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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XXIII

including

CM 236428 to CM 237425

(1943)

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

SPJGQ
CM 236428

7 JUL 1943

UNITED STATES	38TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Livingston, Louisiana, 4 June 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
Private WILLIAM A. CLARK (20533389), Company "G", 152nd Infantry.	

REVIEW by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William A. Clark, Company "G", One Hundred Fifty Second Infantry, did, at Camp Livingston, Louisiana, on or about May 15, 1943, wrongfully and feloniously assault Carol R. Tidd, a female over the age of twenty-one years, by seizing her body and fondling her private parts forcibly and against her will with intent to commit rape upon her.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty 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 pursuant to Article of War 50½.

3. The pertinent evidence for the prosecution shows that Miss Carol R. Tidd (now Mrs. Francis R. Jones) came from Kansas City, Missouri, to Camp Livingston, Louisiana, for the purpose of being married to Technician Grade V Francis R. Jones. About 9:30 p.m., 15 May 1943 the two were seated on a bench near the Guest House of the camp discussing their wedding plans. A soldier, who later proved to be the accused, approached them and

pretended that he was sergeant of the guard and was under orders to arrest all unmarried couples found in that vicinity. He told them that Jones could be court-martialed and could get from one to six years' imprisonment for being found where he was (R. 9,14). He finally convinced them that it would be best for them if Jones would report back to his own area and he, accused, would take Miss Tidd to the provost marshal's office for examination and then to the Guest House. Accused wore a web belt and bayonet scabbard. It was dark. Believing him to be a guard and believing his story about the military orders prohibiting unmarried couples in that area Jones left for his own area and Miss Tidd accompanied the accused. He led her through a path in the nearby woods. She begged him to take her to the Guest House. He said he would if he could get her through the line of guards. While walking, the accused said that he heard a guard and that they must not be seen. The accused pushed her to the ground. She resisted. He then took off his cartridge belt and scabbard and unfastened his trousers. He kept telling her that if she did not submit to him that her fiance would be court-martialed. He pushed her legs apart. She resisted (R. 16). She then submitted to intercourse as he was so much stronger than she. They then got up and started in the direction of the Guest House. He kept telling her to be very quiet. They heard someone and he again pushed her to the ground and she "had to submit to him again". In pushing her to the ground the accused used pressure with his hands so that she could not stand up (R. 16). She was terrified at his threats that Jones would be put in the penitentiary. She would not have gotten on the ground if it had not been for the force used. She did not do so voluntarily (R. 21). She did not think that she could successfully resist him (R. 22).

The military police then came with flashlights. They arose from the ground. The accused started to run and pull Miss Tidd with him. He halted, however, when one of the military police shouted "halt".

Miss Tidd ran into the arms of her fiance Jones who had accompanied the military police. She was taken to the hospital and examined by Major Shelton C. Simmons, Jr., Medical Corps, who testified that she was in a hysterical state (R. 38). He stated that he found what appeared to be semen on the pubic hair, contusions about the urethra, and tears on her vagina which could have been due to a struggle on her part or to the fact that the accused in attacking her was in a hurry (R. 39).

The military police and Jones testified that when they found the couple in the woods the accused's trousers were unbuttoned and his shirt was out (R. 9, 25, 27).

4. The accused elected to testify in his own behalf. He claimed that he drank some beer on the afternoon of 15 May 1943 and from a short time thereafter he does not remember a thing until he was in the hospital. On two prior occasions during his life he suffered a loss of memory. He claimed that he never saw Miss Tidd before seeing her at the trial (R. 28-33).

Major Shelton C. Simmons, Jr., Medical Corps, testified that he examined the accused about 10:30 p.m. on 15 May 1943 and found him sober. At that time the accused did not appear mentally sound, but he could not tell whether accused was actually unsound mentally or was "faking" (R. 35).

Major Frank P. Pignataro, Medical Corps, Chief of Neuropsychiatric Service, Station Hospital, Camp Livingston, Louisiana, testified that he examined the accused on 18 May 1943. Accused was in a state of fear and panic and was not sane. In his opinion the accused was sane prior to his arrest by the military police and was sane at the present time (4 June 1943). Sometimes people who commit crimes suffer insanity when apprehended (R. 36-37).

5. The accused is charged with assaulting Carol Tidd by seizing her body against her will with the intent to commit rape. Competent evidence in the record establishes that the accused did, at the time and place set forth in the Specification, seize Carol Tidd with his hands and force her to the ground in spite of her resistance.

The record is legally sufficient to support the finding and the sentence. There are no errors or irregularities which injuriously affect any substantial right of the accused.

The only legal question that is in this case is whether or not all the elements of an assault with intent to commit rape were proven and established. Section 594, page 1164 of the Fourth Edition of Underhill's Criminal Evidence (revised by Niblack) states the following:

> "The assault is the beginning of a crime, the motive of which is the infliction of some corporal hurt upon the other without that person's consent, as, for example, an assault with intent to commit rape. <u>As soon as the person assaulted is touched, no matter how trifling the hurt or touch may be, the battery has been committed.</u>"

Subparagraph three and four of the section under "Assault with intent to commit rape" on page 179 of the Manual for Courts-Martial, U.S. Army (1928) states:

> "The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice. Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted."

In this case it was proven that the accused first attempted to obtain the culmination of his desires by threats to Miss Tidd, to court-martial her fiance. By misrepresentation he obtained the absence of Corporal Jones. He then took Miss Tidd a short distance into a wooded area. He then pushed her to the ground. He then pulled her legs apart. He then had intercourse with her. Miss Tidd stated positively that if it had not been for the force or pressure used on her, connected with the threat to court-martial her fiance, that she would not have laid down on the ground and submitted. The intent of the accused to have carnal knowledge of Miss Tidd in this case was definitely proven by the fact that the accused went ahead and had the intercourse. Underhill's Criminal Evidence, as stated above, states that the assault is completed with battery when the person assaulted is touched, no matter how trifling the touch or hurt may be.

From the facts as presented to the court, the court was given the burden, under the law, to decide whether or not the accused intended to overcome any resistance by force, actual or constructive, and penetrate the woman's person. The court decided in this case that the accused intended to use any force necessary to accomplish his desires and found the accused guilty.

6. The record shows the accused to be 33 years of age. He enlisted in the Indiana National Guard 9 December 1940 and was inducted into Federal Service 17 January 1941.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty years is authorized upon conviction of assault with intent to commit rape. 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 501, Title 22, Code of the District of Columbia.

William A. Lynds, Judge Advocate.

Paul Dolhen, 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 236430

UNITED STATES	)	93RD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Headquarters, 93rd Infantry Division, A.P.O. 93, c/o Postmaster, Shreveport, Louisiana, 3 May 1943. Dismissal and confinement for two (2) years.
Second Lieutenant WILLIE G. JENKINS (O-1288387), Infantry.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Willie G. Jenkins, 25th Infantry, did, at Fort Huachuca, Arizona, on or about October 22nd, 1942, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit;

Bisbee Arizona October 22nd, 1942 No. ___
MINERS AND MERCHANTS BANK 91-18 ARMY BRANCH
Pay to the Order of Cash $55.00
Fifty five and no/100 - - - - - - - - - - - - - Dollars
Roscoe H. Jones
2nd Lt. 369th
Indorsed: Lt. Willie G. Jenkins
Co. C 25th Inf.

Emanuel M.W. Stewart
2nd Lt. 25th Inf.

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that Second Lieutenant Willie G. Jenkins, 25th Infantry, did, at Fort Huachuca, Arizona, on or about

October 22nd, 1942, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit;

FORT HUACHUCA, ARIZ. October 14 1942 No 37
91-167 ARMY BRANCH 91-167

MINERS AND MERCHANTS BANK
(Head Office, Bisbee, Ariz.)

Pay to the
Order of CASH $60.00
SIXTY AND no/100 - - - - - - - - - - - - - - - DOLLARS
Roscoe Jones
2nd Lt. 369th Infantry

Indorsed: Lt. Willie G. Jenkins
25th Inf.

which said check was a writing of a private nature which might operate to the prejudice of another.

Accused pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal 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. Summary of evidence.

Without objection on the part of the defense, the two checks set forth in the Specifications were introduced in evidence, marked respectively "Exhibit A" (Specification 1) and "Exhibit B" (Specification 2) (R.7,8). It should be noted that each check contains the name and organization of accused on the back. Exhibit A also contains a purported indorsement by Emanuel M. W. Stewart, Second Lieutenant, 25th Infantry.

