UNITED STATES	)	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
First Lieutenant WALTER KLOTZ (0-497030) 710 M.P. Battalion (Z/I).	)	Trial by G.C.M., convened at Omaha, Nebraska, April 15 and 29, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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 95th Article of War.

Specification 1: In that 1st Lt Walter Klotz, 710th MP Battalion (Z/I), being then and there a married man, having a lawful, living wife, and not being divorced, did, at Omaha, Nebraska, on or about March 5, 1943, wrongfully and falsely introduce a woman, one Margaret Underwood, as his wife to Captain Aaron Clarno, CMP, and to Mrs. Aaron Clarno, when in fact the said woman, Margaret Underwood, was not the wife of the said Lt Klotz, as he, the said Lt Klotz, then well knew.

Specification 2: In that 1st Lt Walter Klotz, 710th MP Battalion (Z/I), being then and there a married man, having a lawful, living wife, and not being divorced, did, at Fort Omaha, Nebraska, on or about March 26, 1943,

wrongfully and falsely introduce a woman, one Margaret Underwood, as his wife to Lt Col D. K. Scruby, Inf, and to divers other persons, when in fact the said woman was not the wife of the said Lt Klotz, as he, the said Lt Klotz, then well knew.

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

Specification: In that 1st Lt Walter Klotz, 710th MP Battalion (Z/I), being then and there a married man, having a lawful, living wife, and not being divorced, did, at Omaha, Nebraska, from on or about March 5, 1943, to on or about April 5, 1943, wrongfully, dishonorably and unlawfully live and cohabit with one Margaret Underwood, a woman not his wife.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1, Charge I, of Specification 2, Charge I, except the words "to Lt Col D. K. Scruby, Inf, and", of Charge I and of Charge II and the Specification thereunder. 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:

On March 5, 1943, the accused reported for duty to Captain Aaron Clarno, C.M.P., Commandant of the Seventh Service Command, Military Police Training Center, Omaha, Nebraska. The accused stated that his wife was down at the hotel. Later in the day Captain Clarno took the accused downtown and went to the room of accused in the Wellington Hotel where accused introduced a woman to Captain Clarno as his wife, Mrs. Klotz. She was about twenty years old, was about five and one-half feet tall, weighed about one hundred forty pounds, with a brownish tint to her hair, and spoke with a southern accent. Captain Clarno took them to his home, introduced them to his wife as Lieutenant and Mrs. Klotz. In the evening Captain Clarno and his wife took them around looking for an apartment and located one at 4117 North 24th Street, Omaha (R. 1-10, 24).

Mrs. Gertrude Conway, who operated the rooming house at 4117 North 24th Street, rented the apartment to the accused. An auburn hair girl, who weighed about one hundred forty pounds, was about twenty

years old and talked like a southern girl, looked at the apartment with accused. The accused paid the rent that night for the apartment. On the following Saturday, the accused and the woman who looked at it with him came to the apartment and occupied it until about the fifth of April. The apartment was a two-room furnished apartment and had one bed. The woman paid the rent after the first payment by accused. Mrs. Conway saw them occasionally and noticed nothing unusual about them. About April 5, after the woman said one morning that the accused was going down to headquarters, the woman left, and the accused thereafter continued to live at the apartment (R. 28-33).

On the evening of March 26, 1943, Captain Clarno and his wife attended a party at the Officers Club, Fort Omaha. The accused and the woman whom he had introduced to Captain Clarno as his wife were there. Mrs. Clarno introduced accused and the woman to Colonel Scruby, the post commander, and to the other guests as Lieutenant and Mrs. Klotz (R. 11 -13, 25-27).

About April 3, 1943, Captain Clarno noticed on the office desk of accused a letter addressed to the accused which had as a return address "Mrs. Rose Klotz, Junction City, Kansas" (R. 13-14).

In response to questions of the defense, Captain Clarno stated that he first learned that there was some question about the identity of the woman whom accused introduced as Mrs. Klotz, in the latter part of March. There was introduced in evidence, Exhibit 1, a document which was stipulated to be a certified true copy of the original marriage license of accused and Rosina Clark. The license was issued on March 20, 1929, from the Office of the Probate Judge, Riley County, Kansas, and authorized the marriage of Walter Klotz, age 21, of Abilene, Kansas, and Rosina Clark, age 18, of Junction City. It contained an indorsement of the Probate Judge that he had performed the marriage ceremony on March 20, 1929. There was also introduced a certified copy of pay voucher of accused, stipulated to be a true copy of the original signed by accused for the month of March, 1943, Exhibit 2, which stated as a dependent, "Lawful wife: Rosina Klotz--Junction City, Kansas" (R. 16, 33-35).

It was stipulated that Rosina May Klotz, if present, would waive any privilege to refuse to testify and would testify that her maiden name was Rosina May Clark; that she was married to accused at

Manhattan, Kansas, on March 10, 1929, had ever since been and was now his wife, and had never been divorced from him; that she resides in Junction City, Kansas; that she is 32 years of age, five feet five inches tall, has brown hair and a fair complexion, weighs one hundred thirty pounds, and has no particular accent to her voice; that she and accused have a twelve year old boy; that she was not in Omaha, Nebraska, at any time during March and April 1943, had never lived with accused at any place in Omaha; and that she and accused had not lived together since September 1942.

Major Orlin A. Weede, identified a signed sworn statement (R. 39; Ex. 4), made to him by accused after the 24th Article of War had been read to accused, which was admitted in evidence as Exhibit 3, after certain portions were stricken out by stipulation. The statement shows that accused is 38 years old, enlisted in the Second Cavalry in June 1925, and had since been continuously in service. He was commissioned first lieutenant, CMP, AUS, October 29, 1942, from the grade of master sergeant in the Regular Army. He had resided at 4117 North 24th Street, Omaha, since the fifth or sixth of March. Mrs. Margaret Underwood lived with him there until April 6, 1943. She was not his wife. Mrs. Rosina May Klotz, his wife, and their 13 year old son live in Junction City, Kansas. He had not resided with his wife since September 1942, when the last of four separations since their marriage on March 10, 1929, occurred. He had lived with Mrs. Margaret Underwood as husband and wife in the same living quarters at 4117 North 24th Street until April 6, 1943. He had an agreement with his wife, that he could get a divorce and planned to do so in June 1943. On March 26, 1943, at a party at the Officers Club, Fort Omaha, he introduced Mrs. Margaret Underwood, as "Mrs. Klotz", and as his wife to a number of people including Army officers. Mrs. Clarno, in his presence, introduced Mrs. Underwood as "Mrs. Klotz" to Lieutenant Colonel Scruby, who was in command of Fort Omaha. Accused had represented to Captain and Mrs. Clarno on March 5, 1943, and on other occasions, that Mrs. Margaret Underwood was "Mrs. Klotz", his wife (R. 35-39, 42-43).

4. The defense introduced in evidence the honorable discharge of accused with character "Excellent", dated October 28, 1942, as master sergeant, to accept a commission (Def. Ex. A).

It was stipulated that if present, Brigadier General Charles S. Kilborn would testify that he had found the accused a faithful, forthright, efficient, honest soldier in the Second Cavalry and in the

Headquarters Detachment, 11th Armored Division, and an exemplary example to his detachment (Def. Ex. B); that Colonel E. F. Thompson, Cavalry, would testify that he had known accused during eight years at Fort Riley, that his character was excellent, his performance of duty of a high order, and that he considered him to be of excellent value to the service; and that Colonel A. A. Frierson, Cavalry, would testify that during two years that accused was under his command, his character rating was excellent and his performance of duty, attention to duty and value to the service were superior (Def. Exs.C, D) (R. 44).

The accused made an oral unsworn statement that he had not lived with Rosina May Klotz since before September 1942. He learned in September that she was pregnant by another man with a child which is expected to be delivered in June 1943. She is willing that accused have a divorce. He would have taken steps to get a divorce before, except that he was advised that he could not obtain a divorce in Kansas until after the child was born (R. 45-46).

5. The motion of the defense to strike portion of affidavit relating to Specification 2, because prosecution has not offered evidence of corpus delicti, was properly denied (R. 43-44). The circumstances shown with respect to the introductions made at the party sufficiently indicate that the offense was probably committed and sufficiently evidences the corpus delicti to support the admission of the confession.

6. With respect to Specification 1, Charge I, the evidence shows that the accused on March 5, 1943, introduced to Captain Clarno, as his wife, a woman, Mrs. Margaret Underwood, who was not his wife. The accused admitted in his statement to the investigating officer that he also introduced her to Mrs. Clarno, as his wife and that Mrs. Rosina Klotz was then his living and undivorced wife.

With respect to Specification 2, Charge I, the evidence shows that on March 26, 1943, at a party at the Officer's Club, Fort Omaha, the accused and the woman whom he had introduced to Captain Clarno as his wife were present. With the accused standing right alongside, Mrs. Clarno introduced the accused and the woman as Lieutenant and Mrs. Klotz to Colonel Scruby and to guests at the party. The accused in his statement to the investigating officer, admitted that at that party, he introduced Mrs. Margaret Underwood as Mrs. Klotz and as his wife to a number of people including Army officers, and that Mrs. Clarno introduced her to Colonel Scruby as Mrs. Klotz.

With respect to the Specification, Charge II, the evidence shows, and the accused in his statements to the investigating officer admitted that he rented an apartment at 4117 North 24th Street, Omaha, Nebraska, on March 5, 1943, and from the following Saturday (March 6), occupied that apartment until about April 6, 1943, with Mrs. Margaret Underwood as husband and wife.

The proof shows conclusively and the accused in his statements to the investigating officer admitted that his lawful and undivorced wife was then living and that Mrs. Margaret Underwood was not his wife.

In his unsworn statement to the court the accused stated that he had not lived with his wife since before September 1942, that he learned in September that she was pregnant by another man, that she was willing that he obtain a divorce, and that he would have taken steps to secure a divorce before except that he had been advised that he could not obtain a divorce in Kansas until after the child was born.

The evidence with respect to the two Specifications, Charge I, shows conduct unbecoming an officer and a gentleman in introducing as his wife, a woman not his wife, to the officers and ladies of the post and into the social life of the post. Such conduct offends against good morals, violates public decency and propriety and is cognizable under the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint 1920, p. 718).

7. The accused is 38 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from June 30, 1925: discharged as master sergeant, September 21, 1943, to accept commission as first lieutenant, C.M.P., Army of the United States; active duty October 29, 1943.

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 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 and authorized upon conviction of a violation of the 96th Article of War.

_____, 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 opinion of the Board of Review in the case of First Lieutenant Walter L. Klotz (0-497030), 710 M. P. Battalion (Z/I).

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 introduced as his wife, a woman not his wife to his immediate commanding officer and at a party on the post introduced the same woman to divers persons as his wife. He rented an apartment and there lived and cohabited for a month with this woman, who was not his wife, during which time he had a lawful, living and undivorced wife. I recommend that the sentence to 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 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- Dfrt. ltr. for sig. Sec. of War.
Incl.3- Form of Executive action.

(Sentence confirmed but execution suspended. G.C.M.O. 192, 5 Aug 1943)

Incl #24

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

SPJGK
CM 234815

9 JUL 1943

UNITED STATES	)	2ND INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp McCoy, Wisconsin, 22 April, 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant ISHAM FANN (0-482384), 9th Infantry.	)	

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

Specification: In that Second Lieutenant Isham Fann, Ninth Infantry, was, at Camp McCoy, Wisconsin, on or about March 24, 1943, in a public place, to wit, Service Club Number One, drunk and disorderly while in uniform.

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

Specification: In that Second Lieutenant Isham (NMI) Fann, 9th Infantry, having been restricted to the limits of the post, did at Camp McCoy, Wisconsin, on or about March 23, 1943, break said restriction by going to LaCrosse, Wisconsin.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the findings of guilty of Charge I and its Specification as involved a finding of guilty of being drunk in uniform in a public place in violation of Article of War 95, approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that accused is a second lieutenant, 9th Infantry, stationed at Camp McCoy, Wisconsin (R.4).

.The prosecution and defense joined in stipulating:

"That on March 23, 1943, continuously throughout the day the accused was restricted to limits of the post of Camp McCoy, Wisconsin, that on March 23, 1943, the accused went to LaCrosse, Wisconsin, for the purpose of getting a watch which had been in repair." (R.3-4)

First Lieutenant Hobert W. Howell, Corps of Military Police, saw accused in LaCrosse, Wisconsin, about 11 o'clock the night of 23 March 1943 in the "Happy Hour" (R.18,19).

Accused was seen leaving Service Club No. 1, Camp McCoy, at about 11 o'clock on the morning of 24 August 1943 by Privates Floyd A. Osborn and Joy D. Pawless, military police (R.5,6,12,13). As accused came out of the front door, there was a soldier with him assisting him (R.6,13). Accused said something to the soldier and the latter went back into the service club. About that time two girls came out to catch a bus and accused spoke to them. Accused started down the steps. He seemed to be pretty wobbly (R.6) and fell down the steps. The girls started to help accused and were joined by Privates Osborn and Pawless who tried to assist. Accused told the soldiers to keep their "damned hands off of him" (R.6,13). The military police phoned their orderly room and a jeep was sent down. Accused refused to enter the jeep, returned to the service club and "wanted to go out the back door" (R.6). This, Private Osborn refused to permit. Accused finally got in the jeep. He was driven to the station hospital for a "blood test" (R.6, 13).

At the station hospital accused refused to permit the blood test to be taken (R.6,23). A Lieutenant Shaine, Military Police, who did not testify, attempted to remove accused's blouse forcibly, and accused "made a pass at Lieutenant Shaine" (R.6). He did not strike at him but he pushed him away (R.23). After about fifteen minutes, Lieutenant Colonel William D. McKinley, 9th Infantry, accused's battalion commander (R.35,36), arrived, took accused away, and placed him under arrest in quarters (R.23).

Private Osborn, who saw accused at the service club and accompanied him to the station hospital, testified that accused was drunk (R.10). He said, "I don't know how drunk he was, he just couldn't walk"

(R.8); also, "he seemed to be pretty wobbly" (R.6); and, "he mumbled a bit, but I could still understand him" (R.10). Private Osborn testified that at the service club accused was not "conspicuously disorderly" and did nothing disorderly (R.9).

Private Pawless, who also saw accused at the service club and accompanied him to the station hospital, testified that accused was staggering and could not walk straight (R.13); that accused was "drunk", "his tongue was thicker than it is supposed to be"; that accused "did not wave his hands around in the air" or "talk loud"; that he could be understood; that he got into and out of the jeep without assistance; that accused was "just drunk enough not to be able to handle himself too well"; that accused "knew what he was doing when he got in and out of the car" (R.15-18).

First Lieutenant Hobert W. Howell, Corps of Military Police, observed accused in the jeep on the way to the station hospital and also at the hospital (R.18,19). He testified that accused was drunk, that he could not walk straight nor talk coherently (R.20). On cross-examination Lieutenant Howell stated that accused asked to be taken to his own organization, and that he understood accused. He testified that in his experience with many drunks there are three stages of drunkenness - "slight, middle, and the pass-out stage" - and that accused was in the second stage. He said that accused was not loud or boisterous in his presence. On examination by the court, Lieutenant Howell qualified his former statement as to accused's inability to talk coherently. He said accused "talked fair". He testified accused was in uniform (R.20-22).

First Lieutenant Arthur Steinberg, Medical Corps, saw accused at the station hospital. He was on hand to take the blood test for alcoholic concentration. He stated that accused refused to permit the test to be taken saying that "he wasn't obligated to do it"; that accused refused to take off his blouse and roll up his sleeve; that Lieutenant Shaine "attempted to remove his coat", but was unsuccessful, and that accused "was sufficiently boisterous several times" so that he had to be told to calm down (R.23). The witness refused to qualify as an expert and say whether he thought accused was drunk or sober (R.23), but as a "non-expert" he testified that accused was drunk (R.25). He described accused's speech as "thick" and his gait as "unsteady". He said accused admitted having been drinking (R.24).

Accused took the stand and testified in his own behalf (R.26). He said that late in the afternoon of 23 March, he with a group of second lieutenants had been called to regimental headquarters and told to get

their affairs in order to move out within the next day or two. Accused said he understood he could do what was necessary to get his affairs in order (R.27), and he assumed the restriction had been lifted by his being placed on orders to get ready to move (R.28). He had a watch in repair at LaCrosse and went there to get it. He could not afford to leave it. He was accompanied by a Lieutenant Van Hoy, a very close friend. Lieutenant Van Hoy had a date. They planned to return to camp together that night. They became separated. At 11 or 12 o'clock accused went to the Hotel Stoddard, registered and retired, leaving a note for his friend who was also registered there (R.27,30). The bus for camp did not leave until 9:30 A.M. Before that time he had had breakfast and probably three drinks before breakfast and three afterwards, little whiskey glass size (R.29). Before taking the bus he called his wife at Enterprise, Alabama, and told her he was leaving, perhaps for overseas (R.27). Arrived at camp he got off at Service Club No. 1 and remained there for about thirty minutes. As he left a soldier opened the door. A bus came up in front. He asked two girls who came out of the club if it was an inter-camp bus. As he started down the steps he stumbled. The two "MPs" came up. Accused felt he did not need their assistance, he told them to keep their hands off him. Accused refused to disclose his organization. The military police phoned, a jeep arrived, accused was asked to get into the jeep, and he refused. He asked to be taken to his organization. This was promised and he then got into the jeep. They met two lieutenants, military police, and proceeded to the hospital. There accused refused to permit a blood test. Lieutenant Shaine attempted to remove his coat and accused pushed his hands away. Colonel McKinley came in, spoke to accused, and had him taken back to his quarters. Accused said he may have raised his voice in protest against the blood test, but he did not shout or yell (R.27). To the court, accused answered that he had gotten off at the service club to buy some cigarettes, the post exchange not being open; that he had refused the blood test because he believed he had a right to refuse it; that while he didn't believe he was drunk, he realized that the test "would indicate a bit of alcohol" (R.29,30). Accused on redirect examination said he had not "felt too good" about the orders he had received on 23 March; that he felt he had not yet established himself as a good officer in his organization; that he felt he was being "shanghaied"; and that he felt "low and depressed" on the morning of 24 March. He added that one reason for his drinking was that he had talked to his wife, that it was hard to tell her "good bye", that he did not know when he would see her again (R.30,31). Lieutenant Colonel William D. McKinley testified for accused (R.35), clarifying the latter part of accused's testimony which referred to his dissatisfaction at being sent away.

Lieutenant Colonel McKinley was not only accused's battalion commander and the accuser, but was individual defense counsel. This witness in his testimony referred to accused's testimony that he felt he was being shanghaied, and that he had not had time to establish himself as a good officer. The lieutenant colonel explained that accused came to him about two months before as a salvage case, with reclassification proceedings against him launched by his previous regiment on the ground that he had had less than one month's duty with troops. From the start witness "endeavored to establish accused's confidence" and to "build his feeling of security". The witness told accused that if he did fine work an efficiency report could be turned in that would remove the reclassification proceedings and he would have a permanent home and not have to fear about parting without being told exactly why. The witness testified further that two days before accused was ordered to a replacement center a letter arrived which as a result of accused's good work removed the reclassification proceedings and that unfortunately this fact was never communicated to accused who had no idea as to his status. The witness expressed his conviction that had he had an opportunity to explain to accused that night that "he was going with a clear slate, that he wouldn't have gotten into difficulties". The witness added, in this connection, that accused had performed the work of a good officer in his organization (R.38).

With respect to the incident at the station hospital, Lieutenant Colonel McKinley said that he saw accused from a position at the door of the laboratory where accused was taken for a blood test. There were loud noises in the laboratory. The voice that the witness identified was that of Lieutenant Shaine. He heard Lieutenant Shaine say "Listen here, do I have to throw you down on the ground again or will you do what I tell you" (R.36). The witness said that accused was thoroughly aroused, "an antagonistic man, but not more so than anyone would have been under the circumstances". He said that when he spoke to accused the latter quieted down. He characterized his charges as an "administrative charge". He said that accused's conduct was not disorderly in any way, that when he took accused in charge his conduct was "beyond reproach" (R.36). Lieutenant Colonel McKinley refused to testify that accused was drunk beyond saying that accused was not in sufficient possession of his faculties to command troops at that moment. In his opinion accused's conduct was not unfavorable considering the circumstances (R.37).

Captain Vernon T. Adler, 9th Infantry, testified for the accused. He saw him at the hospital on the morning in question. He saw accused walk into the hospital. Accused was not staggering and was not being assisted. He was very quiet, very normal, talking coherently and in possession of his faculties (R.31,32).

4. On all the testimony, there can be no doubt that accused was drunk when observed by the two military police at Service Club No. 1, Camp McCoy. Accused was in uniform and the service club was a public place. Accused was not grossly drunk. His condition seems best described by Lieutenant Howell who placed accused in the "middle" drunk category. At the service club, accused staggered. He fell down the steps of a porch. He may well have stumbled, as claimed, or slipped. However, accused got into the jeep and out of it, unassisted. When he entered the hospital he was not staggering. Accused certainly was not so incoherent as to be unable to make his wishes clearly understood. Privates Osborn and Pawless both understood accused, as did Lieutenant Howell. Private Pawless' characterization of accused's condition is undoubtedly accurate. He was "just drunk enough not to be able to handle himself too well". Accused was not disorderly at the service club. Private Osborn said that he did nothing disorderly. There was loud talk and a brushing away of officious hands at the station when Lieutenant Shaine attempted to remove accused's blouse. Inasmuch as Specification 1 does not allege disorderly or improper conduct at the station hospital, it is unnecessary for the Board of Review to consider the question of whether accused was justified in refusing to submit to a blood test and in resisting efforts to accomplish the test by force.

It is the opinion of the Board of Review that accused was not drunk and disorderly in a public place, while in uniform, as alleged in Specification 1, in violation of Article of War 95, but that accused was drunk, while in uniform, at Service Club No. 1, in public, in violation of Article of War 96.

As to Charge II and its Specification, there was a technical breach of restriction, in violation of Article of War 96. Although accused doubtless believed that he was authorized to leave camp, and although he may be deemed to have acted in good faith, willful or wrongful intent is not an essential allegation or element in the offense of breach of restriction. Accused should have known that the circumstances required inquiry as to his rights and obligations. There was no such emergency as justified him in taking matters into his own hands. An analogy is found in breach of arrest under Article of War 69, where intention or motive for breach is immaterial and "proof of inadvertance of bona fide mistake is admissible in extenuation" (M.C.M. 1928, par. 139 a).

5. War Department records show accused is 24 years old. He graduated from Georgia Military College and was certified as eligible for appointment in the Officers' Reserve Corps upon attaining his 21st birthday. He was commissioned a second lieutenant, Infantry Reserve, 4 July 1942. He was ordered to and reported for extended active duty 15 August 1942.

On 23 December 1942 accused was tried before a general court-martial and found guilty of being drunk in uniform in public in violation of Article of War 96. So much of the sentence was approved as provided for restriction for three months and forfeiture of $50 per month for six months. Reclassification proceedings were instituted due to the short length of service of accused, but were terminated 19 March 1943 "due to the satisfactory efficiency report".

6. 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 only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation 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., - To the Acting 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 Isham Fann (0-482384), 9th 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 Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified 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.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 235, 16 Sep 1943)

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

SPJGK
CM 234837

2 JUL 1943

UNITED STATES	FORT KNOX, KENTUCKY
v.	Trial by G.C.M., convened at Fort Knox, Kentucky, 16 April 1943. Dishonorable discharge and confinement for life. Disciplinary Barracks.
General Prisoner Paul D. Shiley.	

REVIEW by the BOARD OF REVIEW
LYON, 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 58th Article of War.

Specification: In that General Prisoner Paul D. Shiley, formerly Private, Company L, 7th Infantry, did at Fort Knox, Kentucky, on or about January 13, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Akron, Ohio, on or about February 2, 1943.

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

Specification: In that General Prisoner Paul D. Shiley, formerly Private, Company L, 7th Infantry, having been duly placed in confinement in Post Stockade, Fort Knox, Kentucky on or about November 25, 1942, did at Fort Knox, Kentucky on or about January 13, 1943, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of both Charges and the Specifications thereunder. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and

to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of the court with reference to the Specification of Charge II and Charge II as finds accused guilty of escape at Fort Knox, Kentucky, on or about 13 January 1943, before he was set at liberty by proper authority, after having been duly placed in confinement in Post Stockade, Fort Knox, Kentucky, on or about 21 December 1942, approved the sentence, designated the United States Disciplinary Barracks as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Inasmuch as the Charges and Specifications involve strictly military offenses, and since the review of the staff judge advocate contains a fair and comprehensive statement of the evidence, the Board of Review does not consider it necessary to incorporate in this review a restatement of the evidence. Suffice it to say that the proof shows:

The accused was a general prisoner. He had been tried and found guilty by a general court-martial of (a) desertion in violation of Article of War 58, (b) escape in violation of Article of War 69, and (c) wrongfully taking and using an automobile in violation of Article of War 96. He had been sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence and ordered it executed, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement (R.8, Ex. A, Gen. C.M. Order 53, Hqs. Fort Knox, Ky., 27 Mar 1943). On 13 January 1943, while in confinement in the Post Guard House, Fort Knox, Kentucky, awaiting the action of the reviewing authority upon the foregoing sentence, the accused wrested a gun from his guard, unloaded the gun, threw it into a ditch and escaped. He was apprehended by the civil authorities in Akron, Ohio, 2 February 1943, at which time he was wearing civilian clothes (R.9-11; Exs. B and C).

4. The Charge Sheet shows that the accused is 20 years of age and that he was inducted in the military service 8 February 1941.

5. The court was legally constituted and had jurisdiction of the

person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the approved findings of guilty and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

(183)

28 JUL 1943

SPJGH
CM 234838

UNITED STATES v. Private MORRIS L. BLIZZARD (20409367), Headquarters Battery, 690th Field Artillery Battalion.	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sill, Oklahoma, 12, 13, 14, 15 and 16 April 1943. Death.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Morris L. Blizzard, Headquarters Battery, 690th Field Artillery Battalion, Fort Sill, Oklahoma, did, at or near Richards Spur, Comanche County, Oklahoma, on or about March 21, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill, one Hugh D. Pickett, a human being, by shooting him with a pistol.

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

Specification 1: In that Private Morris L. Blizzard, Headquarters Battery, 690th Field Artillery Battalion, Fort Sill, Oklahoma, did, at or near Richards Spur, Comanche County, Oklahoma, on or about March 21, 1943, by force and violence, and by putting him in fear, feloniously take, steal, and carry away from the presence of Hugh D. Pickett, one 1940 four door Chevrolet sedan, Yellow Cab No. 127, Oklahoma license No. 14-267, valued about nine hundred dollars ($900.00), property of Hugh D. Pickett.

Specification 2: In that Private Morris L. Blizzard, Headquarters Battery, 690th Field Artillery Battalion, Fort Sill, Oklahoma, did, at Fort Sill, Oklahoma, on or about March 21, 1943, feloniously take, steal, and carry away, one hundred forty dollars ($140.00), currency of the United States, the property of Private Eldridge Smith, Fort Sill, Oklahoma.

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

Specification: In that Private Morris L. Blizzard, Headquarters Battery, 690th Field Artillery Battalion, Fort Sill, Oklahoma, did, at Fort Sill, Oklahoma, on or about March 21, 1943, feloniously take, steal, and carry away, one .45 caliber Colt automatic pistol, No. 429613, of the value of about twenty-six dollars and sixty-six cents ($26.66), property of the United States, intended for the military service thereof.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1, Charge II, except the words and figures, "nine hundred dollars ($900.00)", substituting therefor the words and figures "eight hundred dollars ($800.00)", guilty of Specification 2, Charge II, except the words and figures "one hundred forty dollars ($140.00)", substituting therefor the words and figures "about one hundred thirty dollars ($130.00)", and guilty of all other Specifications and the Charges. He was sentenced, all members of the court present concurring, to be hanged by the neck until dead. The reviewing authority approved the sentence, and the record of trial has been forwarded for action under the 48th Article of War.

3. The evidence for the prosecution shows that Private First Class Eldridge C. Smith, Headquarters Battery, 690th Field Artillery Battalion, Fort Sill, Oklahoma, lived in the same barracks with the accused and occupied the adjoining bunk. On the night of 20 March 1943 before going to sleep Smith placed his folding type pocketbook (Ex. 3), containing about $130, inside his pillow slip. He woke up about 2:00 a.m. and discovered that the pocketbook was missing and that a hole had been cut in the pillow slip (Ex. 4). The pocketbook was taken without his knowledge or consent. Smith had seen the accused in the barracks (not in his bunk) the evening of 20 March, probably about nine o'clock, but the accused was gone when he woke up about two o'clock (R. 22-27).

Captain William H. Gurley, commanding officer of Headquarters Battery, identified a .45 calibre Government pistol, No. 429613 (Ex.5),

which he held on memorandum receipt. Corporal Edward L. Steele used the pistol on guard duty on the night of 19 March, and returned it to the drawer in Captain Gurley's desk, in the presence of Captain Gurley, on the afternoon of 20 March, about 6:15 or 6:30. There was no ammunition in the pistol. It was gone the next morning, and Captain Gurley did not see it again until the trial. It was stipulated that the value of the pistol was $26.66 (R. 29-35, 37-39, 44).

On the night of 20-21 March, Mr. Hugh D. Pickett, who owned and operated two yellow cabs at Lawton, Oklahoma, was driving one of the cabs, which he had purchased the night before for $800. According to Mr. Ernest Pickett, a brother, the market value of the car, a 1940 four-door Chevrolet sedan in first class condition, was about $800. Mr. Ernest Pickett last saw his brother between four and five o'clock on the afternoon of Saturday, 20 March, and on Sunday morning, 21 March, about eight o'clock, he saw the dead body of Hugh D. Pickett. Mrs. Essie Munns, dispatcher at the yellow cab station, Lawton, Oklahoma, went on duty at midnight, 20-21 March, and at that time Hugh D. Pickett was driving his cab No. 127. She identified the dispatch record (Ex. 6) which she kept. Mr. Pickett in cab No. 127 reported at 1:50 a.m. and left the station at 1:55 a.m. At some time after midnight on the morning of 21 March, Mr. George L. Hennessee put gasoline in Mr. Pickett's cab at the cab station, and at that time there was one passenger, a soldier, in the cab (R. 45-50, 53-56, 59, 61).

Shortly before 2:00 a.m., 21 March, Private E. J. Helms and Miss Ima Jo Hudson, with whom he had a date, returned by automobile to her home at Richards Spur, about ten miles north of Lawton. Miss Hudson lived with her parents, who operated a store and filling station there, and with her grandparents, Mr. and Mrs. W. R. Hudson. The store and filling station faced east on highway No. 277 and there were two "drive-ins", one between the store and the pumps and one between the pumps and the highway. Private Helms and Miss Hudson sat in the car about fifteen or twenty minutes, parked in the driveway next to the highway, headed north. At that time a taxicab, with a number on top, the last numeral of which was "7", drove into the other driveway from the south and stopped three or four feet from the parked car. When the cab stopped, the right front door opened, someone got out, was standing there, "kind of leaned over in the cab", and said, "Driver, what do I owe you?" There was no reply except "a mumble". In five or six seconds there was a gun shot. Immediately afterward a man (civilian) was seen running from the cab around the southeast corner of the building. He was stooped forward, holding his stomach and sides with his hands, and yelling

"Oh" over and over. Then the cab was driven away, going north on highway No. 277. It left the station slowly, "just took off ordinary", and then gained speed very rapidly. Private Helms and Miss Hudson then went into the house. When the back door was opened, Mr. and Mrs. W. R. Hudson, Helms and Miss Hudson saw a man lying just outside, clutching a broom in his hands. They notified the sheriff's office, and the man died a few minutes later (R. 63-68, 70-72, 76-82, 87-90, 93-95).

Mr. Ralph Deeds, deputy sheriff, received a call at the sheriff's office about 2:20 a.m. on 21 March, and in response to it went to Richards Spur with Mr. Joe Day, another deputy. They found a dead man lying near the back door of the store building, and called the sheriff, Mr. George E. Myers. The sheriff, on receiving this call about 2:30 or 2:45, went to Richards Spur with Justice of the Peace E. P. Evans, and they observed the dead man. About four o'clock that morning an inquest was held and it was determined that the dead man was Hugh D. Pickett. About that time Mr. W. M. Whitson, an embalmer, examined the body and found a bullet wound, extending from about two inches below the right nipple to just above the left hip, and completely through the body. Undersheriff I. W. Manley notified the highway patrol, put out a general alarm, and called surrounding towns (R. 99-102, 104-107, 109-111, 116-117).

Mr. George Borden, night clerk at the Nash Hotel, Hobart, Oklahoma, registered a soldier between six and six-thirty Sunday morning, 21 March, and assigned him to room No. 49. The soldier registered as "Lieutenant Morris L. Brown, Fort Sill, Oklahoma", and had no baggage. The hotel register (Ex. 8) was identified. Mr. Borden was within two feet of the soldier when he registered, went with him to his room and showed him the bathroom, and had a conversation with the soldier in which the latter said he lived in the eastern part of the United States and asked Mr. Borden to "furnish him a woman". Mr. Borden went off duty about 8:00 a.m., and did not see the soldier again. When asked to look at the soldiers in the court room to see whether he could recognize the accused, Mr. Borden stated "I am not right sure that I do", but later, after the trial judge advocate had pointed out the accused, he identified the accused as the man who had registered on 21 March. Mrs. Sylvia Newcomer, operator of the Nash Hotel, went on duty at seven-thirty, Sunday morning, 21 March, and saw the occupant of room No. 49 about eleven or eleven-thirty that morning. She identified the accused as the person she saw (R. 124-127, 130-139, 141-142).

About 10:00 a.m. on Sunday, 21 March, Mr. C. R. McCandless, operator of a men's clothing store at Hobart, Oklahoma, went to his store in response to a call. He met the accused at the store. The accused purchased an outfit of civilian clothes, made payment with two

bills, one of which had blood on it, and gave as a reason for the purchase, that he was on his way to his home in North Carolina on furlough and could wear the clothes at home. The articles purchased (Ex. 10) were wrapped in a package and the accused carried them from the store (R. 145-151).

On 21 March from 6:15 a.m., Trooper E. M. Haynes, Oklahoma Highway Patrol, was on a special assignment in search of a taxicab of a certain license number. At about 4:10 p.m., he located the cab parked in front of the Nash Hotel, Hobart, Oklahoma. He then went into the hotel, and, accompanied by Mrs. Newcomer and another patrolman, went to room No. 49, which was not occupied at the time. He there found some empty packages from the McCandless store and part of an Army uniform. He reported what he had found, and examined the taxicab. In the "panel pocket" he found a pint bottle nearly half full of whiskey and on the floor of the back part of the car, an empty .45 cartridge. Later Trooper Haynes was joined by Sergeant Herman B. Parness, a military policeman and fingerprint expert, and three other men. Sergeant Parness locked the taxicab, as it was too dark to search for fingerprints. They went to room No. 49 in the Nash Hotel and found some soldier's clothing (Ex. 11). They also found a water glass (Ex. 12) with a fingerprint on it. The next day Sergeant Parness returned, examined the taxicab and removed the steering wheel (Ex. 13), on which he found blood smears and fingerprints. On 23 March and again on 30 or 31 March he took fingerprints of the accused. One set of these fingerprints (Ex. 14) and enlargements of two of the prints (Exs. 15 and 17) were compared with photographic enlargements of a fingerprint (Ex. 16) from the steering wheel and of one (Ex. 18) from the water glass. Sergeant Parness was of the opinion that Exhibits 15 and 16 were prints from the same finger, and that Exhibits 17 and 18 were likewise from the same finger. He also made a photograph (Ex. 19) of the taxicab on 22 March, before it was moved (R. 139-141, 152-163, 165-186).

At 6:15 p.m., on 21 March, Mr. Dan H. Clark and Mr. Oscar H. Lair, radio patrolmen of Oklahoma City Police Department, went to the Black Hotel in that city in response to a call. They were directed to room No. 518, where they found the accused, who stated that he had taken Lysol and rat poison. In the room were an Army pistol (Ex. 5), and a note (Ex. 20) in these words, "The gun in the drawer belongs to H. Q. Btry 690th F.A. Bn. my name is", and signed "Morris L. Blizzard". The accused was taken to a hospital by ambulance, where his stomach was pumped out, and he was then taken to police headquarters. Mr. Clark removed a pocketbook (Ex. 3) from the left hip pocket of the accused.

Later that day, about midnight, the accused was removed to Lawton by Sheriff Myers, Undersheriff Manley and Deputy Sheriff Arnold D. Overton. On a later date the taxicab, No. 127, was moved from Hobart to Lawton. It was stipulated that the value of the taxicab was approximately $800. Sheriff Myers and Undersheriff Manley examined it and found a hole below the center of the back cushion of the driver's seat less than a foot from the left side. On opening up the cushion they found a .45 calibre "steel jacket" bullet (Ex. 7) imbedded there (R. 111-114, 117-118, 120-121, 193-199, 208-209, 237-239).

When the accused was taken to police headquarters in Oklahoma City on the evening of 21 March, he was questioned by Detectives P. L. Borden and A. L. West, in the presence of Patrolmen Clark and Lair, for several hours. The accused appeared to be sick, tired, weak and depressed, but stated that he was all right, not hungry or thirsty, and that "he wanted to tell the truth about the whole deal". There were no wounds on his body except where he had cut his left wrist with a razor blade, but this was not bleeding at the time. During the questioning the accused was seated in a chair at the end of a desk in "the captain's office" of the detective bureau. After the accused had recounted a full statement of his activities, he was taken to the report clerk's room, where a written statement of the facts as detailed by the accused was dictated to a stenographer by Mr. Borden. The accused was present, and from time to time, as the statement was dictated, Mr. Borden would ask the accused whether it was correct. When the statement had been typewritten, it was submitted to the accused, who placed it on the desk, turned the pages, "looking some little time at each page", stated "I have got myself in an awful mess", and then signed the statement (Ex. 21). The four police officers signed as witnesses. The written statement contained "the substance of what the accused said there * * * that night", although it was "not exactly" what he told them and there may have been a few things said that were not in the statement. The statement was introduced in evidence over objection (R. 199-204, 209-216, 218-222, 224-232, 236).

The statement or confession was substantially the same as the testimony of the accused hereinafter summarized, except with reference to events immediately before, at the time of, and for several hours after, the shooting of Mr. Pickett. This part of the statement was in substance as follows: The accused and the cabdriver left the downtown area of Lawton, driving toward Fort Sill. Near the edge of Lawton they stopped and the accused purchased a pint of whiskey for $6.50, opened the bottle and started to take a drink, then decided that he would not and told the

driver "lets Go". They drove through Fort Sill on the highway "contuning (sic) to a point" in the country where the driver stopped and stated, "This is ten miles, it is as far as I can take you". At this time the accused, sitting "along side of the Driver, pulled the .45 Automatic from my belt and shot the Driver, one time without any commotion or words whatsoever between me and the Driver. At the time I shot the Driver his only statement was 'O' at which time he opened the door on the drivers side and jumped from the Cab". Immediately afterward the accused moved into the driver's seat, drove the cab away and to Hobart, arrived at Hobart about 5:40 a.m., parked the car in front of a hotel, entered the hotel, registered under the name of Robert Lee Smith, obtained room No. 49, went to bed and waked up "this morning about 10:00 AM" (Ex. 21).

4. The evidence for the defense shows that Private First Class Bennie L. Flynn and Privates Jacob M. Lawson and Eldridge C. Smith had observed a change in the accused in the past two or three months. The accused contracted a venereal disease, took about 78 "sulfa thyzol" tablets at the rate of four a day, and seemed changed since taking the tablets. The accused was depressed, down hearted, moody, duller than usual, would sit for an hour or two and say nothing, and when off duty would lie on his bunk and say nothing. At times he would jump up for no apparent reason and laugh, "just a silly laugh". On one occasion, while drinking, he broke several phonograph records and pretended to eat them, and on another occasion he held a .38 cartridge against his head, beat it with a knife, and said he wished it would "blow hell out of him" (R. 241, 246-247, 257, 260-262, 271-274, 278-279).

Major Lester D. Borough, Medical Corps, a psychiatrist, was a member of a medical board that inquired into the condition of the accused. The report of the board (Def. Ex. 2) contained findings that the accused, at the time of the examination and of the alleged offenses, was not insane, was capable of realizing right from wrong and of the normal control of his actions, and had the ability to adhere to the right and depart from the wrong, and that he was capable of communicating intelligently with his counsel and of doing the things necessary for the proper presentation of his case. In the conclusions, the report stated; "At the time of the offense Blizzard was intoxicated with alcohol. It is very doubtful that the crime as described was a premeditated act. In our opinion the shooting was an impulsive act". Major Borough doubted that the board had in mind the legal definition of premeditation in stating that it was not a premeditated crime. He stated that in its conclusion that the accused was intoxicated the board meant that whereas his normal personality was that of a shy, quiet, timid individual, after

consuming "this alcohol", he was a gay, talkative individual, which indicated "some effect of alcohol upon the higher arteriel centers, commonly described as being results from inhibitions". He stated further, with reference to the effect of "sulfa thyzol", that in some individuals there would be little effect, and others are sensitive to the "sulfa group". The latter might develop a skin eruption, fever, or a state resembling delirium, but the effect would not be permanent (R. 281-283, 285-288).

Sergeant Allen D. Caudle testified that shortly before 20 March two bottles of lemon extract were issued to the kitchen of Headquarters Battery, in which the accused worked, and that when inventory was taken on the evening of 20 March they were missing. Private Flynn was on duty with the accused in the kitchem on the afternoon of 20 March. About 4:30 the accused took a drink from one of the two 8-ounce bottles of lemon extract containing 80 percent alcohol. Only one tablespoonful of the extract had been previously used. The accused later finished the bottle. He cut his fingers on the bread slicing machine. About 5:30 he took the other bottle from the supply room, put it in his pocket, and went out. He returned about six o'clock for some food, and Flynn did not see him again. About 6:30 Flynn observed the two bottles, empty, in the kitchen garbage can. Right after supper Private Smith saw the accused in the barracks. The accused had been drinking. Smith saw him again about nine o'clock, and the accused was drunk, but did not stagger. About ten o'clock, Private Lawson, who had known the accused for four or five years, gave the accused a big drink of whiskey from a pint bottle, which was then emptied by other men in the barracks. Lawson and the accused then went to the "service club" about ten-thirty, and remained there until about eleven. On the way there and back they consumed most of another pint of whiskey which Lawson had. When they returned to the battery they went to the mess hall, the accused fried some eggs, and they ate them. About 12:30 they went back to the day room. Lawson testified that at this time the accused was "high" and "pretty drunk". The accused went out, and on returning said something about "the captain's gun". The accused left and was not seen again. On cross-examination Lawson admitted stating on another occasion that the accused "didn't seem especially drunk" when he left, and that he (Lawson) was a good friend of the accused (R. 241-246, 254-255, 257-260, 262-266, 268-269, 276-277).

The distance from Richards Spur to Hobart, Oklahoma, by highway is about seventy miles. A person going from Richards Spur to Oklahoma City would not go by way of Hobart, but would go north about twenty-five miles and then turn east (R. 315-316).

The accused testified that his home was in Lenoir, North Carolina, and his family consisted of mother, father, three brothers and a sister. His father had been in a sanatorium, with tuberculosis, for four months. On 20 March the accused as a student cook went on duty in the kitchen at 1:00 p.m. Being down hearted and depressed over family conditions, he drank some lemon extract from the supply room. He cut his hand on the slicing machine. He left about six-thirty and at that time had drunk only one bottle of the extract. About seven o'clock he drank another. About nine-thirty or ten, he joined Private Lawson. The accused had a "very big" drink of Lawson's whiskey in the barracks. They then went to the service club and drank more than two-thirds of a pint of whiskey between them. The accused took more than Lawson did. They then went to the day room at the barracks and listened to the radio, went to the kitchen and cooked and ate some eggs, and returned to the day room. In a few moments the aceused went to the orderly room, sat at the captain's desk, found a gun in the drawer, and left it there. He returned to the day room, went upstairs to his bed, saw Private Smith asleep, decided he would take Smith's pocketbook and leave, slit Smith's pillow case with his knife, took the pocketbook, and went downstairs. He saw a jacket and cap on the clothes tree downstairs, took them, thought about the gun, took it and put it in his pocket. It was his intention at that time to go home to North Carolina. He testified that he was drunk, but that he "could get around all right" (R. 291-297).