Second Lieutenant Roscoe H. Jones, 369th Infantry, the purported drawer of the checks, testified that the signatures on the checks were not his (R.7).

Without objection the deposition of Richard Edwards, Assistant Cashier, Miners and Merchants Bank, Fort Huachuca, Arizona, was introduced (R.10; Ex. E). He testified that Exhibits A and B were two checks presented

to his bank for payment against the account of Lieutenant Roscoe Jones. He stated that Exhibit B was charged by the bank against the account of Lieutenant Jones. Exhibit A was cashed "at the window". It was then discovered that there were insufficient funds in Lieutenant Jones' account to cover Exhibit A. Witness was familiar with the signature of Lieutenant Jones, and testified that his signature did not appear on either check. After it had been determined that the checks were forgeries, the bank charged the amount of Exhibit B to the account of accused and credited the amount back to Lieutenant Jones. The bank notified accused of the charge against him and that the check was being held for evidence and investigation. With reference to Exhibit A, Lieutenant Stewart (evidently the Lieutenant Stewart whose name appears as an indorser) brought accused to the bank and accused gave Lieutenant Stewart his check to cover the amount of Exhibit A (Ex. E).

Without objection the deposition of C. B. Arnold was admitted in evidence (R.10; Ex. F). There were also admitted without objection two sheets of paper containing writing (R.10; Exs. C,D). Arnold testified that for the past 15 years he had been Inspector of Questioned Documents, Police Department, Phoenix, Arizona, during which period his duty was to examine handwriting for comparative purposes. He stated that Exhibits C and D contained specimens of accused's handwriting made in his presence and that in his opinion Exhibits A and B likewise were written by accused. He explained the characteristics of the writings which led him to his conclusion (Ex. F).

The accused declined to testify or to make an unsworn statement.

4. There is not the slightest doubt that accused committed forgery of the two checks as alleged. The evidence proved that the signature on the checks was not that of Lieutenant Jones, the purported drawer, and the handwriting expert testified that accused wrote the checks. The intent to defraud is clear from the fact that the checks were negotiated.

5. In their depositions, Edwards and Arnold spoke about Exhibits A and B, and Arnold spoke about Exhibits C and D. No exhibits were attached to the depositions, but undoubtedly the checks in question and the samples of accused's handwriting were the exhibits referred to.

6. Forgery should be charged under Article of War 93. Charging it under Article of War 95 necessitates the disapproval of the confinement, since no punishment other than dismissal is authorized under Article of War 95. Obviously, forgery is conduct unbecoming an officer and a gentleman.

7. War Department records show that accused is 26 years of age. He

graduated from high school and attended Birmingham Baptist College, Birmingham, Alabama, for one year. He served as an enlisted man from 26 February 1936 until 21 July 1942, when, after graduation from the Infantry Officer Candidate School, Fort Benning, Georgia, he was appointed second lieutenant, Army of the United States. In recommending accused for the Officer Candidate School, his commanding officer stated that he had demonstrated outstanding qualities of leadership and that his character was excellent.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. 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 is legally sufficient to support the findings of guilty, legally sufficient to support only so much of the sentence as involves dismissal, and legally sufficient to warrant confirmation of the sentence to dismissal. Dismissal is mandatory under Article of War 95.

Percy E. Gore, Judge Advocate.

John Burnside, 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 Second Lieutenant Willie G. Jenkins (O-1288387), 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, legally sufficient to support only so much of the sentence as involves dismissal, and legally sufficient to warrant confirmation of the sentence to dismissal. I recommend that only so much of the sentence be confirmed as involves dismissal and that the sentence as thus modified be carried into execution.

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.

(Only so much of sentence confirmed as involves dismissal. G.C.M.O. 272, 29 Sep 1943)

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

SPJGN
CM 236464

29 JUL 1943

U N I T E D S T A T E S	)	NINTH SERVICE COMMAND ARMY SERVICE FORCES
V.	)	
Private First Class REGGIE D. DEWA (38100728), Quartermaster Section, Station Complement Unit 1900.	)	Trial by G.C.M., convened at Fort Douglas, Utah, 2 and 3 June 1943. Dishonorable discharge and confinement for life. 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pfc Reggie B. Dewa, Quartermaster Section, SCU 1900, Fort Douglas, Utah did at 442 Church Street, Salt Lake City, Utah on or about May 5, 1943 forcibly and feloniously against her will, have carnal knowledge of Muriel Frew.

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 term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that prior to 5 May 1943, the accused had become acquainted with Earl and Julia E. Frew and their three children, Donald, age 17, Russell, age 12, and Muriel, age 10, and had visited in their home on a number of occasions. On the evening of 5 May 1943, at about 8 p.m., the accused called at the Frew home while Mr. & Mrs. Frew were attending a picture show and while Donald, the eldest son, was also away. The accused visited with the two children, read the newspaper, and listened to the radio. About one-half hour after his arrival, Russell went to a nearby drug store to purchase some funny books. During Russell's absence, the accused turned off the lights, put Muriel on a bed in the living room, took off her panties, pulled up her dress, and lay on top of her. Muriel protested and commenced to cry, but the accused told her to lie still and be quiet. The accused then placed his penis between Muriel's legs, and inserted it into the child's private parts. Muriel continued to cry and to repeat her request that the accused desist. She also complained that the accused was hurting her and he should stop. The accused continued his activities for five or ten minutes. During this time the accused had the odor of liquor on his breath (R. 7-9, 15-18, 20-25, 39-45).

When Russell returned he called Muriel to the kitchen to assist him in washing the dishes. Muriel then told Russell what had happened, explaining that the accused had played "nasty" with her, and that it had hurt her. At that time she appeared to have been crying. The accused remained in the living room (R. 24).

After about fifteen minutes, Muriel, Russell, Donald (the older brother whose whereabouts before this time are not accounted for), and the accused went out for some refreshments. The accused returned with the children to the gate of their home, and then departed (R. 25-27).

On the day following, the children told their parents that the accused had visited their home on the previous evening; but Muriel

did not mention the incident with the accused because the accused had threatened to hurt her if she did (R. 44, 55). Three days later the accused again visited the Frew home and ate lunch there. At that time Mr. & Mrs. Frew had not learned of the attack on Muriel (R. 13-15, 19, 53).

Subsequently, Muriel became nervous and irritable, and complained of pains in her stomach (R. 18, 44). On May 12, the older son, Donald, told his parents of the incident (R. 9). Muriel was thereafter twice medically examined and found to be suffering from acute gonorrhea (R. 68). The incubation period for gonorrhea was shown to be ten days, and in the opinion of one of the medical experts, the disease had not existed in Muriel prior to 5 May 1943 (R. 73, 79). There was also evidence that no case of gonorrhea was known to exist among the girls attending Muriel's school (R. 63). Young females, it was asserted, are particularly susceptible to the disease (R. 80). Neither Muriel nor any member of her family had previously suffered from gonorrhea (R. 17-18, 85, 87).

One of the doctors found no lacerations or evidence of penetration, although he testified that penetration only as far as the hymen would not have appeared from his examination (R. 65, 66). The other doctor observed a small one-quarter inch tear in the posterior fourchette which appeared to have been caused by a forcible spreading of the skin, occasioned by some pressure. This tear was in the process of healing (R.76, 79, 84). There was no evidence that the vaginal orifice had been disturbed and its size would not permit the entrance of a digit (R. 78).

The accused was medically examined on 13 May 1943, and was discovered to be suffering from chronic gonorrhea. In connection with a prior medical examination made in March, 1943, the accused had stated that he had been infected with gonorrhea in 1936, but had been cured in six weeks (R. 73-75).

Lieutenant Edgar M. Vance, the investigating officer, offered in evidence, a question and answer affidavit executed by the accused on 14 May 1943, in which the accused in answer to the question, "What were you talking to Muriel about?", answered as follows:

> "She was sitting right next to me on the couch reading funny books. Then I turned out the lights

and put Muriel down on the couch. I don't know what happened to me. I took my pants down and took her pants down and then I stuck it in".

The following questions and answers were also recorded:

"Q. When you were committing this act, did you make any penetration?

A. No Sir, I didn't try to push it far into her. I did try once and she said it hurt, so I quit. I didn't get it quite all in.