The accused testified further that he then went to Lawton in a taxicab and tried unsuccessfully to engage a room at a hotel. He took another cab and wanted to go to Oklahoma City, but was told by the driver that he could go only ten miles out of Lawton. They started, and "on the outside of Lawton a little ways" the accused purchased a pint of whiskey. He started to take a drink there, but changed his mind and "didn't take one at the time". They drove on down the highway. The accused stated: "There I took a drink of the whiskey; I had taken three or four drinks, I don't remember how many, and that is all I can remember. That is all I remember until I remember the car was stopped and I had---I know a shot had been fired. I know I was standing by the cab with this gun in my hand, and I have just a faint remembrance of somebody saying 'Oh', and I did not see the driver in the cab. The report of this gun gave me such a shock that it scared me and the only thing I could think about at the time was to get away from there, and I got in the taxi and drove off". The accused stated further that he did not know which direction nor how long he drove, did not remember stopping anywhere, and had never heard of Hobart, Oklahoma. The first thing he remembered was seeing the lights of a building. He observed that it was a hotel, stopped, and that was all he remembered until he woke up Sunday morning. When he woke up he did not realize where he was and thought he was dreaming until

he saw the gun. Then he had a faint remembrance of a shot being fired, thought something was wrong, but did not know he had actually shot a man. He knew he was away from his battery, and had "this gun" and "all this money" that did not belong to him. When he went downstairs he saw the taxicab, but did not know that he had actually driven it there. He decided to get some civilian clothes and go home to North Carolina. He located the manager of a store, purchased a civilian outfit, returned to the hotel, put on the clothes, and started to Oklahoma City by bus. On the way to Oklahoma City, he "got to thinking" about what had happened, knew he had done something wrong and was in trouble, but did not know what he had done. He went to a hotel in Oklahoma City and attempted suicide. Before making the attempt, he wrote a note stating the ownership of the gun, and wrote a letter to his mother, in which he inclosed $60, and gave it to the desk clerk to mail. When he thought he was dying he called the switchboard operator and told her he had taken poison. Two policemen came to his room and he was taken to a hospital, where his stomach was pumped out. He was then taken to police headquarters. He stated that at that time he was "very sick and weak" (R. 297-301).

At police headquarters, he was asked his name, told that he was accused of shooting a taxi driver and taking his car, and asked if he wanted to make a confession. After being advised to "go ahead and get it off your chest", the accused stated that he would tell the truth and everything he knew about it. The accused testified that the confession (Ex. 21) was not accurate, that he had told the policemen the same things he testified to, that they wrote up the statement and from time to time asked him if it was right, but he was not paying attention to what was said, that he was not told that it would be used as evidence, nor that he was wanted for murder, and that before signing it he "just looked at it", but did not read it, as he was too sick (R. 301-303).

On examination by the court, the accused testified that on the night of 20 March he had two rounds of .45 calibre ammunition in his pocket but did not remember loading the pistol, that he distinctly remembered taking a drink in the taxicab after they started driving again, but did not know how long it was after they had stopped, and that he had three or four drinks before he was alone in the cab, but did not know how many more (R. 310, 312).

5. Mr. George Borden testified in rebuttal for the prosecution that when he registered the accused at the hotel between six and six-thirty on the morning of 21 March and showed the accused to his room and the bathroom,

about 12 or 14 feet away, he observed no evidence of intoxication on the part of the accused, who appeared to be perfectly sober, was steady on his feet, and "talked just as good and plain as any one ever did" (R. 317-320).

Mr. Clark, recalled as a witness for the court, testified that when he took possession of the pistol it contained one round of ammunition, which was in the magazine (R. 321-322).

6. The evidence conclusively shows that the accused cut a hole in the pillow case of Private First Class Eldridge C. Smith, while Smith was asleep on his bunk, and removed and carried away Smith's pocketbook containing about $130; took and carried away a Government .45 calibre automatic pistol of a value of $26.66; by force and violence robbed Hugh D. Pickett of a Chevrolet sedan of a value of about $800; and without provocation or excuse shot and killed Hugh D. Pickett. The circumstances surrounding the homicide show that it was willful and deliberate, without provocation or excuse, and unlawful.

The accused after he had stolen about $130 from one of his best friends and a .45 automatic pistol from his battery commander, left the barracks after midnight, with the intention of going to his home in North Carolina. Being unable to engage a hotel room in Lawton, Oklahoma for the night, he attempted to hire a taxicab to take him to Oklahoma City, but was told that regulations restricted the taxi driver to a distance of ten miles from Lawton. The accused then engaged the cab, obviously knowing that he would be required to leave the cab at some point on the highway ten miles from Lawton. When they reached this point, he stepped out of the cab, asked the amount of the fare, and then shot and killed the driver with the stolen pistol. No provocation or excuse whatever was shown. The killing was in cold blood. The accused then entered the cab, took the wheel, and drove off on the highway.

Murder is the unlawful killing of a human being with malice aforethought. Malice does not necessarily mean hatred or personal ill-will toward the person killed. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. Malice aforethought may mean an intention to cause the death of or grievous bodily harm to any person, or knowledge that the act which causes death will probably cause the death of or grievous bodily harm to any person, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not (MCM, 1928, par. 148).

The defense was based on the contention that the accused was so drunk at the time that he did not know what he was doing and could not have the necessary intent. But the facts as disclosed by the evidence refute this claim beyond any reasonable doubt. Although the accused had, according to defense testimony, consumed approximately a pint of lemon extract between 4:30 p.m. and 7:00 p.m. on 20 March, there was no indication that he was drunk at that time other than that he cut his hand on the bread slicing machine and that his friend, Smith, testified that the accused had been drinking. Smith stated that at nine o'clock the accused was drunk but did not stagger. Then at about ten o'clock the accused had one drink. Between ten-thirty and eleven, the accused was at the service club and drank approximately a half pint of whiskey. When he and his friend, Lawson, returned to the battery, they went to the kitchen and the accused cooked some eggs, which they ate. About 12:30 they went to the day room and played the radio. The accused then took the pocketbook and money, the pistol, a jacket and cap, and left the barracks, all of which he remembered in detail, as shown by his confession and his testimony. As of this time, Lawson testified that the accused was "high" and "pretty drunk", but on a previous occasion had stated that he "didn't seem especially drunk", and the accused himself testified that he was drunk but "could get around all right".

The accused claimed that after he hired the taxi he took three or four drinks from a bottle of whiskey that he purchased, and then remembered very little until he waked up the next morning about ten o'clock. He did not acquire this whiskey until the taxi had gone outside of Lawton "a little ways" and he at first decided not to take a drink from this bottle. Whatever whiskey was consumed in the taxi prior to the killing was necessarily drunk while the taxi was travelling less than ten miles. In his testimony, the accused remembered that the taxi was stopped, that a shot had been fired, that he was standing by the cab with the gun in his hand, that someone was saying "Oh", that he did not see the driver in the cab, and that he got in the taxi and drove off. In his confession, written in less than 24 hours after the homicide, he remembered in addition that when the cab stopped the driver stated "This is ten miles, it is as far as I can take you", that he pulled the pistol from his belt and shot the driver one time "without any commotion or words", and that the driver opened the door on the driver's side and jumped from the cab.

After shooting the taxi driver about 2:15 a.m. the accused drove away in a normal manner, drove the car a distance of approximately

70 miles to Hobart, Oklahoma, parked it normally as shown by Exhibit 19, registered at the Nash Hotel between six and six-thirty, signed the register (Ex. 8) as "Lt. Morris L. Brown" in legible handwriting and had a normal conversation with the night clerk. The night clerk was within two feet of the accused while he was registering, and showed the accused to his room and the bathroom nearby. He observed no evidence of intoxication on the part of the accused, who appeared to be perfectly sober, was steady on his feet, and "talked just as good and plain as any one ever did".

In the opinion of the Board of Review the evidence shows beyond any reasonable doubt that the accused was not so intoxicated as not to know what he was doing, and was capable of entertaining the specific intent required. The evidence further establishes beyond any reasonable doubt that the homicide was committed by accused with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation as alleged. Such an act constitutes murder in violation of Article of War 92.

7. The defense objected to admission of the confession (Ex. 21) on the ground that the accused had not been warned of his rights and that the statement as signed was not exactly the same as what the accused had stated . The statement was made to civilians, no force, threats or promises were shown, the accused freely and voluntarily detailed what had occurred, he was present when the statement of the substance of what he had recounted was dictated, he was requested to make corrections if needed, he examined the statement after it was transcribed, and he then signed it. The statement is substantially the same as the testimony of the accused, except that as a witness the accused claimed that he had taken three or four drinks while riding from Lawton to the scene of the crime and that he did not remember firing the shot. In the opinion of the Board the confession was voluntarily made and properly received in evidence.

8. Careful consideration has been given to letters and requests for clemency as follows: Letter dated 10 May 1943 from Honorable R. L. Doughton, Member of Congress, North Carolina, to The Judge Advocate General, inclosing an affidavit and 37 letters addressed to the Secretary of War, "from leading citizens of Lenoir, including the mother of young Blizzard, the chairman of the Board of Deacons, First Baptist Church, of which he was a member, his school principal, his half-brother, his pastor, the Mayor, the solicitor of the district, attorneys at law, the school superintendent, bankers, manufacturers, the Clerk of the Superior Court, the Sheriff, Chief of Police, Register of Deeds and others"; letter dated 21 May 1943 from Honorable J. W. Bailey, Senator, North Carolina,

to the President, inclosing a letter from Mr. Hunter Martin, Lenoir, North Carolina, and an editorial; letter dated 21 May 1943 from Senator Bailey to the Secretary of War, inclosing a copy of a letter from Mr. Martin; letter dated 26 May 1943 from Honorable J. Melville Broughton, Governor of North Carolina, to the President; letter dated 26 May 1943 from Governor Broughton to the Secretary of War; letter dated 28 May 1943 from Honorable Robert R. Reynolds, Senator, North Carolina, to the Secretary of War; letter dated 1 June 1943 from Congressman Doughton to the President, inclosing an editorial and 38 letters from persons described as in the letter from Mr. Doughton to The Judge Advocate General; letter dated 19 June 1943 from Mrs. E. L. Smith, Wadley, Georgia, to the President; and letter dated 15 July 1943, from Chaplain James H. Dean, to the President, inclosing a statement from accused.

9. The Charge Sheet shows that the accused is 21 years of age, and that he enlisted 16 July 1940, with no prior service.

10. 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. The death penalty is authorized upon conviction of murder in violation of the 92nd Article of War.

Lester S. Steele Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

J. Holbrook, Judge Advocate

1st Ind.

War Department, J.A.G.O., 2 - AUG 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 Morris L. Blizzard (20409367), Headquarters Battery, 690th Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused stole about $130 from a fellow soldier and an Army pistol from his battery commander, robbed a taxi driver of his cab, worth about $800, and murdered the taxi driver by shooting him once with a pistol. The accused was drunk, but not to such an extent as to affect his mental capacity to entertain the necessary intent. In view of all of the circumstances 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 the term of the natural life of the accused, and that the sentence as thus commuted be carried into execution.

3. The United States Penitentiary, 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.

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

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

(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for term of natural life of accused. G.C.M.O. 214, 3 Sep 1943)

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

SPJGQ
CM 234839

28 JUN 1943

UNITED STATES	)	14TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Chaffee, Arkansas, 24 April 1943. Dismissal, total forfeitures and confinement for two (2) years.
Second Lieutenant JOHN W. HOLMAN (0-1104211), 125th Engineer Battalion.	)	

OPINION by the BOARD OF REVIEW
ROUNDS, HEPBURN, and FREDERICK, 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 94th Article of War.

Specification: In that 2nd Lieutenant John W. Holman, 125th Armored Engineer Battalion, did, at Camp Chaffee, Arkansas, on or about April 10, 1943, knowingly and willfully apply to his own use and benefit a certain government vehicle, to wit, one ¾ ton truck, amphibian, serial number 706220, value about $2,270.00, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that 2nd Lieutenant John W. Holman, 125th Armored Engineer Battalion, having been restricted to the limits of his station, did, at Camp Chaffee, Arkansas, on or about April 10, 1943, break said restriction by going to Russellville, Arkansas.

Specification 2: In that 2nd Lieutenant John W. Holman, 125th Armored Engineer Battalion, was at Camp Chaffee, Arkansas, on or about April 11, 1943, drunk in uniform in camp.

Specification 3: In that 2nd Lieutenant John W. Holman, 125th Armored Engineer Battalion, did, on U. S. Highway Number 22, between Fort Smith, Arkansas and Camp Chaffee, Arkansas, on or about April 10, 1943, wrongfully and unlawfully operate a government motor vehicle, to wit, a ¼ ton truck, amphibian, at a speed of about 55 miles an hour.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of a previous conviction for violation of the 96th Article of War for being drunk in uniform in a public place and drunk and disorderly in uniform in a public building 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, 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 48.

3. The evidence for the prosecution may be summarized as follows: On 19 February 1943, the accused, a second lieutenant, stationed at Camp Chaffee, Arkansas, was found guilty of being drunk in uniform in a public place and with being drunk and disorderly in a public building in violation of the 96th Article of War, and was sentenced to be restricted to the limits of his station for 6 months. This period of time was reduced to 3 months by the reviewing authority. There was also a fine of $25 per month for 6 months imposed upon him (Ex. 2). On 10 April 1943, while the restriction was still in force, the accused, who was authorized to use Government motor vehicles for Government

purposes, directed Private Bernard F. Latawski, 125th Armored Engineer Battalion, the driver of an amphibian ¼ ton truck to take him to Fort Smith, Arkansas. There they stopped for a few minutes during which time the accused left the vehicle in charge of the driver. From there, with the accused in charge, they drove to Russellville, Arkansas, where they picked up two members of the Woman's Army Auxiliary Corps, and drove back to Fort Smith where they dropped the "WAAC's" off at a hotel. The accused himself then took the driver's seat and drove the vehicle from that point toward Camp Chaffee on U.S. Highway No. 22. While en route, State Highway Patrolman Hubbell clocked the speed of the vehicle at 65 miles per hour and served the accused with a summons for exceeding the speed limit. The court was requested to take judicial notice of paragraph 9-13, War Department Circular 384 of 27 November 1942, which provided that the maximum speed for all Army vehicles would be 35 miles per hour unless being operated under emergency conditions (R. 17-18). The local State speed limits are governed by Section 6709, Chapter 81 of Volume I of Pope's Digest of Statutes of Arkansas 1937, which provided, as to the particular highway in question, that the speed would be governed by appropriate signs erected along the highway, otherwise the speed will be that which is reasonable and prudent under the conditions (R. 17). There were posted along the highway the "war speed" 35 miles per hour speed limit signs (R. 16).

The vehicle was returned by the accused to the motor pool at Camp Chaffee at 8 p.m. (R. 6, 7, 16). The driver stated in his testimony "As far as I knew we were looking for a bivouac area" (R. 8). By stipulation it was agreed that the motor vehicle involved was Government property (Ex. 1).

Captain Cecil J. Alley, 125th Engineer Battalion, a witness for the prosecution, testified that all officers, including the accused, were authorized to use this particular Government vehicle for the purpose of carrying out the duties of his command; that on the date in question the accused had a detail of "fixing out" a combat range and "it was his duty to get the material and get it in to the company to continue the work on the range". He further stated that the accused was under restriction to the post unless duty should call him off the post. The accused, however, was not authorized to go to Russellville unless it was for the purpose of getting material. He could not say whether it was necessary for the accused to go as far as Russellville for the material as he, (the witness), was not familiar with the plans that had been drawn up by the division artillery headquarters relating to the combat course

that was being built along the Fort Smith Highway, just off the post (R. 10, 11). The same witness stated that the accused had left the post on duty upon one other occasion.

At about 1 a.m. on the night of 10 April 1943, Lieutenant Colonel Charles P. Westpheling, 501st Armored Field Artillery Battalion, observed the accused at the Officers' Club at Camp Chaffee. The accused was argumentative. The witness "sensed that he had had several drinks". He could not state that the accused was drunk. He did not see him stagger. His manner of speech was normal but nevertheless he was of the opinion that the accused was under the influence of liquor "to an extent". The witness testified that it was one of his duties to look out for and take care of people who had too much to drink. He called the Officer of the Day of his battalion and suggested that he look out for the accused and not permit him, (the accused), to drive a motor vehicle. By stipulation they agreed that if Lieutenant L. L. Molnar were present he would testify that he was the Officer of the Day on the night of 10-11 April 1943, and as a result of Lieutenant Colonel Westpheling's call he drove to the Officers' Club and could not locate the accused but on his way back he passed two officers and two girls on 4th Avenue and stopped his vehicle. The accused came up to the vehicle and asked Lieutenant Molnar what he was doing. Molnar stated that he was just driving around. The accused then asked him to take them to town which Lieutenant Molnar said he could not do. "I noticed that Lt. Holman was intoxicated and staggered at the time he talked to me" (Ex. 4).

4. Accused recalled Captain Alley as a defense witness who testified that on 10 April 1943, he did not know that Lieutenant Holman was leaving the post with the vehicle in question; that he had not given him permission to do so; that even though the accused was in restriction he had upon a previous occasion gone to Fort Smith with the witness' permission on a special mission for the company on company duty; that on 10 April 1943, the accused had the particular duty of procuring the material for building the combat range which could very well have required him to go to Fort Smith for this material; and that he might have gone anywhere off the post to get the material (R. 20-21). The witness did not know what material was necessary for the purpose.

Lieutenant William M. Griffin, Supply Battalion, testified that on the night of 10-11 April 1943, he attended the dance at the Officers' Club and in his opinion the accused was not drunk. He had

seen the accused take a drink and the accused was "feeling quite well" (R. 23, 25). In describing the condition of the accused he stated that he was in complete control of his speech although a little more talkative than usual; that he did not detect any alcohol on his breath because he was not close enough; that he danced; and there was nothing wrong with his dancing or walking. He was of the opinion that anyone that had had one alcoholic drink is under the influence of alcohol, therefore, as the accused had had one or two drinks, he also could be under the influence.

Accused, after being advised of his rights, elected to remain silent.

5. The Specification of Charge I charges the accused with using a Government amphibian truck for his own benefit. It was clearly shown that the accused did, on the date and at the place specified, make use of a Government amphibian truck. The only issue is whether he used it for his own personal benefit or used it in Government service. The burden of proving its improper use was upon the prosecution because it was conceded and shown by the prosecution that the accused had the right to use the vehicle in question. It was shown that the accused used the vehicle to drive to Fort Smith, then to Russellville, and return again to Camp Chaffee via Fort Smith. If the accused had used the vehicle to procure or order material for a combat course being constructed just outside of Camp Chaffee, such would be a proper use of it. The only witness called relative to this crucial point stated that he did not know whether it was necessary for accused to drive as far as Russellville for material or not, because he himself was not familiar with the division plans for the construction of the combat course. It appears from the record that if the accused had driven to Fort Smith and back, his action would not have been criticized. That fact of his trip from Fort Smith to Russellville and return was stressed as improper but never shown to be. The distance from Fort Smith to Russellville was never shown. Was it trivial or considerable? It would be a dangerous procedure to charge an officer with violation of Article of War 94, which was primarily intended to punish those who defraud the Government or who steal, misappropriate, or destroy Government property, - for driving a trivial distance off of his course in a Government vehicle which he has a right to operate. If it were shown that he drove such a great distance off of his course, that it would preclude all the conclusions but private use of the vehicle, a case might properly be made out. But here we have no distance shown. The only witness on the subject of proper use admits that the accused had the authority to drive "anywhere off the post to get the material" (R. 21). The record is therefore insufficient to support the finding of guilty of Charge I and the Specification thereunder.

With reference to Specification 1 of Charge II accused was restricted by the existing provisions of a sentence of a general court-martial to the limits of his station (Pros. Ex. 2). He could not properly leave his station without first obtaining the express permission of Captain Alley (R. 10). On this occasion he did leave the station but he did not obtain such permission. Under this Specification the burden of proving in his defense that he was authorized to leave his station on Government business rested on accused. Under Specification 1 of Charge I the burden of proving that accused used the truck in question for his own purpose rested on the prosecution. In neither case was such proof offered in the evidence. For that reason the Specification, Charge I, was not sustained and accused's possible defense to this Specification falls for lack of supporting evidence. The finding of guilty of Specification 1 of Charge II must therefore be sustained.

With reference to Specification 2, Lieutenant Colonel Westpheling testified that the accused, on the night of 10-11 April 1943, while dressed in uniform, was "to some extent" under the influence of liquor at the Officers' Club, Camp Chaffee. He could not state that accused was drunk. Later, about 1 a.m., he was observed by Lieutenant Molnar on 4th Avenue in Camp Chaffee, apparently on his way to his quarters from the Officers' Club, at which time he noticed that accused "was intoxicated and staggered at the time he talked to me." (Ex. 4). Fourth Avenue is a public highway. Being intoxicated on a public highway in the presence of others is sufficient to sustain the finding of guilty of the Specification. It is not necessary to prove disorderly conduct under Article of War 96. Being drunk or intoxicated in public alone is sufficient (CM 197398).

With reference to Specification 3 of the Charge it was clearly proven by the state highway patrolman that accused was personally driving the Government vehicle at the time and place specified at a speed well in excess of the 35-mile per hour limit imposed by the State and Federal laws. The finding of guilty of the Specification is sustained by the evidence.

6. The record shows the accused to be 28 years of age. He enlisted on 7 April 1942 for the duration plus six months. He was commissioned 2nd Lieutenant, Corps of Engineers (AUS), 30 September 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Charge I and the Specification thereunder, but is legally sufficient to support the findings of guilty of Charge II and its Specifications and the sentence,

and to warrant confirmation of the sentence. A sentence of dismissal, total forfeitures, and confinement at hard labor for two years is authorized upon conviction of violation of Article of War 96.

William A. Bounds, Judge Advocate

Earle Hepburn, Judge Advocate

Herbert B. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O. 5 - JUL 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 John W. Holman (0-1104211), 125th Engineer Battalion.

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 of Charge I and its Specification (A.W. 94 - misapplication of a Government vehicle), but legally sufficient to support the findings of guilty of Charge II and three Specifications thereunder (A.W. 96 - breach of restriction, drunk in uniform, and operating Government vehicle beyond speed limit) and the sentence, and to warrant confirmation thereof. I recommend that the findings of guilty of Charge I and its Specification be disapproved, 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. Consideration has been given to the attached letters, dated 20 May 1943 and 7 June 1943, addressed to Honorable Tom Connally, United States Senate, by Mrs. Jesse R. Holman, mother of accused, Katharine Holman Henning and Evelyn Holman Tacey, sisters of accused, requesting clemency in his behalf.

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.

6 Incls.
1 - Record of trial.
2 - Dft. ltr. for sig. S/W.
3 - Form of action.
4 - Ltr. fr. Mrs. Holman, 20 May 1943.
5 - Ltr. fr. K. Holman Henning and E. Holman Tacey, 7 June 1943.
6 - Ltr. fr. Mrs. Holman, 7 June 1943.

(Findings of guilty of Charge I and its Specification disapproved. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 186, 4 Aug 1943)

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

SPJGK
CM 234896

JUN 4 1943

UNITED STATES v. Technician Fourth Grade FRANK V. NIEDER (R-364045), Headquarters Detachment, Heliopolis Depot, Darb el Hagg, Egypt.	U.S. ARMY FORCES IN THE MIDDLE EAST Trial by G.C.M., convened at Cairo, Egypt, March 1,15,16,17 and 18, 1943. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LYON, 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 found guilty of voluntary manslaughter under Article of War 93 for the wilful, felonious, and unlawful killing of Sedik Okasha, by shooting him with a rifle. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for two 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. Only the evidence in its most favorable aspect to the prosecution need be considered. The incident occurred at London House, a six-room pension in Heliopolis, Egypt (R.28; Pros. Ex. 3). Deceased was the clerk at London House and Tewfik Haggag was a servant employed there. These two comprised the whole staff of the pension (R.26,29,30,36). On the night of January 30, 1943, the only guests at the pension were Private First Class Frank Liodondici, 802nd Military Police, another enlisted man, and accused, all of whom occupied the same bedroom (R.30,34-36). The bedroom was about "20 paces" from the reception room (R.51). After supper the three guests talked for awhile with deceased before retiring (R.40). The unidentified enlisted man left on Sunday morning and did not return (R.30,35).

About 12:30 p.m., January 31, Haggag returned from an errand and found accused and deceased talking in the reception room (R.26,29).

Accused was standing, leaning on his rifle (R.27). Shortly thereafter, Haggag went to the kitchen to wash the dishes (R.26,29). While thus engaged, he could hear accused and deceased talking in English, but, not understanding English, did not know the nature of their conversation. He could not tell whether or not they were quarreling, but testified that their voices "seemed to be just like any people talking in English" (R.27). At this time Liodondici was in the bedroom. He heard no voices and no "scuffling". He testified that his room was near enough to the reception room to have permitted him to hear any "scuffling" (R.35,42,43).

Both Haggag and Liodondici heard a shot (R.26,35). Haggag ran to the reception room, where he found deceased lying on the floor (R.26, 27). Accused was standing there holding his rifle. He turned around toward Haggag and lifted the rifle, whereupon Haggag ran away (R.26). Deceased and accused were the only people in the reception room at the time of Haggag's arrival (R.28,30). Shortly thereafter, accused, gun in hand, appeared at the door of the bedroom and told Liodondici that a man had been shot in the other room (R.35,39,40,41,44). Accused then lay on his bed and went to sleep (R.45,49,51,53,54). In the opinion of two officers who were called in to investigate the death, and who saw accused on his bed, accused was drunk (R.45,46,49). A small, brown, round button was found on the floor in a pool of blood near deceased's body (R.46). Later in the afternoon, after accused was awake, he said to one of the investigating officers that "that was a terrible thing" (R.47). Liodondici testified that accused and deceased had been friendly toward each other (R.36).

Dr. Abdel Selin El Bishry and Major Thomas G. Ward, Medical Corps, each testified as experts, the former as a ballistics expert as well as a "medical legal" expert. Dr. Bishry performed an autopsy (R. 15). Each testified that death was caused by the bullet wound, and Dr. Bishry said that in his opinion the bullet was fired from accused's rifle (R.15,17,24). Each testified further that the bullet entered the palm of deceased's left hand, went through the left joint of the thumb, entered the front part of the chest on the left side near the fourth rib, penetrated the left lung, the left ventrical of the heart, and the middle and back part of the lung, and came out from the back near the third rib (R.15,23). The bullet took an upward course, and in Dr. Bishry's opinion deceased was standing when he was shot (R.16-19). Dr. Bishry testified that the wound in the palm of the hand was surrounded by an area blackened by gun powder and that in his opinion

the "muzzle" of the rifle was less than a quarter of a meter (about 10 inches) from deceased's body (R.15,16). In his opinion the left hand was in a "defending position" (R.17) and the "proper position" of the rifle for "causing this injury" would be "with the rifle held with the butt by the thigh with the muzzle pointed upwards" (R.16). Dr. Bishry said that deceased could not have fired the gun himself (R.17,18).

Accused testified that he had received no instructions about the care or safety devices of a service rifle (R.74,75). Before lunch on January 31 he had six drinks of straight whiskey (R.79,80,87,105). During lunch he and deceased talked in a friendly manner. He had no quarrel with deceased at any time (R.69,70). After lunch accused brought his rifle to the reception room, unloaded it, showed it to deceased, reloaded it, and placed it against the wall (R.71,72,85,106). He did not recall whether the "safety" was on (R.85). Suddenly Haggag, who was present, took the rifle. Accused shouted at him to put it down. The rifle "went off" and deceased fell off the chair (R.75,76,86). Soon thereafter accused went to his room, lay on the bed, and went to sleep (R.81).

4. There is substantial evidence to prove that deceased was killed by a bullet fired from a gun held by accused and that the muzzle of the gun was less than 10 inches from the body of deceased at the time of discharge. There is no substantial evidence to show that accused killed deceased intentionally - a necessary element in voluntary manslaughter. Dr. Bishry's opinion evidence that deceased's hand was in a "defending position" is too meagre upon which to base a conviction. So is the presence of the button on the floor. There was no evidence of a quarrel and the two men were apparently friendly toward each other. No motive for the killing appears. Although motive need not be proved where sufficient evidence of intent to kill exists, it becomes vitally important in the absence thereof (1 Wharton, Criminal Law, 12th ed.,sec. 156).

Although the evidence does not warrant the finding of guilty of voluntary manslaughter, it is sufficient to support a finding of guilty of involuntary manslaughter. From the evidence it may be inferred that accused was pointing the rifle toward deceased at a distance of less than 10 inches. By his own admission accused was not entirely familiar with the service rifle or its safety devices. To point a rifle toward a person under such circumstances constitutes the culpable negligence necessary to support an involuntary manslaughter conviction. Involuntary manslaughter, being a felonious and unlawful killing without the element of wilfulness required for voluntary manslaughter, is a lesser included offense. The

sentence is within the maximum limit for involuntary manslaughter and therefore legal.

5. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, as finds that at the place and time alleged accused feloniously and unlawfully killed Mr. Sedik Okasha by shooting him with a rifle; legally sufficient to support the findings of guilty of Charge I; and legally sufficient to support the sentence.

Thomas E. Eagan, Judge Advocate.
Thomas Trowbridge, Judge Advocate.
Fletcher R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O. JUN 8 - 1943 - To the Commanding General, U. S. Army Forces in the Middle East, A.P.O. 616, % Postmaster, New York, New York.

1. In the case of Technician 4th Grade Frank V. Nieder (R-364045), Headquarters Detachment, Heliopolis Depot, Darb el Hagg, Egypt, 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 findings of guilty of the Specification, Charge I, as finds that at the place and time alleged accused feloniously and unlawfully killed Mr. Sedik Okasha, a human being, by shooting him with a rifle. Upon approval of only so much of the findings of guilty of the Specification, Charge I, as finds that accused at the place and time alleged feloniously and unlawfully killed Mr. Sedik Okasha, a human being, by shooting him with a rifle, 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 234896).

Myron C. Cramer

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

JUN 9 - 40 AM

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ARTMENT
OF SUPPLY

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

SPJGN
CM 234913

MAY 2 8 1943

UNITED STATES	)	77TH INFANTRY DIVISION
v.	)	
Second Lieutenant HARVEY L. RHODES (0-1303388), 306th Infantry.	)	Trial by G.C.M. convened at North Camp Polk, Louisiana, April 4, 1943. Dismissal

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant HARVEY L. RHODES 306th Infantry (then Infantry) did, without proper leave, absent himself from his organization and duties at Headquarters 77th Infantry Division, Maneuver Area, Many, Louisiana, from about March 2, 1943 to about March 8, 1943.

Specification 2: In that Second Lieutenant HARVEY L. RHODES 306th Infantry (then Infantry) did, without proper leave, absent himself from his organization and duties at Headquarters 306th Infantry, Maneuver Area, Many, Louisiana, from about March 9, 1943 to about March 15, 1943.

He pleaded guilty to and was found guilty of the Charge and the 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 February 22, 1943, the accused was transferred from the Infantry Replacement Training Center at Fort McClellan to the 77th Infantry Division which was stationed at Many, Louisiana. This order transferring the accused directed him to proceed on February 28, 1943, from Fort McClellan to his new assignment (Ex. A). The official traveling distance between the two locations was shown to be 612 miles, and the officially permitted traveling time allowed for an officer traveling by rail was shown to be 500 miles a day or 200 miles a day if traveling by automobile (R. 8, 13).

On March 8, 1943, the accused signed the Officers' Register of the 77th Infantry Division, and at about 6:30 or 7 p.m. reported to the office of the Personnel Adjutant, 306th Infantry, to which regiment he was on that date assigned (R. 10, 15; Exs. B, C). An assistant clerk who was on duty there asked the accused if he had his equipment with him. When the accused told the clerk that he had left his equipment in the town of Many, the clerk told the accused that it would be permissible under the practice of that headquarters for him to get his equipment and report for duty on the following morning (R. 8-13). Following this conversation, the accused left and did not again report to Headquarters 306th Infantry Regiment until March 15, 1943 (R. 14).

4. The accused elected to remain silent, and no evidence for the defense was introduced.

5. Specification 1, alleges that the accused absented himself without leave from his organization at Headquarters 77th Infantry Division, Many, Louisiana, from about March 2, 1943, to about March 8, 1943. In addition to the accused's plea of guilty which sustains the findings of guilty, the evidence shows that the order assigning the accused to the 77th Infantry, directed him to proceed on February 28, from Fort McClellan to Many, Louisiana, a distance of 612 miles and to report there for his new assignment. It was also shown that under official traveling regulations, the accused was entitled to use not more than two days for his journey if he traveled by train, and not more than four days if he traveled by automobile. Although the method by which he traveled is not shown, we may assume from his plea of guilty to Specification 1 that he traveled by train, and that he was, therefore, absent without leave from Headquarters 77th Infantry Division from March 2, the date upon which he should have reported, until March 8, the date upon which he actually reported.

Specification 2, alleges that the accused absented himself without leave from Headquarters 306th Infantry, from about March 9, 1943, to about March 15, 1943. The finding of guilty under this Specification is supported by the accused's plea of guilty, and by the evidence showing that the accused was assigned to Headquarters 306th Infantry on March 8, that he reported to that organization on that date, that he then absented himself without leave, and did not again return to it until March 15.

The evidence, as well as the pleas of guilty, sustain beyond a reasonable doubt the findings of guilty of the Charge and the Specifications thereunder.

6. The records of The Adjutant General show that the accused is approximately 23 years of age, that he enlisted in the Regular Army on June 6, 1940, and that he was commissioned a second lieutenant, Infantry, Army of the United States on December 16, 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 record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 61.

Blake D. Bresson, Judge Advocate

Abner E. Lifscomb, Judge Advocate

Benjamin R. Sleeper, 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 Second Lieutenant Harvey L. Rhodes (0-1303338), 306th 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. Although the two offenses of going absent without leave for an aggregated period of approximately ten days involve a serious breach of discipline, the record does not show any aggravating circumstances. In view of the nature of the offenses, and the relative inexperience of the accused as an officer, I recommend that the sentence be confirmed but 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 foregoing recommendation should it meet with your approval.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 189, 4 Aug 1943)

Incl #1

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

SPJGH
CM 234964

JUN 3 1943

UNITED STATES	)	20TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, April 27, 1943. Dishonorable discharge and confinement for twenty (20) years. Post Stockade, Camp Campbell, Kentucky.
Private JOSEPH FURTADO (11044112), Company A, 480th Armored Infantry Regiment.	)	

HOLDING by 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 soldier named above.

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

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

Specification 1: In that Private Joseph Furtado (NMI) Company A, 480th Armored Infantry Regiment, Camp Campbell, Ky., did, at Fort Knox, Ky., on or about December 28th, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Providence, Rhode Island, on or about March 3, 1943.

Specification 2: In that Private Joseph Furtado (NMI) Company A, 480th Armored Infantry Regiment, Camp Campbell, Ky., did, at Camp Campbell, Kentucky, on or about April 10, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Henderson, Ky., on or about April 11, 1943.

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

Specification: In that Private Joseph Furtado (NMI), Company "A", 480th Armored Infantry Regiment, having been duly placed in confinement at Camp Stockade, Camp Campbell, Ky., on or about March 13, 1943, did, at Camp Campbell, Ky., on or about April 10, 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private Joseph Furtado (NMI), Company A, 480th Armored Infantry Regiment, Camp Campbell, Ky., on or about April 10, 1943, with intent to do bodily harm with a dangerous weapon, commit an assault upon Private Charles A. Brock, Headquarters Company, 1st Battalion, 480th Armored Infantry Regiment, by willfully and feloniously pointing a rifle at said Private Brock and threaten to shoot him.

Specification 2: In that Private Joseph Furtado (NMI), Company A, 480th Armored Infantry Regiment, Camp Campbell, Ky., did, at Herndon, Kentucky, on or about April 11, 1943, feloniously take, steal, and carry away one motor truck, value about $1,000.00, the property of Mr. Conrad T. Thomas, Herndon, Kentucky.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The reviewing authority approved the sentence, designated the Post Stockade, Camp Campbell, Kentucky, 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 28, 1942, the accused at Fort Knox, Kentucky, was missed at reveille and could not be found after a thorough search. He had not been given a pass nor permission to be absent from his organization. The morning report of that date showed him from duty to absent without leave. On March 3, 1943, he was apprehended in uniform at the home of his mother, Providence, Rhode Island, by a city policeman. The accused admitted to the policeman that he was a member of Company A, 49th Armored Regiment, 8th Division, Fort Knox, Kentucky, that he had been absent from his post since January 1, 1943, without a pass, and had lived with his relatives since that date (R. 9-10; Exs. D, E, F and G).

Accused was returned under guard to his organization, at Camp Campbell, Kentucky and placed in confinement in the Post Stockade on March 13, 1943. On April 10, 1943, while working under an armed guard, he escaped at about 8:00 p.m., from confinement and absented himself without leave. He was apprehended at about 4:00 p.m., April 11, 1943, in company with another soldier in a truck by a member of the Kentucky State Highway Patrol on State Highway 41, near Henderson, Kentucky (R. 6, 11-13, 16; Exs. A, B, C).

At the time of his escape accused and Private Bernard were prisoners under guard of Private Charles A. Brock. While digging a ditch, the two prisoners, upon their request, were taken to a nearby latrine. As Private Brock followed the prisoners out of the latrine, they turned around, charged Brock and grabbed him. One prisoner grabbed his gun and the other his head and mouth and both carried him into the locker room. They tied Brock up tight, put his pistol belt about his mouth, his web belt about his feet, unloaded the gun leaving one shell in the chamber, said that they were going to New York, told him to wait half an hour before coming out, and that if they were caught they would come back and kill him. As soon as the prisoners left, Brock came out of the building and reported the escape. The accused tied Brock up while the other prisoner pointed the gun "toward" him. Upon examination by the court, Brock testified that he believed that the other prisoner was holding the gun, was not sure whether the accused ever pointed the gun at him, and that he never was really put in fear (R. 12-16).

On Sunday morning, April 11, 1943, a 1½ ton Chevrolet 1941 general stock truck owned by Conrad T. Thomas, Herndon, Kentucky, was standing about fifty yards from his house, with the ignition key in the truck. Mr. Thomas last saw the truck when he left in his car at about 9:30 a.m. He returned at about 6:00 p.m. and next saw the truck at noon, Monday, sitting right close by the jail in Henderson. At about 4:00 p.m., Sunday, April 11, 1943, a member of the Kentucky State Highway Patrol saw two soldiers driving a civilian truck on State Highway 41, North of Henderson. He placed the accused and another soldier under arrest. The truck was a 1941 ton and a half Chevrolet with a stake body, 1942 Kentucky license AN 179, the property of Conrad T. Thomas of Herndon, Kentucky. On April 12, 1943, the sheriff came to Henderson, and took the two soldiers and Mr. Thomas took his truck. The truck had been driven 40,000 to 50,000 miles, had been recently overhauled, brakes relined and placed in good shape and had seven good tires. Mr. Thomas had sold two other trucks and believed that around $1000 would be a fair market value of the stolen truck. His

son expressed the same opinion as to the fair market value (R. 16-20).

4. The defense presented no witnesses. After the arguments of counsel, the accused made an unsworn statement that he would like to ask the court if he could get overseas service and square himself with the United States Army (R. 20).

5. a. Specification 1, Charge I: The evidence shows that accused absented himself without leave at Fort Knox, Kentucky, on December 28, 1942, and was apprehended in uniform on March 3, 1943, in Providence, Rhode Island, at the home of his mother by a policeman. The absence of two months and six days terminated by apprehension at a place long distant from his post warrant the inference of an intent to desert.

b. Specification 2, Charge I, and Specification, Charge II: On April 10, 1943, at about 8:00 p.m., the accused escaped from confinement while working under an armed guard and absented himself without leave until he was apprehended in company with another soldier in a stolen truck, by a member of the Kentucky State Highway Patrol on State Highway 41, near Henderson, Kentucky. The fact that he escaped from confinement and was apprehended in a stolen truck, warrant the inference of an intent to desert.

c. Specification 1, Charge III, alleges that the accused with intent to do bodily harm with a dangerous weapon, assaulted Private Brock, by feloniously pointing a rifle at him and threatening to shoot him. The accused and another prisoner, while working under Brock as a sentry, were leaving a latrine when the prisoners charged Brock and grabbed him. One prisoner grabbed Brock's gun, the other grabbed his mouth and both carried him into a locker room where the accused tied Brock up while the other prisoner was holding the gun toward Brock. They told him to keep his mouth shut.

Private Brock, the only witness who testified upon this Specification, states that other prisoner held the gun toward him while the accused tied him up. The accused is not charged with this offense jointly or in conjunction with any other man. While the evidence does show that the accused assaulted Brock by grabbing him and by tying him up, there is no testimony to indicate that the accused pointed a rifle at Brock and threatened to shoot him. In the absence of such proof the record is legally insufficient to support the finding of guilty of the assault charged.

d. Specification 2, Charge II alleges that the accused stole a motor truck, value about $1000, the property of Mr. C. T. Thomas of

Herndon, Kentucky. The truck, with the ignition key in the truck, was stolen by some person from in front of the residence of Mr. Thomas between 9:30 a.m. and 6:00 o'clock, April 11, 1943. The only direct proof as to the person who committed the larceny is found in the stipulated testimony of Patrolman Copeland of the Kentucky State Highway Patrol that while checking with his partner, State Highway 41, north of Henderson, Kentucky, at about 4:00 p.m., April 11, 1943:

> "* * * That they saw two soldiers driving in a truck at a moderate speed. That thinking it unusual to see soldiers driving a civilian truck, they decided to investigate. That the story the soldiers told of having borrowed the truck was unsatisfactory to the police officers, and the soldiers were placed under arrest. * * *"

The accused and Private Bernard were the two soldiers and the truck was the stolen property of Mr. Thomas.

Proof of unexplained possession of recently stolen property will support an inference that the possessor was the thief, if the possession was personal, conscious, and exclusive (36 C.J. 869, 870) (CM 230928, Lanyon).

The joint possession of two or more individuals may be personal and exclusive, if they are shown to have acted in concert and the possession is exclusive as to all persons not participating in the larceny. Under such circumstances, the possession of one participant is deemed to be the possession of all (36 C.J. 872, 873).

Possession has been held to be joint, and as such sufficient to support the inference of guilt of a defendant, who, in company with one or two other persons, was found riding in a recently stolen automobile and, although defendant was not shown to have been driving the car, the attendant circumstances were such as reasonably to indicate that he was acting in concert with the other occupants with reference to its possession (State v. Kehoe (Mo) 220 S.W. 961, Cheatham v State (Ga) 197 S.E. 70).

The use of the words "they" and "the soldiers" in the stipulation fails to show which of the soldiers was driving the truck and whether one or both of them told the unsatisfactory story about "borrowing" the truck. However, the proof that accused and Private Bernard jointly assaulted the sentry, one with his hands and the other

by pointing the gun, that they jointly escaped, that they were arrested together in the truck and that at least one of them made the false statement, to which the other tacitly assented, that they had borrowed the truck, fairly indicated that they were acting throughout in particeps criminis and warranted the inference by the court that the accused was guilty of larceny of the truck.

> "The Board of Review in scrutinizing proof and the bases of inference does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity as an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests upon an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference * * *" (CM 212505, Tipton).

6. The accused is 20 years of age. The charge sheet shows that he enlisted January 17, 1942, with no prior service.

7. There is no limit of punishment for the two offenses of wartime desertion (Chg. I). The maximum confinement for escape from confinement (Chg. II) is one year, and for larceny of property of a value of more than $50 (Spec., Chg. III) is five years. The testimony of Mr. Thomas as to his dealings in trucks, as to the value of this truck, and as to the condition of the truck and its tires, warrants the conclusion that the fair market value of the truck is in excess of $50.

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I and of Charge I, and of Charge II and the Specification thereunder; legally insufficient to support the findings of guilty of Specification 1, Charge III; legally sufficient to support the findings of guilty of Specification 2, Charge III and of Charge III; and legally sufficient to support the sentence. Penitentiary confinement is authorized for wartime desertions under Specifications 1 and 2, Charge I, under Article of War 42, and for larceny of property of a value of $50 or upward under Specification 2, Charge III, by section 22-2202, Code of the District of Columbia, 1940.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. JUN 8 1943 - To the Commanding General, 20th Armored Division, Camp Campbell, Kentucky.

1. In the case of Private Joseph Furtado (11044112), Company A, 480th Armored Infantry Regiment, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons therein stated, that the findings of guilty of Specification 1, Charge III be disapproved. Thereupon you will have authority to order the execution of the sentence. Penitentiary confinement is authorized by law in this case, but due to his age, 20 years, a Federal correctional institution or reformatory should be designated in lieu thereof under the provisions of the letter dated February 26, 1941 (AG 253, 2-6-41, E) from The Adjutant General to all Commanding Generals, "Subject: Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution."

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 234964).

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

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

SPJGH
CM 235010

22 JUL 1943

UNITED STATES v. First Lieutenant LEWIS ANGYN, JR. (0-412703), Signal Corps.	)	ARMY AIR FORCES SOUTHEAST TRAINING CENTER Trial by G.C.M., convened at Hendricks Field, Sebring, Florida, 5, 6, 7 and 8 April 1943. Dismissal, total forfeitures and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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 93rd Article of War.

Specification 1: In that Lewis Angyn, Jr., 1st Lt. Signal Corps, Hendricks Army Air Field, Sebring, Florida, did, at Hendricks Army Air Field, Sebring, Florida, from about June 4, 1942, to about January 19, 1943, feloniously embezzle by fraudulently converting to his own use the approximate sum of Nine Hundred and Seventy-one Dollars and nine cents ($971.09), lawful money of the United States, the property of the Post Signal Fund, Hendricks Army Air Field, Sebring, Florida, intrusted to him, the said Lewis Angyn Jr., by virtue of his office as Post Signal Officer, Hendricks Army Air Field, Sebring, Florida.

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

Specification 1: In that Lewis Angyn, Jr., 1st Lt. Signal Corps, Hendricks Army Air Field, Sebring, Florida, being at the time Post Signal Officer, Hendricks Army Air Field, Sebring, Florida, did, at Hendricks Army Air Field,

Sebring, Florida, from about June 4, 1942 to about January 19, 1943, feloniously embezzle by fraudulently converting to his own use the approximate sum of Nine Hundred and Fifty-one Dollars and fifty-five cents ($951.55), lawful money of the United States, the property of the United States, intended for the military service thereof, intrusted to him the said Lewis Angyn, Jr., by virtue of his office as Post Signal Officer, Hendricks Army Air Field, Sebring, Florida.

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

Specification 1: In that 1st Lt. Lewis Angyn Jr., Signal Corps, Hendricks Field, Sebring, Florida, did, at Hendricks Field, Florida, on or about December 26, 1942, with intent to deceive the Post Administrative Inspector and other persons authorized to inspect the books and records of the Post Signal Fund and the Post Signal Officer of the said Hendricks Field officially certify on vouchers of the said Post Signal Fund that he had paid ten dollars ($10.00) each to Neil Austin and to Cleo McCroskey, telephone operators, Tully R. Linn, telegraph operator, Harold I. Gates, telephone accountant and Henry L. Green, telegraph accountant, which certifications were false and were then and there known by the said Lieutenant Lewis Angyn, Jr. to be false in that the said Neil Austin and Cleo McCroskey were not telephone operators, the said Tully R. Linn was not a telegraph operator, and the said Henry L. Green was not a telegraph accountant, and the said Harold I. Gates was not a telephone accountant.

Specification 2: In that 1st Lt. Lewis Angyn Jr., Signal Corps, Hendricks Field, Sebring, Florida, did, at Hendricks Field, Florida, on or about January 15, 1943, with intent to deceive the Post Administrative Inspector and other persons authorized to inspect the books and records of the Post Signal Fund and Post Signal Officer officially certify on voucher #3 of the said Post Signal Fund that he had received from persons on vouchers - month of December, 1942 - #4, #12, #13, #15, #18, #21, #22 the sum of Seventy Dollars ($70.00) for redeposit in the Post Signal Fund, Ten Dollars ($10.00) from each person, which certification was false and was then and there known by the said Lieutenant Lewis Angyn Jr. to be false and untrue in that he had not collected from said persons the said sums of money or any other sums for redeposit in the Post Signal Fund.

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

Specification 1: In that 1st Lt. Lewis Angyn Jr., Signal Corps, Hendricks Field, Sebring, Florida, did, at Hendricks Field, Florida, on or about December 26, 1942, wrongfully use his official position as First Lieutenant, Signal Corps and Post Signal Officer to obtain an undue advantage for himself over his subordinates in that he requested, induced, and persuaded twelve (12) enlisted men of his command and seven (7) civilian employees in the Signal Office to endorse and deliver to him certain checks each payable in the amount of ten dollars ($10.00), to which checks he was not entitled.

He pleaded not guilty to, and was found guilty of, all 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 only so much of the finding of guilty of Specification 1, Charge I as involves a finding of guilty of embezzlement of an unknown sum of money, not exceeding $971.09, only so much of the finding of guilty of Specification 1, Charge II as involves a finding of guilty of embezzlement of an unknown sum of money, not exceeding $951.55, only so much of the finding of guilty of Specification 2, Additional Charge I as involves a finding of guilty of falsely officially certifying that he had received $10 each from the persons on vouchers--month of December, 1942--#4, #12, #13, #15 and #22, and only so much of the finding of guilty of Specification 1, Additional Charge II as involves a finding of guilty of wrongfully using his official position to obtain an undue advantage by requesting, inducing and persuading 10 enlisted men and 5 civilian employees to indorse and deliver checks; approved the sentence; and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that the accused was made Post Signal Officer at Hendricks Field, effective 4 June 1942, and served in that capacity until 25 or 26 January 1943, when Captain Henry H. Brice became Post Signal Officer. The accused officially took possession of all assets on 8 June 1942. Second Lieutenant Leland H. Rawlings was assigned to Hendricks Field as Assistant Post Signal Officer 3 December 1942, and prior to that time the accused was the only Post Signal Officer there (R. 126, 134, 135, 140, 141, 143; Ex. A-48).

a. Specification 1, Charge I and Specification 1, Charge II:

Mr. Ray Morgan, manager of the telephone company at Sebring, Florida, had charge of the installation of the telephone system at Hendricks Field. At the suggestion of the accused the pay stations installed were run through the field instead of through the board in Sebring, so that the Signal Officer became responsible for collecting, both as to local and long distance calls. The telephone company bills were prepared from tickets given the Sebring operators by the operator at the field. The Post Signal Officer was billed monthly for $145.50, rental on ten lines into the switchboard (at first it was erroneously charged at $166.50). The telephone company bills for the period involved were as follows: 21 May through 15 June 1942, long distance calls, $347.50; 16 June through 15 July, long distance calls, $722.40 and rental $145.50; 15 July through 15 August, $1,212.10 and rental; 15 August through 15 September, $1,154.50 and rental; 15 September through 15 October, $1,245 and rental; 15 October through 15 November, $1,481.15 and rental; 15 November through 15 December, $1,549.95 and rental; 15 December through 15 January 1943, $1,931.70 and rental; and 15 January through 15 February $1,744.35 and rental. The telephone company made no service charge for personal calls. Charges for Government calls were paid through the Post Finance Office by check; other amounts paid were paid through the Post Signal Office in cash. The total amount charged to the Post Signal Office for telephone No. 340 from 21 May 1942 to 15 February 1943 was $13,608.45, of which $2,683.59 was paid, leaving a balance due of $10,925.86, and the amount charged for telephone No. 341 was $651.79, of which $393.94 was paid, leaving a balance due of $257.85 (Ex. A-33). The balance due was not for personal calls, and the bill had been sent to the Government (R. 56-65).

Miss Mildred Tomlinson, branch manager of Postal Telegraph Company, testified that the Post Signal Officer was billed "for personnel" and also for the Government, and that the Government bills were paid by check. Under an arrangement with the telegraph company, the Post Signal Officer was paid a 15 percent commission on outgoing telegrams, and a "three percent delivery" (3¢) on incoming telegrams. These payments were made in cash on execution of vouchers. This arrangement was already in effect when Miss Tomlinson became manager in November 1942. She testified to amounts paid as follows: 1 August to 15 August, deliveries, $4.62, commissions $5.67; 16 August to 15 September, deliveries $2.91, commissions $18.20; 16 September to 15 October, commissions $8.90, deliveries $2.46; 16 October to 15 November, commissions $10, deliveries $3.03; 16 November to 15 December, commissions $18.04, deliveries $1.80; and 16 December to 15 January 1943, commissions $21.26, deliveries $3.90. Payments were made sometimes to the accused and sometimes to Lieutenant Rawlings. Ten vouchers and a chart of the vouchers were introduced in evidence (Ex. A-34). The total amount paid to the accused was commissions $44.19 and deliveries $13.02 (R. 66-72).

Mr. Arthur P. Schmaus, Western Union office manager in Sebring, Florida, since 19 January 1943, testified that the Post Signal Officer was billed for telegrams sent by personnel at Hendricks Field, and was paid 15 percent of the total bill by the telegraph company. He was also paid three cents for each delivery on telegrams sent to Hendricks Field other than Government telegrams. Amounts so paid to the Post Signal Officer as commissions, according to the records, were as follows: 31 July 1942, $39.67, 25 August $73.49, 22 September $87.09, 30 September $74.64, 16 November $77.24, 5 December $72.25 and 30 December $82.28. Amounts paid for deliveries were as follows: 17 June 1942, $22.99, 30 June $29.58, 31 July $37.50, 31 August $44.07, 29 September $34.71, 16 November $29.40, 2 December $33.45, and 30 December $38.10. Total commissions paid were $506.66, and total deliveries, $268.80 (Ex. A-35). These payments could have been made either by check or in cash, but there were no entries in the checkbook indicating payment by check (R. 72-77).

Mrs. Helen Emry Eddy was chief clerk in the Post Signal Office, Hendricks Field from November 1941 to February 1943. Mrs. Betty Crites Rhoad was employed there from about 15 August 1942 to 15 March 1943, and served as bookkeeper from the latter part of September. Mrs. Eddy identified several books which were used in the office until December 1942, at which time she ceased to have anything to do with the books. At the time the accused became Post Signal Officer there was no shortage in the funds according to the books. Cash was kept in a box in the safe, at first an ordinary cigar box and later a tin box with a lock. The accused and Mrs. Eddy had access to the funds, and during the day other people in the department. Mrs. Eddy discovered a cash shortage of $16.92 in June and reported it to the accused. She had kept the money in her desk during the day, felt responsible and offered to make up the shortage, but the accused told her it was not her responsibility. This shortage was not "made up" while Mrs. Eddy kept the books. She discovered a further shortage of $138, probably in July, again reported it, and suggested that they change the combination of the safe. The accused took no action, and said that the commissions from Western Union and Postal Telegraph Company would make up the shortage. When Mrs. Eddy returned from a vacation in August she found the fund short $500. She again suggested changing the combination on the safe, and also reporting the matter to higher authority, but the accused took no action. In June or July the accused borrowed between $40 and $60 from the money in the safe, stating that he would use it to pay his rent. On another occasion the accused admitted taking $60, which Mrs. Eddy missed from the cash, for use on a trip on detached service and said he would replace it when he was paid for the trip. The sums borrowed were not repaid. In December Mrs. Eddy gave the accused $145 from the cash

fund which he said was used to pay a bill he owed at the Post Exchange. She put a note in the box for this, but it disappeared from the safe. Frequently, the accused took small sums, $10 or $15, from the cash box, and left notes showing the amount taken. These small sums were repaid to the cash box (R. 77-83, 102).

When Mrs. Rhoad took over the bookkeeping a statement was prepared, about 10 or 13 October 1942, showing a shortage of $575.19. Mrs. Eddy gave the accused a copy, suggesting that it be reported to higher authority. No action was taken. The accused asked Mrs. Eddy not to tell Mrs. Rhoad there was a shortage and said that in a few months the commissions would cover "even that shortage". No record of commissions received from telegraph companies was kept except one that Mrs. Eddy kept for her own information. This money was not shown in the council book, which was prepared by the accused. Prior to January or February 1943, Mrs. Eddy and Mrs. Rhoad did not know that a three-cent delivery charge was received on each telegram received. When the statement of shortage was prepared, all of the money was placed in a large box that was locked and put in the safe, except a $25 cash fund for daily use. Mrs. Eddy and Mrs. Rhoad had the only keys to this box. Money from bills was kept in a tin box and money from commissions in a small wooden box. When the latter was opened in the presence of Lieutenant Rawlings, it was empty. The screws had been removed and the money taken out. The accused made collections from the telephone pay stations once a week, but no record was made, nor accounting taken. The accused told Mrs. Rhoad not to keep accounts of these collections. He would give Mrs. Eddy an amount of cash equal to the toll tickets and tax, and it was kept in the safe, but no books were kept on it. At the end of each month the telephone bill would be paid from cash in the safe. There was an overage on these collections from pay stations on account of local calls, and on one occasion the accused said he thought he was entitled to the overage because he used his own car for "collections, etc." He did not accuse Mrs. Eddy or Mrs. Rhoad of taking any money or causing the shortage, and said that it was his responsibility. On one occasion the safe was left unlocked over night, but they checked the funds the next morning and nothing had been taken out. They kept a record of the shortage at all times. Mrs. Eddy told the accused about the shortage on at least three occasions. The combination on the safe was changed and thereafter Mrs. Eddy knew nothing about the state of the shortage, as the accused was the only person who counted the money then. Delinquent accounts owed to the Signal Office were negligible, not more than fifty cents a month. On one occasion Mrs. Rhoad reported a shortage of $5 in the daily cash box to the accused but it was not "made up". The amount of the shortage increased (definitely in December) and was never

"made up" except for small amounts taken by the accused from the cash box for which the accused left notes. On 26 December, before Mrs. Rhoad could determine the increased amount of the shortage, the accused relieved her of keeping the books; thereafter he was responsible for making entries, but none were made. Mrs. Rhoad kept a record of her own cash received and paid out. Later, in January, she was directed to bring the books up to date, which she did by copying entries from her private record. She could not "make a balance" because the accused had put all of the money together (R. 83-89, 94-95, 102-120).

Second Lieutenant Leland H. Rawlings was Assistant Post Signal Officer from 3 December 1942. The accused stated to him that a shortage existed and that it was "from Western Union accounts that were short". On 5 December 1942, he assisted the accused in making collections from the telephone pay stations. When they counted the money and compared it with the toll tickets and charges, there was an overage of either $8 or $18. The accused stated that the overage existed from calls that were made to Sebring, from nickels that were deposited. The money was put on the table and divided, and the accused offered Lieutenant Rawlings half of it, but he refused to take it. Lieutenant Rawlings did not know whom the funds belonged to. When Captain Henry H. Brice became Post Signal Officer on 26 January 1943, he knew there were not sufficient funds on hand to pay the bills that were due. From the records as he found them there should have been funds on hand to pay the bills. What money was on hand was all in one box, and it was impossible to tell what it was for. The amount of cash on hand when he became Post Signal Officer was approximately $723. According to Captain Brice's records the funds were short approximately $500, not including commissions, deliveries, local telephone collections or service charges. In the opinion of Captain Brice, commissions and "deliveries" from commercial telegraph companies and money collected from unofficial or pay station calls, cannot be retained by the Post Signal Officer, but must be accounted for. Captain Brice found in his experience that collections from pay stations exceeded the amount of toll tickets (R. 134-138, 140-143, 147-149).

First Lieutenant T. L. Worrell, an accountant, made an audit of the Post Signal Office accounts about 27 January 1943. In making the audit of the books he found no indication that any delivery commissions were received from telegraph companies. Any amounts so received would be an additional shortage over what is shown in his audit. He found that the money received was "all put in one lump sum" and therefore it was impossible to say whether the cash on hand belonged to

the Government or the Post Signal Fund. The original audit began at a time prior to the date the accused became Post Signal Officer, and the court sustained a motion to strike the part prior to that date. Lieutenant Worrell then revised his audit to eliminate the part stricken on motion and it was introduced in evidence (Ex. A-47). The several schedules of the audit were summarized as follows: Schedule A--cash on hand 25 January 1943, $723.15; Schedule B--receipts from toll charges on personal calls made over Government telephones, including tax, $6,463.98, less amount deposited from this source with Finance Officer, $5,866.68, leaves amount that should be on hand, after correcting error in bookkeeping, $584.05; Schedule C--service charges collected on personal calls over Government telephones, $559.75, less deposits in bank to credit of Post Signal Fund, $452.12, leaves amount that should be on hand, $107.62; Schedule D--amount collected for toll tickets on pay station calls, $723.75, less amount paid therefrom, $447.25, leaves amount that should be on hand, $285.50; Schedule E--service charges collected on pay station calls, $73.15, none of which was deposited to Post Signal Fund; Schedule F--corrected amount collected for Western Union telegrams, $4,241.16, less corrected payments to Western Union, $3,772.97, leaves amount that should be on hand, $468.19; Schedule G--corrected amount collected for Postal Telegraph Company telegrams, $641.23, less payments to Postal Telegraph Company, $605.33, leaves amount that should be on hand, $35.90; Schedule H--15 percent commissions received from Postal Telegraph Company, $82.03, less amount accounted for in Post Signal Fund, $39.30, leaves amount that should be on hand, $42.73; Schedule I--15 percent commissions received from Western Union, $534.99 less amount accounted for in Post Signal Fund, $82.28, leaves amount that should be on hand, $452.71; and Recapitulation--total record balances, after corrections to give amount that should be on hand, $2,049.85, less $87.08 prepaid to Postal Telegraph Company and $23.88 prepaid to Western Union, leaving $1,938.89, less cash on hand, $723.15, leaves net shortage of $1,215.74. The audit did not include "deliveries" collected from the two telegraph companies, and such amounts as may have been collected for "deliveries" would increase the shortage shown by the audit. Lieutenant Worrell was of the opinion that the amounts shown in Schedules B, D, F and G were Government money (R. 121, 122, 125, 127-131, 152-159).

Mr. Charles R. Longbottom, cashier of Tropical State Bank, Sebring, Florida, testified that the accused opened an account at the bank on 30 June 1942, which was converted into a joint account with his wife, Mrs. Marguerite Angyn, on 8 October 1942. The total cash deposits from July 1942 to January 1943, inclusive, were $1,052.43, and the total deposits by check from June to January, inclusive, were $2,122.57, or a

total of $3,175. The signature card, deposit slips and ledger sheet of the account were introduced in evidence (Exs. A-49, A-50, A-51). It was stipulated that the pay checks of the accused for the various months were as follows: June, $156.55; July, $294.35; September, $241.55; October, $242.95; November, $273.22; and December and January, $274.62 each. Mrs. Lucy Battle, a clerk in the civilian personnel office, testified that Mrs. Angyn was employed at Hendricks Field from 14 October 1942 to 7 January 1943 at $135 per month. She received a pay check for $9, five checks for $67.50 each, one for $29.24, and one for $27.37 (R. 131-134, 151-152).

b. Specifications 1 and 2, Additional Charge I and Specification 1, Additional Charge II:

On or about 26 December 1942 the accused submitted to a number of civilian employees and enlisted men of the Post Signal Office checks drawn on the Post Signal Fund in the amount of $10 each and separate vouchers, with the request that these persons indorse the checks, sign the vouchers, and deliver both to the accused. Private Neil R. Austin indorsed a check made out to him (Ex. A-1), returned it to the accused, and signed a voucher (Ex. A-2), which was in blank at the time. He did this at the request of the accused who said something about a shortage, and he wrote the words "Telephone Operator" after his name on the voucher because the accused told him to do so. He was not in fact a telephone operator, but his duties were outside maintenance. He did not receive $10 in money. He identified the signature of the accused on the voucher. Private First Class Tully R. Linn indorsed a check (Ex. A-3) and signed a voucher (Ex. A-4) under practically identical circumstances, except that he did not identify the signature of the accused on the voucher, the accused asked him to write the words "Telegraph Operator" underneath his name, and he was not a telegraph operator. Private Harold R. Gates indorsed a check (Ex. A-5) and signed a voucher (Ex. A-6) under the same circumstances, except that no reason was given him for doing so, he thought he would actually receive the money later, he did not remember whether the voucher was in blank at the time he signed it, he was asked to write "Telephone Accountant" under his name, and he was not a telephone accountant. Private Henry L. Green indorsed a check (Ex. A-7) and signed a voucher (Ex. A-8) under the same circumstances as in the instance of Private Austin, except that the accused gave him no reason for signing, he thought he was giving the check to the accused, he was asked by the accused to write "Telegraph Accountant" under his name, and he was not a telegraph accountant (R. 8-26).

Private Cleo McCroskey indorsed a check (Ex. A-10) at the request of the accused, but could not remember signing the voucher

(Ex. A-11). He returned the check to the accused, and understood that it was to make up a shortage. He was never a telephone operator, and did not receive the $10. When Private First Class J. R. Harpster indorsed a check (Ex. A-12) and signed a voucher (Ex. A-13) the circumstances were the same as in the case of Private Austin, except that he stated that the signature on the voucher looked very much like that of the accused, he did not remember what was on the voucher when he signed it, he intended the check as a gift to the fund to make up a shortage, and he was a telegraph operator, Manager of the Telegraph Office and Chief Operator. Sergeant William D. Brown likewise indorsed a check (Ex. A-14) given him by the accused and signed a voucher (Ex. A-15), which was in blank when he saw it. He did not receive $10, and he left the check on the desk. He thought he would get the money at a later date, and did not know what the money from the check was to be used for. He was not a telegraph operator. Private Clyde Griffin indorsed a check (Ex. A-16) at the request of the accused under similar circumstances, and left it on the desk. The signature under Griffin's indorsement looked like that of the accused. He also signed a voucher (Ex. A-17) because the accused asked him to, and it was not filled out when he signed it. He did not receive $10. The accused told him that the check would be used for a shortage (R. 26-34; Ex. A-9).

Mrs. Mabel B. Monroe, a civilian employee in the Signal Office, also indorsed a check (Ex. A-18) at the request of the accused and left it on the desk. She knew it was to cover a shortage. She signed a voucher (Ex. A-19), and identified the signature of the accused, but did not remember the condition of the voucher, at the time she signed it. She did not receive $10, and the accused did not collect $10 from her about 15 January for redeposit in the Post Signal Fund. Miss Betty Barker, a civilian employee, indorsed a check given her by the accused (Ex. A-20) and left it on the table. She also signed a voucher (Ex. A-21), the top part of which was not written at the time. She identified the signature of the accused. She did not receive $10, and the accused did not collect $10 from her about 15 January for redeposit. She understood that she would receive the money in a month or two. Evelyn Kelly, another civilian employee, also indorsed a check (Ex. A-22) at the request of the accused, and signed a voucher (Ex. A-23), which had not been filled in. She identified the signature of the accused. She did not receive $10 and did not expect to, and left the check there. The accused did not collect $10 from her about 15 January for redeposit to the Post Signal Fund. Ruby Richardson, civilian employee, indorsed a check (Ex. A-24) at the request of the accused and signed a voucher (Ex. A-25), which was not filled in at the time. She was told that the check was to help cover a shortage in the Signal Fund, and she left it on

the desk. The signature on the voucher looked like that of the accused. She did not receive $10, and did not give the accused $10 for redeposit. Margaret Thompson, civilian employee, indorsed a check (Ex. A-26) and signed a voucher (Ex. A-27) under practically identical circumstances. She did not give the accused $10 for redeposit. Corporal W. R. Snoddy indorsed a check (Ex. A-28) at the request of the accused, who said there was a shortage, that he was asking all the men to "help him out", and that "he was going to co-operate with everybody that co-operated with him, that anybody that did not, he would not co-operate with them". Corporal Snoddy left the check on the desk. He identified his signature and that of the accused on the voucher (Ex. A-29), but did not remember signing it. He did not receive $10, but was told that if the shortages were made up there would come a time when they would begin to receive $10 a month. He was a telegraph and teletype operator (R. 35-56).

Mrs. Eddy, chief clerk, was asked to sign a voucher to be used to cover a shortage in the fund. No amount was stipulated, and she refused to sign the voucher. Mrs. Rhoad, bookkeeper, was asked to sign a voucher that she had received a check for $10, which was to be used to make up a shortage, but she refused to do so. It was stipulated (Ex. A-36) that if "certain witnesses" were present they "would testify that they had received the sum of $10.00 and had signed the voucher", and five checks and vouchers (Exs A-37 through A-46) were placed in evidence. Without objection by the defense there was introduced in evidence, without identification other than the statement of the prosecution, "original deposit slip, note signed by Lt. Angyn, and voucher signed by the accused with reference to deposit of $70.00 in the Post Signal Fund" (Exs. A-30, A-31, A-32). The deposit slip shows deposit of $70 to Post Signal Fund in Tropical State Bank on 15 January 1943, the note states that the deposit slip covers $70 collected by the accused from civilian operators, and the voucher, dated 15 January 1943, shows receipt by the accused for redeposit of $10 each from seven persons, not named, on vouchers for December, #4, #12, #13, #15, #18, #21 and #22 (R. 77, 102-103, 120-121).

c. Written statement by the accused:

Colonel Carl B. McDaniel, Commanding Officer, Hendricks Field, identified a five page letter dated 3 February 1943 (without inclosures referred to therein) from Post Administrative Inspector to Commanding Officer (Ex. A- 52) containing a report of investigation of the accounts of the Post Signal Officer, a first indorsement thereon to the accused (Ex. A-52) "for comment and explanation" and a six page indorsement from the accused to Commanding Officer (Ex. A-52) with reference to the basic communication. These documents were introduced in evidence without

objection by the defense (R. 160-161).

The basic communication was a detailed report with recommendations. The indorsement by the accused stated with reference to $10 paid to each telephone or telegraph operator or accountant, that it was explained to each individual that a shortage existed in the cash accounts and that with their help it could be straightened out, that no one was ordered to help with the shortage, that checks were made out to each individual, which they accepted and indorsed, that the checks were then placed in the cash box and not embezzled by the accused, and that later the checks were cashed and the cash placed in the Signal Office safe. When the accused found on 15 January that the civilians were not eligible for remuneration he took $70 from the cash box and redeposited it to the Post Signal Fund. The vouchers covering payments to 12 enlisted men indicated that they were assigned to keeping telephone and telegraph accounts. When a little help was needed "they did at one time or another help check and account the telephone and telegraph activities", although these were not their permanent assignments. Those that did not see fit to place the check in the cash box were not given a check, due to the fact that these individuals refused a check under any circumstances. With reference to the audit and telegraph company commissions the accused stated in the indorsement that the "audit was checked by myself and found to be correct, but it is not understood why there should be more money on the books during a billing period than the regular amount of the bill plus the service charge and tax". All commissions paid by the two telegraph companies were put in the cash box, and it was his understanding that the amounts were placed in the books by the bookkeepers, but they failed to put the commissions received in the books. When he came to the field he assumed that they knew how to handle the books, and he "let them carry on as they were doing". Through his ignorance and lack of knowledge of bookkeeping he failed to note what was going on. With reference to five cent charges on local calls the accused stated that these were made "to cover any shortage that would come up in the telephone coin boxes". They were using Class A telephones, on which persons calling could get the city operator by dialing 9, and thus avoid going through the switchboard at the field and depositing a nickel. There was no way to check these calls made by dialing 9. Sometimes the boxes were over and sometimes under the amount of the telephone tickets. On one occasion Mrs. Eddy remarked that the pay station money was $14 short according to the tickets. The amount of nickels taken in for local calls was used to make up any shortage of toll calls through the pay station. There was no way of knowing when a person made a long distance call by dialing

9, and going through the Sebring exchange instead of the field exchange. For example, the audit showed cash receipts from pay stations of $179.15 for the period 18 September to 20 November 1942, and payments to the telephone company for the same period of $185.29. For the period 21 November to 20 December the respective figures were $259 and $261.96. Five or six days before the accused was relieved, Lieutenant Rawlings tried out a new system by taking the dials off the pay station telephones, to make everyone deposit a nickel for a local call, and make the boxes have more money in them than the long distance toll tickets, provided all long distance calls are paid for. The accused undertook the responsibility of the pay stations for the convenience of the men; it was "getting too much" for him to handle, and he was planning to turn over the pay stations to the telephone company, when he was relieved. With reference to the recommendations in the basic communication, the accused expressed his willingness to repay the Signal Office the amount of $1,823.28, because he realized that it was his responsibility and that through ignorance and lack of knowledge of accounts and books the shortage had developed. He stated it was not an embezzlement for his own use and benefit, that he was the only officer assigned to the Signal Office, that because of the many duties which he had to perform he was kept away from the office most of the time, and that the safe had to be left unlocked in his absence and he could not control "who would have access to the safe in which the money was kept" (Ex. A-52).

4. The defense introduced a schedule of collections (Ex. B-1) showing deposit of $723.15 by Post Signal Office with Finance Office 6 February 1943, and also a receipt by Captain Brice (Ex. B-2) dated 25 January 1943, acknowledging receipt from the accused of $351.05 in bank and $113.98 in cash (R. 163).

"Mrs. Monroe" testified that she was on duty at the Signal Office on a Sunday in September or October 1942 and entered the office through the telephone room, as the front door was locked. On arriving there she found the desk of Mrs. Eddy disarranged and the drawers open. She examined the safe and it was unlocked. She called Mrs. Rhoad and another employee. The next day Mrs. Eddy "checked the safe". Mr. Roy Morgan testified that the arrangements for the pay stations were made by "Lt. Jones". When they arrived the accused was in charge, and suggested that they be run through "his board". It had been Mr. Morgan's idea to run the lines through the Sebring board. The "boxes" were the property of the telephone company. The money from the boxes belonged to the telephone company "after the bill was paid; until then it was somebody else's". The accused was responsible until the company received

the money. It is possible for operators to be confused by people "dropping in money fast". If the lines had been routed "from downtown" the Signal Officer would have been relieved of responsibility. The telephone company did not request the Signal Officer to act as its agent and did not offer him a commission for collecting from the boxes. Although the operator can be reached from some telephones by dialing 9, Mr. Morgan did not know whether this was true of pay stations (R. 163-169).

A statement showing Mrs. Angyn's 1942 income other than that received at Hendricks Field (Ex. B-3) was introduced. The amount was $945. The testimony of Private Ralph W. Card was introduced by stipulation (Ex. B-4), and was in substance as follows: On 26 December 1942 he received a check on Post Signal Fund from the accused, and indorsed it at the request of the accused, who did not give him $10. He understood there was a shortage. He gave the check back to the accused to use as he saw fit, and was not forced to sign the check. He helped "the girls" with the telephone accounts, but not with the operation of the board. It was stipulated that "AR 210-50, dated December 29, 1942" was first received for distribution at Hendricks Field 2 February 1943 (R. 169-170).

The accused elected to remain silent.

5. At the request of the court a certificate dated 8 June 1942, signed by Second Lieutenant George W. Jones (Ex. C-1), showing Post Signal Office assets of $189.66 as of 31 May 1942, including $64.83 cash and $116.03 in bank, was introduced, and also a receipt dated 8 June 1942 and signed by the accused (Ex. C-2), showing receipt of the amounts (cash and in bank) as stated above (R. 170-171).

6. a. Charges I and II: The evidence shows that when the accused was relieved as Post Signal Officer the amount of money on hand was $723.15, whereas according to the books as audited there should have been on hand $1,938.89. He was therefore short in the amount of $1,215.74. In addition to this amount reflected by the audit, he did not account for $13.02 paid to him by Postal Telegraph Company and $268.80 by Western Union for delivering telegrams. The total shortage including these items was $1,497.56. Part of the money involved was property of the Government and part belonged to the Post Signal Fund. The accused commingled the money in his possession so that it was impossible to determine what part of the shortage was in Government funds and what part in the Post Signal Fund.

Of the money that should have been on hand, that part belonging to the Government was $584.05 (Schedule B of Audit), $285.50

(Schedule D), $468.19 (Schedule F), and $35.90 (Schedule G), or a total of $1,373.64, less $110.96 prepaid by the accused to telegraph companies, or a net amount of $1,262.68. The part belonging to the Post Signal Fund was $107.62 (Schedule C), $73.15 (Schedule E), $42.73 (Schedule H), and $452.71 (Schedule I), or a total of $676.21, plus "deliveries" received but not shown in the audit, $281.82, or the total sum of $958.03. It follows that if the total cash on hand were treated as either Government funds or part of the Post Signal Fund, there would remain a substantial shortage.

It was shown without contradiction that the accused borrowed between $40 and $60 from the money in the safe in June or July to pay his rent, took $60 on another occasion for expenses on a trip, took $145 in December to pay his account at the Post Exchange, frequently borrowed sums of $10 and $15 from the cash box (these were repaid), kept no record of commissions and "deliveries" received from telegraph companies, kept no account of collections from telephone pay stations, and stated that he was entitled to the excess collections from pay stations.

> "Where it was charged in four specifications that accused had embezzled certain sums of money received from four different sources, and on the trial he accounted for part of the whole amount that had been entrusted to him, but there was nothing to show from what particular funds the money accounted for had been drawn, a finding under each specification that accused embezzled 'a part thereof, amount unknown' was proper." (Dig. Op. JAG, 1912-40, sec. 451 (23).)

b. Additional Charges I and II:

It was shown that on or about 26 December 1942 the accused certified on vouchers of Post Signal Fund that he had paid $10 each to Privates Neil R. Austin, Harold R. Gates and Henry L. Green, as remuneration, and that they were respectively a telephone operator, a telephone accountant and a telegraph accountant. They did not in fact occupy these positions. It was not shown that vouchers as to Private Cleo McCroskey and Private First Class Tully R. Linn were signed by the accused. Extra payments from Post Signal Funds to enlisted men serving as telephone operators and accountants were authorized under specified conditions (par. 14f (7), and par. 15f, AR 210-50, 1 November 1938). 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), and knowingly making a

false official statement is so cited by the Manual for Courts-Martial as a violation of the 95th Article of War (MCM, 1928, par. 151). It was further shown that the accused requested and induced 10 enlisted men and 5 civilian employees in the Signal Office to indorse and deliver to him checks in the amount of $10 each.

It was not shown by competent evidence that the accused signed a certificate on a voucher of Post Signal Fund that he received $10 each from seven persons on or about 15 January 1943 for redeposit. An instrument purporting to be such voucher was introduced in evidence without objection, but it was not identified by any witness, nor was the signature of the accused proved.

7. The report of investigation of accounts of the Post Signal Officer by Post Administrative Inspector (Ex. A-52) was hearsay and was erroneously admitted in evidence. However, the pertinent matters stated therein were substantially proved by other competent evidence, and the principal effect of the report was to serve as an introduction to the first indorsement by the accused submitting his explanation of events. In the opinion of the Board of Review, the admission of the document under the circumstances did not affect the substantial rights of the accused.

8. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 20 September 1935 to 13 September 1937 and from 14 February 1941; appointed second lieutenant, Signal Corps-Reserve from C.M.T.C., 17 April 1941; active duty 30 August 1941; appointed temporary second lieutenant, Army of the United States, 31 October 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 finding of guilty of Specification 1, Additional Charge I, except as to "Cleo McCroskey" and "Tully R. Linn", legally insufficient to support the finding of guilty of Specification 2, Additional Charge I, legally sufficient to support the approved findings of guilty of all other Specifications, and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd, 94th or 96th Article of War, and mandatory upon conviction of a violation of the 95th Article of War.

Victor S. Hicks, Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 31 JUL 1943 - To the Acting 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 Lewis Angyn, Jr. (0-412703), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of Specification 1, Additional Charge I, except as to "Cleo McCroskey" and "Tully R. Linn", legally insufficient to support the finding of guilty of Specification 2, Additional Charge I, legally sufficient to support the approved findings of guilty of all other Specifications, and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence to dismissal, total forfeitures, and confinement for five years be confirmed and carried into execution.

3. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action 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-Drft. ltr. for sig. Actg. Sec. of War.
Incl.3-Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 283, 30 Sep 1943)

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

SPJGK
CM 235011

UNITED STATES v. First Lieutenant JOSEPH GOODMAN (O-497802), Quartermaster Corps.	)))))))	ARMY AIR FORCES SOUTHEAST TRAINING CENTER Trial by G.C.M., convened at Selman Field, Monroe, Louisiana, 13 April 1943. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, 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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Joseph Goodman, Quartermaster Corps, Army of the United States, did, at Selman Field, Monroe, Louisiana, on or about January 2, 1943, wrongfully dispose of by delivering to the firm of the Lieber Company, a partnership, 70 pounds of zinc, value about $1.75, 10 pounds of copper, value about $.70, 100 pounds of burlap, value about $2.00, and 25 pounds of cotton bags, value about $1.00, property of the United States.

Specification 2: In that First Lieutenant Joseph Goodman, Quartermaster Corps, Army of the United States, did, at Monroe, Louisiana, on or about January 2, 1943, wrongfully accept a gift in the amount of $20.00, lawful money of the United States, from S.K. Heninger, a partner in the firm of Lieber Company, a partnership, doing business in Monroe, Louisiana, with which partnership it was First Lieutenant Joseph Goodman's duty as an agent of the government to carry on negotiations.

He pleaded not guilty to the Charge and Specifications. He was found guilty of Specification 1 with the word "approximately" immediately preceding the words "70 pounds of zinc", immediately preceding the words "10 pounds of copper", immediately preceding the words "100 pounds of burlap", and immediately preceding the words "25 pounds of cotton bags"; guilty of Specification 2, and guilty of the Charge. 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. Accused is a first lieutenant, Quartermaster Corps (R.100). He arrived at Selman Field, Monroe, Louisiana, about 19 November 1942. After about five days, he was made salvage and property officer. As salvage officer he "supervised the handling of salvage materials" (R. 9,47,49). The salvage consisted in part of burlap and cotton bags, rags, copper, brass, aluminum and old flashlight batteries which had covers made of zinc. It was collected "from various places, at all the organizations on the field" and turned in to the salvage department at its Warehouse No. 3 where it was sorted and stored in separate bins in the warehouse (R.15,18). Salvage sales were held according to the "accumulation", bi-weekly, monthly, or bi-monthly. Most of the salvaged property was sold to local junk dealers (R.10). Before accused took charge, the purchasing department handled all contracts for sale of salvage. Upon his arrival the salvage department took over all sales of salvage except those of egg crates, garbage, grease, and tin cans (R.49,56,57).

Sales made by the salvage department were conducted by sending the junk dealer a form on which to make his bid. This form contained the terms of sale. It was executed and returned by the junk dealer in triplicate, with a 20 per cent deposit, in an envelope marked "salvage sale" and designating the time for the opening (R.60). Thereafter the successful bidder was notified and required to pay the balance due before any material was removed (R.61). The salvage department was not required to make deliveries. However, if a purchaser was unable to move "the stuff" and the warehouse was "crowded for space" the salvage department would deliver (R.9). There were "lots of things specified in the contract and lots that were not", lots of things that the salvage officer and the junk dealer got "together on" (R.68).

During the last three months of 1942, used flashlight batteries, issued originally by the sub-depot supply to the squadrons and sub-depot engineers on the post, were turned back to the sub-depot supply for the salvage of their zinc content. They belonged to the "government" and the zinc had a salvage value (R.14). These used batteries were collected in a box outside the sub-depot supply office and were picked up at different times by Corporal Thomas J. Catalano, 907th Quartermaster Detach-

ment, who was salvage foreman under accused at Selman Field. He picked up all kinds of salvage, including brass, copper and the flashlight batteries, in a quartermaster truck and turned it in to the quartermaster warehouse (R.12-17,28).

Private First Class Fronabarger Hutto, 907th Quartermaster Detachment, worked in the salvage warehouse at Selman Field, handling salvage materials. He testified that burlap and cotton bags, salvage clothing, copper, aluminum, and old flashlight batteries were brought in to the warehouse, usually, by Corporal Catalino who drove the salvage truck. On being delivered to the warehouse, salvage clothing was torn into rags, the flashlight batteries were salvaged for zinc, and the bags were separated. The salvaged material was kept separately according to kind in the warehouse. The witness recalled that during the latter part of December or the first part of January Corporal Catalano brought in a "shipment" of flashlight batteries. These were reduced to salvaged zinc, which, Hutto estimated, weighed about 70 or 80 pounds, his estimate being based on his attempt to lift the box in which it was contained into the bin (R.17-21). Hutto, more specific, fixed the date of this delivery as just before or after Christmas (R.19).

Private First Class William A. Jennings, 907th Quartermaster Detachment, also worked in salvage warehouse No. 3. He had been working there since 3 October 1942. He testified that during this period Corporal Catalano brought in salvage material, zinc, copper, and metals, "a little bit at a time - most every week". This was separated and put in the proper boxes (R.21,22).

Corporals Matthew Baker and Albert P. Reid, both of the 907th Quartermaster Detachment, worked at the salvage warehouse. During a period prior to 2 January 1943, or "before or after Christmas", Baker had seen Corporal Catalano bring in copper, brass, and flashlight batteries (R.27,28,30). During December and January Corporal Reid knew that zinc was being delivered to the warehouse by Corporal Catalano in the form of flashlight batteries. After the zinc was salvaged from the batteries it was put in a box and stored in a bin. By the "latter part" of December there was about 75 pounds of zinc in the box (R.31,32).

On a Saturday afternoon, about 2 o'clock, accused got into a truck which was being driven for the quartermaster warehouse at Selman Field by Private Melvin Taborn, 963rd Quartermaster Platoon. Taborn was asleep at the time and the truck evidently was not in immediate use. Accused ascertained that Taborn had an "off-post ticket". On the instructions of accused Taborn drove this truck, which bore the number 367036 (R.26,38), to Warehouse No. 3 (R.36-37). Accused accompanied the

truck. On arriving at the warehouse, accused asked Corporal Baker and Private First Class Jennings to load some "stuff", copper, zinc, and rags (R.22,23,28), on the truck. Corporal Baker was in charge, assisted by Private First Class Jennings. Corporal Reid was absent that afternoon on a pass (R.24,33). Accused asked specifically for the zinc. Baker got out, and Jennings loaded on to the truck, first some rags, then the zinc, and then a small box of copper. Accused mentioned the "stuff by name" to Baker and told him to "Get them out of the bin" (R. 29). Jennings described the material taken by accused as zinc, two boxes of copper, and some torn-up rags. He estimated that there was between eight and ten pounds of copper and forty-five or fifty pounds of zinc (R.23). He stated that the zinc was that which had been brought in by Corporal Catalano (R.24). No tally-out slip was made for this salvage (R.21-31). From the warehouse, accused and Private Taborn drove to Monroe, a distance of between five and six miles (R.40,Ex.C), from the main gate about four or five miles (R.65). At Monroe they went to Lieber's junk yard. Accused had Taborn pull over to the platform and unload what Taborn described as some rags and a few boxes. In one box Taborn noticed battery coverings, the zinc (R.19,21,28). He "paid attention to it" because it was too heavy for him to lift off the truck when he "unloaded it". After the truck was unloaded, accused told Taborn to move the truck and wait for him. Accused talked to a "fellow" up on the platform, after which they drove back to Selman Field (R.37). Taborn asked accused "to sign the ticket", evidently for the trip of the truck. Accused did not sign it (R.43).

The following Monday, "approximately" 21 December (19 December was a Saturday), when Corporal Reid returned from his pass, he noticed that the zinc which had been in the bin had disappeared; "it was gone" (R.32-34,90). Also missing were some copper and some bags, in the warehouse when he left on his pass and missing when he returned (R.33,35,90). Corporal Reid called the attention of Private First Class Hutto to the fact that the box of zinc was gone. The latter "went up and looked and found that it was gone", "the box and the zinc were all gone" (R.20,21). Corporal Reid asked accused what had become of the missing items and was told that he, accused, had carried them to town (R.35). Corporal Reid reported the missing items to Second Lieutenant James B. Erben, Quartermaster Corps, Selman Field, Assistant Salvage Officer. This report was evidently made to Lieutenant Erben on the day Corporal Reid returned from his pass, or shortly thereafter (R.48,90). Lieutenant Erben asked accused about the missing burlap bags and accused told him that he had had them burned Saturday morning (R.47,48). Lieutenant Erben then reported the matter to Major Dewitt H. Clark, Post Quartermaster, Selman Field (R.4,5, 48).

Lieber's Junk Yard was conducted by the Lieber Company, a partnership located in Monroe. S. K. Heninger, a partner, was general manager (R.58,66). This firm bought scrap salvage from Selman Field. Accused came to its place of business several times (R.58). On one occasion, accused went there on a truck "with a negro soldier driver" and delivered some old burlap rags and light colored rags (R.59,63,64). Mr. Heninger was present and "that was the extent of what" he "saw". This occurred a little before or a little after Christmas (R.59). Mr. Heninger did not know whether any metal was delivered at the same time. He didn't think there was. He knew of no zinc purchased from Selman Field and was positive no copper had been bought from the field. He had purchased burlap and rags, contracted for "through the regular channels" from the Quartermaster's office (R.59,60,68). Mr. Heninger thought that the rags which accused delivered had been those bought on an "invitation to bid" and had been contracted for (R.66,96). He had already paid for them (R.67,96,97). That deal covered burlap rags, cotton rags, iron and tin cans (R.67). On 15 December, Lieber and Company bought from Selman Field 263 pounds of mixed cotton rags, also cement bags, wool rags, and scrap iron (R.72). Mr. Heninger could not tell whether Lieber and Company had ever "picked up" the 263 pounds of rags (R.96). On occasion, Lieber and Company had been an unsuccessful bidder. "Plenty" of its bids had been unsuccessful (R.61). On one occasion Mr. Heninger gave accused $20 in cash. He could not tell the date. However, he explained, he had made over $150 profit on a $50 purchase at Selman Field. Accused had assisted in loading the material. "He was very cooperative in every shape, manner and form, and out of goodness of heart, not that he asked for it, that he had anything to sell me or anything but purely as a matter of a gift, of cooperation, friendship and good will", as he described it, Mr. Heninger called accused into his office and made him a present of $20 (R.58,59,62). Accused's wife returned the $20 (R.62). It was Mr. Heninger who testified that while the contract covered "lots of things" that there were "lots of things" the salvage officer and the junk dealer got together on. He cited as instances of this that the government aided him by hauling for him, while he assisted the government by supplying "G.I. cans" for grease, which cans the government should have supplied (R.68). Mr. Heninger testified that on 2 January 1943 the price of zinc was about 2½ cents a pound, light copper 7 cents, and heavy copper 9 cents a pound, and that he paid 1/2 cent a pound for the rags (R.69).

Major Clark, the post quartermaster, testifying as a witness for the court, said that on one or two occasions accused had asked and received permission from him to haul away egg crates for junk dealers who were pressed for transportation (R.92). He added that he would

consider it irregular to make such deliveries as a personal favor to the contractor, without his permission, but would not say that the act itself would imply any guilt of any nature (R.93). Major Clark also testified that he had been unable to locate any tally-outs to cover the items in question. He stated that it would have been "wrong" to have turned the 263 pounds of rags bought and paid for by Lieber and Company over to them on their receipted bill unless a tally-out was made showing that it went out. (Witness was evidently referring to what in his opinion was a matter of right and wrong bookkeeping methods.) According to the witness the normal procedure called for a tally-out being made on everything that left the warehouse. However, there were no directions or written orders issued by Major Clark or anyone else to that effect (R. 95,96).