Q. Why did you stop?

A. She said it was hurting, so I stopped" (Ex. 8).

The defense objected to the introduction of the above evidence on the ground that it was not a voluntary statement but procured by fear of the investigating officer. The accused testified on this interlocutory question that Lieutenant Vance had, several days before securing the statement from him, called him "a dirty dog" and stated that if he were not an officer, he would knock the accused through the wall. The accused testified that he was in fear of the investigating officer at the time he was interrogated and at the time he signed the statement (R. 125). The accused admitted, however, that when Lieutenant Vance interviewed him as investigating officer "He treated me nice" (R. 133).

Lieutenant Vance, admitted that prior to his appointment as investigating officer and while serving as post prison and police officer he had called the accused a "dirty dog" and made the other statement attributed to him by the accused. He testified, however, that after he was appointed investigating officer, his previous anger with the accused was forgotten and that the statement which he procured from the accused was voluntarily made (R. 88-91). The testimony is conflicting as to whether Lieutenant Vance told the accused that he did not have to make a statement if he did not care to (R. 88, 105, 112, 115, 117, 125) and as to whether the accused expressly indicated that he desired to make a statement (R. 99, 102, 108, 136).

4. The accused in an unsworn statement asserted that he left his camp at about 7:30 p.m., went into town, and drank several drinks

of whiskey and beer. He saw Mr. & Mrs. Frew and their oldest son passing across the street, and whistled at them but they did not hear him. In a short time Mr. Frew's son Russell came into the place where the accused was and the accused went with him to his home. While Russell was gone, the accused played with Muriel, pulled her panties down, and got on top of her. The girl said nothing and did not fight back. When she said it was hurting her he got off, buttoned up his pants, and turned the lights on. He told Muriel not to say anything about the incident but he did not threaten her. Later he took the children out for refreshments. After he had returned the children to their home, he proceeded to various drinking places and continued drinking (R. 156-160).

5. The Specification alleges that the accused did, at Salt Lake City, Utah, on 5 May 1943, "forcibly and feloniously against her will, have carnal knowledge of Muriel Frew". This language alleges the crime of rape, one of the two crimes made punishable under Article of War 92.

Rape is defined as "* * * the unlawful carnal knowledge of a woman by force and without her consent". "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not" (M.C.M., 1928 par. 148b). It is also authoritatively stated that "Entry of the labia or lips of the female organ, merely without rupture of the hymen or laceration of the vagina, is sufficient to warrant conviction" (Wharton's Criminal Law, 2d Ed. Vol. I, Sec. 698 note 20).

When the evidence is examined in the light of the above definition, it becomes apparent that the accused is guilty of rape as charged.

The testimony of Muriel Frew shows that the accused placed her on a bed, took off her panties, and against her will forced his penis into her private parts until it hurt. Her testimony shows further that she repeatedly told the accused to stop and that she cried because he forced himself upon her against her will. The testimony of Muriel Frew is corroborated by the surrounding circumstances and by the fact that she developed a gonorrhea infection within a few days after the intercourse. Moreover, the unsworn statement of the accused, his previous admission aside, admits the fact that he took Muriel's panties off, opened his trousers, lay on top of her, and that she told him "* * * it was hurting".

Considered in its entirety, the evidence shows beyond a reasonable doubt every element of the crime alleged, and justifies the finding of guilty.

6. Although it is not entirely clear from the record that the

accused, at the time he made a statement to the investigating officer, understood that he had a right to remain silent, it is not necessary, to determine whether the statement made at that time was voluntarily made or not. This is true because the other evidence, including the admission made in the accused's unsworn statement to the court, apart from the previous formal statement is sufficient to have compelled the court to the conclusion that the accused was guilty as charged. It follows, therefore, that even if the formal written statement was received by the court in error, it could not have affected the substantial rights of the accused.

7. The record shows that the accused is a Zuni Indian and that he is 28 years of age. He was inducted into the service on 23 February 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Chas. L. Dressons, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

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

SPJGN
CM 236472

21 JUL 1943

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Barksdale Field, Louisiana, 28 May 1943. Total forfeitures and dismissal.
Second Lieutenant BILL L. CAROL (0-730709), 477th Bombardment Squadron, 335th Bombardment Group.	)	

- - - - - - - - - - - -

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 Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 2nd Lt. Bill L. Carol, 477th Bombardment Squadron (M), 335th Bombardment Group (M), Barksdale Field, Louisiana, did, without proper leave, absent himself from his station Barksdale Field, Louisiana from about April 14, 1943 to about April 28, 1943 inclusive.

Specification 2: In that 2nd Lt. Bill L. Carol, 477th Bombardment Squadron (M), 335th Bombardment Group (M), Barksdale Field, Louisiana, did, without proper leave, absent himself from his station Barksdale Field, Louisiana from about May 7, 1943 to about May 10, 1943 inclusive.

He pleaded guilty to and was found guilty of the Charge and both Specifications. Evidence of one previous conviction for violations of the 61st and 96th Articles of War, was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The prosecution, following the pleas of guilty by the accused, introduced in evidence, without any objections, extract copies of the morning reports of the 477th Bombardment Squadron, 335th Bombardment Group, for 15 April, 29 April, 8 May, and 11 May 1943, as Exhibits "A", "B", "C" and "D", respectively. These reports show the accused from duty to A.W.O.L. 14 April 1943; A.W.O.L. to hospital 28 April 1943; from duty to A.W.O.L., 7 May 1943; and from A.W.O.L. to confinement in hospital on 10 May 1943, as alleged in the Specifications (R. 5).

4. The defense introduced no evidence except that of the accused, who, after his rights as a witness had been explained to him, at his own request was sworn, and testified as follows:

His last court-martial had resulted from disappointment more than anything else; he had thought, when he came, that an officer was permitted at least a certain latitude of expression, but he was disillusioned. First assigned to the 474th, he got into some difficulty there - "just a little officer trouble between me and another fellow" - and was transferred to the 477th. When he got there, he saw a letter from his former squadron commander, giving him a bad character; everybody seemed to greet him with a sneer; he figured he was branded. Getting off to such a bad start, he had encountered difficulty and friction in his new organization, particularly with his commanding officer, Captain McKean. This finally culminated in his last court-martial, following which Captain McKean told him he did not think the fine imposed by the court was enough; that he had another charge against the accused which he would slap on him the first time he stepped out of line; and expressed his determination to break him. The accused was then put in the ordnance outfit, with another officer to watch him and report everything he did. One morning he had to go to town to pay a bill, was gone three hours and marked A.W.O.L. He tried for three days without success to see his group commander about a transfer, after being told by Captain McKean that he would not approve the accused's application for transfer, reiterating his intention to break him.

He believed under other circumstances he could make a good soldier; he had been one for quite a while, although he admitted a certain amount of bull-headedness. He knew the investigating officer and had made a sworn statement to him, but did not believe he had been warned.

He was A.W.O.L. from 14 to 28 April 1943, and from 7 to 10 May 1943, and was guilty of a violation of the 61st Article of War, as pleaded, but he was not aware how much time a person could be given for being A.W.O.L. When he left the post on 14 April 1943, and also on 7 May 1943, he was sober; as a matter of fact, he was on the field most of that last time, when he had left to straighten out some financial difficulties; but the first time, it had been more of a personal feud - he had got his Irish up then - both he and his commanding officer are Irish.

By being "bull-headed" he did not mean he could not take orders - he had been an enlisted man with a perfect record for a year and a half -

but he felt he was being persecuted, that was where he made his mistake. He believed the only way he could make a good officer was to be transferred to some other outfit, because, when a finger is pointed at a man all the time, he is bound to crack up. He just got tired of this, and so he went A.W.O.L. He had not drunk any whiskey in two months, since he got through with the last court-martial, having gone back then with the idea of trying to be an officer (R. 5-10).

5. The accused having testified under oath, the prosecution called in rebuttal Captain Harold L. McKean, on the question of the accused's general reputation for truth and veracity, as authorized by the Manual for Courts-Martial, page 112, which states, "If the accused takes the stand as a witness, his reputation for truth and veracity may be shown." Captain McKean stated he knew the reputation of the accused for truth and veracity at Barksdale Field, Louisiana, where he had the reputation of misrepresenting the truth. On cross-examination by the defense, Captain McKean stated the opinion he had expressed was his, personally, and that of every officer with whom the accused had served. He had discussed this question with the accused's flight commander, the operations officer, the pilot of his crew, and the squadron bombing officer; and that is also the opinion of the men with whom the accused associated (R. 11-12).