Evidence presented by the prosecution as to the date on which accused took the zinc and other salvage material was inexact. Corporal Reid, Corporal Baker, and Private First Class Jennings definitely placed the date on the Saturday afternoon on which Corporal Reid had been absent on pass (R.23,31,33). Corporal Reid testified that he was absent on this pass in the "latter" part of December (R.32,33); that he "couldn't swear to the date", that it was "approximately" on 19 December (R.34,90); that he thought it was before Christmas (R.90). Baker did not know "the exact date" (R.28); it was some time in December (R.30). Jennings believed it was in the latter part of December (R.22); he "would think" it was after Christmas (R.25). Major Clark knew nothing of the matter until after the event, when it was reported to him on a Saturday (R.5). At the time the "incident" was reported to him, he made a record of "the date of the incident" "on the lower left hand corner" of a tally-out sheet (R.6). The date so, and as, recorded is "1/2/4" (Ex. B). On direct examination the Major was asked: "Major Clark, may I again ask you at what date did Lieutenant Erben report this loss to you?" To this question the witness answered: "On January 2, 1943" (R.6). On re-direct examination, Major Clark testified that he had the memorandum in his possession since 2 January 1943 (R.11). Lieutenant Erben testified that it was on a Monday morning, on 4 January 1943, that Corporal Reid reported the fact of the zinc and burlap missing from Warehouse No. 3 to him, that it was that date that he had reported the matter to Major Clark and that it was on that date that Major Clark "had written the date that it happened, January 2, 1943" (R.48). Private Taborn, testifying as to the date on which he met accused and with him hauled the salvage material to Lieber's junk yard, said: "All I know, it was in January" (R.37); "must have been the second" day of the month (R.38). On 2 January 1943, Taborn made a trip to Monroe (Ex. C).

4. For the defense, the following pertinent facts were adduced: On cross-examination Major Clark testified that he wrote the date "January 2, 1943" on the memorandum (Ex. B) on "the date he received it, January 2". He was immediately asked why on prior inquiry he had testified that he received the information on 21 December. The Major denied that he had ever "made such statement". Defense then offered and there was received in evidence a signed statement of Major Clark, verified by him on 28 January 1943. In this statement Major Clark stated that it was on or about 21 December 1942 that he received information that "a government truck had been used to haul some zinc and salvage to a junk dealer in Monroe" (R.8, Ex. A). On cross-examination Lieutenant Erben admitted making, signing, and verifying a written statement dated 28 January 1943 (Ex. E), in which he stated that it was on or about 21 December 1942 when he discovered that the zinc, copper, and rags were missing from Warehouse No. 3 (R.51). The witness was asked why he "now" said it was another date (4 January 1943, R.48). Lieutenant Erben explained that after executing Exhibit E he had noticed that the date was 2 January 1943; that as a result he had subsequently changed his statement as to the date. He also admitted that at the time he changed his statement he had already seen the trip ticket of Private Taborn which was dated 2 January 1943 (R.51,52; Ex. C). Lieutenant Erben also testified that "there was a little friction" between accused and "Lieutenant Benfield" (R.50). It was to Lieutenant Benfield, on direction of Lieutenant Erben, that Jennings reported the facts to which he later testified (R.25). It was Second Lieutenant James B. Benfield who "took the verifications" of the signatures to Exhibits A, D, and E, respectively. Lieutenant Erben was assistant salvage officer under accused during December and January (R.47). He was salvage officer before accused reported for duty. He "stepped down and became an assistant" under accused (R.54). Lieutenant Erben testified that accused changed the tally-in system when he became salvage officer. "He had the tally-in made out at the warehouse" by Corporal Reid or one of the other men. It would go to Miss Sanders (who testified for accused) or to accused, who brought them from the warehouse to the office. At the office, Miss Sanders was in charge of the tally-in sheets, "in charge of the records kept at the office" (R.50).

Miss Kathryn Sanders testified for accused. She kept the stock records of the salvage department. She stated that when salvage came into the warehouse a tally-in sheet was made out by Corporal Reid who gave it either to accused or to her. It eventually reached her and from it she made a permanent record. Miss Sanders testified that her records did not show the receipt of any zinc until 7 January 1943. She also testified that Lieber and Company was the successful bidder on 263 pounds of cotton rags on 15 December 1942 (R.69-73).

William W. Thompson, a civilian employee, testified that his desk adjoined that of accused. He testified that when accused left the office he would always tell him where he was going and that to his "knowledge" he did not leave the field on 2 January 1943 (R.73-75).

Accused testified in his own behalf. He said that he had been in the military service 21 years. He became a commissioned officer 29 September 1942 (R.76). He had been on salvage duty for seven years before this occurrence (R.88). Accused arrived at Selman Field 19 November 1942 and soon thereafter was assigned by Major Clark to duty as property officer and salvage officer. He found that the records of his department were not being kept according to regulations. He spent a month taking a new inventory, initiating a report of survey, which was approved, to clear the "property shortage", and putting in a system which conformed to regulations. He incurred the enmity of two other officers, Lieutenants Benfield and Hestand, the latter of whom had been "giving orders" instead of taking orders in the property office before accused was put in charge (R.77). Accused testified that he had no knowledge of any zinc having been received in the salvage depot prior to 7 January 1943; that prior to that date he saw no tally sheets showing zinc; and that he "wouldn't have any knowledge of any zinc or any material unless it came in on a tally". He would inspect material when he put it up for sale (R.78). Accused specifically denied the allegations of Specification 1 of the Charge. He denied that on 2 January he delivered anything to Lieber and Company or that he left the field on that date (R.78,82,87). He said that after 15 December and before Christmas he had delivered about 263 pounds of rags purchased by Lieber and Company on 15 December 1942, but that he had delivered no burlap and had never delivered to Lieber and Company any zinc or copper (R.78,79,83). He admitted that Mr. Heninger gave him $20. He believed it was on 21 January, the day after there had been a sale at which Heninger was an unsuccessful bidder. He was returning Heninger's deposit on his way home. Heninger said he wanted to give him a little present. Accused did not look at the money until later. He stated he would not have done any more for Heninger than he would for the rest. Never before had he taken a gift from a junk dealer. The $20 was subsequently returned to Heninger (R.79,87). Sometimes he drove to Lieber and Company in his own personal car (R.82). On cross-examination, accused testified he never saw any zinc brought into the warehouse, that he rarely went through the warehouse, that when he did inspect the warehouse he passed the bin where the zinc would have been kept, that there was no zinc whatsoever in the bins prior to 7 January (R.79,80,83). Accused said that he did not tell Lieutenant Erben he had burned any burlap, but told him that he had given instructions to burn bags that were wet and musty

and that did not dry out so as to be useable as either whole bags or as mixed cotton rags (R.80). He went to Lieber and Company about a half dozen times. He went there three times to weigh scrap rubber, once to deliver the rags purchased 15 December and once to report an unsuccessful bid. The $20 was returned around 11 March after he had learned of Army Regulations 600-10. He went to Lieber and Company "mostly" in his own private transportation (R.82). He denied that he ever went to Lieber and Company with Private Melvin Taborn or that he had ever seen the man before (R.82).

5. Corporal Reid was recalled by the prosecution in rebuttal. He stated that there was zinc in the warehouse prior to 7 January and that he thought November was the first time he received any zinc. The witness also testified that several times he saw accused "go by" the bin "where the zinc was", that the zinc was where accused could see it, that during November and December accused talked about the zinc "some" and "said he was going to get rid of it on sale day" (R.89).

6. As to Specification 1 of the Charge, the proof is convincing that some time in the latter part of December 1942, on or about 19 December 1942, and prior thereto, there was on hand in Warehouse No. 3 at Selman Field some zinc and some copper, of some value, the property of the United States, salvaged by the Army. The credible evidence was sufficient to establish beyond reasonable doubt that on or about 19 December 1942, accused personally took this property out of the warehouse, off the field, and delivered it to Lieber and Company, a partnership, which had not purchased the property; that Lieber and Company had no right to the zinc and copper, and that such disposition by accused was unauthorized and was wrongful.

It is unnecessary to decide the quantity of this salvaged property or its exact value since Specification 1, which alleges wrongful disposition of this and other property by accused, specifies $5.45 as the total value of all the property. The zinc and copper had some value.

As to the burlap and cotton bags alleged in Specification 1 to have been wrongfully disposed of by accused to Lieber and Company at the same time, the record does not sustain this Specification in regard to this property. The proof is that accused delivered cotton rags which Lieber and Company had bought and paid for.

The presence of the zinc and copper in the warehouse prior to its taking by accused was proved by the testimony of Corporal Reid who

was in charge in the warehouse supervising the receipt, the storage, and out-shipments of salvage, by that of Corporal Catalano who picked up zinc, copper, and other salvage on the field and delivered it to this warehouse, and by the testimony of Thomas P. Hodgins, a civilian, who corroborated Corporal Catalano as to the fact that zinc was being salvaged at the field and collected by Corporal Catalano in November and December 1942, and by Private First Class Hutto who remembered specifically a delivery of zinc just before or after Christmas. The presence of the zinc and copper in the warehouse at the time on the afternoon Corporal Reid left on his pass is proved by the testimony of Corporal Baker and Private First Class Jennings who were present at the time and who at accused's instructions loaded it out of the warehouse onto his truck. This fact is also proved by Private Melvin Taborn who drove the truck for accused and who saw and handled the battery coverings, the zinc. Private Taborn unloaded the property off the truck onto the platform of Lieber and Company on instructions of and in the presence of accused. Accused and Taborn then drove away leaving the property there. Corporal Reid, also, knew the zinc and copper were in the warehouse the Saturday afternoon he left on a pass. It was that Saturday afternoon, about 19 December 1942, according to the testimony of Baker and Jennings that accused took this metal. Three of these witnesses testified that accused took the zinc away, while two of the three knew that accused also took the copper.

Accused denied that he took the zinc and the copper, that he delivered it to anyone, and denied also that there was any zinc or copper in the warehouse prior to 7 January 1943, a date subsequent to that specified as the date of accused's wrongful act. The records of the salvage office fail to show receipt of zinc in the warehouse prior to 7 January 1943. This latter circumstance is not conclusive since the tally-in slips, which if made out would have shown the arrival of this metal at the warehouse, were under the physical control of accused, and since the testimony of six witnesses who all saw the zinc in the warehouse is direct evidence and of the highest probative value.

Accused and one of the prosecution witnesses testified to enmity against accused on the part of certain officers in the Quartermaster Department, who were active in the prosecution. The implication was that this enmity extended to the two officers who testified against him. But proof of the allegation of Specification 1 of the Charge in no wise rested on the testimony of these officers. This Specification was proved by the testimony of six enlisted men who, as far as the record shows, had no reason to perjure themselves.

The Board of Review is not disturbed by the fact that the two officers attempted to fix 2 January 1943 as the date of the "wrongful disposition" of the property by accused, that a trip ticket of Private Taborn shows that he made a trip with his truck to Monroe, where Lieber and Company was located, on 2 January 1943, and that on the other hand the testimony of the enlisted men at the warehouse actually establishes the date of the "taking" as around Christmas, probably 19 December 1942. The two officers did not pretend to know any facts first hand.

Nor is the Board of Review disturbed by the fact that the Specification lays the charge as "on or about" 2 January 1943. A variance between the date of an offense as charged and as proved is immaterial if accused has sufficient notice of the offense with which he is charged; if the offense is sufficiently identified for the purpose of defense (C.M. 120017 (1918)). Here the date was of slight importance to identify the offense. Accused was charged with wrongfully disposing of zinc and copper, property of the United States, to Lieber and Company. Accused testified that he never delivered zinc or copper to Lieber and Company. He clearly was not relying on a specific date. Variations in the matter of time are treated liberally. The reason is that "it would be futile to require the pleaders to allege a specific, definite time in those cases where time is immaterial as an element of the offense, and the evidence showing that the offense was committed at a different time than that alleged will sustain a conviction" (Dig. Op. JAG, 1912-40, Sec. 428 (10), C.M. 120989 (1919)).

Specification 2 of the Charge alleges that accused wrongfully accepted a gift of $20 from a partner of Lieber and Company, a partnership of Monroe, Louisiana, with which partnership it was accused's duty as an agent of the government to carry on negotiations. The date of the offense as alleged is 2 January 1943. Here, too, there is a variance between the date alleged and that proven. This variance is, as pointed out, immaterial. Accused admitted receiving the money. He said that never before had he accepted a gift from a junk dealer. Heninger indicated that he gave the money to accused around Christmas 1942, while accused thought he had received it around the middle of January 1943. Accused was not misled by the date alleged in the Specification. The real question is whether the acceptance of the money by accused, even if judged in its most favorable light as an unsolicited gift predicated upon no past or future consideration or favor, is an offense in violation of Article of War 96. It is the essence of naivete to believe that such a gift can be accepted without kindling forbidden hopes in the heart of the giver or stultifying the recipient's sense of singleminded obligation to the Government. The public regards the acceptance of gratuities by public servants with grave suspicion. The acceptance of this money by

accused was a suspicious circumstance. It tended to belittle accused, and to bring discredit and disrepute not only to him but to the service which he represented. Army officers transacting public business are, like Ceasar's wife, required to be beyond suspicion. It is unnecessary to determine that accused was carrying on negotiations with Lieber and Company within the meaning of paragraph 2 e(2)(a) 1, Army Regulations 600-10, which condemns "acceptance by an officer of a substantial loan or gift or any emolument from a person or firm with whom it is the officer's duty as an agent of the Government to carry on negotiations". It is unnecessary to decide whether Lieber and Company, from whom accused accepted the gift, had made its purchase of salvage material through the agency of accused on a negotiated or non-negotiated basis as defined by Section V, 21, b (1), Army Regulations 30-2145, wherein is prescribed the procedure for disposition by the Quartermaster Corps of unserviceable property. Accused was in a position, according to S.K. Heninger, managing partner of Lieber and Company, to get together with the junk dealer on "lots of things" not "specified in the contract". A glaring example was the gratuitous delivery by accused to Lieber and Company of the rags bought by the latter, which the purchaser contracted to haul away himself. Therefore, regardless of the general ethics as stated above, the acceptance by accused of this gratuity or gift would at the very least give rise to reasonable suspicion that such acceptance would have the effect of interfering with or hampering in a degree the full and proper discharge by him of his duties. Paragraph 2 e (2), Army Regulations 600-10, reads:

> "There are limitations upon the activities of officers and other personnel subject to military law. The general principle underlying such limitations is that every member of the Military Establishment, when subject to military law, is bound to refrain from all business and professional activities and interests not directly connected with his military duties which would tend to interfere with or hamper in any degree his full and proper discharge of such duties or would normally give rise to a reasonable suspicion that such participation would have that effect. Any substantial departure from this underlying principle would constitute conduct punishable under the Articles of War."

7. War Department records show accused is 46 years old. He is married and has one son, 12 years of age. He completed the eighth grade in elementary school. The Charge Sheet shows:

> "Enlisted Quartermaster Corps, January 12, 1939, discharged to accept commission in Army of the United States, September 29, 1942, commissioned First Lieutenant, Quartermaster Corps, Army of the United States, September 30, 1942. Previous service:

Enlisted Co. C. 56th Inf. September 18, 1917 to July 5, 1919, ETS; re-enlisted Co. M, 5th Inf., September 3, 1919 to September 2, 1920, ETS; re-enlisted Battery C. 8th FA, September 3, 1920 to Nov. 28, 1922, Conv. of Govt; re-enlisted Co. A, 1st Gas Battery, CWS. Aug. 15, 1923 to Jan. 20, 1925, Conv. of Govt.; re-enlisted Panama Chem. Warfare CWS, Jan. 21, 1925 to Oct. 28, 1925, Purchase. Re-enlisted Det QM Corp, Ft. McDowell, April 28, 1926 to Sept. 24, 1929, ETS; re-enlisted 3rd Bkry Co. Sch. Cooks & Bkrs. QMC, Jan. 12, 1933 to Jan. 11, 1936, ETS; re-enlisted Sch Cooks & Bkrs QMC Jan. 12, 1936 to Jan. 11, 1939, ETS; re-enlisted QMC Det Jan. 12, 1939 to Sept. 29, 1942. Discharged to accept commission in Army of the United States."

8. The court was legally constituted and had jurisdiction over 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, for the reasons stated, the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves a finding of guilty of wrongfully disposing of a quantity of zinc and copper of some value, legally sufficient to support the findings of guilty of Specification 2 of the Charge and of the Charge, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

(On leave), Judge Advocate.

John Tannenbaum, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 4- AUG 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 Goodman (0-497802), Quartermaster Corps.

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 finding of guilty of Specification 1 of the Charge as involves a finding of guilty of wrongfully disposing of a quantity of zinc and copper of some value, legally sufficient to support the findings of guilty of Specification 2 of the Charge and of the Charge, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

3. Consideration has been given to a brief filed on behalf of accused by Sidney L. Herold, Esq., counsel for accused, to the attached statement of Major D. H. Clark, Quartermaster Corps, and the attached petition of the Jewish Welfare Board.

4. Inclosed are a draft of a letter for the signature of the Under Secretary of War, 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.

6 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Under Sec. of War.
Incl.3-Form of action.
Incl.4-Brief on behalf of accused.
Incl.5-Statement of Major D.H. Clark, QMC.
Incl.6-Petition of Jewish Welfare Board.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 249, 20 Sep 1943)

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

SPJGQ
CM 235014

16 JUL 1943

UNITED STATES v. Major WALTER H. SAPP (0-287493), 100th Coast Artillery (Antiaircraft).	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Stewart, Georgia, 20 April 1943. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Major (then Captain) Walter H. Sapp, 100th Coast Artillery (Antiaircraft), did, at Sault Sainte Marie, Ontario, on or about the second day of September 1942, wrongfully and officially submit a statement of charges against Private Alton Shelvin, 34076222, Battery B, 100th Coast Artillery (Antiaircraft) alleging that the said Private Alton Shelvin had lost seven (7) cots, folding, canvas, model 1938, to the value of twenty-three dollars and forty-five cents ($23.45), and fourteen (14) shakers, salt, glass, to the value of ninety-eight cents ($0.98), total value twenty-four dollars and forty-three cents ($24.43) and did, as Battery Commander, certify thereon that the statements on the said Statement of Charges were complete and correct and that the charges were made for the reasons stated, which certificate was known by the said Major (then Captain) Walter H. Sapp to be false.

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

Specification 3: In that Major (then Captain) Walter H. Sapp, 100th Coast Artillery (Antiaircraft), did, at Sault Sainte Marie, Ontario, on or about the twenty-first day of October, 1942,

wrongfully and officially submit a statement of charges against Private Dennis Thomas, 34077856, Battery B, 100th Coast Artillery (Antiaircraft) alleging that the said Private Dennis Thomas had lost one barrel assembly (forty-five inch S. Number D-28271) to the value of fifteen dollars and sixty-six cents ($15.66); and did, as Battery Commander, certify thereon that the statements on the said Statement of Charges were complete and correct and that the Charges were made for the reasons stated, which certificate was known by the said Major (then Captain) Walter H. Sapp to be false.

Specification 4: (Finding of guilty disapproved by reviewing authority).

Specification 5: (Finding of guilty disapproved by reviewing authority).

Specification 6: In that Major (then Captain) Walter H. Sapp, 100th Coast Artillery (Antiaircraft), did, at Sault Sainte Marie, Ontario, on or about the twenty-sixth day of October, 1942, wrongfully and officially submit a statement of charges against Private James J. Overton, 16000922, and Private James Scott, Junior, 34078119, both of Battery B, 100th Coast Artillery (Antiaircraft), alleging that each of the said Privates James J. Overton and James Scott, Junior had lost fifty-three (53) pillow cases to the value of fourteen dollars and thirty-one cents ($14.31), total value twenty-eight dollars and sixty-two cents ($28.62), and did, as Battery Commander, certify thereon that the statements on the said Statement of Charges were complete and correct and that the charges were made for the reasons stated, which certificate was known by the said Major (then Captain) Walter H. Sapp to be false.

Specification 7: (Finding of not guilty).

Specification 8: (Finding of not guilty).

2. He pleaded not guilty to the Charge and all Specifications thereunder. He was found guilty of Specifications 1 to 6 inclusive, and guilty of the Charge, not guilty of Specifications 7 and 8. There were no previous convictions. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 2, 4 and 5 of the Charge, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence of record as to Specification 1 of the Charge is as follows:

Private Alton Shelvin, Battery C, 100th Coast Artillery (AA), Camp Stewart, Georgia (R. 21), identified prosecution's Exhibit No. 2, as a Statement of Charges dated 2 September 1942 (W.D., A.G.O. Form 36), which he had signed, acknowledging that he had lost seven folding canvas cots, value $3.35 each, and fourteen glass salt shakers, value 7¢ each; the total amount of the Charge, $24.43. He signed this statement under the following circumstances:

He had been an hour late reporting for guard duty (R. 29). The corporal of the guard took him to accused, (then Captain Sapp), his battery commander, where, after some discussion, he went to his barracks. He returned to accused's office and asked if he could sign a Statement of Charges for anything in the supply room that was short (R. 26) so that he would not be court-martialed for missing guard duty for 1 hour (R. 26). Accused agreed and Shelvin signed the Statement of Charges in question. In fact he had never lost or destroyed any folding canvas cots or glass salt shakers (R. 11, 27). The charge was entered on Shelvin's service record file by First Lieutenant Ghulam R. Muthleb, assistant adjutant and assistant personnel officer of the 100th Coast Artillery (R. 13), and the amount stated therein was deducted from Shelvin's pay (R. 13-30).

As to Specification 3 of the Charge, both Private Dennis Thomas, Battery B, 100th Coast Artillery (R. 35), and Lieutenant Ghulam Muthleb, Assistant Personnel Adjutant of the unit, identified a copy of a Statement of Charges made against Private Dennis Thomas in the amount of $15.66, for the alleged loss of a barrel assembly (machine gun) made in November 1942, when the organization was stationed at Sault Sainte Marie, Michigan, and Ontario, Canada, guarding the locks (R. 35; Pros. Ex. 3). This statement is signed by Thomas, by the accused, and by Lieutenant Muthleb. The last named entered the amount stated therein in Thomas' service record and it was deducted from his pay (R. 15,16). This paper was executed under the following circumstances: Thomas was about an hour late one night in coming back from a pass (R. 37). The accused called on him for an explanation, whereupon Thomas asked accused if he could sign a Statement of Charges instead of being restricted. Accused agreed and told Thomas to sign for $15 (R. 35, 39), but did not say what kind of property Thomas was to sign for. Thomas had not lost a barrel assembly or any other kind of property (R. 39), nor did accused claim that Thomas had lost a gun assembly through negligence (R. 37). Thomas went to the supply room, signed the statement and left it with the supply sergeant (R. 38).

As to Specification 6 of the Charge, prosecution's Exhibit No. 6, a Statement of Charges against Privates James Scott, Jr., and James J. Overton,

for the loss of 53 pillow cases each, value of 27¢ each, and in the amount of $14.31 each, total $28.62, signed by each of them and by accused and by Lieutenant Muthleb, Assistant Personnel Officer of the 100th Coast Artillery, was identified by both Privates Scott (R. 51), and Overton (R. 62) and also by Lieutenant Muthleb (R. 20). Lieutenant Muthleb testified that these Charges were entered on the service records of Scott and Overton respectively, and $14.31 deducted from their pay (R. 20).

Private Scott's version of the events relating to the execution of this Statement of Charges is as follows: He and Overton missed the ferry in coming back from Sault Sainte Marie from a dance (R. 50). After spending the night in a police station they reported to accused who was their battery commander. He called them into his office and said, "I have some pillow cases for you to sign for * * *. If you don't sign for the pillow cases, you will be court-martialed and fined $25.00". He further said that he would call them back after he made the Statements of Charges out. Private Scott can write, but he can not read (R. 51). He never lost or destroyed any pillow cases and only one was issued to him in the battery which he returned (R. 52). Accused did not say how much Scott was to be charged for each pillow case (R. 53), nor did he accuse Scott of losing them; but he did say "Sign a statement, or pay a fine" (R. 52). Scott and Overton signed the statement in the presence of each other.

Private Overton's version of the occurrence is that he took sick while attending a dance at Sault Sainte Marie, Michigan, with Private Scott, and missed the returning ferry. After spending the night in the police station he reported to accused, who was then his battery commander, who restricted him for thirty or sixty days (R. 60). A few days later accused gave him the election of being either court-martialed for missing the ferry or signing a Statement of Charges (R. 61). He had never lost or destroyed any pillow cases (R. 62).

Second Lieutenant Evans S. Walker, who served under accused in Battery B, 100th Coast Artillery (R. 70) from 6 September to 30 November 1942, was present in the battery office during the time that a conversation took place between accused and Private Overton, relative to the Statement of Charges referred to above (Pros. Ex. No. 6). Overton had attended a dance the previous night with Scott and they were called in the office individually and told that they had missed bed-check. Accused asked them if they would rather pay a $25 fine to a court-martial or sign a Statement of Charges for approximately $15. Private Overton did not agree to do so readily, but Private Scott did, and signed a Statement of Charges for approximately $15 (R. 72, 73).

The accused, at his own request was sworn and testified in substance that he had been in the Army since 5 November 1940 and had commanded Battery B of the 100th Coast Artillery from 30 April 1941 until 1 December 1942. In March 1942 this organization was moved to the Sault Sainte Marie locks, Michigan (R. 89) where its mission was to furnish antiaircraft protection against planes and protect the locks against sabotage. It was on an alert status from the date it arrived. The unit was composed of colored troops, and it took a minimum of 130 men to man an antiaircraft battery (R. 90). The unit had a 44-hour training week and always had to maintain sufficient men to open fire and to sustain fire. By reason of the fact that the men went out quite a bit and stayed out late he had difficulty in keeping a crew on hand to man the guns. For that reason he used Statements of Charges as a means of punishment because it had the effect of keeping his men present for duty and thereby his battery was ready to fire at all times (R. 91). No one authorized him to do this, nor did he find anything in Army Regulations authorizing such action (R. 97). He undertook it upon his own initiative entirely (R. 98). He did not consider it punishment to send his men to the guardhouse at Sault Sainte Marie, because while in the guardhouse they could sleep all night and work only eight hours a day, whereas his men on duty were then standing guard on their guns all night long in temperatures sometimes 25 or 30 degrees below zero (R. 94). When he spoke to the various enlisted men regarding the Statements of Charges he did not tell them that they were being charged for the equipment because of their own negligence or destruction of the equipment. They were simply told to sign a Statement of Charges for a stated amount, but there was no reference to property at that time, although the statement was made out to cover property actually missing at the time in the battery (R. 95). As to each one of the cases set forth in the Specifications, he admitted that he personally signed each of the Statements of Charges involved and officially submitted them (R. 96, 97). He admits that the regimental summary court could have tried these men for the offenses which they had committed, but in his opinion the fines the summary courts were imposing at that time were inadequate (R. 99), and moreover, to prove to a summary court that a soldier was absent "was a pretty 'doggone stiff' proposition" (R. 100). He had no explanation to offer for not referring cases of this kind to a summary court where he had clear cut evidence but did it "probably just because I got into the habit and carried it out that way" (R. 100). He admitted that he relieved himself of property responsibility by virtue of these Statements of Charges, but denies that he personally profited thereby because he undoubtedly would have been relieved of financial responsibility if he had requested a survey on such property. Both before and after these Statements of Charges were signed and submitted by him he had put in surveys which had been automatically approved (R. 99, 100).

Lieutenant Colonel Frederick D. Knapp, 100th Coast Artillery, has known the accused since May 1941, and his opinion is that he is one of the best officers in the regiment (R. 82, 83, 84). Lieutenant Colonel

Philip Doyle, also of the 100th Coast Artillery, and accused's immediate superior officer since 1 December 1942 (R. 85), testified that accused's reputation as an officer and a gentleman has always been excellent (R. 86). Major Laurence J. Ellert, 100th Coast Artillery, has known accused about two years. In his opinion accused is an exceptional officer, one of the best in the regiment. His integrity has always been unquestioned. He is extremely honest and there is no question but that he is a gentleman (R. 87).

4. It is deemed appropriate to introduce an explanatory remark about a "Statement of Charges". If any article of public property is lost or destroyed or damaged through the fault or negligence of an officer or enlisted man he is required to reimburse the Government and pay the value thereof. The money value of the article is deducted from the pay of the officer or soldier unless he is relieved of responsibility for such loss by an approved report of survey (AR 35-6640). All lost or damaged property which is to be charged against the pay of an enlisted man under the provisions of the preceding Army regulations is first entered in a War Department R.R.O. Form, No. 36, designated as a Statement of Charges (AR 35-300).

Not only did the evidence produced by the prosecution at the trial pertaining to the three Specifications of the Charge of which accused was convicted, establish his guilt beyond a reasonable doubt, but, in addition thereto, accused himself, as a voluntary witness in his own behalf, admitted that he had signed and officially submitted each of the Statements of Charges alleged in Specifications 1, 3 and 6 (R. 96, 97). He further admitted his guilty knowledge of the falsity of each of the three statements in question when he acknowledged that the enlisted men, involved in each case, were not warned or advised that he was allowing them to sign these Statements of Charges not because he actually knew or believed each of them individually had lost or damaged, through their own negligence, the property for which they were being charged and eventually deducted from their pay, but was deliberately resorting to this subterfuge as a substitute for regularly authorized disciplinary punishment. In effect it was a form of coercion devised and employed by accused to deprive the enlisted men involved of their pay as a punishment for an offense of which they were never put on trial and legally convicted. This procedure unquestionably deprived these soldiers of due process of law in that they were convicted and punished without a hearing. This system was particularly vicious in that the whole procedure made it very clear to these colored soldiers, one of whom was unable to read, that their commanding officer was not only setting forth a deliberate lie in the form of an official statement but was also either allowing or compelling a soldier of his command to be an accomplice in this deception.

The accused, when he signed his name on each of these Statements of Charges certified not only that the statements thereon were complete and correct, but also that the money charges thereon were made "for the reasons stated." (See form No. 36 in pros. Exhibits 2-3-6). The falsity of the reasons stated such as, for example, that Privates Overton and Scott had each lost 53 pillow cases, has not even the redeeming feature of being reasonably plausible. Another result of the unlawful method employed by accused in this case is, that accused as a superior and commanding officer, by reason of his position of authority, practically extorted money from the pay of enlisted men of his command by a threat to punish them by court-martial trial if they did not sign a statement of charges the contents of which both he and they, then and there, knew to be a deliberate, studied and planned falsity. There is no need for further discussion. The offense is obviously conduct unbecoming an officer and gentleman, in violation of the 95th Article of War.

5. War Department records disclose that this officer is 34 years of age, has been a reserve officer since 1931, was called to active duty with the Civilian Conservation Corps and served therein from 1 June 1935 until 30 April 1937. He was recalled to duty on 24 November 1940, from which date until the present time he served with the 100th Coast Artillery, Antiaircraft.

6. Clemency——Four of the seven members of the court which tried the case, plus the two defense counsel, recommend by petition attached to the record of trial that the sentence to dismissal be suspended or remitted for the following reasons:

"1. His exemplary conduct and record as an officer and gentleman both before and after the offense charge.
2. The need of the Army for the services during the present emergency."

Another petition, also attached to the record of trial, contains a recommendation that the sentence be suspended or remitted for identically the same reasons cited above plus an additional reason, namely, the extenuating circumstances under which the acts were committed. This second petition is signed by twenty officers who are members of the 100th Coast Artillery.

7. 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 of the sentence. Dismissal is mandatory upon conviction of violation of Article of War 95.

William A. Lounds, Judge Advocate.

Earle Stebbins, Judge Advocate.

Herbert A. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 27 JUL 1943 - To the Acting 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 Walter H. Sapp (0-287493), 100th Coast Artillery (Antiaircraft).

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. 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. A. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 233, 15 Sep 1943)

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

SPJGK
CM 235044

30 JUL 1943

UNITED STATES	NEW YORK PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Fort Dix, New Jersey, 13 and 20 April 1943. To be hanged by the neck until dead.
Corporal ELIHU H. WINTERS, JR. (35014507), Company F, 372nd Infantry.	

OPINION of the BOARD OF REVIEW
LYON, 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Elihu Hutchinson Winters, Jr., Company "F", 372nd Inf., did, at Fort Dix, N.J., on or about February 21, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Samuel Green, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. By direction of the reviewing authority the court reconvened for the purpose of reconsidering the findings and sentence. The court adhered to its original findings and sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that only so much of the findings be confirmed as involves findings of guilty of voluntary manslaughter in violation of Article of War 93, and that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years.

3. Evidence for the prosecution:

At about 7:30 p.m., 21 February 1943, a crap game was in progress on someone's bed in one of the barracks of Company F, 372nd Infantry (R. 37,38,42,55,56,64,65,90). Accused was standing at the bed watching the game (R.50,51,81). He was in his customary friendly mood (R.44,45). The deceased, Green, entered the room with another enlisted man, named Robert Hardin (R.42,50,65,90). According to some of the testimony deceased had what appeared to be a whiskey bottle in a paper sack inside his blouse or field jacket. According to other testimony, he had a bottle in his hand. Hardin also had a bottle (R.55,56,62,63,65,96). Although deceased was not drunk, he appeared to have been drinking (R. 43,50,61). Desirous of joining the game and placing a bet, deceased walked to the bed and pushed accused aside by a thrust of his elbows. Although quite a crowd was collected around the bed, no pushing had been observed previously (R.38,43,45,50,51,65,81,90). Accused told Green not to push him, but Green immediately pushed him a second time. Again accused remonstrated, and suggested that Green go around to the other side of the bed (R.38,45,50,51,65,80,81,90). Deceased then told accused to "kiss his ass"; said, "Damn that nigger-fucker"; and directed other filthy remarks at accused (R.38,51,81,90). Without using any profanity or making any threats, accused left the barracks by the side door (R.38,41,51,52,54, 55,65,91). One witness testified that,as accused walked away from the bed, he remarked, "I guess I have to kiss your ass" (R.90). Accused was calm and did not appear angry (R.54,69).

After the departure of accused, Green asked Hardin to give him a bottle of whiskey, and, upon Hardin's refusal, a struggle ensued between them, during the course of which Hardin drew a knife. The combatants finally were separated; Hardin surrendered his bottle to deceased; and they parted on friendly terms (R.52,56,57,58,62,63,65,66,73,91,96). Deceased thereupon left the barracks, with one bottle in his field jacket and the other in his hand (R.39,52,55,63,66,73,96).

Meanwhile accused went to his own barracks, apparently close by, and obtained from Sergeant Nelson Proudfoot, a member of the same company, the key to the rifle racks, which were locked (R.28-32). Proudfoot testified that accused seemed "very cool", that his voice did not sound excited, and that he said nothing about killing anyone (R.32-35).

Shortly thereafter, witnesses saw Green on the side porch and accused standing on the ground about twelve feet from him. Green had the two bottles in his hands, and accused was facing him. Accused held a rifle, with the muzzle pointed downward (R.75,78,82,85,86,92,95). The witnesses

were inside at this time. One of them testified that he did not know whether or not accused and deceased were saying anything. From his position, he could hear nothing, but their mouths were "working" (R.93). It was after dark, but there were lights in the barracks, and the witnesses were able to see what transpired (R.73,85,103,104).

Deceased started down the steps toward accused, with the bottles raised above his shoulders. Accused started backing away. Deceased advanced toward him (R.75,77,79,80,93,94). Disregarding the warnings of accused to keep away, deceased continued to advance, while accused continued to back away (R.75,76,78,79,83,85,94,96,98). Green was in a crouching position, with the bottles held above his shoulders (R.77-79, 99,179,180). He appeared to be in a fighting mood. He seemed threatening and looked as though he wanted to strike accused with the bottles (R.179,184,185). He made a lunge at accused, and accused fired a shot into the ground. At that instant, deceased was only four or five feet from accused (R.75,76,78,83,84,94,99). Immediately after the firing of the shot, deceased dropped the bottles (R.67,75-78,80,95,180). He advanced toward accused in a threatening manner, hands above his shoulders, and lunged or jumped at accused as if to grab and attack him. Green had nothing in his hands at the time (R.67,72,74-77,79,80,84,86,87,95,98,99, 180,182). Accused, holding the rifle at his waist, pointed it toward Green, and fired two shots, killing him. One shot entered the chest and the other entered the face and skull (R.15-17,20,21,76,77,89,95,101; Pros. Ex. 1). There was testimony that accused stepped back just before he fired the shots and that deceased was only two or three feet away from accused and not more than a foot from the muzzle of the rifle (R.76,77,84, 86,87). Deceased was ten or twelve feet from the barracks (R.16,40,77). The bottles were eight or ten paces from the body (R.67). There was testimony that only about ten minutes elapsed between the departure of accused from the crap game and the firing of the shots (R.39), and only from one to three seconds between the dropping of the bottles and the fatal shots (R.82,179).

Accused stood "in a daze" for a few seconds and then walked away (R.76). Three or four minutes later the Sergeant of the Guard, Sergeant Clarence Nailon, Company G, 372nd Infantry, arrived (R.107, 111,112). Nailon asked accused whether he knew who had shot deceased. Accused replied that he had done it, and when Nailon asked him the reason, he replied that for the first time in his life he had lost his head (R.109,111).

In the opinion of eyewitnesses, Green appeared to be attempting to attack accused and accused appeared to be trying to "avoid trouble"

(R.79,103,104). However, accused's back was toward the company area and there was nothing behind him to prevent escape (R.77,84,101). Green was somewhat heavier than accused and about equal in height (R.14,21,97). There was no evidence of alcohol in the blood, brain, urine, or stomach of deceased, but it was possible that all traces might have disappeared during the period between the death and the autopsy (R.20-23).

Two written statements signed by accused were admitted in evidence without objection (R.114,115). One was witnessed by the Post Provost Marshal, the other by the investigating officer (Pros. Exs.3,4). Outside of an assertion by the trial judge advocate that before making each statement accused was informed of his rights under Article of War 24, there is no evidence concerning the circumstances surrounding the statements (R.114, 115). However, the first statement contains a recital that accused read Article of War 24 and was informed of his rights thereunder; that no force, duress, or threats were used; that no reward or immunity was promised; that accused knew that anything he said might be used against him; and that his statement was voluntary (Pros. Ex. 3). The second statement contains a recital that accused was advised of his rights under Article of War 24 (Pros. Ex. 4). Since the statements overlap to a considerable extent, they will be considered together.

In the statements, accused corroborated the foregoing evidence that he was watching a crap game and that Green pushed him with his shoulder and elbow in an attempt to get into the game. Accused had never seen Green before. Accused asked Green not to push him. Green persisted and threatened to "bust" accused in the mouth if he didn't like it. Accused could tell that Green had been drinking. Green had two whiskey bottles in his hands, and waved them at accused in a threatening manner. The sacks containing the bottles were open. Since accused was defenseless, he walked away. He was not angry. He procured his rifle from the rifle rack by obtaining the key from Sergeant Proudfoot, and he also procured some ammunition which he had failed to turn in after a tour the previous week as Corporal of the Guard. He did not load the rifle, but kept the ammunition in his shirt pocket. He started back for the crap game, not intending to harm deceased. He brought the gun as a "bluff" and for the purpose of showing deceased that he was not defenseless and could not be imposed upon. As he went around the corner of the barracks, he saw Green standing on the porch. He walked past the steps, ignoring Green, and intending to go around to the front door of the barracks. As he looked back, he could see Green, in a "bad mood", looking toward him with the bottles raised. Green started toward him, apparently with the intention of approaching him and hitting him with the bottles. Accused did not think that Green intended to throw the bottles. Accused told Green to

stop, as he did not want to hurt him. However, Green continued toward accused, whereupon accused loaded the rifle, but put on the safety catch, not intending to fire. Green disregarded further warning and kept advancing as accused backed away. Green kept calling accused vile names, such as "son-of-a-bitch" and "God-damn bitch". The words did not make accused angry, but he wanted to avoid being hit by the bottles, since he believed that a blow by a bottle inside a sack could split his skull. Accused kicked off the safety catch and fired a shot into the ground. Green kept coming toward him, charging rapidly. When Green reached a point very close to accused, accused fired two shots and Green fell to the ground. The period between the first shot and the last two was only a matter of seconds.

Accused said that he fired to protect himself and was acting in self-defense. Deceased was perhaps an inch taller than accused and 20 or 25 pounds heavier, and accused was scared and excited when he fired. He believed that if he had turned around and run, deceased would have hit him. He did not think about the possibility of hitting Green with the butt of the rifle (Pros. Exs. 3,4).

4. Evidence for the defense.

Accused testified that all his statements in Prosecution's Exhibits 3 and 4 were correct (R.121). He reiterated his statements about the events at the crap game and added that Green also threatened to break his neck and called him a "son-of-a-bitch" and similar names (R.121,125,127,128,131,132,135,148). Accused "resented" Green's words, but was not angry (R.131,132). At that time he did not fear for his life, but he was afraid of Green (R.129,130). He repeated in substance the story given in his statements covering the time he left the barracks until he saw deceased on the porch, again emphasizing that he obtained the rifle to bluff Green and to discourage Green from bothering him (R.121,122,124,130,131,134,135,151,152).

He testified further that had he known that Green was on the porch, he would have gone around the other side of the barracks to the front door (R.154). When he saw Green he did not go back, as he did not think that Green would attack him (R.155). Three or four minutes had elapsed since his departure from the barracks (R.136). He was not angry, resentful, afraid, or excited when he first saw Green on the porch (R.136-138). He walked by the steps, as he wanted to avoid trouble with Green (R.122,124,134,137,154). He was not looking for trouble (R. 150,151). Green "jumped hot again", flew into a rage, and cursed accused (R.122,133,134). He told accused that accused was "in for it" and that he was going to hurt him (R.127). He continued cursing accused until

shot (R.133). Accused did not run away, because he thought that Green would desist from the attack by reason of the rifle (R.142,144). Green started down the steps with the bottles at shoulder level (R.122,123). He was eight or ten feet from accused and could have thrown them (R. 140-142). Had accused continued along the street and not turned around, Green would have hit him with the bottles (R.139). Accused feared that Green would knock "the devil" out of him and probably kill him with the bottles (R.124,125,142). He was afraid to turn around and run for fear of being hit on the head with them (R.144).

Accused reiterated the events from that point until the firing of the first shot, as recited in his statements (R.123-124,126,143). He told Green that the rifle was loaded, and he fired into the ground in order to avoid injuring Green (R.123,149). Green was about four feet away (R.125). Accused did not run away, as he thought Green would stop (R.123,145). After the first shot was fired, he did not dare turn away, as Green probably would have hit him with the bottles (R.124,145). Green still had the bottles in his hands, and seemed to be getting ready to swing (R.123,143,150). At the time accused fired the third shot, he didn't know whether Green still had the bottles, as he "wasn't even conscious of anything" (R.143). When he fired the second and third shots he was very excited and afraid, and it seemed as though Green were "springing right upon" him (R.125,131,147,148). To shoot Green was the only thing he could do (R.147,153). He pointed the rifle at Green when he fired the two shots (R.123,146). At no time did Green actually strike him (R.146).

Before the killing, accused did not make up his mind to kill Green. His actions were automatic and he was afraid that Green would kill or seriously injure him (R.126,146,147). He had no hate for the deceased, tried to avoid the difficulty, and realized that he had committed "a great crime", for which he was sorry (R.153).

Several officers and enlisted men of accused's organization testified that accused was an excellent soldier and a very quiet, peaceable person (R.13,34-36,43,44,54,61,69,156,157,161,164,165,168,169,170-175, 182,184,186,187,189,190-195,197).

5. The evidence thus shows that deceased forcibly pushed accused aside in order to place a bet in a crap game and that he directed some foul language at accused in an angry manner and possibly threatened him with harm. Thereupon accused went to his barracks and obtained his rifle and some ammunition. On the way back to the crap game accused saw deceased on a porch adjoining the barracks in which the game was in progress. As accused passed the steps, deceased threatened him with the bottles and

started down the steps after him, whereupon accused told him several times to keep away, and backed away as deceased advanced. When deceased reached a point only a few feet from accused, the latter fired a shot into the ground. According to eyewitnesses, deceased then dropped the bottles and lunged or jumped at accused, who pointed the rifle at him and fired two shots in rapid succession, thereby killing him.

Accused's claim of self-defense was properly rejected by the court. It is true that by merely arming himself and going to a place where deceased was likely to be, he did not sacrifice his right to self-defense in case of an unauthorized attack (Thompson v. U.S., 155 U.S. 271; Peo. v. Gonzales, 71 Cal. 569, 12Pac. 783; Radford v. Comm., 5 S.W. 343 (Ky.); State v. Evans, 124 Mo. 397, 28 S.W. 8; 11 Harv. Law Rev. 58). As the court in the Evans case remarked,

> "The fact that defendant expected an attack did not abate by one jot or tittle his right to arm himself in his own proper defense, nor go where he would after thus arming, so long as he did no overt act, or made no hostile demonstration toward Fine (the deceased)".

But before one may take the life of his assailant, he must reasonably believe that his life is in danger or that he is in danger of suffering great bodily harm, and he must also reasonably believe that it is necessary to kill to avert the danger (Acers v. U.S., 164 U.S. 388; Davis v. Peo., 88 Ill. 350; State v. Thompson, 9 Iowa 188; Wesley v. State, 37 Miss. 327; Smith v. State, 25 Fla. 517, 6 So. 482). Furthermore, he must retreat if by so doing he may lessen the danger (16 Harv. Law Rev. 567; 12 Iowa Law Rev. 171; 18 A.L.R. 1279). As one court expressed it:

> "When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die" (Comm. v. Drum, 58 Pa. St. 9, 22).

And as said by another court:

> "No balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live" (Springfield v. State, 96 Ala. 81, 11 So. 250).

Some courts have departed from the common law rule, but in the opinion of

Professor Beale their ideal "is found in the ethics of the duelist, the German officer, and the buccaneer" (16 Harv. Law Rev. 577).

The Manual for Courts-Martial adopts the doctrine of retreat for excusable self-defense cases; i.e., those arising from mutual combat (M.C.M. 1928, p. 163). Presumably the intention is to adopt it also in cases of justifiable self-defense; i.e., those where accused is feloniously assailed (Clark and Marshall, Crimes, 3rd ed., sec. 276).

As noted, the Board of Review is of the opinion that accused was not absolved from the killing under the doctrine of self-defense. In the first place, it was not reasonable to believe that accused was in danger of being killed or suffering grievous bodily harm. The latter phrase refers to an injury so severe that it might maim accused, be permanent in its character, or produce death (Acers v. U.S., 164 U.S. 388). In Napier's Case (Fost. C.L. 278), deceased threw accused to the ground, beat him, and held him in such a manner that he could not escape the blows. Accused killed him by cutting him with a penknife. The court held accused guilty of the homicide. In Blackburn v. State (86 Ala. 595, 6 So. 96), deceased, a vicious character who previously had threatened to kill accused, pursued him at a distance of five or six paces, with a stick in one hand and a pair of metal knuckles in the other. Deceased was a fine physical specimen. Accused jumped across a ditch, wheeled, and shot deceased. The conviction was affirmed. In State v. Thompson (9 Iowa 188), deceased advanced upon accused with a heavy board. He dropped the board and continued after accused unarmed. Deceased was strong and in the prime of life, whereas accused had recently fallen off a horse and broken several ribs. He had been out of bed only a day or two. When deceased reached a point near accused the latter shot him. It was held that accused was not justified in killing his assailant to avoid a violent beating, he having no reason to fear death or great bodily harm. Similarly, in the present case, accused, armed with a rifle which he could have used as a club, had no reason to fear death or grievous bodily harm, and it was not reasonably necessary for him to shoot deceased to protect life or limb. Furthermore, accused could have avoided the danger by retreating when deceased threatened to attack him from the steps. To have retreated would have lessened the danger materially, and his chances of suffering death or grievous bodily harm from a thrown bottle were infinitesimal. Instead, believing that deceased had been drinking, and knowing him to be in an ugly, threatening mood, accused elected to remain on the scene and invite the disaster. He failed to take proper steps to avoid the catastrophe.

However, in the opinion of the Board of Review, the accused was not guilty of murder, but only of voluntary manslaughter. Had accused formed a design to kill Green, he could have carried it into effect upon

seeing him on the porch or at some point in the chain of events prior to the actual killing. He warned deceased to stay back, and fired the first shot into the ground. Only when he believed himself cornered and in great danger did he fire the fatal shot. He thus lacked the malice aforethought essential to murder. His state of mind is best described by his statement to Sergeant Nailon immediately subsequent to the crime; i.e., that he had lost his head. The case is distinguishable from a recent one in which, after a quarrel, accused procured a rifle and, without warning, fired the fatal shot (Bull. JAG., May 1943, p. 187, sec. 450 (1)).

The mere fact that accused armed himself and returned to a place where he was likely to meet deceased does not of itself indicate malice aforethought. All the circumstances must be considered (Gourko v. U.S., 153 U.S. 183; 1 Wharton, Criminal Law, 12th ed., p. 633). And as the court said in Allison v. State (74 Ark. 444, 86 S.W. 409, 413), an honest although unjustifiable belief in the necessity of killing in self-defense may reduce the crime to manslaughter. Accused's testimony that he procured the gun as a "bluff" and to keep Green from bothering him, is borne out by the sequence of events.

6. Since accused is guilty of voluntary manslaughter only, that portion of the sentence adjudging the death penalty is illegal.

7. Certain occurrences at the trial require brief mention.

a. For reasons already given, motions by the defense that the charges be dismissed and that a finding of not guilty be entered, on the ground of self-defense, were properly denied (R.117,119). The law member's ruling should have been made subject to objection by any member of the court, but since the ruling was correct, the irregularity was harmless.

b. The defense moved that the Specification and Charge be dismissed on the ground that the prosecution failed to make out a case of murder (R.116). The motion was denied (R.117), and properly so. Regardless of the sufficiency of the evidence to sustain a murder charge, accused was on trial for all lesser included offenses. Again, the ruling of the law member should have been made subject to objection by any member of the court, but since it was correct, the irregularity was harmless.

c. Over objection by the defense, Sergeant Nailon was permitted to testify that shortly after the shooting, in response to Nailon's question whether he knew who had done the act, accused admitted that he had done it and said that he had lost his head (R.108-109). The testimony was properly admitted. At all times accused has acknowledged the killing, and

his admission that he had lost his head was undoubtedly voluntarily made.

d. As noted, Prosecution's Exhibits 3 and 4 were admitted without evidence concerning the circumstances surrounding their preparation. Since accused, as a witness, adopted them, no possible harm could have arisen from their admission. Furthermore, they were not confessions, for in them accused in effect set up the theory of self-defense.

e. In connection with the proceedings in revision, the defense objected to the court's decision on the ground of the absence of one member of the court (R.231). There is nothing in Article of War 40 or the Manual for Courts-Martial invalidating the proceedings by reason of the absence of a member (M.C.M., 1928, par. 83).

8. The charge sheet shows that accused is 28 years of age and was inducted into the military service on 21 March 1941.

9. The court was legally constituted and had jurisdiction of the person and offense. Except as noted above, 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 only so much of the findings of guilty as involves findings of guilty of voluntary manslaughter, at the place and time and upon the person alleged, in violation of Article of War 93, and legally sufficient to support a sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, - the maximum authorized for voluntary manslaughter. Confinement in a penitentiary is authorized by Article of War 42 for the offense of voluntary manslaughter, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 454, Title 18, United States Code.

(On Leave), Judge Advocate.

Thos Wrumbill, Judge Advocate.

Fletcher R. Andrews, 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 Corporal Elihu H. Winters, Jr. (35014507), Company F, 372nd Infantry.

2. I concur in the opinion of the Board of Review, and, for the reasons stated therein, recommend that only so much of the findings of guilty be confirmed as involves findings of guilty of voluntary manslaughter, at the place and time and upon the person alleged, in violation of Article of War 93. In view of the previous good character of accused and the fact that he was actuated by fear rather than viciousness, I recommend that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years; that the sentence as thus commuted be carried into execution; and that the Federal Reformatory, Chillicothe, Ohio, 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.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. G.C.M.O. 234, 15 Sep 1943)

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

(277)

SPJGH
CM 235088

1 JUL 1943

UNITED STATES	)	98TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened
	)	at Camp Breckinridge,
Second Lieutenant SMITH F.	)	Kentucky, 27 April 1943.
MUNSON (0-1289778), In-	)	Dismissal.
fantry.	)	

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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 96th Article of War.

Specification: In that 2nd Lieutenant Smith F. Munson, 390th Infantry, having received a lawful order from Lieutenant Colonel Nicholas D. Woodward, 390th Infantry, "to get dressed and report in the field to Lieutenant Colonel Joseph E. McGill this afternoon", the said Lieutenant Colonel Nicholas D. Woodward being in the execution of his office, did, at Camp Breckinridge, Kentucky, on or about April 12, 1943, fail to obey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced in evidence. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on the evening of Sunday, 11 April 1943, accused went to the quarters at Camp Breckinridge, Kentucky, of Lieutenant Colonel Nicholas D. Woodward, Executive Officer of his regiment, 390th Infantry, and asked to have Monday off, stating that he "needed to get

some finances straight and to purchase some clothing". Colonel Woodward gave the accused permission to have all day Monday off and directed him to report to his battalion commander on Tuesday, 13 April. Early Monday morning, 12 April, the regimental commander directed Colonel Woodward to have the accused report to his battalion commander on that day. At about 0930 Monday, Colonel Woodward met the accused in the club room of the officers' quarters and said to him: "Why aren't you getting your clothing?" "The Colonel told me that I should have directed you to report to the field immediately. You get dressed, get your clothing at the sales store this morning and report to Lieutenant Colonel McGill in the field this afternoon". Accused had on a field jacket, a pair of trousers and bedroom slippers and was standing behind the bar in the club room. He went upstairs immediately, got dressed and left the barracks. Accused did not report on that day to Colonel McGill, who was in the field in Bivouac Area 9, Camp Breckinridge. On the morning of 13 April, Colonel Woodward sent word to accused to report to him. Accused did so and was placed under arrest in quarters. At that time, accused stated that it had been impossible for him to comply with Colonel Woodward's instructions. When asked why he had not told Colonel Woodward about it, and what efforts he had made to comply, he said: "I went to the company and was unable to draw any field equipment there, and by the time I got the clothing that I needed it was 3:30 [1530] and I didn't think to come back and tell you". (R. 3-13)

4. The accused elected to remain silent. No testimony was offered for the defense.

5. The evidence is clear and uncontradicted that the accused failed to obey the order of Lieutenant Colonel Woodward to report to Lieutenant Colonel McGill in the field the afternoon of 12 April. When placed in arrest the next morning the accused offered the excuse that it was 1530 before he secured the clothing which he needed.

6. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service, National Guard, 1929 to 1937, and in 1940; active service from October 15, 1940; appointed temporary second lieutenant, Infantry, Army of the United States, from Officer Candidate School, and extended active duty, August 11, 1942.

The accused was tried by general court-martial on 10 December 1942, found guilty of being found drunk in bed with an enlisted man in

a private residence, in violation of the 95th Article of War, and sentenced to be dismissed. The President on 7 April 1943, approved only so much of the finding of guilty of the Charge as involved a finding of guilty in violation of the 96th Article of War, confirmed the sentence but suspended the execution thereof during his pleasure.

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

Lieutenant S. Hall Jr, Judge Advocate

Samuel M. Drivers, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 5 - JUL 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 Smith F. Munson (0-1289778), 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 legally sufficient to support the sentence and to warrant confirmation of the sentence.

The accused failed to obey a lawful order of the Executive Officer of his regiment to report in the field to a certain other officer, in violation of the 96th Article of War.

In another case the President on 7 April 1943, confirmed a sentence of this officer to dismissal for violation of the 96th Article of War for being found in bed with an enlisted man in a private house, but suspended the execution thereof during his pleasure. I recommend, therefore, that the sentence to dismissal in the instant case be confirmed and carried into execution.

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 order carrying 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- Drft. ltr. for sig. Sec. of War.
Incl. 3- Form of Executive action.

(Sentence confirmed. G.C.M.O. 182, 4 Aug 1943)

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

(281)

SPJGQ
CM 235090

- 3 JUL 1943

UNITED STATES v. Private JOHN M. SIPP (6286364), Company M, 364th Infantry.	WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Phoenix, Arizona, 22, 23 and 24 March 1943. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 96th Article of War.

Specification: In that Private John M. Sipp, Company M, 364th Infantry, being in camp at Papago Park, Phoenix, Arizona, did incite a riot at Papago Park, Phoenix, Arizona in that he did urge and advise certain other soldiers to the number of about thirty (30) to procure arms and ammunition and motor vehicles from the regimental motor pool and go to the City of Phoenix Arizona for the purpose of committing a riot therein.

CHARGE II: Violation of the 66th Article of War.

Specification: In that Private John M. Sipp, Company M, 364th Infantry, being in camp at Papago Park, Phoenix, Arizona, did cause a mutiny in the 364th Infantry regiment by urging the members of said 364th Infantry regiment to procure arms, ammunition and motor vehicles by force and go to the City of Phoenix, Arizona for the purpose of committing a riot therein.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. It appears that about 9:30 on the evening (Thanksgiving) of 26 November 1942 a colored soldier of the 364th Infantry was arrested by the MPs of the 733d MPs following an altercation in the "Savoy" in Phoenix, Arizona. There was considerable animosity between the two organizations. The 364th Infantry was encamped twenty minutes' bus ride distance from Phoenix at a place called Papago Park. Other members of the 364th crowded around the MPs who had the soldier under arrest. One of the MPs pulled his gun and shot a member of the 364th. The MPs then closed the Savoy and drove the 364th members out of town. Busses were sent to the usual corner known as "Mae's Place" (R. 103-110). The 364th men were lined up and then crowded aboard and taken back to camp. There was great resentment displayed against the MPs by loud talking, muttering and noise at Mae's Place and on the busses. The news of what had occurred, and what each one thought had occurred, was told around Phoenix and around the camp. The news had spread so rapidly that when the busses arrived there was a large gathering of troops at the main cross streets (Moss and Holliday) of the camp discussing the occurrence.

The pertinent evidence produced by the prosecution showed that the accused, a private in Company M of the 364th, but formerly first sergeant of Company D, about 10 p.m. of the night in question was seen by Privates Martin Tennyson and Meyer C. Flynn in line with the other soldiers of the 364th at Mae's Place awaiting a bus to return to camp (R. 306,336). He boarded one of the busses and was crowded up in the front end of the bus within a foot or two of Tennyson and Flynn and also Private Ollie D. North. Tennyson and Flynn knew him and knew his voice. They did not see him on the bus, nor did they hear him say anything (R. 336,370). They told of the considerable noise and loud talking and shouting going on in the bus, but could not remember anything in particular that was said, nor who said it. The third soldier, North, subsequently convicted of mutiny--and against whom the accused testified at his trial--was at Mae's Place and heard the crowd talking about what had happened at the Savoy and about the MPs beating up and shooting the soldiers of the 364th (R. 17). He saw one soldier arrive at Mae's Place who wanted to go in and wash off the blood on his face, but an MP would not permit him to enter and when he tried to go in anyway the MP kicked him and struck him on the head with a pistol (R. 18). North then got on the bus and was crowded up in the front end in almost bodily contact with accused, Tennyson and Flynn. The men on the bus were all colored soldiers of the 364th Infantry and were talking about the treatment of the soldiers

by the M.P.'s. North heard accused say "they were rotten, we should come back to town, wipe them off the face of the earth" (R. 19). He could not remember anything else that accused said. The men on the bus were very loud, noisy and boisterous. No one corroborated North regarding accused's alleged statement. When the bus reached the camp it unloaded and its occupants went through the north gate of the camp. About 30 of them gathered inside about 50 yards from the gate. North testified:

"Q. And what happened there?

"A. The men were still discussing the occurrence, the happenings of down town, and they wanted to know if they were going back to town; how could they get guns and ammunition.

"Q. And what, if anything, did Sipp say?

"A. Sipp said they could get guns and ammunition from any company around the area.

"Q. What other conversation, if any, took place in that crowd?

"A. The men wanted to know how they could go back to town; Sipp said there was plenty of transportation at the motor pool; they could use that.

"Q. Now, what tone of voice did he make those remarks in?

"A. Loud enough for the men to understand him, to hear him.

"Q. And how many men were around in that crowd at that time?

"A. Oh, about thirty, I imagine.

"Q. Now, after those statements were made, what happened to this crowd?

"A. Well, the crowd proceeded to break up, some going left, and right - myself, I started toward my company.

"Q. What was your company?

"A. My company was company D.

"Q. And did you go to D Company?

"A. I did, sir.

"Q. And when you got to D Company, what did you do?

"A. I went to my tent, took my wallet out of my pocket, put it in my trunk; I came back out of my tent; a corporal there, by the name of Celestine, was passing the rifles around, and I got my rifle.

"Q. What did you do then?

"A. After I got the rifle, I proceeded toward Moss and Holliday, where there was a large crowd, approximately one-hundred, two-hundred men.

"Q. What did you see there, in that crowd?

"A. I seen an officer, which is Lieutenant Gaskins, trying to quiet the crowd; he was standing on a weapons carrier, trying to get the men quiet.

"Q. Now, how long were you in the Company D Area, in your tent, there, before you secured that rifle, do you know?

"A. Not hardly over three minutes." (R. 20, 21).

* * * * * * *

"Q. And when you arrived at the intersection of Moss and Holliday, and saw this crowd, what did you observe, relative to the crowd?

"A. Noisy, boisterous crowd; the officer was trying to quiet the crowd, this officer Lieutenant Gaskins. Private Sipp was standing alongside of Lieutenant Gaskins; when Lieutenant Gaskins wasn't saying anything, Private Sipp was also trying to help the officer quiet the crowd.

"Q. What did Private Sipp say?

"A. He said, 'At ease, men, listen to the Lieutenant, see what he has to say.'

"Q. What did the crowd say?

"A. There was no response from the crowd.

"Q. Did the crowd say what they were going to do?

"A. Oh, some of them would want to listen to the lieutenant, and others would want to 'Come one, let's go' - the crowd was, all of it, indifferent decisions.

"Q. And then what happened in regard to this crowd?

"A. Oh, after the officer had spoken to the men, there was a wounded soldier brought in among the crowd; the crowd seemed to flame up after this soldier was brought in, and the crowd broke up and started -- I was among the men going toward the motor pool." (R. 23).

* * * * * * *

"Q. And when the crowd got to the motor pool, what did they do?

"A. Some of the men proceeded to get trucks, and move out of the motor pool, at that time, I did not get in the truck; I walked back toward Moss and Holliday; it was at Moss and Holliday that I met companions that I started to town with." (R. 24).

In his first written statement made 26 December 1942, during the investigation of the occurrence, North made no mention of having

seen accused on the bus (R. 25). Private William Ford, Company "D", who had also been convicted of mutiny and against whom accused had testified at his trial, knew the accused. On the night of 26 November he was on one of the busses that drove from Phoenix to the north gate of the camp but did not see accused on the bus. After leaving the bus he saw accused talking to some boy near F Company area (Ex. 2) and heard him say "Let's go to town". The boy said, "No, let's go and talk to the colonel about it". Accused advised against such action. The witness proceeded to "D" Company area and turned in his pass. He observed the crowd of men at the main intersection of camp, Moss and Holliday Streets. There were two to three hundred there. "D" Company occupies the southeast corner of Moss and Holliday Streets. Ford could not understand what they were saying but a car drove up containing the wounded soldier from Phoenix. Ford then went with the crowd to the motor pool and got on one of the trucks which headed toward Phoenix. Some of the men on the trucks had rifles (R. 34, 37).

On cross-examination he stated that when he turned in his pass to Private Willie L. Dixon, charge of quarters of Company "D", he did not observe any disorder in the orderly room resulting from men breaking open the rifle racks (R. 38).

Private First Class Lawrence W. Henderson, Company "D", on the night in question was in bed asleep. He was awakened by the noise outside of his tent in the Company street. He heard accused's voice saying that there had been some trouble down town. He got dressed and went outside. There he saw accused who told him and other unnamed persons present about the M.P.'s beating up the men down town and shooting them. He stated that accused said "we should come to town and do something about it". Someone then asked "how were we coming to town". Accused replied that there were plenty of trucks at the motor pool. He saw accused shortly thereafter in the crowd at Moss and Holliday Streets telling the men <u>not</u> to go to town. There was quite a crowd there. Some had rifles. While the crowd stood around and talked a car drove in with the wounded soldier and that inflamed them and started them on to Phoenix (R. 47). He himself went to the motor pool and boarded one of the vehicles. Henderson admitted that in a sworn statement that he made on 25 December 1942 regarding the occurrence he made no mention of the accused. In the same statement he swore that it was Ollie North (witness mentioned above) who was standing in the door of his tent when he awakened who told him that there had been trouble in Phoenix (R. 49). He admitted discussing accused's case with Ollie North and the others when they were all confined in the jail.

Sergeant Pharris Moore of Company "D" was asleep in his bed in the orderly room of Company "D" on the evening of 26 November when he was awakened by the accused and told to get up. In referring to

the accused, he stated:

> "Well, the first thing I remember was that he came in and shook and woke me up; he told me to get up, he said, 'The 733d MPs are shooting up all of our boys, and we are going to do something about it ' he said, 'One of them even hit me over the head'. And I told him to go ahead, I said, 'I'm in bed, I don't want to have anything to do with it,' and then he left."

Moore had been convicted of failure to suppress the riot. He was asleep on his cot within 12 feet of the rifle rack that was alleged to have been broken open and from which 29 rifles had been taken about 30 to 45 minutes after accused had awakened him (R. 55). In December 1942 Moore made a statement under oath that he had not seen the accused that night before he went to sleep, nor after he awakened; and that as far as he knew accused did not come into the orderly room on that night at all (R. 56). This witness was also in the jail with North and the others discussing the case (R. 58).

Private First Class Willie L. Dixon, charge of quarters of Company "D", was in the orderly room. Accused came in there about 9:15-9:30 on the night of 26 November and told Sergeant Moore that he was in town, that the MP's had hit him across the head and that he wanted to get revenge on them. He tried to get Moore out of bed to go with him, but Moore would not go (R. 69). Accused left. About 15 or 30 minutes (R. 83) later a group of about 30 soldiers came in to the orderly room and broke open a rifle rack and removed 29 rifles. Accused was not among them. They did not make much noise. They did not even awaken Sergeant Moore who was asleep in the same room (R. 75). Dixon was also in jail with North and the others.

On 2 January 1943 Dixon swore to a statement that,

> "During the earlier part of the night when the crowd was gathered at the corner of Moss and Holliday, I think I heard Private John M. Sipp - former 1st Sergeant of Company D - trying to help quiet the men down, but I did not see Private Sipp in the orderly room that night" (R. 78).

The orderly room is located at the southeast corner of Moss and Holliday Streets. Although he did not see accused, Dixon heard him about five minutes after ten o'clock shouting--telling the men to go back and go to bed, and they were crazy to be doing something like that (R. 81). Dixon was about 25 yards away from the intersection (R. 82).

First Lieutenant James D. Gaskins, 364th Infantry, was officer of the day on the night of 26 November. About 9:30 he received by phone knowledge of the shooting affray in Phoenix. He then received

a call from the guard at the north gate who told him that some men were gathered around and wanted to go to town. He went there and saw from 35 to 50 men gathered there. They had heard that a soldier had been shot and wanted to go to town to see if they could do any good. He told them that they could do no good and to go back to their company streets. The crowd dispersed and went back towards their company streets. He later observed men milling out in the company streets and sensed there might be some serious trouble. Later he observed a large crowd of men gathered at the main intersection (R. 92). It was about 10:30 p.m. They were shouting and yelling; they wanted to go to town to "get" the MPs.

> "I rushed in the crowd, tried to quiet them down so I could get - give them some orders; I yelled at least several times in a loud tone of voice, but they could not hear me. Private Sipp came right beside me and yelled at the top of his voice, and said, 'Men, this is Lieutenant Gaskins, let's listen to what he has to say.' Finally, between Private Sipp and myself, we managed to quiet the big crowd down. It was then I gave them orders not to go to town; that this was mutiny in its worst form, 'Those are my orders, don't go to town.' And about that time a civilian car drove up, right next to the crowd, and someone yelled, 'A soldier has been shot.' At that time the crowd went completely wild, I could not control them at all. I managed to keep them from the car, away from the car long enough to have the soldier taken to the officers' club for medical treatment because there was a doctor in there. Then the song started ringing out about 'Let's get trucks and go to town together; let's go to the motor pool, get trucks and go to town and get them.' At that time I slipped out of the crowd, went to the motor pool to the Dispatcher's Office, told them to disconnect the trucks and do something to the motor so the trucks couldn't run. On my way back, towards the officers' club, which is also towards Moss and Holliday, where the crowd was, I met this crowd head-on. I noticed about five or six rifles in the crowd. Again I ordered them not to go to town; it was the worst form of mutiny, 'Those are my orders.' Then continued; they went on either side of me, and I just went right through the crowd. As I got to the officers' club, I waited outside to see what was going to happen. I noticed about four trucks left the motor pool; as I saw them leave, the motor pool, I called the highway patrolman and told him to stop any trucks loaded with colored soldiers going to Phoemix from Papago on Van Buren, Thomas or McDowell Roads. Those trucks were returned about an hour later. They did stop the trucks, all but one" (R. 93).

Accused was with him at least twenty minutes helping him to try to quiet the crowd (R. 96), and was the only one there helping him (R. 101). Lieutenant Gaskins knew accused when he was First Sergeant of "D" Company. Accused's reputation for soldierly bearing, honesty and integrity, and obedience was good. Accused was a good first sergeant and maintained discipline.

Second Lieutenant William F. Housner observed the large gathering of soldiers at the main crossing in the camp milling around and making a noise about 5 or 10 minutes after 11 o'clock. The soldiers were talking to each other about one of their men being shot by an MP in town.

> "* * * they kept insisting on going to town; that he, Lieutenant Housner, went up to the middle of the crowd and attempted to stop them, and get them to stay in camp; that he told them it would be foolish for them to go to town, and it would just cause him trouble; that he gave them no direct orders but just told them that it would be foolish for them to go to town; that he saw two other officers trying to quiet the crowd, namely, Lieutenant Lovelady and Lieutenant Gaskins. Lieutenant Lovelady was standing in front of a weapons carrier; that both of these officers were in the crowd at the same time he was; that he heard two shots fired in this crowd. One fired near the old guard house, and the other one fairly close to the crowd. That while the crowd was at Moss and Holliday streets he saw some men in it with rifles and other weapons; that he took four rifles away from four men who were in the crowd. That when he entered the crowd, when he first saw them, there was no resistance to his entry into it; that no violence was offered to him; that when he took the rifles away from the men, they gave them up willingly; that he did not hear Lieutenant Lovelady give a direct order for the crowd to disperse; that he did not hear Lieutenant Lovelady or Lieutenant Gaskins give a direct order for the crowd to disperse; that the crowd appeared to be a hostile crowd, but they did not appear to be hostile to the officers; that the only order he gave to the men about not going to town was that he ordered the men driving one of the trucks out of the motor pool not to go to town; that the truck pulled out and drove off in violation of this order; that he heard Lieutenant Gaskins tell the men on Moss and Holliday streets that it would be foolish for them to go to town; if they go to town they would just cause twice as much trouble as had already started, and that he, Lieutenant Gaskins, didn't blame them for anything that had happened up town; that he, Lieutenant Gaskins, said that more than likely it was the MPs' fault. That later he was at the officers' club and saw a wounded soldier brought into the officers' club, and that as he came out of the officers' club, he saw a portion of the crowd approaching toward the motor pool; that he went to the motor pool; that he saw four trucks leave the motor pool; * * *" (R. 116, 117).

The defense's motion for a finding of not guilty under the evidence was denied by the court (R. 21).

For the defense numerous witnesses were called to show that the accused was in and around the noncommissioned officers' club in the camp from about 6:30 p.m. 26 November until times varying from 8 p.m. to 10 p.m. (R. 121, 131, 138, 148, 157, 179, 190).

Staff Sergeant John Wallace on the night of 26 November, at Papago Park, heard a shot fired and 15 minutes later went to the main intersection. It was about 10 p.m. There he saw the accused, standing on the hood of a weapons carrier talking to the crowd below. He heard him say, "Fellows, don't go up there because we can't get anywhere like that, because we are a mob" (R. 205). He did not observe anyone else trying to break up the crowd.

First Lieutenant Robert C. Propst was awakened by a shot when asleep in his quarters at the camp. He dressed and went out to the motor pool and stopped several trucks loaded with men and some rifles from leaving the camp. The accused rushed up and said "Lieutenant, you have got to stop them; they are going to kill somebody". Accused himself was doing his beat to stop the moo (R. 209).

Captain Robert S. Swayze was walking east on Moss Street when the soldiers had gathered at the main crossing on the night of 26 November 1942. Accused came up to him, about 11 or 11:30 p.m., and said, "Captain, we have got to do something to stop these men; all they are going to do is to go to town and give our regiment a bad name".

The Captain went to the motor pool and ordered the dispatcher to remove all the keys from the trucks. He then went to the officers' club and saw Captain Burdick and accused there. He told Captain Burdick of all that accused had done in trying to stop the men from going to town and trying to quiet them (R. 210).

Captain Robert B. McGivney of Company "M", testified that accused was not issued a pass on the evening of 26 November to go to Phoenix.

Captain Charles D. Reddell was awakened about 11:45 p.m. on 26 November by the noise and shouting of the men gathered at the main intersection of the camp 75 yards away. He dressed and went to the motor pool. He passed within 50 yards of Moss and Holliday Streets. There was no one there then. At the motor pool he saw the tail lights of a truck going out of the west gate and another truck coming out of the pool. There were several men talking about going to town. A man whom he later learned was accused was trying to talk the men out of going (R. 224).

Corporal Charles Ellison was also at Moss and Holliday Streets about 10 p.m. on the evening of 26 November and saw accused up on the weapons carrier trying to quiet the soldiers and to stop them (R. 233-238). When the wounded soldier was brought in they all quit the intersection and rushed right over to the motor pool (R. 242).

Private James D. Smith was in the jail in December 1942, with North and Collins and Jackson. He overheard North tell Collins that he was going to get even with accused and if he were asked if accused tried to stop the soldiers from going to town that night, he was going to testify that accused encouraged them to go (R. 246).

The accused after being advised of his rights elected to testify on his own behalf. He claimed he spent the evening of 26 November in and around the noncommissioned officers' club at Papago—that he was not in Phoenix that night. About 10 p.m. he went over to "D" Company area—which is on the way to his own "M" Company area and stayed in the orderly room for about a half an hour talking to Moore. Dixon was in the room as "CQ". He denied that he asked or urged Moore to go to town. When he came out of the orderly room he saw the men gathering in the area and heard them talking about going to Phoenix. He tried to talk them out of it--to discourage the idea. He told them they would be fools to do anything like that. Henderson was among them. So was North (R. 252-253). He then went back to the orderly room and told Moore and Dixon about the men looking for rifles—that they should lock the rifle racks. He then joined Lieutenant Gaskins at Moss and Holliday streets and helped to quiet the men gathered there so that Lieutenant Gaskins could talk to them. Lieutenant Gaskins left him in charge until Lieutenant Propst came up. Things were under control. Lieutenant Lovelady also came there and talked to the crowd and then left. The car containing the wounded soldier arrived. That excited the crowd. It broke and the soldiers ran to the motor pool. He rushed over to try to stop them from going to town. He succeeded in stopping many. He helped Captain Swayze pick up many rifles that were discarded (R. 250-260). He denied that he urged or advised anyone.

Captain McGivney, commanding officer of Company "M", 364th Infantry, testified that accused was a good leader, good instructor, obeyed commands, could give them, had the respect of his men, vigorously enforced discipline and he would accept accused's word as he would that of an officer (R. 286).

In rebuttal the prosecution put in evidence two letters written by accused to a Private King while accused was confined in jail and King was in a hospital (R. 298, 300). These letters indicated that accused was anxious to have someone procure witnesses for him to prove that he was in the noncommissioned officers' club the evening of 26 November 1942; and that accused had some money and was

willing to "fix them up". Many witnesses were called by both sides to prove the presence or absence of accused in Phoenix that evening. This issue of minor importance detracted from the real issue of the case.

5. A discussion of the case would be inadequate without some comment upon the caliber of the testimony upon which the findings of guilty must necessarily be based. Five witnesses testified unfavorably to the accused: North, Ford, Henderson, Dixon and Moore. North and Ford were convicts against whom the accused had testified at their trials. Henderson was also a convict who had been confined with North and Ford and discussed at length this charge against accused. In December he made a sworn statement regarding the occurrence of 26 November and made no mention of accused. At that time he stressed the activity of North. Moore was also a convict and confined with the others and discussed the charge against accused. In December he swore that he had not seen accused at all on the night of 26 November. This is contrary to his present testimony and therefore he perjured himself in one statement or the other. Dixon was not a convict but had been confined for a while with North and the others. He also was an admitted perjurer as he, contrary to his present testimony, swore in early January that he did not see accused in the orderly room the night of 26 November.

It was clearly shown by witnesses on both sides, principally commissioned officers--that accused was the only enlisted man who took an active part in trying to quiet the soldiers gathered at Moss and Holliday Streets and to stop them from going to Phoenix. When Lieutenant Gaskins was unable to make himself heard in the crowd, it was accused who got the crowd quiet. It was accused who by means of his voice and leadership ability got the crowd to listen to the Lieutenant; who called other officers; suggested means of preventing the men from taking the trucks; helped remove keys from the trucks; and performed other acts to stop the mob. His efforts might have succeeded had it not been for the untimely appearance of the automobile containing the soldier shot by the MPs. All concede that the appearance of the wounded soldier caused the execution of the common intent to go to the motor pool, seize some trucks, and head for Phoenix.

The court, however, has accepted as true the testimony of the five witnesses that the accused spoke the words inciting the riot and mutiny prior to his commendable action to the contrary.

Referring, now, to Charge I, the accused is charged with inciting a riot. The Specification alleges that he did this by urging and advising about 30 other soldiers to procure arms and ammunition and motor vehicles, go to Phoenix, and commit a riot there.

Bouvier defines a riot as,

"a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority with an intent mutually to assist each other against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful."

The only assembling that night of 26 November that approaches the foregoing definition was the assembly of soldiers at Moss and Holliday Streets in their camp at Papago Park. Undoubtedly more than three persons assembled there in a tumultuous manner with a common intent and displayed force and violence. Their purpose was to go to Phoenix and deal with the MPs there. The record does not disclose that they ever carried out this purpose. The Specification alleges that the purpose was to go to Phoenix to "commit a riot therein". In other words, this was a riot to commit a riot. In fact, it was a riot among the soldiers to seize arms, ammunition and trucks. This they succeeded in doing. For the purposes of the opinion we will assume that the assembly at Moss and Holliday Streets constituted a riot. The legal issue is then simplified. Did the accused cause this riot?

In order to answer this question it should be ascertained at what time the assembly first took place. Lieutenant Gaskins said he saw the men already gathered there at 10:30. North, who got off the same bus with the accused, walked to his company street and anywhere from 3 to 15 minutes later joined the crowd already assembled there. At that time accused was helping to control the crowd. Ford also went to Company "D" located close to the intersection in question, turned in his pass and saw the crowd assembled at the intersection. There were two to three hundred men gathered there then. It is apparent from this evidence and the evidence produced by the defense that the assembly or gathering of a crowd at Moss and Holliday Streets took place <u>before</u> accused arrived back in camp. It was shown that the bus he boarded left Phoenix at or after 10 o'clock and that it took twenty minutes to reach Papago Park.

The only evidence produced by the prosecution to support this Charge and Specification is the testimony of North. His story was that accused, while a passenger on the crowded bus, in answer to someone's derogatory remark concerning the MPs of Phoenix, in a loud voice stated, "they were rotten, we should come back to town, wipe them off the face of the earth". It was not shown that anyone other

than North heard this remark. Two other witnesses of the prosecution standing in almost bodily contact with the accused on the bus did not hear him say anything. The bus was filled with noisy, boisterous, shouting soldiers. The prosecution failed to show what effect, if any, the accused's remark had upon his possible listeners, assuming that he made it. After the bus unloaded North says about 30 of the passengers gathered near the north gate and "they" wanted to know if they were going back to town how could they get guns, ammunition and transportation. North says accused told them that they could get guns and ammunition from any company around the area, and transportation from the transportation pool. It should be noted that accused did not urge them to do this, nor suggest force or violence. Not one of the thirty was identified. Not one was called as a witness to corroborate North. It was never shown that any one or more of these soldiers participated in the riot that was either then in progress at Moss and Holliday Streets, Papago Park, or that took place subsequently. What effect, if any, accused's advice had upon the thirty soldiers or any of them was not shown. According to North the crowd broke up, going in different directions. Lieutenant Gaskins observed this gathering of 35 or more men. They had heard about the soldier who had been shot by the MPs and wanted to go to Phoenix. He did not mention accused as having been among them even though he knew accused well. The Lieutenant talked to them and told them that they could do no good by going to town; that the matter was being taken care of by the proper authorities, and for the men to go back to their company streets. He says that the men did then disperse and return to their company streets. According to North, whose testimony has been given full credit, he himself proceeded directly to his company street and almost immediately he was handed a rifle by Corporal Celestine and shortly thereafter he joined the mob at Moss and Holliday Streets.

The testimony of Moore and Dixon had very little, if any, bearing on the case. Accused came into the orderly room and awakened Moore and urged him to get up and told him they were going to do something about the MP's shooting up the soldiers of the 364th. Moore went back to sleep. Dixon stayed in the orderly room. Neither was incited to riot, nor to take any action as a result of accused's alleged urgings. Ford's testimony was of no value. He saw accused talking to a boy soon after the arrival of the buses from Phoenix and heard him urge the boy to go to town and not to bother about talking to the colonel about it. Whether the unidentified "boy" ever participated in the riot or not is not shown. Henderson, the only remaining unfavorable witness, did not witness the occurrence on the bus nor the occurrence of the alleged remarks made by accused to the 30 or more soldiers who gathered near the north gate. Henderson was asleep in Company "D" street--which is near Moss and Holliday and a considerable distance from the north gate. He was awakened by the noise of people outside of his tent. He heard accused's voice telling that there had been some trouble down town. Henderson got dressed

and went outside of his tent. Accused told "us about the MPs" and said "we should go to town and do something about it". No mention or explanation is made of who constitutes "us" or "we". There was again no evidence of what effect if any accused's words had upon the undisclosed "us" or "we".

The conclusion is therefore inevitable that the prosecution has failed to prove that accused incited or caused the riot. The tumultuous assembly started before accused spoke the words complained of. The mob's action in seizing the trucks and heading for Phoenix was caused by the sight of the wounded soldier. The record is therefore insufficient to sustain a finding of guilty of the Charge and Specification.

With reference to the more serious charge of causing a mutiny, Bouvier has defined mutiny as "the lawful resistance of superior officers--or the raising of commotions and disturbances--in opposition to the authority of the officers." Paragraph 136, Manual for Courts-Martial, 1928, states, "Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority." Mutiny has also been defined as, "concerted insubordination, or concerted opposition or resistance to, or defiance of, lawful military authority by three or more persons subject to such authority with the intent to usurp, subvert or override such authority" Sec. 424, Dig. Ops. JAG, 1912-40. So serious is the offense that Article of War 66 provides for punishment by death for any soldier who causes any mutiny.

The proof required is (a) an act or acts of accused which proximately tended to create a certain intended (or actual) collective insubordination; (b) a specific intent to create a certain intended (or actual) collective insubordination; and (c) that the insubordination occurred.

In applying these principles of law and evidence to the facts disclosed by the record, a mutiny actually took place on the night of 26 November at Papago Park when those assembled at Moss and Holliday Streets collectively refused to obey the order of Lieutenant Gaskins not to go to town--"Those are my orders, don't go to town". But about that time a civilian car drove up right next to the crowd with the wounded soldier. The crowd went completely wild. The Lieutenant could no longer control them. In violation of the only order given a group seized trucks and headed for Phoenix. There was the mutiny. The same witness who proved the mutiny stated that the accused was helping--and the only one helping--to quiet the crowd and prevent them from going to town. The apparent proximate cause of the collective insubordination was the sight of the wounded soldier. The acts of the accused by making the remarks attributed to him by North, Ford, Henderson, Moore and Dixon were not shown to have any causal connection

with what took place, much less to be the proximate cause. As was pointed out in reference to Charge I and the Specification thereunder, the prosecution did not show that any one of the unnamed and unidentified persons to whom accused is alleged to have addressed his remarks participated in or took any part in the riot or the mutiny.

It therefore necessarily follows that the record of trial does not sustain the findings of guilty of either Charge or Specification.

The accused vainly tried to convince the court that he was not in Phoenix that night. Whether he was or was not was not a vital issue. The defense produced numerous witnesses to show where the accused was during the early evening of 26 November. The prosecution produced letters written by the accused tending to show that he was willing to procure alibi witnesses at any price. This issue befogged the main issue of fact--were the acts of the accused the proximate cause of the riot or the mutiny?

6. The record of trial shows that the accused is 23 years of age; that he enlisted 10 September 1938 and served until 26 October 1941. He again enlisted 27 October 1941 for a term of three years.

7. The court was legally constituted and had jurisdiction of the person and offense. 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 not legally sufficient to support the findings of guilty and the sentence.

William A. Rounds, Judge Advocate.

Carter W. Flum, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 26 JUL 1943 - To the Acting 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 John M. Sipp (6286364), Company M, 364th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty be disapproved, that the sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Consideration has been given to the attached ten letters from accused, his mother, sister and aunt, three addressed to the Commanding General, Western Defense Command, one addressed to the Chief of Staff, Western Defense Command, one addressed to the Chief of Staff of the Army, one addressed to the Secretary of War, three addressed to the President and one addressed to Mrs. Roosevelt, all urging clemency in accused's behalf.

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.

13 Incls.
Incl.1-Record trial.
Incl.2-Dft let. sig. A.Sec.War.
Incl.3-Form of action.
Incl.4-Let. fr accused to C.G.,3-27-43.
Incl.5-Let. Mrs. Sipp to C.G. 4-3-43.
Incl.6-Let. Mrs. Sipp to C.G. 4-10-43
Incl.7-Let. to Pres. fr Adele Winters, 4-10-43.
Incl.8-Let. to Mrs. Roosevelt fr Mrs. Sipp, 4-10-43.
Incl.9-Let. to Gen. Marshall fr Adele Winters 4-15-43.
Incl.10-Let to Pres. fr Sipp, 4-15-43.
Incl.11-Let. to Sec. War fr Sipp 4-18-43.
Incl.12-Let. to C. G. fr Sula Rickard, 4-25-43.
Incl.13-Let. to Chief Staff, West. Def. Cmd. fr accused, 5-6-43.

(Findings and sentence vacated. G.C.M.O. 197, 11 Aug 1943)

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

SPJGQ
CM 235092

- 1 JUL 1943

UNITED STATES v. Second Lieutenant WILLIAM R. LESTER (O-251794). Corps of Military Police, 713th M. P. Battalion.	)))))))	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort George G. Meade, Maryland, 3 May 1943. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates

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

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

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

Specification: In that Second Lieutenant William R. Lester, 713th Military Police Battalion (ZI), having been restricted to the limits of his post did, at Fort George G. Meade, Maryland, on or about April 11, 1943, break said restriction by going to Baltimore, Maryland.

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

Specification: In that Second Lieutenant William R. Lester, 713th Military Police Battalion (ZI) did, at Fort George G. Meade, Maryland, on or about April 11, 1943, knowingly and willfully apply to his own use and benefit, a five (5) passenger Ford Sedan No. 119653, Battalion Staff Car, of the value of about $866.66, Property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of the Charges and Specifications. There was evidence submitted of one previous conviction, for conducting himself in a manner to bring discredit upon the military service, in violation of Article of War 96. 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, with a recommendation that the sentence be suspended during the pleasure of the President.

3. The pertinent evidence submitted by the prosecution shows that on 11 April 1943, the date of the occurrences hereinafter related, the accused was properly restricted to his post which was Fort George G. Meade, Maryland (Ex. "C"). The accused was at that time Motor Transport Officer. About 1:15 a.m. on that date he ordered Private First Class Michael A. Koral to procure from the motor pool a Ford Sedan used as the Battalion Staff Car, property of the United States, and drive him and a lady friend to Baltimore, Maryland. After leaving the lady off at her home they returned to the post, arriving about 5:15 a.m. of the same day. The vehicle was immediately returned to the motor pool (R. 6-12). The speedometer showed that it had traveled 69 miles during the trip. The accused at no time was given proper authority to use the vehicle in question, nor to break his restrictions (R. 18).

4. The accused elected to testify on his own behalf. He admitted that he was restricted to his post. Nevertheless he left the post on the morning of 11 April 1943 in the Battalion Staff car and drove to Baltimore and return. He explained his conduct by stating that a lady who had visited him the evening of 10 April became ill and he felt justified in taking her to her home in Baltimore and the staff car was the only means of transportation then available (R. 30-32).

5. All of the necessary elements of the offenses charged were not only clearly proven by the prosecution but frankly admitted by the accused as a witness in his own behalf. He broke the restrictions. He used the Government vehicle described for his own personal use for a trip to Baltimore and return. His explanation goes solely to the question of extenuation or mitigation of the punishment. The court was justified in finding him guilty of the offenses.

6. Seven members of the court and the trial judge advocate and the reviewing authority recommend clemency by suspending the sentence of dismissal because of the superior manner in which the accused has

performed his official duties.

7. The accused is 36 years of age. He was a member of the Branch Infantry Reserve from 9 April 1928 to 29 March 1938. He served as an enlisted man from 11 December 1940 until 25 May 1942, when he was commissioned a 2nd Lieutenant, Military Police.

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. A sentence of dismissal is authorized upon conviction of violation of either Article of War 96 or Article of War 94.

William A. Founds, Judge Advocate

Carlos Asplund, Judge Advocate

Herbert B. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O., 8 - JUL 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 William R. Lester (0-251794), Corps of Military Police, 713th Military Police 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 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.

(Sentence confirmed but execution suspended. G.C.M.O. 200, 12 Aug 1943)

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

SPJGN
CM 235134

16 JUN 1943

UNITED STATES v. Private EGON B. GRAMPP (32800699), Company A, 13th Infantry Training Battalion.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Wheeler, Georgia, April 22, 1943. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING 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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: (Disapproved by the reviewing authority.)