6. The accused having pleaded guilty to the Charge and to both Specifications, the prosecution introduced copies of the morning reports substantiating the plea, and the accused in his sworn testimony, admitted the allegations were correct.

7. War Department records show the accused is 25 years of age. He was enlisted man from 29 April 1941 to 26 September 1942, when he was commissioned Second Lieutenant, A.U.S.

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 Article of War 61.

Elias R. Gresson, Judge Advocate

Abner E. Lipscomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 236472

1st Ind.

War Department, J.A.G.O., 31 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 Bill L. Carol (0-730709), 477th Bombardment Squadron, 335th Bombardment Group.

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 that the forfeitures be remitted, and that the sentence, as thus modified, be carried into execution.

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 217, 4 Sep 1943)

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

SPJGN

3 JUL 1943

CM 236503

UNITED STATES v. Private ALVIN L. JERLS (34490679), Company "C" 327th Medical Battalion, 102nd Infantry Division, and Private RAYMOND L. GAIN (38222429), 181st Signal Repair Company, Replacement Pool.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Maxey, Texas, 2 June 1943. Jerls: Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center, Camp Bowie, Texas. Gain: Dishonorable Discharge and confinement for life. Disciplinary Barracks.

REVIEW by the BOARD of REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

1. The record of trial in the case of the soldier Private RAYMOND S. GAIN has been examined by the Board of Review.

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

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

Specification: In that Privates Raymond L. Gain, 181st Signal Repair Company, Replacement Pool, Fort Dix, New Jersey, and Alvin L. Jerls, Company C, 327th Medical Battalion, Camp Maxey, Texas, acting jointly and in pursuance of a common intent, did, at Camp Maxey, Texas, on or about May 18, 1943, with intent to do him bodily harm, commit an assault upon Private Albert (NMI) Zulch, Detachment, Corps of Military Police 1882nd Unit, Eighth Service Command, Camp Maxey, Texas, by striking him on the head with a dangerous instrument; to-wit, a piece of lumber.

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

Specification 1: In that Private Raymond L. Gain, 181st Signal Repair Company, Replacement Pool, Fort Dix, New Jersey, did, at Camp Maxey, Texas, on or about May 18, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended in the vicinity of Paris, Texas, on or about May 29, 1943.

He pleaded not guilty to Charge I and the Specification thereunder; guilty of Specification 1, 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, and not guilty of Charge II but guilty of violation of Article of War 61. He was found guilty of Charge I except the words "and Alvin L. Jerls, Company C, 327th Medical Battalion, Camp Maxey, Texas, acting jointly and in pursuance of a common intent", of the excepted words, not guilty, of joint Charge I, guilty except the word "joint" and guilty of Charge II and its Specification. There was no evidence of previous convictions. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowanced 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 the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The pertinent evidence for the prosecution shows that on 18 May 1943 accused was a prisoner in confinement in the stockade at Camp Maxey, Texas. He was sent out on a work detail under Private Zulch as guard with several other prisoners. They were hauling wood in a truck driven by Private Walker. The truck stopped near Gate 6 to unload the wood. As the guard, Private Zulch, got off the truck accused struck him on the head with a 2 x 2 piece of lumber. The guard fell to the ground. Accused seized his shotgun and, pointing it at the driver, compelled him togive him the keys to the truck. Accused threw the keys away. The three prisoners, including accused, ran off. Accused and one of the prisoners were captured two days later by the military police, east of Paris, Texas which is accused's home town. He was dressed in civilian clothes (R. 11-25).

The shotgun was recovered about 200 yards from the truck (R. 14). No one saw the accused strike the guard, but accused himself admitted that he struck him on the head (R. 24). After he was recaptured the accused was taken to the scene of the offense and asked to identify the stick he used on the guard. Accused said there was so much lumber there that he could not identify it, but added that it was a "two-by-two" and he picked up a piece of lumber similar to the one used (R. 55).

As a result of the blow struck by the accused, Private Zulch was taken to a hospital and an operation on his skull and brain had to be performed in order to save his life (R. 26-28). The injury was described by medical officers as follows:

> "At the time (19 May 1943), my impression was a severe skull and brain injury, probably a skull fracture and concussion of the brain * * * we operated and found a blood clot on the brain * * * a concussion and a large blood clot on the brain" (R. 26, 27, 28).

Following the operation the patient improved rapidly. He is in no danger of losing his life. As to permanent injury the witnesses could not foretell. "There is a chance that he might be mentally unbalanced, or a slight loss of mind". Private Zulch was 45 years of age (R. 28).

4. The accused having been advised of his rights elected to remain silent.

5. The Specification under Charge I alleges that the accused on 18 May 1943 at Camp Maxey did, with intent to do him bodily harm, commit an assault on Private Zulch by striking him on the head with a dangerous weapon: to wit, a piece of lumber. It was clearly shown that the accused on the date and at the place averred did strike Private Zulch on the head with a piece of lumber with sufficient force to knock him unconscious and severely injure his skull and brain. While a piece of lumber is not a dangerous weapon per se, yet it may be made such by using it to strike another over the head with sufficient force to severely injure his skull and brain. The intent to do bodily harm may be inferred from the circumstances. A similar conclusion was reached and an identical specification sustained regarding a piece or stick of wood in CM 172101. See also CM 170728; CM 210965; CM 188152. The evidence was therefore ample to sustain the finding of guilty of Charge I and its Specification.

The evidence is also clear that the accused escaped and remained absent without leave until he was apprehended dressed in civilian clothes at an undisclosed distance from his station. From these facts the court may infer the intention not to return to military control and therefore properly convict the accused of desertion. He pleaded guilty to being absent without leave during the time specified.

6. The Charge Sheet shows the accused to be 21 years of age. He was inducted into the Service at Dallas, Texas, on 8 September 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 and the sentence. A sentence of life imprisonment may be imposed by the court for violation of Article of War 58.

William T. Toombs, Judge Advocate

Carlos Hoeburg, Judge Advocate

Herbert R. Friedrich, Judge Advocate

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

SPJGN
CM 236505

25 Aug 1943

UNITED STATES v. Private GEORGE HEFLIN (7000985), 1970th Quartermaster Company, 83rd Service Group.	SECOND AIR FORCE Trial by G.C.M., convened at Army Air Base, Pueblo, Colorado, 10 and 11 May 1943. Death by hanging.

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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that PRIVATE GEORGE HEFLIN, 1970th Quartermaster Company (Truck), did, at Pueblo, Colorado, on or about April 22, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Staff Sergeant, Frank C. Fritze, a human being, by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. 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. The evidence for the prosecution shows that on the night of 21 April 1943, the accused was visiting the city of Pueblo, on a pass expiring at midnight. At 11:30 p.m. he, as well as all other soldiers from the army air base in town on similar passes, were ordered into government vehicles for transportation to the base. The accused left the

Vulcan Club, a tavern in a section of Pueblo known as Bessemer, in one of those vehicles, from which he alighted shortly after its departure, returning to the tavern. Houston, a colored military policeman on duty there, loaded him into another truck, leaving for the base, but in a little while he reappeared at the Vulcan. All government vehicles having then departed, Houston telephoned military police headquarters in Pueblo, requesting a detail with transportation to escort the accused to the base. In response to this call, the deceased, Sergeant Frank C. Fritze, in charge of the town patrol, accompanied by Private Domenic Manfredi - both wearing MP armbands and carrying sticks, but otherwise unarmed - arrived at the Vulcan in a jeep, about one o'clock on the morning of the 22nd. Houston identified the accused, who was standing beside the piano, and Sergeant Fritze informed him they had come to take him to the base. Outside the tavern, approaching the jeep, Sergeant Fritze walked beside the accused holding his right arm, Manfredi his left. As they were about to enter the vehicle, the accused suddenly drew his arms back, releasing the grip of both MP's. Immediately thereafter he withdrew his right hand from his trousers pocket, clutching an open knife with which he struck Sergeant Fritze over the heart. Sergeant Fritze then, for the first and only time, hit the accused with his stick. As he did so, he jumped back toward the jeep and fell off the sidewalk. The accused, off balance, fell also. When he got up, Manfredi struck him with his stick. The accused started up the alley by the club. Houston and Daniels, another colored MP on patrol duty at the Vulcan, cornered him. "Come on, give me that knife," Houston ordered. Daniels grabbed hold of the accused, whereupon he changed his knife from his right hand to his left, and knocked Daniels' hand away. He kept cursing all the time. When he started running away the MPs set out in pursuit; but Fritze had gone only a few feet when he told Manfredi to get him to the hospital, that he was stabbed in the heart. On the way to the hospital he lost consciousness, and, shortly after his arrival, in the early morning hours of 22 April 1943, he died from the effects of a knife wound in his heart (R. h, i, j, k, r, s, w, tt).

The accused, having eluded his pursuers, ran three miles to his mistress' house, where he told her, as well as two other women and two soldiers who were also there, that he had cut one MP, and would settle with two others in the morning. He was apprehended there by civilian police about 3 a.m., covered up in bed, with his shoes and trousers on, his shirt and blouse rolled up beside him, a bloody knife concealed in one shoe. He was not intoxicated (R. ee, vv).

4. The evidence for the defense shows, by the accused's sworn testimony, which he elected to give, after being properly advised of his rights as a witness, that he had smoked three sticks of marihuana on the night the deceased was killed, and had drunk large quantities of both wine and whiskey. He left the truck on which he and other soldiers were being transported to the base from the Vulcan Club, returned to the club, and was taken

outside by several MP's who belabored him over the head and neck with their clubs. He pulled his knife and swung at them; then fled to the house where he was later apprehended. He did not know the deceased, but did know Houston and Daniels, and remembers cutting at the latter while escaping from him. Medical testimony was also adduced, showing that the combined use of marihuana and alcohol in the quantities testified to by the accused might well produce amnesia (R. aaa-zzz).

5. The Specification alleges that the accused with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, killed the deceased by stabbing him with a knife.

The evidence clearly establishes the fatal stabbing of the deceased by the accused, when the latter, suddenly and without warning, broke away from the lawful custody of the deceased, a military policeman in the execution of his duty, at the same time plunging a knife into his heart. The deceased was unarmed except for his MP stick, with which he struck the accused after and not before the stabbing, according to the two eye-witnesses who testified for the prosecution; whose evidence also established the absence of any rough treatment whatsoever, prior to the fatal thrust.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. * * *
>
> "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. * * *
>
> "Malice aforethought may exist when the act is unpremeditated."

(In such cases the use of the words "with premeditation" in the Specification is mere surplusage).

> "It" (malice aforethought) "may mean any one or more of the following states of mind preceding or co-existing with the act or ommission by which death is caused: * * * An intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, * * * provided the offender has notice that the person killed is such officer or other person so employed (Clark)" (par. 148a, pp. 162-164, MCM, 1928).

Applying this standard to the proof adduced on the trial, it clearly appears that the record supports the court's findings of guilty of murder, as defined by the Manual, in violation of Article of War 92.

6. The charge sheet shows that the accused is 25½ years of age. With no prior service, he enlisted 11 October 1939, to serve for the duration of the war and six months thereafter.

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 thereof. A sentence of death or imprisonment for life is mandatory upon conviction of Article of War 92.

Chas. L. Bresson, Judge Advocate.

Abner E. Lifsconb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 236505

1st Ind.

War Department, J.A.G.O., 2 SEP 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 George Heflin (7000985), 1970th Quartermaster Company, 83rd Service Group.

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 death be confirmed and carried into execution at a time and place to be designated by the reviewing authority.

3. Consideration has been given to the attached copy of a letter from Mrs. Anna C. Donley, addressed to the President, dated 25 May 1943, to three letters from Miss Cornelia Heflin, sister of the accused, one addressed to the President, dated 26 May 1943, and two addressed to the "Commanding General", dated 2 and 8 June 1943, and to a letter from Mrs. Eunice M. Adams, aunt of the accused, addressed to the President, dated 31 May 1943, 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 foregoing recommendation, should such action meet with your approval.

Myron C. Cramer

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

8 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Copy ltr. fr. Mrs. Donley, 25 May 1943.
Incl 5 - Ltr. fr. Cornelia Heflin, 26 May 1943.
Incl 6 - Ltr. fr. Cornelia Heflin, 2 June 1943.
Incl 7 - Ltr. fr. Cornelia Heflin, 8 June 1943.
Incl 8 - Ltr. fr. Mrs. Adams, 31 May 1943.

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 315, 21 Oct 1943)

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

SPJGQ
CM 236509

28 JUL 1943

UNITED STATES v. Second Lieutenant WILLIAM J. VEAL (0-428781), Air Corps.	ARMY AIR FORCES SOUTHEAST TRAINING CENTER Trial by G.C.M., convened at Stuttgart Army Air Field, Arkansas, 26 May 1943. Dismissal.

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OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

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

Specification 1: In that Second Lieutenant William J. Veal, Stuttgart Army Air Field, Stuttgart, Arkansas, did, at Stuttgart Army Air Field, Stuttgart, Arkansas, on or about March 14, 1943, with intent to deceive Major General Ralph Royce, officially report to the said Major General Ralph Royce, that he, the said Second Lieutenant William J. Veal, was on said date indebted to Craig Field Exchange in the sum of $32.95, to Rosing Jewelry Company in the sum of $51.70, and to Standard Oil Company in the sum of $41.88, and that his only other outstanding debt was to Dodd Jewelry Company in the sum of $75.00, which report was known by the said Second Lieutenant William J. Veal to be untrue in that on said date he was in fact indebted to said Craig Field Exchange, Craig Field, Alabama, in the sum of $57.95, and to said Standard Oil Company of New Jersey, Columbia, South Carolina, in the sum of $109.68, and in that on said date he was also indebted to First Lieutenant Peter B. Venable, Blytheville Army Air Field, Blytheville, Arkansas, in the sum of $75.00, and to Crowe Drug Company, Incorporated, Stuttgart, Arkansas, in the sum of $5.00, and to Floyd A. Denman, Stuttgart, Arkansas, in the sum of $16.00, and to the Aug. W. Smith Company, Spartanburg, South Carolina, in the sum of $56.19, and to Mary B. Alpert, Sumter, South Carolina, in the sum of $32.35, and to

Westmoreland Kennels, Dallas, Texas, in the sum of $25.00, and to Hotel DeGink, Army Air Forces Servicing Detachment, Lambert Field, Missouri, in the sum of $15.00, and to Arkansas Power & Light Company, Stuttgart, Arkansas, in the sum of $3.89.

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

Specification 3: In that Second Lieutenant William J. Veal, Stuttgart Army Air Field, Stuttgart, Arkansas, did, at Stuttgart, Arkansas, on or about March 16, 1943, with intent to defraud, wrongfully and unlawfully make and utter to 555 Service Station, Stuttgart, Arkansas, a certain check, in words and figures as follows, to-wit:

"SAN ANTONIO March 16, 1943 No. 8

30-65
NATION BANK OF FORT SAM HOUSTON
at San Antonio

PAY TO THE ORDER OF - -555 Service Station — $10.00
- - - Ten and no/100- - - - - - DOLLARS

(Signed) William J. Veal",

and by means thereof, did fraudulently obtain from said 555 Service Station, merchandise and currency of the United States, all of the value of about $10.00, he the said Second Lieutenant William J. Veal, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston for the payment of said check.

Specification 4: In that Second Lieutenant William J. Veal, Stuttgart Army Air Field, Stuttgart, Arkansas, did, at Stuttgart, Arkansas, on or about March 20, 1943, with intent to defraud, wrongfully and unlawfully make and utter to 555 Service Station, Stuttgart, Arkansas, a certain check, in words and figures as follows, to-wit:

"SAN ANTONIO, TEXAS March 20, 1943 No. 9

30-65
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

PAY TO THE ORDER OF * - 555 Service Station - - $50.00
Fifty and no/100- - - DOLLARS

(Signed) William J. Veal",

and by means thereof, did fraudulently obtain from said 555 Service Station currency of the United States, of the value of about $50.00, he, the said Second Lieutenant William J. Veal, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston for the payment of said check.

Specification 5: In that Second Lieutenant William J. Veal, Stuttgart Army Air Field, Stuttgart, Arkansas, did, at Stuttgart, Arkansas, on or about March 24, 1943, with intent to defraud, wrongfully and unlawfully make and utter to 555 Service Station, Stuttgart, Arkansas, a certain check, in words and figures as follows, to-wit:

" 30-65 SAN ANTONIO, TEXAS March 24, 1943 No. 13
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

PAY TO THE ORDER OF -- 555 Service Station $20.00
Twenty and no/100 - - - - - - - - - - - - - DOLLARS

(Signed) William J. Veal",

and by means thereof, did fraudulently obtain from said 555 Service Station merchandise and currency of the United States, all of the value of about $20.00, he, the said Second Lieutenant William J. Veal, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston for the payment of said check.