Specification 2: In that Private Egon B. Grampp, Company A, Thirteenth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about March 16, 1943, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America, to wit: "I will not fight against Germany because I have flesh and blood relatives living in Germany and I prefer to be placed in an internment camp", or words to that effect.

Specification 3: (Disapproved by the reviewing authority.)

Specification 4: (Disapproved by the reviewing authority.)

Specification 5: In that Private Egon B. Grampp, Company A, Thirteenth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about March 31, 1943, wrongfully and unlawfully make and utter the following disloyal statement against the United States of America, to wit: "I have money and relatives in Germany. A cousin of mine is a flight leader in the 'Luftwaffe', and an uncle of mine is a Major in the German Marine Corps. I am a German and I am registered with the German Consulate, and if anything should happen to me, something will happen to an American in Germany. My money is safe where it is. I have too much to lose by fighting Germany. I hate the Japs, but I would not fight against them. If I had known about the Army in advance, I would have refused to take the oath and would have been sent to a concentration camp", or words to that effect.

Specification 6: (Finding of not guilty.)

Specification 7: (Disapproved by the reviewing authority.)

Specification 8: (Finding of not guilty.)

Specification 9: (Finding of not guilty.)

He pleaded not guilty to the Charge and its Specifications. He was found guilty of the Charge and of Specifications 1, 2, 3, 4, 5, and 7, and not guilty of Specifications 6, 8, and 9. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor at such place as the reviewing authority may direct for 20 years. The reviewing authority disapproved the findings of guilty of Specifications 1, 3, 4, and 7, approved the sentence but reduced the period of confinement to five years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution pertaining to Specifications 2 and 5, the only Specifications of which the findings were not disapproved by the reviewing authority, was supplied by two witnesses, Sergeant Charles A. Lee and Private Kurt M. Lassen. Sergeant Lee, one of the accused's superior noncommissioned officers testified that on March 16, 1943, the accused was "brought to him" when he was conducting an investigation of statements alleged to have been made by

the accused. The pertinent evidence resulting from the investigation is presented in the following testimony:

> "I asked him why he wanted to be placed in a concentration camp. He then said that he did not say he wanted to be in a concentration camp. I told him he was lying to me and he said he was not lying. He said he wanted to be placed in an internment camp. I asked him why and he said he was not a citizen of this country and I asked him where he was born and he said that he was born in Germany and I asked him how long he lived in this country and he said he had been here seventeen years. I asked him how old he was and he said he was nineteen. I asked him if he felt like he would fight for this country and he did not answer that directly. He said he did not feel that he could fight against Germany because his own flesh and blood lived in Germany" (R. 12-13).

Private Kurt M. Lassen, testified that on March 31, 1943, he questioned the accused at the request of Sergeant Lee for the purpose of determining the feelings of the accused toward the United States Army. The pertinent evidence concerning this interview is as follows:

> "*** Approaching him I asked if he did not want to be a good soldier and he said the Army made him angry. I asked him why and he said he did not want to get into the Army and he said if he knew what the Army was going to be like, he would have taken internment in preference to the United States Army. I questioned him and he said he was a German citizen and he said he could have gotten out of the Army. I told him he had taken an oath to enter the Army and that was the time for him to make a choice. He said he was not listening to the oath and it did not matter then. He told me he had been born in Germany and came here at the age of two; that his father and mother had not taken out American citizenship. He said he had a cousin in the German Luftwaffe and an uncle who was a Major in the German Marines and he had a substantial inheritance in Germany and he intended to claim it at some future date. He said he would not fight against the Germans, that he had everything to lose by

fighting them in view of the inheritance and also he would not fight the Japs but he gave no reason for that.

"Q. Did the accused make any further statements to you with reference to his citizenship?

"A. He said he had been registered with the German Consulate and that if anything did happen to him, in view of his feelings, that something similar would happen to an American prisoner in Germany" (R. 14-15).

4. The accused elected to testify on his own behalf. He testified that he was born in Germany of German parents. His father was in the German Army during the last war. His parents brought him to this country when he was two years of age. He has lived here 17 years. He was drafted into the Army on Feburary 18, 1943, when he was 19 years of age. An uncle of his had died in Germany and left him a half million dollars. He had cousins in Germany. He was puzzled whether he should be interned or enter the Army. His father had never been naturalized as an American citizen because of his desire to protect his son's interest in property to be inherited. He himself had never been naturalized because he was under 21 years of age, and he was therefore still a German citizen. He didn't know what to do about his problem so he had asked "a couple of fellows" what he should do, and "they misinterpreted everything". He claimed that the statements attributed to him by the witnesses were misinterpreted. He testified, "I told them probably at that time that I would rather be interned because I did not know—my mind was in conflict.*** There was no question of loyalty *** it was the question over the estate" (R. 25-26). As to his conversation with Private Lassen, he stated that he knew what Lassen was after when he questioned him and that he, the accused, "kidded" him to see what Lassen, who had never bothered with accused before, would say. He stated that now he had made his decision and desired to remain in the Army and was willing to fight for America as an American soldier, and to abandon any claim to his inheritance in Germany. (R. 20-29)

5. In order to understand the mental attitude of the accused on March 31 when questioned by Private Lassen, it should be noted that on March 16, he had been questioned by Sergeant Lee; and that on March 20 the accused had been taken by two corporals to the office of First Lieutenant Grover C. Twiner, Fourth Regimental Headquarters, investigating officer. There he had been told that boys of foreign descent and with families in Germany were given the privilege if they desired to exercise it of signing statements expressing their desire not to bear arms against any particular country. He had then been asked if he would like to sign a statement that he did not want to bear arms against Germany. He had been told that if he signed

such a statement refusing to bear arms against Germany, that there was a possibility that he might not have to fight against Germany. A statement had then been written by the investigating officer and placed in front of the accused. He had been told that he did not have to sign it. The accused signed it and his act in doing so was made the basis of Specification 1. The finding of guilty based on Specification 1 was thereafter disapproved by the reviewing authority.

The record shows that the practice of giving to soldiers the privilege of electing to indicate in writing their reluctance to fight against any or all countries was given to all foreign born soldiers so that the record of the soldier could be so noted, and "proper disposition could be made of the man". (R. 37-39)

6. The court found that the alleged utterances of Specifications 2 and 5 were disloyal statements in violation of Article of War 96. In order to sustain these findings the record must not only show that the statements were made, but that they were made to "the prejudice of good order and military discipline" or that they were of a nature to "bring discredit upon the military service".

The record shows that the statements were in fact made, but that they were made in the form of answers to questions presented to the accused by Sergeant Lee and Private Lassen. Sergeant Lee, to whom the statements of Specification 2 were made, stated that he was investigating certain statements alleged to have been made by the accused whereas Private Lassen testified that the statements made by the accused to him were made when he was sent by Sergeant Lee to question the accused. It appears, therefore, that both the statements were made as the result of an official investigation. Do such statements constitute a violation of Article of War 96?

In considering this question The Judge Advocate General in CM 229063, Bresky, stated that,

> "In my view honest official statements disclosing the true sentiments of accused, made only because accused was asked by his military superior to make them, were not of a nature to bring discredit upon the military service and were not to the prejudice of good order and military discipline within the meaning of Article of War 96".

He expressed the same view in CM 229062, Irskens. Since the same principle controls and is as applicable in the present case as in the cases cited, we must conclude that the record is not legally sufficient to sustain the findings of guilty under Specifications 2 and 5.

7. For the reasons stated the Board of Review holds that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

Chas. L. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Shafer, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 19 JUN 1943 - To the Commanding General, Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Private Egon B. Grampp (32800699), Company A, 13th Infantry Training Battalion, I concur in the holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be vacated.

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 235134).

Myron C. Cramer

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

RECEIVED JUN 24 1943 STAFF JUDGE ADVOCATE

RECEIVED JUN 24 1943 HQ. 4TH SERVICE COMMAND

JUN 21 '43 PM

DISPATCHED WAR DEPARTMENT SERVICES OF SUPPLY J.A.G.O.

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

(309)

27 JUL 1943

SPJGH
CM 235143

UNITED STATES v. Private JACK D. MCKINNEY (15063989), Company B, 727th Military Police Battalion.	PERSIAN GULF SERVICE COMMAND U. S. ARMY FORCES IN MIDDLE EAST Trial by G.C.M., convened at Tehran, Iran, 22, 23, 24, 25, 26 and 27 March 1943. Dishonorable discharge, total forfeitures and confinement for life. The United States Penitentiary, Atlanta, Georgia.

REVIEW by the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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 92d Article of War.

Specification: In that Jack D. McKinney, Private, Detachment, 727th Military Police Battalion, did, at Amirabad Barracks, Tehran, Iran, on or about February 22, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill Lawrence M. Colvin, a human being, by shooting him with a rifle.

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 the remainder of his natural life. Evidence of two previous convictions for absence without leave (4 days and 1 day) was introduced. The reviewing authority approved the sentence, 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. The evidence for the prosecution is substantially as follows:

At about 4:25 p.m., on 22 February 1943, Mess Sergeant H. F. Butters and Private Lawrence K. Colvin, a dining room orderly, were in Mess Hall 2 at Amirabad Barracks, Tehran, Iran, after early "chow" was over. Colvin was cutting bread for supper and Sergeant Butters was about to go off duty, when someone began knocking or kicking at the front door of the mess hall. Colvin went to the door, unlocked and opened it. The accused was standing outside. Colvin then asked accused if he had a right to early "chow". Accused pushed past Colvin and went through the mess hall into the kitchen. At the time, Privates John M. Volk and Edward Grey were in the kitchen and a number of other enlisted men including Sergeant William J. Pickett, Sergeant Joseph Verdun and Corporal John H. Ruth were in the mess hall finishing their meal. The accused helped himself to food in the kitchen, walked back into the mess hall and stopped at the table where Colvin was cutting bread, and said to Colvin "Don't get smart with me" and "I will break your neck". Colvin said "Let me alone" and raised the knife which he had in his hand. Accused said "Don't swing that knife on me", or "I dare you to swing that knife at me", and Colvin replied "I am not going to hit you with this knife", "Go on, sit down and forget about it" or words to that effect. Accused then seated himself at the next table with his back to Colvin, and remarked "If I had my gun with me I would shoot you". Colvin put aside the knife, walked over to accused, tapped him on the shoulder and said "If you don't want to shut up, get up and fight". Accused made no answer and soon afterward left the mess hall. Several of those present paid little attention to the incident, and regarded it as only an argument or as rough play (R. 10-14, 16-17, 20-22, 25-27, 37, 39-40, 46, 48, 63-64, 70, 74, 76-78, 81).

Accused returned to his barracks and walked over to the rifle stacks. Sergeant Pickett noticed him there and said, "McKinney, don't do anything like that". After some talk accused picked up a cigarette and smoked it. Sergeant Pickett moved away, but when he heard accused open the bolt of a rifle, turned back and saw accused go through the motion of putting a shell in the chamber. Sergeant Pickett then tried "to talk him out of the rifle". Accused said "Sergeant, I'm not going to shoot him, I am just going to scare him". Sergeant Pickett made no further effort to stop accused, but Sergeant Verdun who entered the room at that time, asked accused what he was going to do with the rifle. Accused

replied "Nothing at all, sergeant". Sergeant Verdun said "If it is something pertaining to the argument you had, settle it if you want to, but leave the gun here" and "Don't do anything you will be sorry for". Accused said "You saw him raise the knife on me, didn't you?", and "Step aside and don't bother me". Accused then left the barracks and in passing Corporal Ruth, said to him "Don't try to stop me, Ruth". (R. 64, 71-72, 75, 78).

About five minutes after accused had left the mess hall, he returned, carrying a rifle, walked through the building and out the kitchen door. He was next observed standing near a corner of the kitchen with his rifle in a "ready position", his right hand on the stock, his left hand near the barrel and the barrel pointing to the left. Colvin was about 30 feet away in conversation with Carpenter. Privates Volk and Neider were looking through a torn place in the covering of one of the kitchen windows. Accused called to Colvin "Now get your knife" according to Volk, or "Go get your knife and I will shoot you deader than hell" according to Carpenter. Colvin, empty-handed, walked toward the accused and when about a foot away from him, reached for the muzzle of the rifle with his right hand. As he did so, and before he had touched the rifle, accused raised his arms, the gun fired, and the bullet passed through Colvin's left chest and out his back. Colvin was given prompt surgical attention but died three days later as the result of a gunshot wound in the left chest (R. 17, 27-30, 33, 46, 50-51, 56, 58-60, 78, 83, 90, 92-94).

After the shooting, accused returned to his barracks, handed the rifle to Sergeant Verdun and said "All right, place me under arrest". Sergeant Verdun went to the mess hall, saw Colvin on the ground "with a hole through him", returned to the barracks, placed accused under arrest and sent for Lieutenant Henry A. Menjou. Lieutenant Menjou arrived about ten minutes later. Sergeant Verdun stated that accused had shot someone, and accused said "Some guy drew a knife on me". The rifle was delivered by Sergeant Verdun to Sergeant Pickett who identified it as the rifle which belonged to accused (R. 64, 68-69, 75, 78-80, 83).

Corporal Ruth on cross-examination testified that he had known accused at Camp Kilmer when accused was a corporal and Ruth was a private, and that accused was a "very good" soldier, and that "He knew how to drill men, how to instruct them in bayonet drill and he knew the nomenclature of the rifle very well" (R. 75-76).

4. For the defense: Corporal Milton C. Boyer, a draftsman, and Private William H. Blohm, a photographer, testified to the preparation

of the drawing and photographs of the M.P. barracks and mess hall No. 2, which were introduced in evidence as exhibits by the defense (R. 99-106).

The accused testified that he was born at Louisville, Kentucky, on 11 April 1925. His parents moved to Cincinnati when he was five years old, but his mother and father "did not get along" and at the age of 10, he was put in the Childrens' Home at Cincinnati for a short time, and then in a "foster home" on a farm, where he stayed until August 1940. Upon leaving the farm, he visited his mother and father who were "separated", and spent a week with each of them. He then worked on a farm at Batavia, Ohio, until he enlisted in the Army on 1 November 1940. In May 1942 he went to Fort Riley for military police training and then to Camp Forrest, where he was made a corporal in the 727th Military Police. From there he went to New Jersey, California, Hawaii, New Zealand, Australia, India and Iran, arriving at Tehran on 31 January 1943. He was on guard duty from midnight to 6:00 a.m., 22 February 1943, and was due for another tour of duty at 6:00 p.m. that evening. After "chow" at 11:00 a.m., on 22 February, he went to Tehran where he had lunch and four drinks of vodka and vermuth. He testified that the drinks did not affect him and that he returned to camp about 4:00 p.m. He then got his mess kit and went to the mess hall because he had to eat "early chow", clean up and be ready to go on guard at 6:00 p.m. He knocked on the door "pretty loud". A voice said "Wait a minute" and the door was opened by someone, whom accused didn't recognize. He went into the kitchen and got his supper, and as he passed the bread can and reached down for some break, Colvin said something to him, and when accused looked up, Colvin had a butcher knife raised in his right hand. Accused told Colvin that "if he swung that knife on me, that I would break his neck". Accused took a seat at the next table and started to eat. Colvin came up behind him and said something. Accused finished eating, left the mess hall and went to his barracks, where he got his rifle intending to go back and scare Colvin. He wanted to teach Colvin a lesson. Accused put a round of ammunition in the rifle. Sergeant Pickett told him not to do anything he would be sorry for, and accused said he wasn't going to shoot Colvin, but was just going to scare him. He also made the same statement to Sergeant Verdun when the latter told accused to leave the rifle in the barracks and settle the argument some other way. Accused then went to the mess hall. He was looking for Colvin to teach him a lesson because accused was afraid of the knife which Colvin had drawn. He did not find Colvin in the mess hall or kitchen. Accused went out the kitchen door, and had started back to the barracks when he noticed Colvin about

20 feet away and "hollered" at him. Accused was holding his rifle at port arms. Colvin did not speak but walked fast toward accused. As Colvin approached, accused was not directly facing him, but was at just about a half right face with his left shoulder pointing toward Colvin. Accused did not at any time aim the rifle at Colvin. He intended to shoot it in the air. When asked whether he at any time intended to do harm to Colvin, accused answered "No, I didn't. I just wanted to scare him and teach him a good lesson. That's all". Accused stated that when Colvin had approached to within three feet of him, Colvin "made a pass at the rifle" and hit the stacking swivel but that accused never did see Colvin's hand come up. He first saw Colvin's hand holding the rifle "about the stacking swivel" when "The gun was down, and had been fired and I noticed his hand when he fell". As Colvin fell, accused saw the blood, became frightened and ran to the barracks where he stated to Sergeant Verdun that he had shot a man and "arrest me" (R. 107-132).

5. The accused is charged with murder. The Specification alleges that the accused did "* * * with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill * * *" the deceased by shooting him with a rifle. In order to determine the legal sufficiency of the evidence to support the finding of guilty under this Specification, it is necessary that the evidence support the conclusion that the accused unlawfully killed the deceased with malice aforethought.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". A justifiable homicide is "A homicide done in the proper performance of a legal duty * * *". Furthermore, an excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, * * *". The definition of murder requires that the death of the victim "* * * take place within a year and a day of the act or omission that caused it, * * *" (M.C.M. 1928, par. 148 a). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities, in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which the terms may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive.

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

* * *

"* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of,

or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * * (M.C.M., 1928, par. 148 a).

6. The evidence clearly shows that the accused shot the deceased with a rifle on 22 February 1943, and that the deceased died three days later as the result of a gunshot wound in the left chest. It is clear that the homicide was unlawful in that it was done without justification or excuse. An analysis of the evidence reveals ample proof to support the finding that it was done with malice aforethought. In the mess hall accused said, "I will break your neck" and "If I had my gun with me I'd shoot you". Accused was not armed at the time, but shortly afterward he obtained a rifle from the barracks, loaded it and returned, looking for Colvin. When he located Colvin outside the kitchen accused said to him, "Go get your knife and I will shoot you deader than hell". Accused admitted that he intended to scare Colvin by shooting the rifle in the air. The accused has been a corporal in the military police, understood the mechanism and operation of the rifle, knew how to drill men and how to instruct them in bayonet drill. He must be presumed to have known the danger of carrying a loaded weapon. Colvin was empty-handed when he approached accused. A man trained in bayonet drill does not require a loaded rifle to protect himself against an unarmed individual.

The evidence establishes, in the opinion of the Board of Review, beyond any reasonable doubt that the homicide was committed by accused with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation as alleged. Such an act constitutes murder in violation of Article of War 92.

7. a. The record does not state that the accused was present upon the reconvening of the court on 23 March 1943 (R. 16), on 24 March 1943 (R. 44), on 25 March 1943 (R. 74), on 26 March 1943 (R. 98) and on 27 March 1943 (R. 133). The record does not state the presence of a reporter upon reconvening on 24 March 1943 (R. 44), on 26 March 1943 (R. 98) and on 27 March 1943 (R. 133).

The record itself is evidence of the presence of the reporter, and the presence of accused is shown by his subsequent participation in the proceedings (CM 123492, Winchester; see CM 187949, Murphy).

b. Just before the defense rested, the defense requested the trial judge advocate to challenge one member of the court for cause because he had been a member of a Board of Officers who investigated the death of the deceased. The court sustained the challenge and the member withdrew. The defense then made a motion for dismissal of the case and for a new trial on the ground that the defense was prejudiced because the member, now excused, had sat through the trial. The law member properly denied the motion after each member of the court stated that the presence through the trial of the member now excused had not influenced his opinion as to the guilt or innocence of accused (R. 135-136).

8. The accused at enlistment stated that he was born on 11 April 1922. A photostat copy of the birth certificate of accused, received in evidence by stipulation, states his date of birth as 11 April 1925. According to the birth certificate accused was 17-10/12 years old on 22 February 1943, the date upon which the offense was committed.

An enlisted minor who commits an offense prior to his formal discharge from the Army is subject to trial by court-martial (Dig. Ops. JAG, 1912-1940, sec. 359, (3)).

9. The accused is now 18 years of age. The charge sheet shows that he enlisted at Fort Thomas, Kentucky, on 1 November 1940, for three years.

10. 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 and legally sufficient to support the sentence. Life imprisonment is authorized upon conviction of a violation of the 92nd Article of War. 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).

Lester S. Hill Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

H. Lottenhoe, Judge Advocate

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

SPJGK
CM 235184

11 AUG 1943

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Geiger Field, Washington, 2 and 3 April 1943. Dismissal.
First Lieutenant JOSEPH J. HUSVAR (O-455074), Corps of Engineers.	)	

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

CHARGE I: Violation of the 94th 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 First Lieutenant Joseph J. Husvar, Company "A", Eight Hundred and Fifty-second Engineer Aviation Battalion, did, at Geiger Field, Washington, on or about February 22, 1943, with intent to deceive Major Joseph C. Rollins, officially state in an affidavit attached to a Report of Survey as an exhibit that he had packed by mistake for overseas shipment one pistol, automatic, caliber .45, M 1911A1, #703102, two magazine assemblies, and one holster, pistol, M 1916 (leather), which statement was known by First Lieutenant Joseph J. Husvar to be untrue, in that the said pistol, magazine assemblies, and holster were in his personal possession at the time.

Specification 2: In that First Lieutenant Joseph J. Husvar, Company "A, Eight Hundred and Fifty-second Engineer Aviation Battalion, did, at Geiger Field, Washington, on or about January 31, 1943, with intent to deceive First Lieutenant Thomas P. Duncan, officially state on a Statement of Charges (W.D., A.G.O. Form No. 36), that the cause of the charge of one pistol, automatic, caliber .45, M 1911A1, #703102, two clips, and one holster was "lost", which statement was known by First Lieutenant Joseph J. Husvar to be untrue, in that the said pistol, clips, and holster were in his personal possession at the time.

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

3. The evidence for the prosecution showed that accused is a first lieutenant, commanding Company A, 852nd Engineer Aviation Battalion, stationed at the time of the alleged offenses at Geiger Field, Washington. On 18 January 1943, there was issued to accused from the armament shop, 41st Air Base Squadron, an automatic 45 calibre pistol #703102, 2 clips and 1 holster, for which accused gave his memorandum receipt (R.9,10,12, 25,32,44,79,80; U.S.Exs.4,11). About a week or a week and a half later, Master Sergeant Charles R. Bickle, 41st Air Base Squadron, who had issued the pistol to accused, asked him to return it and was informed by accused that the pistol had been mislaid. Sometime in February, First Lieutenant Thomas P. Duncan, then commanding officer of the 41st Headquarters and Air Base Squadron, prepared a final statement of charges for his organization for the month of January. On this statement was listed the pistol, holster and clips issued to accused. The charge made was $29.61 and the reason stated for the charge was "lost". The statement of charges was signed by Lieutenant Duncan. On the face thereof accused certified over his signature that he acknowledged the correctness of the charges and waived his right to "action of a Surveying Office under 35-6640". About this time accused called Second Lieutenant Kenneth R. Patton, Supply Officer, 41st Air Base Squadron, at the Finance Office and said he had a statement of charges to pay. Lieutenant Patton met accused at the Finance Office where accused "presented" him with the amount "charged". On that day or the next, Lieutenant Patton learned that the pistol was a "controlled item" and could not be accounted for on a statement of charges. Accordingly he returned the payment and instituted a report of survey to investigate the loss of the pistol (R.32,44,80-83;U.S.Ex.5).

Major Joseph C. Rollins, Air Corps, Geiger Field, was on the board that made the survey. He talked to accused by telephone about the "lost" pistol. Accused told him "that a revolver, .45, had been packed with a shipment going to the port of embarkation, that he had in his possession, and that he wanted to pay for the revolver so that he could clear himself". Major Rollins told accused that he could clear himself only through a "report of survey, * * * he would have to make out an affidavit stating the exact circumstances accompanying the loss" (R.77). On cross-examination, Major Rollins testified that accused "simply said as nearly as he could figure it out it must have been packed and shipped to the port of embarkation, and he wouldn't be able to secure the pistol until he got there, and at that time the stuff would already have been shipped" (R.78). Accused did not tell Major Rollins that he had packed the pistol himself. On examination by the court, Major Rollins said that accused did "report" to him "that he wanted to pay for it" (R.79). A written statement (incorrectly identified by Major Rollins as an affidavit) was thereafter submitted by accused. It became a part of the Report of Survey which, under date of 24 February 1943, "found" that the pistol, 2 magazines and the pistol holster were lost through the fault, the negligence, of accused and recommended that accused make reimbursement in the sum of $30.61, the value of the property. The so-called "affidavit" of accused was dated 6 February 1943. It read:

> "I, Lt. Joseph J. Husvar, do hereby state that one (1) Forty-Five Calibre Automatic pistol was packed in error and forwarded to the Boston Port of Embarkation along with other Company equipment. The equipment is enroute to a different Port of Embarkation than the one that the personnel are bound to and therefore cannot be reached until we reach the final port of Debarkation.
>
> "It is without negligence on my part and through unfortunate circumstances that the pistol was packed in error along with Company equipment sent to the Port of Embarkation."

There was offered and received in evidence an extract copy of a Packing List, bearing certification as to its truth, signed by accused, purporting to show that a .45 calibre automatic pistol with holster and magazine, "the only one in the possession of the company", had been packed in box 266. The extract copy was a part of the Report of Survey (R.32,44,77, 78; Ex. 8). The Report of Survey was forwarded to accused for his perusal and any statement he desired to make, under date of 24 February 1943. By first indorsement, dated 1 March 1943, accused returned the report and allied papers and stated that he would pay the sum of $30.61 for the lost property (R.32,44,77; U.S. Exs. 6,7).

On March 27, 1943, there was found in the room of accused a .45 calibre automatic pistol, having serial number 703102, also one Hi-standard model A .22 calibre pistol, which belonged to accused, and a holster (R.27,51-53).

For the defense, it was shown, on cross-examination of Major Graham C. MacEachin, 852nd Engineers, a prosecution witness, that during the two or three weeks preceding the trial held 2 and 3 April 1943, accused wore the .45 calibre pistol "a great deal of the time on duty hours". He wore either this pistol or his own .22 Hi-standard pistol "practically constantly". The witness could not pick out any particular period when accused did or did not wear it (R.41,42). First Sergeant Harry E. Nagel, Company A, accused's company, a prosecution witness, testified on direct examination that accused wore a Colt automatic, Army issue, some of the time; that "when he came in in the morning, if he had it in his desk", he would usually carry the weapon when he went out on duty. On cross-examination Sergeant Nagel testified that accused also had a .22 calibre pistol with a holster, that "sometime during the interval of January 31 to February 22, 1943" accused carried the .22 calibre pistol (R.27).

On questioning by the court, First Lieutenant Laurence W. Vogel, Headquarters, accused's battalion, testified that he believed a "Sergeant Angus" was "packer on the boxes at Company A" (R.47).

Accused testified in his own behalf. During the course of his testimony, he was temporarily excused and Major MacEachin was recalled. Major MacEachin, questioned by the court, testified that the equipment of Company A was actually loaded into the car (freight car) on 25 January and that the cars moved 27 January (R.120).

Accused stated that he finished high school in 1933 (R.113) and entered the Army in 1934, and had had a little over 8 years service (R.111); that he received his first discharge as a "buck" sergeant; that after about 18 months service as a first sergeant he went to Officers' Candidate School, from which he graduated (R.116); that during high school years he had worked as a construction engineer for his father who was a contractor, "bridges and roads"; and that for two years he had been on detached service in the Amazon River Valley in South America working with a New York firm (R.114,122).

Accused testified, with respect to Specifications 1 and 2 of Charge II that he received the pistol on memorandum receipt just before "going to the range", that he brought it back and thought that he put it on his desk in the orderly room. When the pistol was to be returned he could not find it. He told Sergeant Bickle that he had mislaid the

pistol, that if he found it in the next day or two he would return it. At that time the Sergeant drew up a Charge Sheet which he signed; thereafter he paid the money "on the statement of charges" to Lieutenant Patton, but within a day or two the money was returned and he was told that the Charge Sheet was not proper under the circumstances, and that a report of survey would have to be initiated. Accused said he was asked for an affidavit and he gave "it" (sic) to them. His reason was that he could account for the loss of the pistol only by its having gone with other organization equipment packed up for the port of embarkation. He stated that "frankly" he did not know in which box it had gone but he believed it would naturally have gone in the demolition box. Therefore he took the packing list for that box, added the pistol, holster and clips, certified it on a "true extract copy" and sent it to the 41st Orderly Room. Accused said that right after that, Major Rollins phoned him and said that the report of survey was about to be put through and that if he "had no knowledge of the pistol" he would probably be held responsible. Accused replied that he was agreeable since the loss was due to his carelessness or "unfortunate circumstances" (R.103). He stated specifically that at the times he signed the statement of Charges and "put in this report of survey" he "honestly and truthfully believed that the pistol was lost and that it had been shipped to the port of embarkation" (R.104,105). Accused said that having received the pistol on 18 January he signed the statement of charges about 28 January, the affidavit attached to the Report of Survey on 6 February, and the certificate about the same date (R.105). He explained further that his reason for stating that the pistol had been packed in a shipping box was because at that time they were packing their equipment for shipment and were packing "a lot of stuff" in his office, the orderly room; that the "pistol could be packed in by mistake very easily, seeing as they were in the orderly room and out of it getting this and getting that, putting it into these crates * * * and that was the only place" he "figured the pistol could be gone". He reported that the last time he "recalled" seeing the pistol was on his desk in the orderly room. He continued that he finally located the pistol the day before pay day, on 27 February. He was going through a desk in his quarters which had been made by a man in his company and which he rarely used. He came across it in a bottom drawer. Asked why he didn't turn the pistol in or report having found it, accused said:

> "A number of reasons. The first one, as I realize now, it was bad judgment, I know that, but then, we were in somewhat, if you gentlemen have ever been mixed up in an overseas movement you know what I mean, everybody was here and there - I was as much as anyone. Another reason I didn't give it much thought because I had paid for the pistol once and I had told Major Rollins when he called me about the report of survey, he told

me I would be liable to pay for the pistol, and I said I would, and seeing as I wasn't trying to steal the pistol, in fact I was going to take the pistol with me if and when we got to our port of embarkation * * * that I didn't try to hide the pistol or put it away. I wore it, in fact, all over" (R.106,107).

On cross-examination, accused testified as to what he did in searching for the pistol: "I searched through my company orderly room". In addition, he stated, he made a cursory search of his room. There was sporting equipment in the orderly room, which had been packed in the demolition box. He knew of one or two instances where extra equipment was put in the demolition chest without being recorded since it made no difference to anyone whether the company had it or not (R.110,111).

On examination by the court accused said that he had asked Sergeant Angus, who was in charge of the packing, and the other men who were in the crew, whether they had packed a pistol and holster. They said that they did not remember packing it. Specifically asked, accused said he had not interrogated all the members of the crew for the reason that it would have been too much of a job. There were too many men on the crew, different men detailed at different times. There was nothing definite about the detail except the two "non-coms", Sergeant Angus and Corporal Dunbar.

4. The uncontroverted facts are that on 18 January 1943, accused drew a .45 calibre automatic pistol, a holster and two magazines, property of the United States. On or about 28 January accused was asked to return the pistol and he reported that it was mislaid. A charge sheet was prepared at once by the responsible officer, which incorporated this report, described the pistol as "lost", and fixed the cost of the lost property. Accused endorsed the charge sheet admitting liability and waiving his right to action by a surveying officer. Accused then paid the amount shown to be owing. This money was almost immediately refunded, since the procedure adopted was improper, and the responsible officer at once initiated a report of survey. Thereafter Major Rollins, member of the survey board, spoke to accused by telephone about the missing pistol. Accused told him that "as nearly as he could figure out" the pistol must have been packed and shipped to the port of embarkation. At the request of Major Rollins, accused made a statement in writing with reference to the pistol, in which he said that the pistol was packed in error and forwarded to the Boston Port of Embarkation and that this was done without negligence on his part. The equipment of accused's company had been "shipped out" 27 January 1943. On 27 March the pistol in question was found by a search party in accused's room. Accused explained that he himself had found the pistol on 27 February in the lower drawer of a desk which he seldom used, and that he had started to wear the pistol

again. Credible evidence is that during a period of three weeks subsequent to the date on which accused claimed to have found the pistol his wearing of it was open and obvious. There was some evidence, also, that between the dates when accused claimed the pistol was missing he wore another pistol which he owned.

Accused accounted for his failure to report recovery of the pistol on the ground of bad judgment, the fact that he and his company were busily engaged in preparation to go overseas, and that he had admitted liability and had paid or was going to pay for the pistol. Accused stated that after finding the pistol he wore it openly, intimating that that was tantamount to an announcement, if not a report, that the pistol had been recovered.

5. The questions first to be determined are what official statements were actually made by accused, whether such statements were false and whether accused knew that they were false at the time he made them. The statements were made officially.

Specification 2 of Charge II, relating to an "offense" earlier in point of time than Specification 1, alleges that accused officially and falsely stated that the pistol was lost. The evidence is that accused orally represented that the pistol was "mislaid" and that he officially "adopted" a formal report made out by another, i.e., the statement of charges, in which the pistol was described and reported "lost". "Mislaid" or "lost", there is no material difference. The same official action was required in either event, and either representation led to the same results. Accused made the representation specified.

Specification 1 of Charge II alleges that accused officially and falsely stated that he had packed the pistol, holster and magazines for overseas shipment by mistake. The undisputed evidence is that accused stated orally to Major Rollins that the pistol was mislaid or stolen and stated in writing that the pistol was packed (not by him) in error and forwarded to the Port of Embarkation. In fact, the written statement was orally described as only the opinion of accused. However if the pistol was not mislaid or lost, then his representation that he believed the pistol to have been packed by mistake was a false statement in violation of Article of War 95. The variation is immaterial.

The sole issue in this case, then, is, did accused know where the pistol was on 28 January 1943, the date on which accused first reported the pistol "mislaid". Accused contended that he did not. The prosecution had the burden of proving beyond a reasonable doubt that accused did know.

No direct proof was offered to show that the pistol had not been lost or mislaid at the time the statements were made or to show accused's factual knowledge with respect to the pistol at such time or times.

Circumstantial evidence only was introduced to show guilt. It was proved that the pistol was in accused's quarters on 27 March 1943, two months after accused claimed that the pistol was mislaid or lost. Accused himself testified that he had "found" the pistol on 27 February 1943.

This circumstance, that the property was found, was not sufficient to overcome the presumption of accused's innocence. It was not sufficient to prove that accused had known it was never lost. The inference to be drawn from this circumstance is as consistent with innocence as it is with guilt. It is a matter of human experience that the lost is often found. Had the pistol in fact been mislaid in the drawer of a seldom used desk, as claimed by the defense, for all practical purposes it was lost.

However there was another circumstance proved. After "finding" the pistol, accused permitted the record to remain unchanged. He failed to report its recovery. The question to be considered at this point is whether accused's failure to report the recovery of the pistol is as consistent with innocence as with guilt. If not, the court was justified in attributing to accused a sinister purpose which found its roots deep in the beginning of the transaction, and in imparting to him guilty knowledge of the falsity of his official statements.

At first blush, the failure to report the recovery of this pistol appears to indicate guilt. For instance, one who recovers on a policy of insurance for property claimed to have been lost and who thereafter is found in possession of the property without having reported its recovery is a likely subject for prosecution for fraud.

However the situation here, governing accused's responsibility with respect to the recovered pistol, is different. Consider it from the viewpoint of an inexperienced young officer. He knew that he was expected to wear a pistol in the service as part of his required equipment. Furthermore, he undoubtedly considered the fact that he was charged for the cost of the pistol as a controlling factor. It is reasonable to assume, in judging his good faith, that he did not consider that under the circumstances he was under any further obligation with respect to this weapon. In addition, he was under unusual pressure in preparing his company for overseas. It is doubtful if he gave the matter much thought. A guilty mind would have dictated the further concealment of the pistol until arrival overseas. Instead after 27 February he wore the pistol openly and constantly.

Considering the evidence as close, the deciding factor here, as always, should be the splendid reputation of the accused in civilian and military life, a factor that should be considered and given weight.

It is the opinion of the Board of Review that the circumstances proved and the inferences therefrom are as consistent with innocence as with guilt. The rule is that when the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction be of such nature as to exclude every reasonable hypothesis except that of accused's guilt (Dig. Op. JAG, 1912-40, sec. 395 (9), C.M. 153330 (1922); 169811 (1926)).

6. Accused is 25 years of age. He was appointed second lieutenant 15 April 1942 and promoted to grade of first lieutenant 19 January 1943. According to the Charge Sheet, there was prior enlisted service 11 December 1934 to 14 April 1942. Accused's 201 File shows no service prior to 8 January 1941.

7. The court unanimously agreed to recommend clemency. This recommendation, in writing, is attached to the record and is signed by all the members except two who were absent at the time the instrument was executed.

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 and the sentence.

Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGK
CM 235184 1st Ind.

War Department, J.A.G.O., 13 AUG 1943 - To the Commanding General, Second Air Force, Colorado Springs, Colorado.

1. In the case of First Lieutenant Joseph J. Husvar (0-455074), CE, 852nd Engineer Aviation Battalion, I concur in the foregoing opinion 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 235184).

Myron C. Cramer

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

1 Incl.
Incl.-Record of trial.

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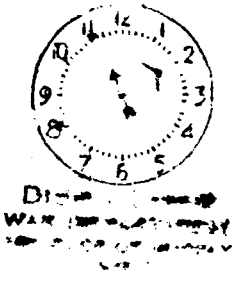

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WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 235223

12 JUL 1943

UNITED STATES v. Second Lieutenant MARDEN B. FRY (0-574653), Air Corps.	)))))))))	N.D. ARMY AIR FORCES SCHOOL OF APPLIED TACTICS Trial by G.C.M., convened at Orlando Air Base, Orlando, Florida, 27 April 1943. Dismissal, total forfeitures and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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 95th Article of War.

Specification: In that Second Lieutenant Marden B. Fry, Air Corps, Headquarters and Headquarters Squadron, Air Service Department, Army Air Forces School of Applied Tactics, being indebted to First Lieutenant Joseph E. Osborne, Air Corps, 50th Fighter Control Squadron, his brother officer of the Army of the United States, in the sum of $300.00, as a result of a gambling game honorably had between them and with other brother officers, which amount became due and payable on April 2, 1943, did, at Orlando, Florida, from April 2, 1943, to April 14, 1943, dishonorably fail, and neglect, and refuse to pay said debt, this to the scandal and disgrace of the Military Service.

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

Specification: In that Second Lieutenant Marden B. Fry, Air Corps, Headquarters and Headquarters Squadron, Air Service Department, Army Air Forces School of Applied Tactics, did, at Orlando, Florida, on or about April 2, 1943, with intent to defraud, falsely make and falsely indorse a certain check in the following words and figures, to wit:

"April 2 1943 No.

Florida Bank at Orlando

Pay to the order of Cash $400.00

Four Hundred and no/100 - - - - - - - - - - - - - - - Dollars,

Joseph E. Osborne,"

(Indorsed on back of check "Charles E. Houser")

in its entirety, except the Arabic numerals "$400.00" and the signature "Joseph E. Osborne" on the face of said check, which said check was a writing of a private nature which might operate to the prejudice of another.

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

Specification: In that Second Lieutenant Marden B. Fry, Air Corps, Headquarters and Headquarters Squadron, Air Service Department, Army Air Forces School of Applied Tactics, did, at Orlando, Florida, on or about April 2, 1943, with intent to defraud willfully, unlawfully, and feloniously, pass as true and genuine a certain check and indorsement thereon in words and figures as follows:

"April 2 1943 No.

Florida Bank at Orlando

Pay to the order of Cash $400.00

Four Hundred and no/100 - - - - - - - - - - - - - - - Dollars

Joseph E. Osborne,"

(Indorsed on back of check, "Charles E. Houser")

> a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Second Lieutenant Marden B. Fry, then well knew, falsely made in its entirety, except the Arabic numerals "$400.00" and the signature "Joseph E. Osborne", and which check was, as he, the said Second Lieutenant Marden B. Fry, also then well knew, falsely indorsed and forged.

He pleaded not guilty to and was found guilty of all 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, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on the evening of 1 April 1943, the accused engaged in a dice or crap game with a number of other officers in the game room of the Officers' Club at the Orlando Air Base. Checks were freely used and bets ranged from $5 to $150. The game continued through the early hours of 2 April, but by two o'clock everyone had dropped out except First Lieutenant Joseph E. Osborne and accused. Lieutenant Osborne had been losing, but the most that he was out, according to his testimony, was four or five hundred dollars, and when the other officers dropped out his losses were "possibly" $350. At that time, there were left in the game six checks of accused for $50 each, a check of another officer for $25, and checks of Lieutenant Osborne totaling about $230, all of which were fully made out showing his name, rank, serial number and organization. When accused won all the checks except the one for $25, Lieutenant Osborne started to make out a check for $400 (Ex. I), stating, "That is all I can afford to lose and I will shoot a hundred dollars". Accused threw the dice and lost the bet, before Lieutenant Osborne had completed filling out the check. Lieutenant Osborne then placed the uncompleted $400 "paper" on the counter in front of him and did not use it again during the game. Up to that point, Lieutenant Osborne had written 10 or 12 checks, of which the largest was for $100; he had kept a record of his checks in a notebook and, according to his testimony, the $400 check was the only instrument he filled out in partial form during the evening. Later the luck changed, Lieutenant Osborne won all the checks, and from then on checks were not used. Lieutenant Osborne testified

that after the game he sorted the checks and said to accused "I guess I have five checks of yours for $50.00"; accused said "No, you must have six * * * Do you mind if I give you one check for $300.00 in place of the six $50.00 checks". Lieutenant Osborne agreed to this, placed all the checks, including Exhibit I, on the counter and went to the lavatory, while accused was making out the $300 check. When he returned accused had his hand in Lieutenant Osborne's pile of checks. Accused then delivered the $300 check in exchange for six $50 checks, Lieutenant Osborne picked up the $25 check and the $300 check, put them in his wallet, and placed the white blank form checks of his own which he had won back in his right pocket, assuming at the time that the check, Exhibit I, was with them. Accused drove Lieutenant Osborne to his hotel, and stated that "he /the accused/ was quite a loser"; Lieutenant Osborne remarked that if accused did not have enough money to cover the check, he would hold it until accused was in funds; accused stated that would not be necessary. Lieutenant Osborne testified that when he reached his room he spoke to his roommate, First Lieutenant Carlos W. Nestlor, and then took the papers which were in his pocket, tore them up and put them in the wastebasket without examination, because he "had examined them carefully before leaving the Club". Lieutenant Nestlor testified that Lieutenant Osborne had a piece of paper on which he had some kind of bookkeeping record, that he compared it with more than ten checks, then tore them up and threw them in the wastebasket, not mentioning that a check for $400 was missing (R. 9, 16-22, 30-33, 35, 36, 57-59).

After a few hours sleep, Lieutenant Osborne went on 2 April 1943 to the Florida Bank at Orlando, to deposit the $300 check of accused and the $25 check. The $300 check was "turned down for insufficient funds". Lieutenant Osborne stated to Miss Elaine Webb, a bank employee, that he had written some checks at the Officers' Club on blank check forms and that he wished them honored when presented. Miss Webb asked if he meant the $400 check which had been cashed a few minutes before. Lieutenant Osborne said "That is impossible, I did not write a $400.00 check". Miss Webb produced the check, Exhibit I. Lieutenant Osborne looked at it and said "You should not have cashed this check, it isn't made out. This check was stolen from me". At that time, the check was as shown in Exhibit I, but when he had last seen it during the crap game, it merely bore the figures $400 and his name and did not have on it the words "April 2 * * * 3", "Florida Bank at Orlando", "Cash", the two small zeros following the figure "400", the words "Four Hundred and no/100", or the indorsement "Charles E. Houser".

He had not authorized anyone to place any of the additional words or figures on Exhibit I (R. 19, 21-24, 29, 39).

After the $300 check of the accused (Ex. II) was returned to Lt. Osborne by Miss Webb, who said it was not good because of insufficient funds and that it was on an improper form, he did not present it again. He assumed that the check would not be good or that the bank officials would notify him if it should become good. On Friday night 2 April, accused expressed surprise when Lieutenant Osborne told him that the $300 check was not good. On 3 April, accused stated to Lieutenant Osborne that he knew that it was not good and that he was stopping payment on it, and that there was nothing that Lieutenant Osborne could do about it. Lieutenant Osborne three times called upon accused to pay the check but accused did not pay it, nor had it been paid to the date of the trial. On 3 April, accused wrote the bank requesting that payment be stopped on the check (R. 21, 27, 29, 33, 39, 61; Ex. VII and Defense Ex. II).

Mr. Charles E. Willard, an assistant cashier of the Florida Bank at Orlando, testified that on the morning of 2 April, accused came to him in the bank, handed him the $400 check, Exhibit I, and stated that Lieutenant Osborne could not leave the base and had asked accused to cash the check. Mr. Willard looked at the check, turned it over and asked accused "Is that your indorsement". Accused replied "Yes". Mr. Willard then went to Miss Webb's window and verified the signature and the amount. Accused accompanied him but stopped to talk with Mr. Herman D. Carmichael, another official of the bank, and Mr. Willard authorized payment of the check. As a general rule, the bank identified an officer by his "AGO pass" but Mr. Willard did not ask to see accused's pass. The check was drawn to "Cash". Under the Negotiable Instruments Law, a check so drawn can be cashed without an indorsement. When such a check was presented, the Florida Bank would cash it for anyone at all and if the man were known the bank would cash the check without indorsement, but if a stranger should present such a check the bank would require an indorsement, although it is not necessary under the law. Mr. Carmichael said he saw accused talking with Mr. Willard, and went over and spoke to accused, whom he had met about ten days before (R. 40-42, 44-46, 48, 60).

The signature card furnished the bank by accused in opening his account, Exhibit IV, was received in evidence upon identification by Mr. Willard. The letter of accused requesting that payment be stopped upon his $300 check, Exhibit VII, and the deposit slip of 2 April 1943, depositing the $300, Exhibit VIII, were received in evidence upon identification by Mr. Carmichael (R. 44, 48).

Technical Sergeant Richard T. Hanson testified as a handwriting expert, over objection by the defense, that in his opinion all of the writing on the front and back of Exhibit I, except the figure "400" and "Joseph E. Osborne" and "Florida Bank at Orlando" was written by the same person who wrote Exhibits II and VII and the name Marden B. Fry on Exhibits IV and VIII. Mr. Willard whose qualifications as a handwriting expert were admitted by the defense testified that the indorsement "Charles E. Houser" on Exhibit I, the writing and signature on Exhibits II and VII and the signature on Exhibit IV were written by the same person. (R. 49-52, 59, 60)

4. For the defense, the accused testified that he entered the crap game shortly before midnight on 1 April with about $60. By the time he and Lieutenant Osborne were the only ones left in the game he had lost that cash and about $200 in checks. He continued to lose until Lieutenant Osborne held six of his $50 checks. At that time, his supply of checks had run out and, as he wished to "keep track" of how he stood, he drew a $300 check on one of the blank forms furnished by the club and delivered it to Lieutenant Osborne in exchange for the six $50 checks. This enabled him to continue betting in multiples of $50 without drawing additional checks. Later accused won back his $300 check and several checks of Lieutenant Osborne. During the course of the evening, Lieutenant Osborne wrote eight or nine checks, only two or three of which were completely filled out. On the others, including three or four $200 checks and several $400 checks, Lieutenant Osborne, in order to save time wrote merely the amount of the check in arabic numerals and his own name. At one time, accused had in his possesion over $2,000 in checks bearing Lieutenant Osborne's signature, and it was then that accused questioned Lieutenant Osborne concerning the amount of his bank balance. Lieutenant Osborne admitted not having enough in the bank to cover all his checks, but stated that those outstanding at the end of the game would be made good (R. 72, 73, 76, 82; Ex. V).

When Lieutenant Osborne went to the lavatory he and accused had agreed to play a half hour longer, and accused, intending to get a drink of water and wash his hands, placed some checks in his shirt pocket. It was his habit to carry his checks with him and not to leave them lying around. At that time, the accused had in his possession the six $50 checks and the $300 check which he had won back, and he thought he put the $300 check in his pocket, because he had determined not to risk it further. Then Lieutenant Osborne began to win, regained possession of all checks signed by himself, and it was decided to stop the game. Both officers

went to the lavatory, then accused went to the coat room, got his hat, returned to the game room, destroyed the checks in his posession bearing his signature and tossed them in the waste-basket. He then drove Lieutenant Osborne to the hotel. During the drive, they mentioned the game, but Lieutenant Osborne made no statement about any check of the accused. After leaving Lieutenant Osborne, accused went home, where, in looking through his pockets, he came across the blank form with the numerals "400" and the signature "Joseph E. Osborne". He was surprised, because he was under the impression that Lieutenant Osborne had regained possession of all checks written by the latter (R. 73-74, 76-78).

The next morning, accused filled in the blanks on the face of the $400 check, and took it to the bank to get it cashed. Near the bank, he met a civilian, Charles E. Houser, whom he had become acquainted with through Mrs. Virginia Moffett several weeks before. Accused told Houser that he was going to the bank to cash a check, and of the "extra amount" of checks written by Lieutenant Osborne, and stated that he was doubtful whether the check was good, and because of its size, he believed something might be said in the bank. Houser volunteered to indorse the check. Accused allowed him to do it because, unless there was money enough in Lieutenant Osborne's account to cover it, accused did not want his name to appear, and he knew it made no difference whose name appeared on the back of a check to the order of "Cash". Accused then went in the bank, which had just opened, and presented the check. He was told that the signature was in order and that there were sufficient funds to pay the check but that it was not on the proper form and it would be necessary to have a bank official initial it before it could be paid. Accused knew both Mr. Willard and Mr. Carmichael, and seeing Mr. Willard, told him that he, the accused, had a check which he would like to cash, but that it was necessary to have a bank official initial it. Mr. Carmichael then came over and spoke to the accused, Mr. Willard started to say something about identification and then said "I see Mr. Carmichael knows you, that is good enough for me" and passed the check to the clerk. Accused received $400 in cash, deposited $300 in his own account and retained $100 to pay some bills. Mr. Willard did not ask accused if the indorsement was his. The indorsement was that of Charles E. Houser (R. 74-81,83).

Accused further testified that there were seven checks of his in the game; that he kept track of them and thought he had destroyed all seven; and that when he discovered that Lieutenant Osborne had the $300 check, he stopped payment on it, because Lieutenant Osborne had no legal right to it. As to the $400 check, accused told Lieutenant Osborne that

as he found it in his pocket when he reached home, he felt that it was in his possession, was his, and he saw no reason for not cashing it (R. 73,75,84).

On cross-examination, the accused admitted that the face of the $400 check, Exhibit I, was in his handwriting except for the Arabic numerals "400" and the name "Joseph E. Osborne"; that the writing on the face of the $300 check, Exhibit II, was in his handwriting except for the word "Orlando"; that the signature on the signature card, Exhibit IV, was his; that the writing-except for the pencil notation—and the signature on the letter, Exhibit VII was his; and that the signature and date on the deposit slip, Exhibit VIII, was in his handwriting (R. 75-77).

Mrs. Virginia Moffett testified that she knew Charles E. Houser, had introduced him to accused and others in March 1943, and that on 3 April 1943 he had told her he was going away (R. 66-68).

Mr. Willard testified that if a deposit were made in the bank at 9:00 a.m., it would be set up before 10:30 a.m., but would probably not get on the bank ledger until noon. He also testified that he wrote the accused on 7 April, in reply to accused's letter stopping payment on the $300 check, that it was necessary to know the amount of the check before payment could be stopped, and that payment was later stopped (R. 63-64; Def. Ex. II).

5. Lieutenant Osborne and the accused were the only witnesses as to the transfer of possession of the two checks which are the subject matter of the Charges. Each flatly contradicted the other on material points. According to the testimony of accused, he did not owe a debt to Lieutenant Osborne, the $300 check drawn by accused was wrongfully in Lieutenant Osborne's possession, and the $400 check drawn by Lieutenant Osborne belonged to the accused. According to Lieutenant Osborne's testimony, accused owed him $300 represented by the check Exhibit II, given him in exchange for six $50 checks won from the accused, and the $400 check was stolen by the accused.

There are several factors which are unfavorable to the credibility of accused in this conflict of testimony. With respect to the indorsement "Charles E. Houser", Mr. Willard, the assistant cashier of the bank and a disinterested witness, testified that the accused stated in presenting the $400 check that Lieutenant Osborne—whose name was signed on the check—could not leave the base and had asked accused to cash the check, and in reply to his question "Is that your indorsement"; the accused said "Yes". The two handwriting experts—the defense admitted

the qualifications of Mr. Willard but challenged those of Technical Sergeant Hanson—each testified that the indorsement "Charles E. Houser" on the $400 check was written by the same person who wrote the entire face of that check, Exhibit I, except the signature and the arabic numerals "400", and wrote the face of the $300 check, Exhibit II, the signature on Exhibit IV, the writing on the letter, Exhibit VII, and the signature and date on the deposit slip, Exhibit VIII, all of which exemplars the accused admitted were written by him. The accused, on the other hand, testified that Mr. Willard did not ask him the question if the indorsement "Charles E. Houser" was his and insisted that the indorsement was volunteered by Mr. Houser, a casual acquaintance whom he met outside the bank, when accused expressed some hesitation in presenting it to the bank because of the large amount of the check. The fact that accused cashed the $400 check with the indorsement "Charles E. Houser" thereon at one window in the bank and then made out a deposit slip and deposited in cash to his account at another window $300 of the proceeds instead of depositing the check directly to his account and cashing a check for the $100 which he retained in cash, indicates an intention to conceal and leave no record of any connection on his part with the $400 check. In explanation of that transaction the accused stated that at the time he did not know that he had a special checking account, thought he had to cash the check and make out a deposit slip for the $300, and deposited it at another window because he had to make out the deposit slip and just walked to another window.

a. With respect to the allegation that accused dishonorably failed, neglected and refused to pay his honorable gambling debt (Chg. I) the Board accepts as true the testimony of Lieutenant Osborne, that he received the $300 check from accused in lieu of six checks of accused for $50 each, at the close of the game. Lieutenant Osborne was entitled to accept the refusal of the bank to honor that check because of insufficient funds to the credit of the account of the accused, although in fact accused had made a deposit at a teller's window which had not yet in the normal course of business been credited to his account on the books of the bank. The refusal of the bank to honor the check, the later statement of the accused that he was stopping payment of the check and that there was nothing that Lieutenant Osborne could do about it, the failure of accused to pay it when three times called upon by Lieutenant Osborne to do so, and the fact that the check had not been paid at the date of trial support the allegation of dishonorable failure and refusal to pay the check. The evidence shows that the game was conducted honorably, that the $300 check was given by accused in exchange for six of his

own $50 checks which Lieutenant Osborne had won, the debt of the accused was just and that a moral obligation existed which the accused should have paid. In the opinion of the Board the evidence shows a dishonorable neglect and refusal to discharge a pecuniary obligation cognizable under the 95th Article of War (Winthrop's Military Law and Precedents, Reprint, pp. 713-715).

b. The Specification, Charge II, alleges the false making of the face of the $400 check, with the exception of the figures "400" and the signature, and the false indorsing of that check, and the Specification, Charge III, alleges the uttering of that check with knowledge that it was falsely made and indorsed.

The evidence shows that during the game Lieutenant Osborne started to write a check, wrote upon a blank form the figures "400" and his signature, but did not complete the form and did not put the incomplete check into the game. The accused stated that Lieutenant Osborne before the end of the game regained possession of all checks which Osborne had signed, but that the accused in looking through his pockets before retiring found the blank form with the Arabic Numerals "400" and the signature "Joseph E. Osborne". On cross-examination, accused stated that he was surprised as he was under the impression that Lieutenant Osborne had regained all checks which Lieutenant Osborne had written. The accused saw no reason for not cashing it and filled in all the blanks, including the date, the name of the bank, the word "Cash" and the words "Four hundred and no/100". The accused contends that when he met his casual acquaintance, Charles E. Houser, outside of the bank and expressed to Houser his hesitation, because of the amount, about inquiring whether the check was good, Mr. Houser volunteered to indorse and did indorse the check. The two handwriting experts testified that the indorsement "Charles E. Houser" on the check was written by the same person who wrote the several exemplars which the accused admitted were in his handwriting. In the opinion of the Board, both experts were shown to be qualified, and the conclusion is inescapable that the accused wrote the indorsement, as well as completing the face of the form which contained only the figures "400" and the signature of Lieutenant Osborne. The accused presented the check to the bank, affirmed to the assistant cashier that the indorsement was his, and received $400 from the bank. The fact that accused cashed the $400 check with the indorsement of Houser thereon at one window and then made out a deposit slip and deposited $300 of the proceeds to his account at another window instead of depositing the check directly to

his account and cashing a check for the $100 which he retained in cash, shows an intention to conceal and leave no record of any connection on his part with the $400 check. In explanation of that transaction accused stated that at the time he did not know he had a special checking account, thought he had to cash the check and make out the deposit slip for the $300, and that he deposited it at another window because he had to make out the deposit slip and just walked to another window.

With respect to the indorsement of the check, "Charles E. Houser", the evidence shows clearly that it was in the handwriting of the accused, and accused stated to the assistant cashier that the indorsement was his. It was also clear that the admitted filling in by the accused of the face of the check, the blank form which then contained only the figures "400" and the signature "Joseph E. Osborne", was an act of forgery. The accused wrote in the name of the bank, the payee and the words four hundred. A false writing by the unauthorized filling in of a paper signed in blank is forgery (par. 149j, MCM 1928; Wharton's Criminal Law, Vol. 2, secs. 878, 879).

In the opinion of the Board the record of trial supports the findings of guilty of forgery of the face and indorsement of the check alleged in the Specification, Charge II, in violation of the 93rd Article of War, and of the uttering of the check alleged in the Specification, Charge III, in violation of the 96th Article of War.

6. The motions of the defense to strike the Specification, Charge II and the Specification, Charge III based upon the provisions of section 674.16 of the Florida Negotiable Instruments Act were properly overruled (R. 4-6) because that statute defines rights between parties under the civil law, is not a criminal statute, and by its terms applies only where the person filling blanks in an instrument is "in possession thereof" (obviously rightful possession) or where the paper has been "delivered by the person making the signature".

7. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 15 August 1940; appointed temporary warrant officer, junior grade, 15 May 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty 3 March 1943.

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 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 96th Article of War and mandatory upon conviction of a violation of the 95th Article of War.

_____, Judge Advocate

Samuel M. Drwer, Judge Advocate

F. J. Lotthus, Judge Advocate

1st Ind.

War Department, J.A.G.O., 26 JUL 1943 - To the Acting Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and opinion of the Board of Review in the case of Second Lieutenant Karden B. Fry (0-574653), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence.

The accused neglected and refused to pay his honorable gambling debt in the sum of $300 in violation of the 95th Article of War, forged a check for $400 and the indorsement thereof, in violation of the 93rd Article of War, and uttered that check in violation of the 96th Article of War. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for five years 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- Drft. ltr. for sig. Acting Sec. of War.
Incl.3- Form of Executive action.

(Sentence confirmed but four years of confinement remitted. G.C.M.O. 218, 4 Sep 1943)

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

(341)

SPJGQ
CM 235227

MAY 27 1943

UNITED STATES	)	20TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, May 5, 1943. Dishonorable discharge and confinement for thirty-five (35) years. Disciplinary Barracks.
Private HARRY J. BERNARD (32239494), Company B, 100th Armored Reconnaissance Battalion.	)	

REVIEW by the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, 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 I: Violation of the 58th Article of War.

Specification: In that Private Harry J. Bernard, Company "B", 100th Armored Reconnaissance Battalion, Camp Campbell, Kentucky did, while enroute from Fort Custer, Michigan to Fort Knox, Kentucky on or about October 21, 1942, desert the Service of the United States and remain absent in desertion until he was apprehended at Chicago, Illinois on or about March 3, 1943.

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

Specification: In that Private Harry J. Bernard, Company "B", 100th Armored Reconnaissance Battalion, Camp Campbell, Kentucky, having been duly placed in confinement enroute from Fort Custer, Michigan to Fort Knox, Kentucky on or about October 21, 1942 did, on that date escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private Harry J. Bernard, Company B, 100th Armored Reconnaissance

Battalion, Camp Campbell, Kentucky, did, while enroute from Fort Wayne, Detroit, Michigan to Fort Knox, Kentucky on or about July 26, 1942, desert the Service of The United States and did remain absent in desertion until he was apprehended at Detroit, Michigan on or about October 5, 1942.

Specification 2: In that Private Harry J. Bernard, Company B, 100th Armored Reconnaissance Battalion, Camp Campbell, Kentucky, did, at Camp Campbell, Kentucky on or about April 10, 1943 desert the Service of the United States and did remain absent in desertion until he was apprehended at Henderson, Kentucky on or about April 11, 1943.

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

Specification: In that Private Harry J. Bernard, Company B, 100th Armored Reconnaissance Battalion, Camp Campbell, Kentucky, did without proper Leave absent himself from his organization at Fort Knox, Kentucky, from about July 8, 1942 to about July 21, 1942.

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

Specification: In that Private Harry J. Bernard, Company B, 100th Armored Reconnaissance Battalion, Camp Campbell, Kentucky, having on or about July 25, 1942 received a lawful order from Milton Goldstein, a warrant officer who was then in the execution of his office, to report to his immediate Commanding Officer, Fort Knox, Kentucky, did, while enroute from Fort Wayne, Detroit, Michigan to Fort Knox, Kentucky, on or about July 26, 1942, willfully disobey the same.

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

Specification 1: In that Private Harry J. Bernard, Company B, 100th Armored Reconnaissance Battalion, Camp Campbell, Kentucky, did, at Camp Campbell, Kentucky on or about April 10, 1943, with intent to do bodily harm with a dangerous weapon, commit an assault upon Private Charles A. Brock, Headquarters Company 1st Battalion,

480th Armored Infantry Regiment, by willfully and feloniously pointing a rifle at said Private Brock and threaten to shoot him.

Specification 2: In that Private Harry J. Bernard, Company B, 100th Armored Reconnaissance Battalion, Camp Campbell, Kentucky, did, at Herndon, Kentucky on or about April 11, 1943, feloniously take, steal, and carry away one motor truck, value about $1000.00, the property of Conard T. Thomas, Herndon, Kentucky.

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

Specification: In that Private Harry J. Bernard, Company B, 100th Armored Reconnaissance Battalion, Camp Campbell, Kentucky, did, at Detroit, Michigan, on or about October 5, 1942, wrongfully wear the uniform of a Noncommissioned Officer with three year's service.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 35 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 competent and pertinent evidence of record discloses that accused, while a member of Company B, 88th Armored Reconnaissance Battalion, Fort Knox, Kentucky (R. 9), went absent without leave on July 8, 1942 (Pros. Ex. 1) and surrendered at Fort Wayne, Detroit, Michigan, on July 21, 1942 in uniform (Pros. Ex. 2). He admitted to Sergeant E. D. McKendrick, Military Police Detachment, Fort Wayne, Michigan, and then Commander of the Guard, that he had left his organization and station at Fort Knox, Kentucky, on or about July 9, 1942 (R. 14). Accused was then and there attached to the Quartermaster Supply Depot, Fort Wayne (Add. Chg. II).

The Assistant Adjutant at Fort Wayne, Milton Goldstein, WOJG, on July 25, 1942, gave accused an order in writing to report back to the station at Fort Knox, Kentucky (R. 15; Pros. Ex. 2). Accused was put on a train at Detroit enroute to Fort Knox without guard by Military Police Sergeant E. P. Tracey on July 25, 1942, in pursuance of this order (R. 16; Pros. Exs. 3, 4). Accused did not return to

his station at Fort Knox (R. 11) (Add. Chg. III), but remained absent without leave (R. 11; Pros. Ex. 1) until October 5, 1942, on which date he was apprehended at 4740 Woodward Avenue, Detroit, Michigan, by Corporal Maciejewski (R. 15) (Add. Chg. I), at which time he was wearing his Army uniform but with staff sergeant's chevrons and one service stripe thereon (R. 16; Pros. Ex. 5) (Add. Chg. V).

On October 21, while Private W. E. Gibson, 46th Ordnance Company, Fort Custer, Michigan, as a guard was returning the accused as a prisoner from Camp Custer, Michigan, to his proper station at Fort Knox, Kentucky, he jumped head first through the open window of a wash room of a coach on a Pennsylvania Railroad train in the vicinity of Greenwood, Indiana (R. 17) (Orig. Chg. I and Chg. II).

First Sergeant Burton Connally, of accused's organization, Company B, 100th Armored Reconnaissance Battalion, at Camp Campbell, Kentucky, testified accused was not present at his organization during the first part of October, 1942 until he was brought back on March 3, 1943 (R. 13). Officer James O'Shea of the Chicago, Illinois, police department testified that on March 3, 1943 he apprehended accused at 827 Lawrence Avenue, Chicago, Illinois, and that he was wearing a uniform at the time (R. 17) (Orig. Chg. I).

On or about March 3, 1943, the military police returned accused to his organization in the 20th Armored Division at Camp Campbell, Kentucky (R. 10, 11), where his company commander, First Lieutenant Carl R. Senft, placed him in confinement at the post guardhouse and never, subsequent thereto, ordered or authorized his release (R. 10).

On April 10, 1943 while accused was still a prisoner at Camp Campbell, Kentucky, and while working under the guard of Sentry Charles Brock, Headquarters Company, First Battalion, 480th Armored Infantry Regiment, he and another prisoner jumped on Sentry Brock in a boiler room and while accused pointed the sentry's gun, which they had taken away from him, at the sentry, the other prisoner tied up his hands and feet and gagged his mouth. The gun was loaded at that time. When they started out the door of the furnace room they emptied the shells out of the gun but missed one. They told the sentry that if he cried out they would shoot him and threatened to come back and kill him if they got caught. They said they were going to New York (R. 19, 20, 21) (Add. Chg. IV, Spec. 1).

State Highway Patrolman Wayne Copeland testified that about 4:00 p.m. Sunday, April 11, 1943, he arrested accused and another soldier as they were driving a civilian truck, a 1941 Chevrolet ton and a half stake body with a 1942 Kentucky license number AN 719, near Henderson, Kentucky. The truck was the property of Conrad T. Thomas of Herndon,

Kentucky. The ownership and fair market value of about $1,000 was established by the testimony of Conrad B. Thomas, the owner's son, who qualified by experience as a dealer, and who further testified that the truck was taken from in front of his father's farmhouse with the ignition key in it, sometime after 11:45 Sunday morning, April 11. The truck was recovered by the owner on April 12 at the Highway Patrol Station (R. 24). The owner had not given anyone permission to use the truck during that period (R. 23, 24; Pros. Exs. 8, 9) (Add. Chg. IV, Spec. 2).

Accused was returned to military control when he was placed under arrest on April 12, 1943, at Henderson, Kentucky, by Private John F. Pike of the Military Police, Camp Campbell, Kentucky, to whom he admitted that he expected to ditch the truck at Evansville, a few miles further on, "and get away" (R. 22, 23). The court took judicial notice of the fact that the place where accused stole the truck, Hopkinsville, Kentucky, is about 85 miles from Henderson, Kentucky, the place where accused was arrested by the State highway patrolman (R. 22).

The accused elected to testify in his own behalf but gave no testimony relative to the Specifications and Charges for which he was on trial. He said, "I have done many wrongs as far as these charges are, most of them they are true. But I didn't desert". He stated that he had disgraced himself, his uniform, and his family and asked the court to send him overseas to combat, or that he be shot rather than put in a stockade or penitentiary (R. 25).

4. The evidence is legally sufficient to support the findings of guilty of the Charges alleging the military offenses of three wartime desertions (Chg. I, and Specs. 1 and 2, Add. Chg. I), and of a wartime absence without leave (Add. Chg. II), during which desertions accused was absent for a total of six months and twenty-four days, plus the period of absence without leave of thirteen days. All three of the desertions were terminated by apprehension. The absence without leave, however, was terminated by surrender. Although accused testified that he did not intend to desert, the circumstances of each desertion as set forth in the evidence of record belie this statement, as likewise does his escape from the guard while on a train enroute from Fort Custer, Michigan, to Fort Knox, Kentucky, on October 21, 1942. His intent to permanently remain away from the service with respect to the desertion at Camp Campbell on April 10, 1943 (Spec. 2, Add. Chg. I) is clearly established by his assault with a loaded gun on the sentry guarding him and the subsequent larceny of a motor truck to assist him in getting further away from the post at which he was confined.

The evidence as to Add. Chg. III, willful disobedience of Warrant Officer Goldstein's written order, is clear and conclusive.

The entry on the morning report of his organization as to August 3, 1942 shows him still absent without leave since July 1942. This much of the entry is not subject to an objection based on hearsay. The morning report also fails to show accused picked up as present any time between July 9 and August 3. The fair and logical inference is that he did not report back to his unit at any time during that period. The order was in writing, it was specific, accused signed for it, and there is no other reasonable inference but that accused understood it. These circumstances constitute more than a mere failure to obey.

The competent evidence of record as to the civilian offenses, assault with a dangerous weapon and the larceny of the truck, is clear and conclusive and legally sufficient to support the findings of guilty of those two offenses.

The failure of accused in testifying to explicitly deny or explain the offenses with which he was charged is the basis of a legitimate inference that if he could have truthfully denied or credibly explained them he would have done so. The United States Supreme Court, in Caminetti v. United States, 242 U. S. 470, 494, stated:

> "* * * where the accused * * * voluntarily testifies for himself * * * he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.
>
> "The accused of all persons had it within his power to meet, by his own account of the facts, the incriminating testimony * * *. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. * * *
>
> "The court did not put upon the defendant the burden of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf."

5. Admissions against his interests made to the investigating officer by accused after proper warning but not introduced into the evidence of this trial are found with the allied papers attached to the record. This document has not been considered by the Board of Review in arriving at its conclusions as to the guilt or innocence of accused but should be considered at a future date in connection with any further application for clemency.

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.

William A. Rounds, Judge Advocate.

Lenny E. Gore, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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

SPJGK
CM 235229

10 JUL 1943

UNITED STATES	)	FOURTH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	)	
Private JESS F. VELOZ (39696534), Air Corps unassigned, attached 802nd Training Group.	)	Trial by G.C.M., convened at Fresno, California, 4 May 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
LYON, HILL and ANDREWS, 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 93rd Article of War.

Specification: In that Private Jess F. Veloz, Air Corps Unassigned, attached 802nd Training Group, did, at Fresno, California, on or about April 18, 1943, with intent to commit a felony, viz. rape, commit an assault upon Verna Lee Becker, a female person, by willfully, and feloniously throwing the said Verna Lee Becker to the ground and choking her with his hands with the intent to forcibly and feloniously, against her will, have carnal knowledge of the said Verna Lee Becker.

He pleaded not guilty to and was found guilty of the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of twenty (20) years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as

the place of confinement and forwarded the record of trial for action under article of war 50½.

3. The evidence is substantially as follows:

Verna Lee Becker testified that she was 8 years of age and lived with her mother and three brothers at 2404 Rose Street, Fresno, California. She stated that she understood "what it means to tell the truth" and that she would tell the truth. She stated that on a Sunday evening as she was returning to her house from the mail box she saw the accused near a woodshed in the alley through which she was walking. Accused held out his coat and asked her "to come over and hold it". As she neared the accused he grabbed her, pulled her in the shed, threw her on the floor, pulled up her dress, pulled down her panties, choked her, held both of her hands over her mouth, and said that he would kill her if she was not quiet. Witness stated that she was afraid and tried to get away, but that "He was sitting on top of me". His penis was exposed. Accused ran away when another man came in the building. Verna Lee Becker stated that she and her mother were called to the city police station later that night, at which time she recognized the accused as the man who dragged her into the shed (R.5-9).

Mr. Fred Hurst of 2336 Rose Avenue, Fresno, California, stated that between 6 and 7 o'clock of the afternoon of 18 April 1943 he had occasion to go to his garage. While in the garage he noticed a light (sun's rays, R.15) through a crack or loose board in the partition wall between the garage and a woodshed. This was unusual and witness said that it gave him "a funny feeling". He opened the door to the woodshed and saw the accused kneeling over the body of a child named Verna Lee Becker. The child was lying on her back on the floor. She was struggling trying to get up, but the accused was holding her down and held both of her hands over her mouth. The child's dress was up. The accused, with his penis exposed, was "quite close" to the body of the child. When accused discovered the presence of Mr. Hurst he jumped up and escaped through the opening in the wall of the shed where the board had been pulled loose. The blouse of accused was found on the floor next to the place where the child was lying. Witness stated that he took the child and the blouse to Nagel's store on Nicholas Street and called the police. City Police Officer James William Shaw responded to the call. Upon his arrival at the store Mr. Hurst accompanied the officer to the woodshed where the attack occurred. Witness then went home, but about 3:15 the next morning he was called to the City Hall where he identified the accused as the party who was in the woodshed with Verna Lee Becker the night before. At this time accused showed no signs of having suffered any injuries (R.10-14,17). Officer Shaw

stated that when he arrived at Nagel's Store he found Mr. Hurst and the Becker child. The witness further stated that Mr. Hurst did not have in his possession any article of clothing, but that he and Mr. Hurst found the blouse in the woodshed on their examination of the premises shortly after the phone call (R.18,20). The blouse was introduced in evidence as prosecution's exhibit C (R.19). Witness stated that he found in the pocket of the blouse a soldier's pass in the name of the accused,which was likewise identified and without objection received in evidence (R. 19, Pros. Ex. D). The pass was delivered by Officer Shaw to First Lieutenant Arnold Pratt, 749th Military Police Detachment, Fresno, California (R.20,24). Lieutenant Pratt and Officer Shaw continued the investigation. The child was interviewed. "She was very nervous and excited. There were finger marks on both sides of her neck and her eye was bruised, and her arms had bruised places on them". Her eyes were blood-shot. After examining the pass which had been found in the blouse (Ex. D) Lieutenant Pratt called the organization shown on the pass. In consequence of the information received, the accused was found about 0130 19 April at 935 Pottle Street. Accused was in bed, but got up, dressed, and accompanied Lieutenant Pratt and Officer Shaw to the police station. Accused was sober and there was no odor of liquor on his breath (R. 23-25,31). While on the way to police headquarters Lieutenant Pratt asked accused about the assault on the child. The accused became excited and attempted to open the door and get out of the car. Considerable force was exercised in order to subdue accused. Several blows were exchanged. Accused was finally overcome (R.27,28). Accused stated to the officer that he was drunk "all day and didn't know what happened * * * He would say sometimes that he had done it, and then he would say, 'I don't remember', and that he was just drunk and didn't know what happened" (R.29). When asked about his blouse accused stated that he had gone to sleep on a lawn and when he woke up his blouse was gone (R.30).

For the defense, Mrs. Marselina Cavillo of 915 Pottle Street, Fresno, California, testified through an interpreter that she had known the accused more than ten years. Accused had visited her home many times. He came to her home to see her son, Santos, about 9 o'clock on the evening of 18 April 1942. Witness stated that accused was drunk "and didn't know what he was doing". She asked accused to leave but he did not do so. Accused went to bed (R.32,33). The accused testified that he started on a drinking spree Saturday night 17 April 1943. He spent the evening at a dance hall drinking beer and wine. He slept that night at the home of Mrs. Cavillo. He got up Sunday morning about 10 o'clock and began drinking again (R.35). During the day he visited several places, drinking cheap wine and beer and became so drunk

that he did not remember all the events of the day. He remembered a drinking place on Walnut Street around 12 o'clock and going to Chinatown, and guessed that he went from one drinking place to another (R.36). His next recollection was being awakened by a lieutenant and a civilian policeman in the home of Mrs. Cavillo. Accused stated that he was taken in a car to police headquarters, where he was questioned by the officers and accused of raping the girl. He told the officers that he did not remember anything about it. Accused stated that he was then taken by the same officers to a cemetery where he was again asked if he raped the child, so, in order to save himself from further harm, he said: "All right, I raped her, let me go" (R.38). Accused stated that before being taken to the cemetery two people (witness Hurst and Verna Lee Becker) came to police headquarters and said they had seen him (accused) "some place on Rose Street" (R.39). Accused identified prosecution's exhibits C and D, respectively, as his coat and pass (R.40), and stated that he remembered definitely that it was light when he went to bed on the evening of 18 April 1943 (R.40). He remembered walking alone from Chinatown to Santos' (Cavillo) house, remembered going to sleep on the lawn at Santos' house, getting up later on and going to bed in the house. When asked if he denied committing the offense for which he was being tried, he replied: "I don't deny it; I don't know" (R.41). He denied that he attempted to get out of the car on the way to police headquarters as testified to by Lieutenant Pratt (R.42).

4. The evidence shows that the accused on the late afternoon of 18 April 1943 enticed little Verna Lee Becker, 8 years of age, into a woodshed near Rose Avenue in the City of Fresno, California; that accused had the child on her back on the floor. The accused was on his knees with his body close to the body of the child. The child was struggling, trying to get up, but was prevented from doing so by accused. The child's dress was up, her underwear or panties were down, and the penis of the accused was exposed. While in this attitude a neighbor happened to look in the woodshed and upon being discovered the accused jumped up and fled through some loose boards in the side wall of the building. A superficial examination of the child made later that evening disclosed finger marks on both sides of her neck, and her eye and arms were bruised. The identity of the accused as her assailant was established beyond peradventure by direct and circumstantial evidence. Although the court in the exercise of its discretion was authorized to receive the testimony of the child and to give to it such credence as it deemed proper, the Board of Review holds the record of trial legally sufficient to support the findings of guilty without regard to the testimony of the child. Every element of the offense of assault with intent to commit rape is present, independent of the testimony of Verna Lee Becker (CM 234190, Torres). The accused does not categorically deny the charge. He stated in effect that he was

so drunk that he remembered nothing about it, thus raising the question of his mental capacity to entertain the specific intent. In addition to the general rule of law that voluntary drunkenness is not an excuse for crime, the court in the light of all the evidence, especially the testimony of Lieutenant Pratt, was fully warranted in rejecting the contention of the accused (CM 229156, Bradford).

5. The Charge Sheet shows that the accused is 20 years of age and that he was inducted in the military service 22 March 1943.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 assault with intent to commit rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 22-301, District of Columbia Code (1940).

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGN
CM 235258

3 JUL 1943

UNITED STATES	)	FORT KNOX, KENTUCKY
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 7 January, and 15 April, 1943. To be shot to death with musketry.
Private CLAYTON R. SMITH (6669841), Battery C, 95th Armored Field Artillery Battalion.	)	

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 soldier named above and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Private Clayton R. Smith, Battery C, 95th Armored Field Artillery, Bn., did, at Fenner, California, on or about August 29, 1942, desert the service of the United States, and did remain absent in desertion until he was apprehended at Lynch, Kentucky on or about October 9, 1942.

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

Specification: In that Private Clayton R. Smith, Battery C, 95th Armored Field Artillery, Bn., did, at Louisville, Kentucky, on or about October 5, 1942, with intent to do him bodily harm, commit an assault upon Sergeant Wayne E. Day, Company E, Instructors Regiment, Training Group, Armored Force School, by striking him with a dangerous weapon, to wit a pistol.

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

Specification 1: In that Private Clayton R. Smith, Battery C, 95th Armored Field Artillery Battalion, did, at Louisville, Kentucky, on or about October 5, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Sergeant Wayne E. Day, Company E, Instructors Regiment, Training Group, Armored Force School, one 1940 Hudson Coach automobile, the property of the said Sergeant Wayne E. Day, value about $750.00.

Specification 2: In that Private Clayton R. Smith, Battery C, 95th Armored Field Artillery Battalion, did, at Louisville, Kentucky, on or about October 5, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Sergeant Wayne E. Day, Company E, Instructors Regiment, Training Group, Armored Force School, one Camera, the property of the said Sergeant Wayne E. Day, value about $10.00.

Specification 3: In that Private Clayton R. Smith, Battery C, 95th Armored Field Artillery Battalion, did, at Louisville, Kentucky, on or about October 5, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Sergeant Wayne E. Day, Company E, Instructors Regiment, Training Group, Armored Force School, one Bulova Wrist Watch, the property of the Said Sergeant Wayne E. Day, value about $35.00.

Specification 4: In that Private Clayton R. Smith, Battery C, 95th Armored Field Artillery Battalion, did, at Louisville, Kentucky, on or about October 5, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Sergeant Wayne E. Day, Company E, Instructors Regiment, Training Group, Armored Force School, two Cameo Rings, the property of the said Sergeant Wayne E. Day, value about $12.00 each.

The accused pleaded guilty to the Specification, Charge I, except the words, "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words guilty; not guilty to Charge I, but guilty of a violation of the 61st Article of War; and not guilty to all remaining Charges and Specifications. He was found guilty of all Charges and Specifications, and sentenced to be shot to death with musketry. The reviewing authority directed the court to reconvene for the purpose of considering the recision of the sentence, and, if that be accomplished, to impose an adequate but less severe one. The court, after reconvening and reconsidering the sentence, reported to the reviewing authority that it was the considered opinion of the court that the sentence originally imposed was not unduly severe and should not be rescinded or vacated. The reviewing authority then approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused departed without leave from his organization at Fenner, California, on 29 August 1942, remaining absent until apprehended at Lynch, Kentucky, unemployed and in uniform, on 9 October 1942 (R. 7-8; Exs. A, B).

Four days prior to the accused's apprehension - on 5 October 1942 - Sergeant Wayne E. Day of the Armored Force School, driving his own car from Fort Knox, where he was stationed, to Louisville, Kentucky, picked up two uniformed soldiers, both unknown to him, one of whom was the accused, the other, Private William Kirk. En route, at his passengers' suggestion, Day stopped at West Point where Kirk alighted and purchased a pint of whiskey, of which Sergeant Day testified he had one drink only, after the accused and Kirk had consumed all of it except that quantity (R. 8-9).

As they were driving along, Day observed that one of the other two had an object in his belt, concealed by his coat. Day inquired what it was, and the soldier displayed a nickle-plated .45 calibre revolver. Day asked him what he was going to do with it and he said he was going to pawn it (R. 8, 15, 17, 18).

It was almost dark when they arrived at the bus station in Louisville, where Day stopped his car and asked his passengers if they wanted to get out. One of them requested Day to take them to their girl friend's. He told them he would, if it were not too far. However, in following their directions, he arrived at such a "tough" section of the town that he again stopped his car, and, this time, requested his passengers to alight. Then he testified,

> "* * * something hit me from behind on the head and I didn't remember anything then until I woke up. I was on the opposite side of the car from the driver. It was very dark and the car was moving and someone reached across over me and opened the door and pushed me out. * * * I don't know whether they left and came back or whether the car stopped but afterwards I remember Smith" [the accused] "was down over me and had this hand in the air and was taking my watch and ring or something off -- I saw his face and I took a slug at him, and he kicked me in the head. * * *" (R. 9).

Day was picked up, unconscious, by strangers, who turned him over to the police, who, in turn, took him to a civilian hospital in Louisville, where his injury was diagnosed as a "probable skull fracture"; thence, he was transferred for treatment to the Marine Hospital, where, during the next several days, he identified the accused and Kirk, both of whom were brought to his bedside on separate occasions (R. 9-10).

Two or three weeks later, when the doctor had permitted Day to sit in a chair on the sun porch, the accused, then a patient in the venereal ward of the same hospital, came walking up with his guard. "I asked him what he wanted", Day testified, "and he said,

'I have talked to Kirk and we have decided if you prosecute this case, you are going to be hurt', he said, 'We decided if you do that we are going to make you hurt worse and you had better drop it'". At a later date, the accused and Kirk charged Day with being homosexual, as a result of which, Day testified,

> "by order of General Henry I was interviewed with a lie detector and sent to a psychiatrist, Captain Jensen, and he also interviewed several of my friends and had two or three different conversations with me - with the lie detector, and reported that I was perfectly normal."

Day testified that he had not made improper advances to the accused or Kirk, but had been driving the car at all times prior to being hit, except when he was waiting for Kirk to get the whiskey (R. 10-11, 15).

With reference to what hit him, in the car, Day testified that, before he was struck, the accused had the gun in his hand; there was a shelf behind the seat, but nothing on it that could have been used to deliver a "knock-out" blow; and the accused was sitting on the outside - with Kirk in the middle - so the accused must have reached back unobserved by Day, and used the gun to tap Day on the head from behind (R. 12).

The items taken away from Day at the time he was slugged and pushed from his car included, among others, his automobile, camera, two rings and a wristwatch. No evidence was adduced as to the value of any of these articles (R. 13).

4. Private Kirk, then a prisoner in the guardhouse following his trial, testified for the prosecution that he had first met the accused "over a year ago" when they were both members of Company B, Armored Force School. The accused had later been assigned elsewhere; upon his recent return to Fort Knox, he had told Kirk that he was "assigned to California", and was on furlough. On the morning of 5 October 1942, the accused showed Kirk a gun, at Company B supply room. That afternoon they both went by and got it, before starting out for Louisville. Sergeant Day picked them up on the way, after they had agreed to pay him fifty cents for the ride; and when they got into Day's car, the accused took the gun out and handed it to Kirk, who laid it on the seat between the accused and himself; that was the last Kirk saw of

it until he came back to town "after Sergeant Day was supposed to have been robbed" (R. 20-21, 35).

The three each drank an equal amount of the pint of whiskey Kirk purchased en route. Then Kirk went to sleep, and when he awoke they were out on the River Road; the accused was out of the car; and Day - quoting the witness directly - "had my breeches undone and was biting my dick". Kirk cursed him and pushed him away, then got out of the car to urinate (R. 21).

He had walked down the road, lighted a cigarette and started back toward the car, when he saw the accused and Day roll out of the car fighting. Kirk "went up there and asked what was wrong and he" - the accused - "said, 'That son-of-a-bitch tried to suck my dick and I proceeded to give Sergeant Day a whipping'" (R. 21).

Kirk advised the accused "don't beat him up too bad, Smith. He ain't no good anyway". Then Kirk went over and wiped the blood off Sergeant Day's face and nose. "He was bleeding pretty bad", Kirk testified. After that, Kirk and the accused got in the car and came to town (R. 22).

While the accused was beating Day up, he demanded Day's watch and ring, and Day gave them to him. When Kirk and the accused got to town in Day's car, the accused gave Kirk the watch "to hock"; Kirk did, and they split the money. Then they went to a honky-tonk, leaving the car parked on the street. There they separated, Kirk returning to Fort Knox (R. 23-24).

On cross-examination, Kirk testified "When we started out, Sergeant Day was driving and I was sitting in the middle and Smith was sitting on the right hand side, sir". During the fight, concerning which he had testified on direct examination, Day said, "Don't hit me no more and I will give you anything I got — I will give you my watch or my rings or my car. My people has got money". Kirk did not see the accused hit Day with a pistol or any instrument whatsoever. When he was hit, it was with the accused's fist (R. 24-26).

On redirect examination, Kirk testified that when he got out of the car and walked down the River Road, he did not see the accused; "I think he must have been up in the front end of the car some place",

he testified. He heard the argument start between Day and the accused. There was a lot of swearing going on as he walked toward the car, and he heard the accused curse Sergeant Day and say, "'You are not going to suck my dick,' or something like that". As Kirk approached, they got out from under the steering wheel; several blows were struck by both men; part of the time they were standing and part of the time they were on the ground. While they were on the ground, "Day would get on top and then they would roll over and Smith would be on top. It was a regular tough and tumble fight". Kirk was "Standing back there watching them", all that time. Asked if anything was taken from Day while they were stopped there on the River Road, Kirk replied, "That was where Smith came into possession of the stuff — I couldn't say he had taken it off Sergeant Day or whether Sergeant Day gave it to him". He first saw the watch after the fight was over, when the accused came back to the car (R. 26-29).

After Kirk wiped the blood from Day's face, Day and the accused started fighting again. Day cursed the accused, who then knocked Day down, picked him up, knocked him down again, "and Day grabbed Smith and they were rolling again on the ground". The fight stopped only when "Sergeant Day was beat up". Asked whether Day could get up, Kirk replied, "I don't know sir. I didn't go over to see. ***They were down the road a little piece from me and I was sitting on the running board and Smith came back up there and said 'Let's go'". Kirk saw the accused finish beating Day up and come back to the car; they were down the road about 15 or 20 feet from Kirk, and the accused hit Day and knocked him down, and Day "didn't get up" (R. 30-32).

In response to questions by the court, Kirk testified that he and the accused left Day lying on the side of the road, "near a little ditch like", and came on into Louisville by themselves. Kirk did not see the accused driving the car at any time prior to the stop on the River Road where the "fight" occurred (R. 33-35).

5. Two statements made by the accused to the investigating officer were introduced, after proper predicate had been laid. The first admitted the accused's unauthorized departure from his station at Camp Cooke, California, 29 August 1942, after which he travelled through Arizona, New Mexico, Texas, Tennessee and on to Kentucky "as fast as possible". He stopped in Louisville and stayed there three or four days, then came out to Fort Knox to see Kirk whom he had known for about a year. He was apprehended and arrested by civilian police,

at Lynch, Kentucky, 7 October 1942. He did not intend to return to his organization, but "to turn in at Fort Knox and get in one of my old outfits, if possible" (R. 35-36; Ex. C).

The other statement admitted beating Sergeant Day up with his fist "because he tried to suck my dick". Asked if Day tried to do this while they were in the car, he replied:

> "Yes, he unbuttoned my pants and started pulling my dick out before I knew what he was trying to do, and then he must have tapped me on the side of the head. Then he went and hit me once while in the car, so we clinched and rolled out of the car together as the door was open, and when in the road we started fighting each other. Day hit me once on the side of the head with his fist, so I grabbed him by the shirt collar and hit him five or six licks with my fist. I hit him once more and he fell on the ground. He didn't get up, and so I reached and picked him up and hit him again, and he didn't get up. I didn't know whether he was knocked out or not. So I left him lay. So I said, 'Come on, Kirk, let's get in the car and get back to town'".

According to this statement, when they first arrived at the bus station in Louisville, Kirk was asleep, and the accused woke him up.