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

Specification 1: In that Second Lieutenant William J. Veal, Stuttgart Army Air Field, Stuttgart, Arkansas, being indebted to First Lieutenant Peter B. Venable in the sum of $75.00, for money borrowed by him, the said Second Lieutenant William J. Veal, from the said First Lieutenant Peter B. Venable, which amount became due and payable on or about November 25, 1942, did, at Stuttgart Army Air Field, Stuttgart, Arkansas, from November 25, 1942, to March 28, 1943, dishonorably fail and neglect to pay said debt.

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Second Lieutenant William J. Veal, Stuttgart Army Air Field, Stuttgart, Arkansas, did, at Stuttgart, Arkansas, on or about March 25, 1943, with intent to defraud, wrongfully and unlawfully make and utter to McCallister Motor Company, Stuttgart, Arkansas, a certain check, in words and figures as follows, to-wit:

"SAN ANTONIO, TEXAS, March 25, 1943, No. 15

NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay to the order of McCallister Motor Co. - $10.00
Ten and no/100 - - - - - - - - - - - - - - - - - - - Dollars

(Signed) William J. Veal"

and by means thereof, did fraudulently obtain from said McCallister Motor Company currency of the United States and merchandise, all of the value of about $10.00, he, the said Second Lieutenant William J. Veal, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston for the payment of said check.

Specification 3: In that Second Lieutenant William J. Veal, Stuttgart Army Air Field, Stuttgart, Arkansas, did, at Stuttgart, Arkansas, on or about March 29, 1943, with intent to defraud, wrongfully and unlawfully make and utter to McCallister Motor Company, Stuttgart, Arkansas, a certain check, in words and figures as follows, to-wit:

"SAN ANTONIO, TEXAS, March 29, 1943, No. 18

NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay to the order of McCallister Motor Co. - $53.20
Fifty-three and 20/100- - - - - - - - - - - - - - -DOLLARS

(Signed) William J. Veal"

and by means thereof, did fraudulently obtain from said McCallister Motor Company $50.00 lawful money of the United States, and merchandise and services of the value of about $3.20, he, the said Second Lieutenant William J. Veal, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston for the payment of said check.

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

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

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1 of Additional Charge I. He was found guilty of the remaining Charges and Specifications except, (a) with reference to Specification 1, Charge I, the words "Aug. W. Smith Company, Spartanburg, South Carolina, in the sum of $56.19, and to" and the words "$3.89", substituting therefor the words "$6.99"; (b) with reference to Specification 2, Charge I, the words "Pay to the order of Westmoreland Kennels", substituting therefor the words "Pay to the order of Omer Charter"; (c) with reference to Specification 1, Charge II, the words "March 28, 1943", substituting therefor the words "March 20, 1943". Evidence of one previous conviction for making a false official statement, for dishonorably failing and neglecting to pay debts, and for making and uttering checks with insufficient funds in bank, all in violation of Article of War 96, was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specification 2, Charge I and of Additional Charge II and its Specification, approved the sentence and forwarded the record for action under Article of War 48.

3. For the prosecution:

With reference to Specification 1, Charge I it was shown by competent evidence that on or about 14 March 1943 accused officially reported in writing to Major General Ralph Royce that his only outstanding debts at that time were:

Craig Field Exchange	$32.95	
Rosing Jewelry Company	$51.70	
Standard Oil Company	$41.88	
Dodd Jewelry Company	$75.00	(Incl. 2 of Ex. 1)
Total	$201.53	

Contrary to this report it was shown that accused was indebted as follows:

Craig Field Exchange	$ 57.95	(R. 70; Ex. 18)
Standard Oil Company	$109.68	(R. 70; Ex. 19)
First Lt. Peter B. Venable	$ 75.00	(R. 24)
Crowe Drug Company, Inc.	$ 5.00	(R. 26; Ex. 6)
Floyd A. Denman	$ 16.00	(R. 27; Ex. 7)
Mary B. Alpert	$ 32.35	(R. 70; Ex. 20)
Westmoreland Kennels	$ 25.00	(R. 70; Ex. 21)
Hotel DeGink	$ 15.00	(R. 70; Ex. 22)
Arkansas Power and Light Co.	$ 6.99	(R. 30-33)
Total	$342.97	

With reference to Specifications 3, 4 and 5 of Charge I and Specifications 2 and 3 of Additional Charge I it was shown by competent evidence that on the following dates, in the amounts and at the places indicated, accused made and issued checks drawn on the National Bank of Fort Sam Houston when he did not have sufficient funds deposited therein for the payment of the checks. All of these checks were returned by the bank to the depositor or recipient marked "not sufficient funds." At the time accused issued each check listed below he received cash, merchandise or other things of value in exchange.

	Date	Payee	Amount	Obtained	
Charge I Spec. 3	16 March 1943	555 Service Station Stuttgart, Arkansas	$10.00	Cash & Merchandise	(R. 34) (Ex. 10)
Spec. 4	20 March 1943	555 Service Station Stuttgart, Arkansas	$50.00	Cash	(R. 35) (Ex. 11)
Spec. 5	24 March 1943	555 Service Station Stuttgart, Arkansas	$20.00	Cash & Merchandise	(R. 35) (Ex. 12)
Add. Chg. I Spec. 2	25 March 1943	McCallister Motor Co.	$10.00	Cash & Merchandise	(R. 38) (Ex. 14)
Spec. 3	29 March 1943	McCallister Motor Co.	$53.20	$50 cash $3.20 labor	(R. 38) (Ex. 20)

The deposition of the cashier of the National Bank of Fort Sam Houston was admitted in evidence (R. 71; Ex. 23) to which was attached a copy of accused's account with the bank from 1 April 1942 to 18 May 1943. This account shows that during the period of 13 November 1942, the date of the check given by accused to Mary B. Alpert (R. 70; Ex. 20), until 29 March 1943, when the last of the checks enumerated in the Specifications was given, there were 8 instances when the account was overdrawn; 33 instances of checks returned for insufficient funds; and that at no time prior to 3 March 1943 did the account have more than $53.53 on deposit. The account also showed the daily balance of the accused and corroborated the insufficiency of the funds to pay the checks described in the Specifications.

With reference to Specification 1 of Charge II, First Lieutenant Peter B. Venable testified that about 25 July 1942 he loaned the accused $75 at the latter's request and upon his promise that it would be repaid in three or four months (R. 20). In December 1942 Venable requested payment and accused gave him his check for $75, drawn on the National Bank of Fort Sam Houston, which, when presented for payment, was returned for insufficient

funds (R. 22). On 9 January 1943 Venable telephoned accused who told Venable to present the check for payment again. Payment was again refused by the bank. On 16 January Venable again telephoned accused who said he had moved his bank account to Little Rock and would take care of the obligation. He failed to do so. Venable contacted accused again on 10 March by telephone and by letter on 13 March (R. 23; Ex. 4). In the latter part of March he received payment by a money order (R. 24).

4. For the Defense:

Accused having been advised of his rights elected to testify in his own behalf. The substance of his testimony was that he entered the service practically out of school with no financial experience. He was an enlisted man for 15 months and then a flying cadet during which time he had no financial troubles. In January, 1943, he turned $100 over to Major Donald T. Jones to apply to his debts but Major Jones turned it over to the adjutant who was taken sick and placed in a hospital. The $100 was in the headquarters' safe, but was not found there until some time later. The time was not established (R. 74-75).

The presence of the money in the safe was corroborated by First Lieutenant Clorval A. Cook (R. 72), and Lieutenant Colonel Hugh P. Avent (R. 78). It was not, however, sufficient to cover his obligations (R. 78).

The accused admitted that he knew how wrong it was to issue the various checks but pleaded that if the Charges were dropped his wife would assume the obligation and pay them out of an allotment that he would make of his pay. He requested that he be transferred to combat duty. He claimed that inasmuch as he had had over three years' military experience he was of value to his country and would be a credit to the service (R. 75).

5. Specification 1 of Charge I alleges that accused made a false official statement when he officially reported in writing that his only creditors were five in number and his outstanding debts totaled $201.53, when as a matter of fact his creditors were 9 in number and the amount due them totaled at least $342.97. It was clearly shown that on 9 March 1943, Major General Royce requested a complete statement from the accused outlining his overdue indebtedness as of 10 March, 1943. The accused in response to the request had prepared and signed a statement setting forth the names of five creditors and that the total amount due them was $201.53. The prosecution proved beyond a doubt that in addition to the creditors listed in the statement accused was also indebted at that time to numerous other creditors to whom the accused was indebted for at least $342.97. The accused's official statement was therefore false.

Making a false official statement has long been considered a violation of Article of War 95 (M.C.M., par. 151, p. 186; CM 220269; Dig Op. J.A.G. 1912-40; sec. 453 (18)).

Specifications 3, 4, and 5 of Charge I and 2 and 3 of Additional Charge I allege that accused upon five different occasions in March 1943 gave his check on a bank where he knew, or reasonably should have known,

there were no funds to meet it, and did thereby defraud the person from whom he obtained cash or merchandise in exchange for the worthless check, in violation of Article of War 95. The prosecution proved that the accused gave his check upon the five different occasions during March 1943 in varying amounts to various persons and received cash or some other thing of value in exchange. At the time there were not sufficient funds in the bank upon which the checks were drawn to meet the checks. The bank statement or account covering a period of two years clearly shows that the accused should have known that there were no funds in the bank to meet these checks. It shows that he had overdrawn his account at least five times; that he had given checks on this account which had been presented and dishonored for insufficient funds upon thirty-three different occasions during this period of time; and that at no time did he have a substantial deposit. The evidence was therefore sufficient to sustain the findings that the accused gave his checks to the persons named and in amounts alleged in the Specifications enumerated above at a time when he did not have and must have known that he did not have sufficient funds in the bank upon which the checks were drawn for the payment of the checks, and did thereby fraudulently obtain cash and merchandise. Fraudulently passing worthless checks is a violation of Article of War 95 (Dig. Op. J.A.G. 1912-40 par. 453 (21)).

The Specification of Charge II alleges that the accused was indebted to First Lieutenant Peter B. Venable in the sum of $75 which became due and payable on or about 25 November 1942, and that from that date until 28 March 1943 he did dishonorably fail and neglect to pay this debt.

It was clearly shown that accused borrowed $75 from Lieutenant Venable about 25 July 1942, promising to repay this amount in three or four months. He failed and neglected to pay it as agreed. When Lieutenant Venable requested payment in December 1942 accused gave him a worthless check for $75. The statement of accused's bank account shows that during the month of November 1942 the account was overdrawn. During December 1942 his largest balance was $46.43. The check was returned by the bank upon which it was drawn. In January accused told Lieutenant Venable to again present the check for payment. At that time his bank balance was $4.68, so that the accused must have known that the check was still worthless. Later on in January accused told Lieutenant Venable that the reason the check was dishonored was because he had transferred his account. This was not true as shown by continuation of the account. Accused continued to ignore the indebtedness until the middle of March when he was more or less compelled to make payment in a vain effort to avoid the institution of these charges. It was therefore clearly shown that the accused not only failed and neglected to pay this obligation, but also, when pressed for payment he dishonorably failed and neglected to pay it by giving a worthless check in payment and insisting that the check was valid when he knew such was not the case. The dishonorable failure and neglect to pay a debt characterized by a fraudulent design to evade payment constitutes a violation of Article of War 95 (CM 220760; CM 228894). As

such conduct brings discredit upon the military service it also violates the 96th Article of War (Dig. Op. J.A.G. 1912-40; Sec. 454 (46)). The findings of guilty of the Specification of Charge II and of Charge II in violation of Article of War 96 is therefore sustained by the evidence.

6. War Department records show that accused is 23 years of age. He graduated from high school. He enlisted on 3 January 1940 and was discharged on 14 March 1941 to reenlist as a flying cadet. Upon completion of the course of instruction at the Air Corps Advanced Flying School, Craig Field, Alabama, he was appointed as second lieutenant, Air Reserve, on 31 October 1941. He entered on active duty on 1 November 1941.

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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95.

William A. Bounds, Judge Advocate

Paul Stephens, Judge Advocate

Herbert B. Fredrick, Judge Advocate

(40)

SPJGQ
CM 236509

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 Second Lieutenant William J. Veal (O-428781), 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 thereof. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to the attached letter from Senator Burnet R. Maybank to Major General James A. Ulio, dated 22 June 1943.

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.

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. USW.
Incl 3 - Form of action.
Incl 4 - Ltr. from Senator Maybank to Maj. Gen. James A. Ulio.

(Sentence confirmed. G.C.M.O. 216, 4 Sep 1943)

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

SPJGH
CM 236530

2 - AUG 1943

UNITED STATES	)	90TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Barkeley, Texas, 4 June 1943. Dismissal, total forfeitures, and confinement for three (3) years.
Second Lieutenant JOHN K. ROBSON (0-1166167), Field Artillery.	)	

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 61st Article of War.

Specification: In that Lt. John K. Robson, Battery A, 915th Field Artillery Battalion, did, without proper leave, absent himself from his station at Camp Barkeley, Texas, from about Feb. 1, 1943, to about March 24, 1943.

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

Specification 1: (Nolle prosequi entered).

Specification 2: In that 2nd Lieutenant John K. Robson, Battery A, 915th Field Artillery, did, at Lawton, Oklahoma, on or about Dec. 9, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Bryan's Coffee Shop, a certain check, in words and figures as follows, to wit:

Lawton, Okla., Dec. 9 1942 No. 6

THE CITY NATIONAL BANK

Pay to the order of Bryan's Coffee Shop $ 10.00

Exactly Ten and no/100 DOLLARS

Lt. John K. Robson
C - 26 - 6

and by means thereof did fraudulently obtain from the said Bryan's Coffee Shop, the sum of $10.00, lawful money of the United States, he, the said Lt. Robson, then well knowing that he did not have and not intending that he should have any account with the City National Bank, at Lawton, Okla., for payment of said check.

Specification 3: (Nolle prosequi entered).

Specification 4: Same form as Specification 2; but alleging check dated 24 December 1942, for $25, drawn on The City National Bank, Lawton, Oklahoma, to Camp Barkeley Exchange, at Camp Barkeley.

Specification 5: Same form as Specification 2; but alleging check dated 28 December 1942, for $25, drawn on The City National Bank, Lawton, Oklahoma, to Camp Barkeley Post Exchange, at Camp Barkeley.

Specification 6: Same form as Specification 2; but alleging check dated 31 December 1942, for $10, drawn on The City National Bank, Lawton, Oklahoma, to Hilton Hotel, at Abilene, Texas.

Specification 7: Same form as Specification 2; but alleging check dated 31 December 1942, for $20, drawn on The City National Bank, Lawton, Oklahoma, to Private First Class E. Carpio, at Camp Barkeley.

Specification 8: Same form as Specification 2; but alleging check dated 8 February 1943, for $25, drawn on Citizens National Bank, Abilene, Texas, to Adolphus Hotel, at Dallas, Texas.

Specification 9: Same form as Specification 2; but alleging check dated 8 February 1943, for $50, drawn on Citizens National Bank, Abilene, Texas, to Adolphus Hotel, at Dallas, Texas.

Specifications 10-15: (Nolle prosequi entered).

Specification 16: Same form as Specification 2; but alleging check dated 20 February 1943, for $25, drawn on Citizens National Bank, Abilene, Texas, to Kemp Hotel, at Wichita Falls, Texas.

Specifications 17-20: (Nolle prosequi entered).

Specification 21: Same form as Specification 2; but alleging draft dated 25 February 1943, for $25, drawn on Citizens National Bank, Abilene, Texas, to Rice Hotel, at Houston, Texas.

Specification 22: Same form as Specification 2; but alleging draft dated 26 February 1943, for $25, drawn on Citizens National Bank, Abilene, Texas, to Rice Hotel, at Houston, Texas.

Specification 23: Same form as Specification 2; but alleging draft dated 27 February 1943, for $25, drawn on Citizens National Bank, Abilene, Texas, to Rice Hotel, at Houston, Texas.

Specifications 24-25: (Nolle prosequi entered).

Specification 26: Same form as Specification 2; but alleging draft dated 3 March 1943, for $25, drawn on Citizens National Bank, Abilene, Texas, to Texas State Hotel, at Houston, Texas.

Specification 27: Same form as Specification 2; but alleging draft dated 4 March 1943, for $40, drawn on Citizens National Bank, Abilene, Texas, to Stephen F. Austin Hotel, at Austin, Texas.