> "Day asked us if we had anything special to do in town tonight. We told him no. So he drove around * * * and after it was dark he drove out on the river road. While he was in town every time he would shift gears, he was playing with Kirk's cock. Kirk was asleep and I looked over and happened to see Day playing with his cock. * * * Day asked me if I wanted to drive. I said I didn't care. So he stopped the car and I got behind the wheel. I was driving; Kirk was in the middle, and Day was on the outside. Kirk was in the middle all the time. Kirk looked to me as if he was still asleep. I drove up the road and stopped right there on the side of the road, where they later

> found Day. * * * I was the first one to get out of the car, and went behind the car to take a piss. * * * I came in and seen Day with his head down on Kirk trying to suck his cock. Day had woke Kirk up by nibbling on his cock. * * * Kirk got out of the car to take a piss and he was already behind the car taking a piss, so he says to me that son-of-a-bitch is a cock sucker. I said I thought that's what he was all the time. * * * I went back in the car myself. * * * Day was under the steering wheel. * * * He started playing with my cock trying to get it out. 'Watch that shit', is exactly what I said. He tapped me on the side of the head, and I said, 'Aw, come on, and the fight started * * *".

Kirk had the revolver, the accused having given it to him before they met Day, because Kirk wanted to look at it. The accused took from Day a watch and two rings. His statement goes on to recite:

> When I had beat him up, and knocked him up, I decided that since he was a queer, I would take his stuff as has often been done with a cock sucker before. I didn't think he would say anything about it, as that kind seldom do. I intended to leave his car in Louisville, and he would get the police to find his car, and that would be all there was to it".

The accused got "lit up on whiskey" in town, so he decided to go back and get the car, drive it to Lynch, Kentucky, and leave it there instead of at Louisville, but "the car quit on me", his statement concludes, "and I left it at Corbin. From there I went on to Lynch by hitch-hiking" (R. 36; Ex. D).

6. The evidence for the defense consists of the accused's sworn testimony, he having elected to take the stand under oath after his rights as a witness had been explained to him. He testified that Kirk was still asleep when they arrived at the bus station in Louisville. There Day suggested riding around town. The accused acquiesced. On the River Road, Day inquired, "Do you want to drive, Smith?" "I don't care", the accused replied, and the two exchanged places. The accused

drove three, four or five blocks "on up the River Road", then parked the car and went back of it to urinate. Kirk joined him, with the remark, "That son-of-a-bitch was sucking on my dick". The accused returned to the car, whereupon Day handed him his watch, saying, "You know what this is for". The accused denied that he did, and inquired, "What is this for?" Day then unbuttoned the accused's pants and "tried to get on my dick and suck it". The accused pushed him back; Day hit the accused on the side of the head; the accused pounced on him; they clinched; and both rolled out of the car and commenced fighting on the outside. The accused already had Day's watch and rings "outside there". He got tired of fighting and hit Day one hard lick. Day staggered about 15 feet and fell in the ditch, "and", added the accused, "that is all I know". He also testified that when he returned to the car after urinating he saw the accused bent over Kirk "and he had his head down through his legs". He denied hitting Sergeant Day with the gun, which he testified belonged to him. He had given it to Kirk before Day picked them up; Kirk had put it in his bosom, and "said it fell out on the seat when he went to sleep". As to the "stuff" in Day's car, the accused testified, "I didn't have no possession of that at all, that was left in the car. * * * There was a camera * * * I seen the camera and this other junk that was left in his car when it was found" (R. 37-39).

On cross-examination the accused testified "When this happened" he had been around Louisville and Fort Knox about seven days. He intended to "turn in" at Fort Knox, but wanted to see his sick mother first. He had wanted to see her for 20 or 30 days, but had not yet gone to Harlan, Kentucky, where his home is located. "I wanted to come on the Post and see a few of the boys I knowed out here", he testified. He had been trying to borrow some money from Kirk and from his girl in Louisville, with whom he was staying. "I was waiting on Kirk to get his pay day. *** I met Kirk *** and we started back to town. *** that was our last night; I was going on home when I left Kirk. Me and him wanted to have some fun in town. *** I had a little money; I had about fifteen dollars myself". He asked Kirk to pawn Day's watch, because "it didn't do me no good and I might as well pawn it and get something to drink out of it". As for the pistol - "it would not even shoot" - he expected to get three or four dollars for that if he found somebody that wanted one. He wanted to "hock" Day's watch and the pistol, despite having fifteen or sixteen dollars, because "I spend money just like that. I knew I could get rid of it awfully fast" (R. 39-43).

7. The Specification, Charge I, alleges desertion at Fenner, California, on or about 29 August 1942, terminated by apprehension at Lynch, Kentucky, on or about 9 October 1942. The offense is clearly proved, and the accused's own testimony that he did not intend to return to his own organization, merely confirms the inescapable inference from his long flight, his apprehension, and his conduct during the interim, that his absence without leave for the period specified - to which he pleaded guilty in violation of Article of War 61 - was accompanied by the intent not to return. His assertion that he intended to "turn in" at Fort Knox is belied by his failure to take any steps toward doing so, during his week in its vicinity; and his claim that he left to visit his sick mother is discredited by his failure to continue on to Harlan, Kentucky, despite ample opportunity and plenty of money to defray the expenses of the trip. Instead, he lingered around Louisville and Fort Knox, living with "his girl", spending his money in "honky-tonks" and corrupting his soldier friend Kirk, from whom he was also hoping to borrow money on pay day.

8. The Specification, Charge II, and Specifications 1, 2, 3 and 4, Additional Charge, allege assault with a dangerous weapon, to wit, a pistol, with intent to do bodily harm, upon Sergeant Day, and robbery by force and violence, resulting in the stealing and carrying away of Sergeant Day's car, watch, rings, and camera.

The evidence as to the assault with a pistol is circumstantial but convincing. Sergeant Day testified as to the presence of the pistol in the accused's possession, of a blow on the back of his head that rendered him unconscious, and of the absence of any other instrument in the car with which such a blow could have been struck; also a diagnosis of a "probably fractured skull" at the first hospital to which he was taken, and several weeks of recuperation at the Marine Hospital where he was transferred for treatment. It is true, both Kirk and the accused contradict this testimony; but their respective stories also contradict each other in so many essential particulars, that they would be entitled to slight credibility, even in the absence of Day's testimony of the threatened "frameup" to smear him with charges of homosexuality; which vicious threat, the record indicates, was brutally and ruthlessly - albeit fruitlessly - carried out by the accused and his convicted accomplice.

In this connection, it will be noted that Kirk testified that the accused gave him the gun when they were in Day's car, and he - Kirk - laid it down on the seat between him and the accused; whereas the accused testified he gave Kirk the gun before Day picked them up, and Kirk put it in his bosom, whence, he quoted Kirk as saying, it fell out on the seat while Kirk was asleep. Kirk testified when he got out of the car and walked down the River Road to urinate he did not see the accused; he thought he must have been up in the front end of the car some place; whereas the accused testified, first, that before Kirk alighted, he came back and saw Day's head in Kirk's lap, and, shortly afterward, that when Kirk was behind the car urinating, Kirk told the accused that Day was a "cocksucker". The two versions of the alleged fight between Day and the accused are divergent in many significant details. In fact the whole testimony of Day's abnormal assaults on his two "hitch-hiker" passengers, is replete with indications that all of it is a fabrication, concocted for purposes of defense and extenuation.

The value of the articles of which Day was robbed is not shown, but proof of value, although alleged in the Specification, is not a necessary element of proof in order to sustain a conviction of robbery.

> "As the offense of robbery does not depend upon the value of the property taken, the fact that the sums stolen were not testified to with exact nicety is immaterial, it being sufficient to show that the sums were shown to be approximately as alleged" (Dig. Ops. J.A.G., 1912-30, sec. 1589).

The court in this case undoubtedly took notice that the automobile, camera, watch and rings possessed some property value. There is evidence that the watch was pawned for $5. The fact that the items mentioned in the Specification under the Additional Charge were stolen and carried away from Day's possession by the accused by force and violence is established by a preponderance of the credible testimony.

7. The Specifications under the Additional Charge allege four

separate robberies, whereas the record discloses but one involving all of the articles mentioned in the four Specifications. However, the accused was not prejudiced by the multifarious character of the pleading under the Additional Charge, since the conviction under Charge I, alone, is adequate to support the sentence.

8. The accused is 22 years of age. He enlisted at Fort Knox, Kentucky, on 19 October 1939. His record shows 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 and the sentence. A sentence of death is authorized upon conviction in time of war of desertion in violation of Article of War 58.

Thos. H. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 235258

(368) 1st Ind.

War Department, J.A.G.O., 14 JUL 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 Clayton R. Smith (6669841), Battery C, 95th Armored 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 commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 25 years.

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 your approval.

Myron C. Cramer

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

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

(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty five years. G.C.M.O. 198, 11 Aug 1943)

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

SPJGK
CM 235295

6 AUG 1943

UNITED STATES	NINTH SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, 30 April 1943. Dismissal.
Captain JOHN W. ANDERSON (0-503539), Medical 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. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain John W. Anderson, Medical Corps, Station Hospital No. 1, Fort Huachuca, Arizona, did, at Fry, Arizona, on or about February 7, 1943, from about 3 a.m. to about 8 a.m. drink liquor in uniform, in the presence of enlisted men, in a public place, to wit, the Blue Moon, a disreputable place frequented by civilians of low repute, enlisted men, and prostitutes.

Specification 2: In that Captain John W. Anderson, Medical Corps, Station Hospital No. 1, Fort Huachuca, Arizona, did, at Fry, Arizona, on or about February 7, 1943, between the hours of about 3 a.m. to 7 a.m., in a disreputable place, to wit, the Blue Moon, associate with a woman habitue of said place, while in uniform and under the observation of enlisted men.

Specification 3: In that Captain John W. Anderson, Medical Corps, Station Hospital No. 1, did, at Fort Huachuca, Arizona, on or about February 7, 1943, wrongfully take, use, and cause to be driven, contrary to law, a certain vehicle, to wit, an Army ambulance, property of the United States, intended for the military service thereof, and did use his position as an officer in the Army of the United

States to induce enlisted men on duty as military police to allow said vehicle to leave the reservation at Fry Gate, contrary to standing orders and regulations, for the purpose of conveying the said Captain John A. Anderson to Fry, Arizona, where he remained from about the hour of 3 a.m. until about the hour of 7:45 a.m.

Specification 4: In that Captain John W. Anderson, Medical Corps, Station Hospital No. 1, was, at Fort Huachuca, Arizona, on or about February 7, 1943, drunk while in uniform.

Specification 5: In that Captain John W. Anderson, Medical Corps, Station Hospital No. 1, did, at Fort Huachuca, Arizona, on or about February 7, 1943, with intent to deceive Captain Arthur H. Thomas, Medical Corps, who was acting in his official capacity as Officer of the Day, officially state to the said Captain Arthur H. Thomas, as to his reason for not returning the Army ambulance sooner, that he had had a flat tire, which statement was known by the said Captain John A. Anderson to be untrue.

He pleaded not guilty to and was found guilty of the Charge and all Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to dismissal. 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 is substantially as follows:

At about the hour of 2:30 in the morning of 7 February 1943, the accused, a Captain, Medical Corps, attached to Station Hospital No. 1, Fort Huachuca, Arizona, went to the receiving room at the hospital and asked Private Jesse Smith, an ambulance driver, for transportation to the taxi stand. "Sergeant Nesbit", who was in charge, told Smith to take the accused to the taxi stand in a government owned field ambulance which was intended for and used in the military service (R.6,8,10-12). The taxi stand was at Service Club Number One (R.41). Upon arriving there it was found that the taxi stand was closed. The accused then told the driver to take him to the Fry Gate. Arriving at the gate they were stopped by a military policeman. Accused asked the policeman if he could go outside the gate without a pass in order to get a taxi. Accused was told by the policeman that he did not need a pass and that he (the military policeman) would be responsible for the ambulance (R.13).

Prior to 7 February the Post Surgeon had issued and published a standing order prohibiting the use of ambulances for any purpose not authorized by Army Regulations 40-75. Lieutenant Colonel M. O. Bousfield, Medical Corps, Commanding Officer Station Hospital No. 1, stated that the special order "was merely an extract copy from the Regulation" (R.6-9, Ex. A).

After getting through the gate the accused directed the driver to take him to the Blue Moon. The driver stated that he knew such use of the ambulance was contrary to Army Regulations (R.13), but that he had been "taught in the Army to obey the last order that was given by an officer" (R.23).

The Blue Moon is a public drinking and gambling establishment located in a disreputable segregated district adjacent to the Fort Huachuca Reservation. The area embraces 20 acres, surrounded by a fence. A large number of prostitutes occupy tents and cribs within the enclosure.

The Blue Moon is regularly patronized by procurers, pimps, prostitutes, and criminals. The prostitutes ply their trade in the tents and cribs. Lieutenant Colonel Walter C. Rathbone, Provost Marshal, Fort Huachuca, stated that "for many months and many years the Blue Moon has been known as a degraded place" (R.35,36).

It was about 3:15 a.m. when accused entered the place. Two military policemen and several civilians, including four women, were present (R.15, 17,22). Accused remained in the Blue Moon about 2½ hours (R.19), during which time he purchased through a military policeman, three half pints of whiskey (R.21). The whiskey was consumed by accused and the military policemen (an enlisted man), assisted by one of the girls who joined the party. The driver of the ambulance tried to persuade the accused to leave but accused said that "he was in charge". Accused put money in the juke box and danced with the girl (R.17). At times he acted as though he were drunk (R.18). After dancing, accused had the driver take him and the girl to a tent in the enclosure. Accused wanted the driver to remain in the tent with them, but the girl said, "I won't do business with the two of you in the tent" (R.19). The driver left the tent and sat in the ambulance. In about 30 minutes accused and the girl returned and were taken back to the Blue Moon where the accused remained until about 8:00 a.m. (R.20). When accused left the Blue Moon for camp he did not walk like a normal man. His gait was unsteady and he talked loud like a drunken man (R.21). On accused's arrival at the hospital, Captain Arthur H. Thomas, Officer of the Day, reprimanded him for taking the ambulance, and in the course of the interview with accused, accused told Captain

her. He did not know she was a frequent visitor of the Blue Moon (R.44). Accused admitted drinking in the place and admitted that his judgment was impaired by the drinks, but stated that he was not drunk (R.50,51). He denied drinking with enlisted men (R.51), but stated that enlisted men were present and perhaps saw him drink. He did not know that drinking in the presence of enlisted men and drinking in uniform in a public place was an offense as long as one conducted oneself as a gentleman (R.45-46). He stated that he had never visited the Blue Moon or the segregated district before. He admitted going to the tent with the woman and that it was perhaps 7:30 or 8:00 in the morning when he returned to the hospital with the ambulance (R.49). In that connection accused stated "* * * we were on our way back to the post and I was confused by the drinks and I did not know I was at the Blue Moon until the next day" (R.50).

Accused stated that at the time of this occurrence he had been in the military service two months and two weeks and had been at Fort Huachuca 14 days (R.41). He was not familiar with Army Regulations (R.52) and he had never seen a copy of the Post Regulation governing the use of Army ambulances (R.53). With respect to his alleged false official statement to Captain Thomas, the Officer of the Day, accused stated that when he was asked about the ambulance "* * * it didn't give me the impression that I had committed any wrong, other than keeping the ambulance over a period of time, and I was not trying to deceive Captain Thomas, but I thought it might help the driver if I said we had had a flat tire, * * * that was my main reason for doing that, and before the conversation was over, I told Captain Thomas the truth about the whole thing" (R.52). Continuing, the accused stated, "I regret the whole incident, and naturally, I feel I should be punished, in spite of the fact that I was not cognizant of all the rules and regulations, * * * I also regret that I haven't had a chance to do what I can in such an emergency as we are in" (R.47).

4. The evidence is virtually undisputed that the accused in uniform drank liquor in a public place in the presence of enlisted men as alleged in Specification 1; that the accused, between the hours of 3 a.m. and 7 a.m., 7 February 1943, entered the Blue Moon, a disreputable place, and in uniform and in the presence of enlisted men associated with a woman habitue of said place as alleged in Specification 2; that accused in violation of Army and Post Regulations, wrongfully used an Army ambulance as alleged in Specification 3; that accused was drunk in uniform at Fort Huachuca on the morning of 7 February 1943 as alleged in Specification 4, and that accused, with intent to deceive Captain A. H. Thomas, Officer of the Day, officially stated to Captain Thomas that the delay in returning the ambulance was caused by a flat tire, which statement was known by accused to be untrue, as alleged in Specification 5.

5. It will be noted that all Specifications are laid under Article of War 95. Clearly the offense of making a false official statement as alleged in Specification 5 of which accused was found guilty, constitutes a violation of Article of War 95. With respect to the offenses covered by Specifications 1,2,3, and 4, although the behavior of the accused reflects an utter lack of appreciation of the standard of conduct required of an officer, since there is no evidence of gross drunkenness or serious disorder and since accused's association with the "woman habitue" was casual rather than habitual, the Board of Review is of the opinion that the record is legally sufficient to support only so much of the findings of guilty of those Specifications as involves findings of guilty in violation of Article of War 96.

6. The accused is 39 years of age. He was graduated from Howard University (Bachelor of Science), Washington, D.C., in 1928, and was graduated from the Medical School, Howard University (Doctor of Medicine), in 1932. He is single. He was appointed a Captain, Medical Corps, Army of the United States, 6 November 1942 and ordered to active duty 20 December 1942.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted, 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 only so much of the findings of guilty of Specifications 1,2,3, and 4 of the Charge as involves findings of guilty of those Specifications in violation of Article of War 96, legally sufficient to support the findings of guilty of Specification 5 and of the Charge, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96 and mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

1st Ind.

War Department, J.A.G.O., 11 AUG 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 John W. Anderson (0-503539), Medical Corps.

2. I concur in the opinion of the Board of Review, and for the reasons stated therein recommend that only so much of the findings of guilty of Specifications 1,2,3, and 4 of the Charge be approved as involves findings of guilty of those Specifications in violation of Article of War 96. I recommend 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 the signature of the Under Secretary of War 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,
Major General,
The Judge Advocate General.

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 260, 22 Sep 1943)

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

SPJGN
CM 235380

14 JUN 1943

UNITED STATES v. Major FRANK J. BANE (0-316771), Air Corps.	5TH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Miami Beach, Florida, April 20, 21 and 22, 1943. Dismissal, total forfeitures, and confinement for five (5) years.

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: In that Major Frank J. Bane, Air Corps, A.U.S., Miami Beach Training Base, AAFTTC, Miami Beach, Florida, did, at North Miami, Florida, on or about April 2, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anum with Richard S. Ringemann, Jr.

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

Specification: In that Major Frank J. Bane, Air Corps, A.U.S., Miami Beach Training Base, AAFTTC, Miami Beach, Florida, did, at North Miami, Florida, on or about April 2, 1943, conduct himself in an indecent, lewd and obscene manner by riding in an automobile on a public highway about 0100 o'clock in the company of Richard Ringemann, Jr., a fourteen-year old boy, the said Major Frank J. Bane, AC, A.U.S., and the said Richard Ringemann, Jr., each with his underdrawers removed and each with his trousers open at the front.

He pleaded not guilty to and was found guilty of the Charges and Specifications. There were no prior convictions. 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 at such place as the reviewing authority may direct for five 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 pursuant to Article of War 48.

3. The only direct evidence of the commission of the crime of sodomy was the testimony of a 14-year-old boy, Richard S. Ringemann, Jr. He identified the accused, who will be designated hereinafter as Bane for the sake of brevity, and stated that about midnight of April 1, 1943, he was walking home along 79th Street, Miami, Florida, when a Ford coupe being driven by Bane going in the same direction stopped alongside, and Bane offered him "a lift". Though he lived only four blocks away, the lad accepted the offer, and got into the vehicle. Before they reached the corner where the boy lived, Bane told him that he was lonesome, and asked if he would ride around and talk with him, and listen to the radio with which the car was equipped. He agreed. They drove around a few blocks; then stopped at a restaurant known as "Fletcher's" at the corner of 79th and 7th Avenue. Not being able to obtain curb service there, they drove to the "Pig and Whistle", where each had a hamburger and a Coco-Cola. Bane paid for these refreshments, although the boy was willing to pay his share. Shortly after leaving Fletcher's, Bane unfastened the boys pants and started to play with his privates. This continued while they were parked at the "Pig and Whistle." They stopped at a filling station and procured gas. Bane

asked the boy if he knew of any place where he could spend the night; and, if he rented a cabin whether or not the boy would stay with him. The boy, having no intention of doing so, said that he would. They stopped at several places, seeking without success to rent a cabin. During their search for one, Bane suddenly turned off the main highway, drove a few blocks on a side street, and stopped. He turned the radio and lights off, and suggested that they both get out. The boy told Bane that he had to have a bowel movement. While he was getting out of the car, Bane helped him to remove his pants, which were already unfastened. Bane himself removed his own pants, picked up the boy's pants and shorts, and put them with his own on the back seat of the car; then joined the lad at the side of the road to evacuate his own bowels. When the boy returned to the car, Bane asked him "to lie across the seat, and it was then" the boy testified, "that he put his penis into my rectum". During the act, the boy's feet were on the ground, and he leaned over the seat of the car, face down, while Bane manipulated back and forth until he was out of breath. Then the boy, feeling that he was going to have another bowel movement, rose hastily and went back to the side of the road. Upon his return, Bane had him resume his former position across the seat "to see if it would be more successful this time" and was trying in vain to re-insert his penis - it was not then hard enough to penetrate the lad's rectum - when a searchlight from a cruising police car spotted them (R. 19-22, 86).

Both jumped into the car. The boy grabbed his pants and put them on quickly. Bane put his on while the car was in motion, the boy steadying the steering wheel. After driving several blocks, Bane stopped the car. Policeman Ernest C. Rogers then came over from the police car which had stopped behind them, and, after a few questions, ordered the boy to get into the police car. The boy complied, after retrieving his shorts. Thereupon, being questioned further by Rogers, he told him what had happened. Rogers drove him to the police station. Bane followed in his own car. Upon his arrival at the police station, the boy was given a pencil and paper and told to write down all that had occurred. This he did. When Chief of Police W. R. Hoban came in later, the boy gave him his written statement. Hoban typed another statement for the boy's signature, paraphrasing the contents of the penciled one, substituting certain words having the same meaning as those eliminated, and adding a few statements made to him by the boy, which had been overlooked in the original statement (Def. Ex. C).

Upon cross-examination, the boy repeated substantially the

same details, with but a few immaterial variations. He again described the commission of the crime of sodomy (R. 57-61, 86). He referred to the act as "corn-holing", and was the first to mention it, when, after Bane had stopped the car, he inquired if Bane had ever tried it (R. 51, 52, 73-74). He denied, however, that he intended to suggest their doing it. He was positive that his trousers were buttoned up before Rogers looked into the car, and quite sure that Bane's were also fastened (R. 65).

Officer Rogers testified that he never knew the accused nor the boy Ringemann before the night of April 1-2, 1943, when, in search of a stolen car, he spotted Bane's, parked on a side road, without lights. It almost immediately started to move, and he followed it until it stopped. He then walked over to the driver's side of the car, and, throwing his light inside, observed that the accused's trousers were unfastened (R. 89-90). On the rear seat were two pairs of shorts. Each admitted the ownership of his respective shorts. He ordered the boy to pick his up, and come to the police car. There the boy told him what had taken place. The accused refused to make any statement, so he ordered him to follow in his car, and he himself drove the boy to the police station. There he gave the boy pencil and paper and told him to write down what had happened. He locked the accused in one of the cells. The accused's shorts had disappeared from his car, so he returned to place where he had stopped the accused, and found a pair of shorts marked with the letter "B" (R. 90, 92, 95). He corroborated finding conclusive evidence of the bowel movements at the scene of the alleged offense (R. 109).

Chief of Police Hoban (an ex-convict, formerly convicted of operating a gambling house) explained the changes made from the boy's written statement - which was destroyed - to the typed statement typed by the witness. The typed statement is attached to the record (R. 112; Def. Ex. C). The chief corroborated Rogers as to the finding of the shorts, the stools and toilet paper (R. 113).

Captain Cadwallader L. Polk, Air Corps, testified, that when he physically examined the accused on the morning of April 2, 1943, Bane had no underwear beneath his trousers (R. 120).

4. The accused, having had his rights fully explained to him, testified on his own behalf (R. 163). He related his military history. He had been a patient in a local Army hospital from about March 20, 1943, to April 1, 1943, receiving treatment for an internal urethral infection.

Discharged at 8 p.m., he had kept a dinner engagement with a married couple at a local restaurant, from 8:30 until about 10 p.m. Thence he went to the "Clover Club" alone. He then drove to 79th and 7th Avenue, to keep a midnight appointment with a young woman whom he had met (for the first time) a few nights before at the Clover Club and whom he had neither seen nor heard from since (R. 183). He waited there a while, and looking in at the restaurant on the corner but not finding the woman, he drove west on 79th Street slowly, still looking for her. Then he observed Ringemann alight from a motor vehicle, cross 7th Avenue and walk west on 79th Street. When he approached Ringemann, the latter was walking backwards as if looking for a lift; the accused stopped his car, and Ringemann got in. Bane told the boy that he was going only a short distance, and that he was looking for a young lady, giving her name. The boy said he was going only a short distance and that he was not acquainted with the lady whom the accused had named, but if she could not be found he could find him another one. They circled around and returned to the restaurant at 7th Avenue and 79th Street. There the accused again looked around in vain for the woman; then discussed the possibilities of the boy procuring him another one, for a fee (R. 189). At the boy's direction, he drove back toward Miami, to a place known as the "Pig and Whistle", where they had something to eat, while seated in the car. The accused paid their check (R. 199). He had $200 in a roll in his right hand pocket, and, as they drove from the "Pig and Whistle" to a filling station for gas, it seemed the boy sat rather close to the accused, so while getting gas, the accused shifted his money from his right to his left shirt pocket. The two then discussed the question of getting a room or a cabin for the night, so that, if a girl should be procured, the accused would have a place to entertain her, as it was getting late and cabins might not be available at a later hour. With that purpose in mind, the accused drove back along 7th Avenue to a tourist camp called "Jeane's", but found no cabins there available (R. 201). At the suggestion of the proprietress, the accused drove back toward Miami and inquired for accommodations at another place, without success. Ringemann then said he knew of a place out north on 7th Avenue, so they started driving north but had not located any cabins, when Ringemann announced that he had to have a bowel-movement. The accused suggested waiting until they reached a cabin or filling station, but the boy protested that he could not wait and, as they approached a side street urged the accused to "turn off here". The accused turned, drove a little more than a block, stopped the car, turned off the lights, and told the boy to hurry. There was a roll of toilet paper in the glove compartment of the car which the accused habitually carried for use as a

windshield wiper. He handed this to the boy, who then got out, and went to the roadside near the left front of the car. While waiting, the accused had a similar urge. He got out of the car by the left door, leaving it open; procured the roll of toilet paper from the boy; walked some distance away; and relieved himself. The accused was not wearing shorts at the time, because, in dressing at the hospital, he had observed that his only pair of available shorts were soiled, so he had picked them up and thrown them on the rear seat of the car. After the boy had finished his first evacuation, he walked toward the car; then remarked that he had to have another, and went back to the roadside, then returned to the car and stood by the open door, at the left. This open door was between them, so the accused, whose bowels were then moving, could not see whether the boy had his trousers on or not. The boy then asked the accused if he had ever tried "corn-holing". The accused vehemently answered, "No". The boy then suggested that the accused permit the boy to try it on the accused. This infuriated the accused, who decided it was time to get away from there, and he had started to rearrange his clothing when the boy remarked that he had the accused's license number and that, if the accused did not give him some money, he could cause trouble. The accused walked over to the car, fixing his trousers, and saw the boy seated in the car with one foot stuck out of the right door, as if to run away. The boy's trousers were open and his belt unbuckled. Just at that moment the light from the police car flashed on them (R. 206).

In order to avoid being seen then "with what was on the street", the accused got in the car, backed to 8th Avenue, and turned left. The other car followed. The boy, in the meantime, was fastening his trousers and looking back. He remarked, "It must be the police". The accused pulled to the right side of the road and stopped. The other car also stopped, and a policeman walked up and asked what they had been doing back there. The accused suggested that if the policeman would go back, he would see. The officer then talked with the boy in a manner that indicated to the accused that they had known each other before. He sent the boy to the police car, then examined the accused's identification card and driver's license. He walked back to the police car, and, upon his return, told the accused that the boy said he had tried "to do something to him". The accused either denied this, or remained silent. The policeman then made several trips back and forth, and finally told the accused to follow him to the police station at North Miami. During this period, the accused, becoming frightened, picked up his shorts from the rear seat and threw them out of the window on the right side of the car (R. 210).

When they arrived at the police station, the policeman took the boy into a room. The accused was locked up in a cell. His requests for a physical examination, and to communicate with an attorney, or even with the military authorities, were refused (R. 212). The chief of police came in during the night and questioned him, but he was badly frightened and refused to make any statements. Again, without avail, he demanded a physical examination. He also heard someone badgering the boy, as if trying to induce the boy to say something which the boy was reluctant to tell (R. 213). It was not until 11 o'clock on the morning of April 2 that the accused was finally permitted to communicate with anyone. He was then turned over to the provost marshal, and incarcerated in the post stockade. The accused exhibited a Major's insignia of rank, having a broken clasp, in explanation of its absence on his uniform on the night of April 1 (R. 224). Because of the wide publicity given to the charges, the accused had, on April 14, 1943, tendered his resignation as an officer of the Army of the United States (R. 229). He complained that the military authorities had hampered him considerably in properly preparing his defense, by confining him in the stockade, and, for a long time, preventing him from conferring alone with his attorney.

It appears from the accused's testimony that after he got out of school about 1922 he taught in an elementary school for three years, then in a high school for about six years, during which time he engaged in other activities such as scoutmaster and Sunday school teacher (R. 245).

The accused offered in evidence the affidavit of Ringemann typed by Chief of Police Hoban from the destroyed written statement, to show alleged discrepancies between its contents and Ringemann's testimony before the court (R. 258; Def. Ex. C).

Major Robert M. Johnson, Medical Corps, corroborated the fact that the accused was released from the hospital about 8 p.m., April 1, 1943 (R. 191).

Second Lieutenant Glendora Pullen, Army Nurse Corps, corroborated the fact that the accused demanded a physical examination when he was brought to the hospital on the afternoon of April 2, 1943 (R. 125). Second Lieutenant Harrison W. James Jr., Air Corps, corroborated the accused's statement that when he dressed about 1 p.m., April 1, 1943, he did not don any shorts (R. 141).

A medical officer testified that, in his opinion, if the

accused's penis (which he had examined) had been inserted in the rectum of a person after a bowel movement, it would have had on it, unless and until removed by soap and water, a predominance of fibrin, B. coli and fecal matter (R. 153).

The testimony by stipulation of three Army officers, ascribed to the accused an excellent reputation for truthfulness and veracity, and for moral character (R. 157, 161-162).

5. In rebuttal, the prosecution re-called Ringemann, who testified that, at no time during his conversation with Bane, was money mentioned, nor did Bane speak of trying to find or get a woman (R. 259). He denied ever knowing Officer Rogers before the early morning of April 2, 1943. Rogers corroborated this statement (R. 260).

6. The Manual for Courts-Martial, par. 149k, defines sodomy as "sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals".

The charge in this case is a serious one, as it involves an Army officer of field grade and a fourteen-year-old youth. In considering the evidence it must be borne in mind that crimes of this nature, when committed, are usually committed in secrecy, and it would be a dangerous policy to permit the testimony of one participant to convict the other without corroborating evidence of a substantial nature.

The boy Ringemann testified at length, tracing his actions from the time he met the accused until apprehended by the police. He displayed unusual intelligence for his years. Although subjected to a severe cross-examination, he did not deviate from his original account of the actual commission of the offense, although he slightly varied the sequence in which he related some of the minor details. The accused himself corroborated the boy in the preliminary incidents of the meeting and the places visited, but denied emphatically the actual commission of the offense. He admitted that he picked the boy up late at night, drove him around, bought him refreshments, inquired at several places in an effort to rent a cabin for the night, and parked on a lonely road with the lights off; that both lowered their pants for the purpose of defecating, discussed "corn-holing", and fled when a light was flashed. His story of taking a strange fourteen-year-old boy around in search of a woman to spend the night with him, of trying to rent a cabin in anticipation of finding a woman in such a sparsely settled section of Miami,

and of the two of them stopping under such circumstances on a lonely road for the sole purpose of evacuating their bowels is not convincing. It fails, definitely, to ring true. The court, in trying to arrive at the fantastic truth, accepted an even more shameful, but - all things considered - a far more likely and more probable version. The evidence was ample to support the finding. The weight of the evidence favored the court's determination that the accused was guilty. His story, while possible, was too genuinely incredible to create a reasonable doubt as to the substantial truth of the boy's account of what actually occurred. The finding of guilty of sodomy, as alleged in the Specification under Charge I, is amply sustained.

7. With reference to Charge II and the Specification thereunder, the Board is of the opinion that it fails to set forth an offense under Article of War 95. The alleged offense must refer to the time when Bane was driving away from the scene of the act described in the Specification, Charge I. Ringemann testified that his own trousers were fastened, and that he believed Bane's were also. It was dark in the car. The policeman testified that when he flashed his light inside, he saw their trousers open. There was neither allegation nor proof of indecent exposure. There is no law or regulation that requires persons subject to the jurisdiction of courts-martial to wear shorts when driving, or that renders them criminally responsible for the absence of shorts on either passengers or guests. The record is insufficient to sustain the findings of guilty of Charge II and of the Specification thereunder.

8. During the cross-examination of the prosecution's principal witness, Ringemann, defense counsel endeavored to elicit testimony that he had previously indulged in the practice of sodomy. The trial judge advocate's objection to this line of questioning was sustained by the Court (R. 26, 76). The defense counsel argued that he was testing the credibility of the witness by these questions. The Board is of the opinion that the court's ruling was correct. It is a well founded principle of law of evidence that a witness' <u>conviction</u> of a crime may be shown to discredit his testimony, but not the accusation thereof, nor even the actual commission of a crime, of which the witness has never been convicted nor accused. (Dig. Ops. J.A.G., 1912-1940, sec. 395 (8) p. 204; M.C.M., par. 111; See also Richardson on Evidence, sec. 578). Evidence to be admissible must be material and relevant. Evidence is not material when the fact which it tends to prove is not part of the issue in the case. Whether the boy witness had previously indulged in such sodomitical practices was not a part of any issue in the case. It had nothing to do with his ability or willingness to tell the

truth. It was therefore not material. Nor did it affect his credibility one way or the other. The witness could have properly refused to answer on the grounds of incrimination. The offer of proof was therefore properly excluded.

8. The accused is 37 years of age. The records of the Office of The Adjutant General show that he was appointed a second lieutenant in the Army of the United States (Field Artillery Reserve) on March 19, 1934, and reappointed in the same grade and section on March 19, 1937. He was promoted to the grade of first lieutenant, Field Artillery Reserve, on February 23, 1939; to Captain AUS (AC), April 23, 1942, and to Captain, AUS, December 9, 1942. He was promoted to the grade of major AUS (AC) on December 14, 1942. He was assigned to active duty on June 27, 1936, and served continuously until relieved on March 30, 1939. He was again assigned to active duty on November 9, 1940, and has continued thereon to the present.

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 not legally sufficient to support the findings of guilty of Charge II and its Specification; legally sufficient to support the findings of guilty of Charge I and its Specification; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 93.

Chas. L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 18 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 Frank J. Bane (0-316771), Air Corps.

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 II and its Specification; legally sufficient to support the findings of guilty of Charge I and its Specification; and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the findings of guilty of Charge II and its Specification be disapproved, and that the sentence be confirmed and carried into execution.

3. Careful consideration has been given to a brief submitted by Mr. Vincent C. Giblin, Miami, Florida, individual counsel for 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 dvocate 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 - Brief of counsel

(Findings of guilty of Charge II and its Specification disapproved. Sentence confirmed. G.C.M.O. 141, 13 Jul 1943)

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

SPJGQ
CM 235382

10 JUL 1943

UNITED STATES v. Second Lieutenant HORACE G. SINGLETARY (0-1294735) 364th Infantry.	SOUTHERN LAND FRONTIER SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Camp Lockett, California, 26 April 1943. Dismissal

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: In that Second Lieutenant Horace G. Singletary, 364th Infantry, did, on or about April 4, 1943, at or near Blue Point Picnic Grounds of the Tonto National Forest, Arizona, cause to be sold or aid in the selling of intoxicating liquors; to wit, about two bottles of whiskey, to certain members of the 364th Infantry through and with the assistance and connivance of Private John Daniel, Company G, 364th Infantry.

Specification 3: (Finding of guilty disapproved by reviewing authority)

Additional Charge: Violation of 96th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

He pleaded not guilty to all the Charges and Specifications. He was found guilty of Specifications 2 and 3 of the Charge and of the Charge; and not guilty of Specification 1 of the Charge, and of the Specification of the Additional Charge, and of the Additional Charge. There was no evidence of any previous convictions. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 3 of the Charge, approved the sentence and withheld the execution of the sentence "pursuant to Article of War 50½." The record has been treated as if forwarded for action under Article of War 48.

3. The pertinent evidence for the prosecution shows that at the time involved the 2nd Battalion of the 364th Infantry was encamped on the east side of a river in Tonto National Forest Park, Arizona. On the west side of the river was the Blue Point Picnic Grounds and it was used by the troops as a training area. It contained no military installations, but the battalion had been engaged there in field exercises. 4 April 1943 was a Sunday and no field exercises were taking place (R. 25-30).

Private John Daniels, Company "G", 364th Infantry, testified that he knew the accused to be in military service. He was his orderly. On 2 April, the witness asked the accused if he would get some liquor for the boys. The accused said it was too risky but he would see what he could do (R-34). On 4 April the accused asked the orderly to get the lunch out of the car. There was a case of liquor in the vehicle and the witness asked the accused if he could have it. The accused did not answer. Later the accused asked the orderly where he was going with it and the witness told the accused across the river. Witness said he was going to let the boys in "G" Company have it, that he was going to sell it to them. The accused asked the witness how he was going to get it over there and the witness replied he was going to carry it on his shoulder. The accused then offered to take him over in the car and did so (R-35). The place where the liquor was taken to was about 300 yards on the other side of the river from the camp. The witness set the liquor on the ground, a couple of the boys came up and wanted a pint and he let them have it. He sold it to them. Private Daniels identified a box marked, "Mint Springs Kentucky Straight Bourbon Whiskey" as the box accused gave him, as the one he took out of the car and as the box from which he sold the liquor (R-36). It was marked as Exhibit "A" (R-37). The witness knew it was the box of whiskey that was in the car that day because of the way he opened it (R-37). While the witness was selling liquor there was another boy that gave him some money and as he was closing the box to move down the river, two officers approached. They said it was wrong and one officer remained with him. Other officers came up, Lieutenant Parrish, Colonel Ellis, and Captain Rogers. Colonel Ellis was the commanding officer of the Second Battalion and asked who brought the witness over there. Private Daniels told the Colonel that accused brought him. The Colonel ordered the liquor taken to his tent and the witness carried it over (R-38).

Private Daniels ordered the liquor because the boys wished to have a little celebration on Sunday, it was dry up there and they wanted something to kind of amuse themselves. He did not discuss with the accused what price he was going to sell the liquor for and no mention was made as to what was to be done in case any bottles were left over. The witness told the accused he was going to let the boys have it. He did not pay the accused for the liquor (R-39). He was not selling it for anyone particularly, only accused. He had asked the accused for the liquor and finally he let the witness have it. The accused did not tell him to sell it. There were troops on the west side of the river, but they were not camped there. There had been civilians selling liquor to the soldiers over there, there was only one car, and the men were buying liquor. During Friday, after pay day, the witness was there to buy some himself but it was too high and was a cheap brand of whiskey, so he did not buy it. Some of the boys told him that night "she was getting $2.50 at least for a Coca-Cola bottle full." It was not good liquor (R-41).

The witness, Private Daniels, did not have a license to sell liquor in Arizona. There were twenty-four pint bottles in the case and the witness sold three (R-42-43). The witness had been asked to get liquor, in fact, they were trying to get to town to get some. By "they" he meant around thirty-five or forty of the boys. Private Daniels was selling the liquor for $1.50 a pint and was going to give accused his money back, whatever he had paid for it, after the witness sold the liquor (R-43).

4. The accused having been advised of his rights elected to remain silent. For the defense Second Lieutenant Bruce Hamilton, 364th Infantry, testified as to the accused's excellent character; that he was a hard worker; that he would go out of his way to do things that he was not required to do; he had initiative; and helped the men of his company (R. 75). Captain Arden S. Morris, 364th Infantry, considered accused the finest officer he had had in the company, and the most promising one in the regiment. Accused had given up part of his leave on one occasion to help out when the organization was shorthanded for officers. The defense counsel also showed that accused enlisted in the Army on 18 September 1940; that he was appointed Specialist 5th Class 25 January 1941, Sergeant, 20 March 1941, Staff Sergeant, 17 November 1941, Technicial Sergeant, 15 May 1942, and commissioned 2nd Lieutenant Infantry AUS on 28 September 1942.

5. Private Daniels was recalled by the court and repeated that he did not know how much accused paid for the liquor; that he did not consider the transaction a gift; that after he had gotten the money from "the boys" by means of his "sales" at $1.50 per pint, he would repay the accused the cost of the liquor; and that the accused did not know how much he was going to charge for the liquor (R. 83-84).

6. Three members of the court recommended that clemency be extended the accused by suspension of the sentence of dismissal on the grounds that he is a capable and enthusiastic officer and that this was his first error of judgment. The recommendation is attached to the record. Defense counsel also requested similar clemency.

7. Specification 2 of the Charge alleges that the accused did on or about 4 April 1943 at Tonto National Forest, Arizona, cause to be sold, or aid in the selling of, two bottles of whiskey to members of the 364th Infantry through Private John Daniels.

The evidence was clear that at the time and place specified Private Daniels sold two bottles of whiskey to members of the 364th Infantry and that he obtained the bottles from the accused for that express purpose. The whiskey belonged to the accused and he permitted Daniels to sell it to the enlisted men of his command. With full knowledge and clear understanding of his purpose, accused assisted Private Daniels, by transferring the liquor in question from the east side of the river where he and the troops were encamped, to a picnic grounds on the west side of the river, where it was immediately put on sale to soldiers of the 364th Infantry. It therefore follows that the prosecution proved beyond a doubt that the accused committed the act of aiding in the sale of intoxicating liquor as alleged in this Specification. There was no evidence, however, that he caused it to be sold. It also was apparent that the accused did not act for financial gain, but did so as a favor to his orderly and the other enlisted men of his organization. Ignorance of the law, however, is no excuse. His lack of malo animo should be taken into account in determining the punishment for the act.

> "The sale of or dealing in beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or army transport, or UPON ANY PREMISES USED FOR MILITARY PURPOSES by the United States, is hereby prohibited." (Sec. 38, Act of February 2, 1901 (31 Stat. 748); 10 U.S.C. 1350; Sec. 310 M.L. 1939).

The accused's military organization was engaged in maneuvers on the very grounds upon which this liquor was sold. The mere fact that because it was Sunday and the troops were resting and inactive should make no difference. The accused therefore violated the statute quoted and such an act constitutes in turn a violation of the 96th Article of War.

Apart from the statute, supplying the men of his command with intoxicating liquor is certainly prejudicial to good order and military discipline, whether it is viewed from the standpoint of currying favor with the troops

or from the standpoint of the possible result of the effect on the men the intoxicating liquor might have during field exercises. It is therefore a direct violation of the 96th Article of War which expressly prohibits all disorders or neglects to the prejudice of good order and military discipline.

This court, however, had found the accused guilty of violating the 95th Article of War. It has considered the acts of the accused as conduct unbecoming an officer and a gentleman. No precedent could be found to sustain such a conclusion. The accused was acting in an unofficial or private capacity. In order that such acts constitute a violation of the 95th Article of War they must dishonor or disgrace the individual personally as a gentleman, seriously compromise his position as an officer and exhibit him as morally unworthy to remain an officer. The accused admittedly had good intentions but exercised very bad judgment. He acted more through ignorance than through immorality. It is therefore concluded that his conduct constituted a violation of the 96th Article of War rather than the 95th Article of War.

8. The record shows the accused to be 25 years of age. He enlisted on 18 September 1940; arose through the ranks as Specialist 5th Class, Sergeant, Staff Sergeant, Technical Sergeant, and was commissioned Second Lieutenant, Infantry, A.U.S. on 28 September 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 finding of guilty of Specification 2, Charge I, except the words "cause to be sold or", in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of Article of War 96.

William A. Hounds, Judge Advocate.

Charles S. Glenn, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., [illegible] 1943 - To the Acting 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 Horace G. Singletary (0-1294735), 364th Infantry.

2. I concur in the opinion of the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of the Charge and Specification 2 thereunder be approved as involves findings of guilty of the Specification (pertaining to the selling of liquor to enlisted men) except the words "cause to be sold or," in violation of Article of War 96, and that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President. Accused was found not guilty of Specification 1 of the Charge, alleging that he caused intoxicating liquor to be introduced into an area occupied by military forces for the use of military personnel in violation of Article of War 95, and not guilty of the Additional Charge and its Specification, alleging that he caused intoxicating liquor to be introduced into an area occupied by military forces for sale to military personnel, in violation of Article of War 96.

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 206, 21 Aug 1943)

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