Specification 28: Same form as Specification 2; but alleging draft dated 4 March 1943, for $50, drawn on Citizens National Bank, Abilene, Texas, to Stephen F. Austin Hotel, at Austin, Texas.

Specifications 29-30: (Nolle prosequi entered).

Specification 31: Same form as Specification 2; but alleging draft dated 10 March 1943, for $25, drawn on Citizens National Bank, Abilene, Texas, to New Crosby Hotel, at Beaumont, Texas.

Specifications 32-42: (Nolle prosequi entered).

Specification 43: Same form as Specification 2; but alleging check dated 19 March 1943, for $25, drawn on Citizens National Bank, Abilene, Texas, to "Cash" (The First State Bank), at Uvalde, Texas.

Specifications 44-48: (Nolle prosequi entered).

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specifications. He was found guilty of all Charges and Specifications, and was sentenced to be dismissed "from the service of the United States", to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of ten years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for three years, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

a. Charge I: Morning report of Battery A, 915th Field Artillery Battalion (Ex. B) shows the accused from leave to absent without leave, 1 February 1943, and from absent without leave to confinement in Camp Barkeley Stockade, 25 March 1943. It was stipulated (Ex. A) that the accused was returned to military control on or about 24 March 1943 (R. 33-37).

In a statement (Ex. C) made by the accused to Captain James D. Richter, investigating officer, after he was advised that he need make no statement, and that any statement he made could be used against him, the accused stated that he had a ten day emergency leave on account of illness of his mother and his grandfather, was granted a three day extension, his grandfather died, the accused telephoned for a ten day extension and the Red Cross investigated and joined in the request but he heard nothing from it. He took his girl home, came to Abilene and found that the 90th had already gone, started to Lake Charles to find the division, met a friend in Houston, and started drinking. He stated that he remembered "lots of things", then did not know what happened, sobered up about two weeks before the trial, started back to join his organization, and was picked up by MPs. In another statement made to Captain Richter (Ex. D), the accused stated "in reference to movements while A.W.O.L." that he went from "here to Marlow", then to Oklahoma City,

by plane to Pittsburgh, Pennsylvania; at the end of ten days leave he was granted a three day extension; after the death of his grandfather he applied for a further extension, which was not granted, the Red Cross investigated and requested extension for him but he heard nothing from it; after the funeral he left Pittsburgh, returned to Abilene, found the 90th had gone, started to Louisiana, met a friend, was worried "about this mess I was in" and started drinking. He vaguely remembered different things after this, sobered up in Del Rio, started back to Camp Barkeley, and was picked up by the Military Police (R. 37-44, 48-49).

b. Charge II: In his second statement made to Captain Richter (Ex. D), the accused admitted that he signed the 48 checks shown to him, and made statements with reference to the checks covered by Specifications on which he was tried, as follows: he passed check marked No. 2, to Bryan's Coffee Shop and received $10; passed No. 4 to Camp Barkeley Exchange and received $25; passed No. 5 to Camp Barkeley Post Exchange and received $25; passed No. 6 to Hilton Hotel and received $10; passed No. 7 to Private First Class E. Carpio and received $20; passed No. 8 to Adolphus Hotel and received $25; did not remember the details about Nos. 9, 16, 21, 22, 23, 26, 27, 31, and 43, but identified his signature thereon; and did not remember receiving cash on No. 28 but remembered paying a hotel bill with it. (The checks referred to are numbered to correspond with Specifications under Charge II). Captain Richter identified the several checks which had been submitted to the accused, as referred to above, and they were introduced in evidence as follows: Check No. 2 (Ex. E-1), No. 4 (Ex. E-2), No. 5 (Ex. E-3), No. 6 (Ex. E-4), No. 7 (Ex. E-5), No. 8 (Ex. E-6), No. 9 (Ex. E-7), No. 16 (Ex. E-8), No. 21 (Ex. E-9), No. 22 (Ex. E-10), No. 23 (Ex. E-11), No. 26 (Ex. E-12), No. 27 (Ex. E-13), No. 28 (Ex. E-14), No. 31 (Ex. E-15), and No. 43 (Ex. E-16) (R. 44-47, 49-51).

Mrs. W. C. Bryan, cashier of Bryan's Coffee Shop, Lawton, Oklahoma, about 9 December 1942, cashed a $10 check, marked No. 2 for the accused. The check was written by the accused in her presence, was turned down by the bank, and had not since been paid by the accused. Mr. B. D. Appleton, manager of Post Exchange No. 8, Camp Barkeley, identified a check (Ex. E-2) that had passed through Post Exchange No. 11, and cashed for the accused, or accepted for merchandise, another check (Ex. E-3). These checks (Exs. E-2 and E-3) were returned to the cashier of Post Exchange, Camp Barkeley, unpaid, and had not since been paid. About 8 February 1943, Mr. R. G. Dillard, credit manager of Adolphus Hotel, Dallas, Texas, cashed a $25 check, marked No. 8, and a $50 check, marked No. 9, for the accused. These checks were not paid by the bank, nor since by the accused. Mr. C. S. Cate, manager of

Kemp Hotel, Wichita Falls, Texas, about 20 February 1943 cashed a $25 check, marked No. 16 for the accused, which check was not paid by the bank, nor since by the accused. Mr. T. N. Hostetter, credit manager of Rice Hotel, Houston, Texas, between 25 February and 1 March 1943, "O.K.'d for payment" and the accused cashed three checks for $25 each marked Nos. 21, 22, and 23, which were not paid by the bank, nor since by the accused. Mr. Dave Hubbard, assistant manager of Texas State Hotel, Houston, Texas, about 3 March 1943, cashed a $25 check, marked No. 26 for the accused, which check was not paid by the bank, nor since by the accused. Mr. H. A. Wyche, assistant manager of Stephen F. Austin Hotel, Austin, Texas, about 4 March 1943, cashed a $40 check, marked No. 27, and a $50 check, marked No. 28, for the accused, which checks were not paid by the bank, nor since by the accused. Lena Jordan, auditor of New Crosby Hotel, Beaumont, Texas, about 10 March 1943, cashed a $25 check, marked No. 31 for the accused, which was not paid by the bank nor since by the accused. Mr. C. C. Ham, cashier of First State Bank, Uvalde, Texas, about 19 March 1943, cashed a $25 check, marked No. 43 for the accused, which check was not paid by the drawee bank, nor since by the accused. It was stipulated (Ex. A) that photographs attached to the several depositions were of the accused and that photostatic copies of checks attached thereto were true copies of original checks correspondingly numbered and shown to the accused by the investigating officer (R. 33-34, 56-63; Exs. F-1, F-3, F-4, F-5, F-6, F-7, F-8, F-9).

The drawee banks on the several checks (Exs. E-1 to E-16) were The City National Bank, Lawton, Oklahoma, and Citizens' National Bank, Abilene, Texas. Subsequent to 7 November 1942 the accused had no account with The City National Bank, Lawton, Oklahoma, and checks marked Nos. 2, 4, 5, 6 and 7, were presented to the bank and not paid because the accused had no checking account nor credit arrangements. The accused did not have an account of any kind with The Citizens National Bank, Abilene, Texas, and did not open an account, although he may have come there to make arrangements to open an account. Certain checks (Exs. E-6 to E-16) were turned down by that bank because the accused had no account (R. 52-55, 60; Ex. F-2).

In the statements made to Captain Richter (Exs. C and D) the accused stated that he had made arrangements to pay the checks through a loan from the Red Cross to his grandmother, that he remembered some of the checks, that he "didn't write any" checks "only on the Citizens National", that at the time he made and passed checks drawn on The City National Bank he had an account there which he thought sufficient to cover the checks drawn, that he had signed a "depositor's card" and a "release of check from finance card" at Citizens National Bank the day he went on leave and an official of the bank said "he would check with Finance to see that

my check would be deposited there", and that after he started drinking he wrote some checks on the bank where he thought he had some money, but did not know how many nor for how much (R. 40-42, 47-48).

4. The accused testified that about 12 January 1943 he requested leave on account of the illness of his mother and grandfather, was granted ten days leave on that date (Def. Ex. 1), was granted three days additional leave (Def. Ex. 2), his grandfather died before the additional leave was up, he telephoned for an extension of leave, which was not granted, the Red Cross investigated and wired his commanding officer that the presence of the accused was absolutely necessary, but received no notice of extension of his leave. On the night of 28 January he left by train for Camp Barkeley and at that time thought he was "AWOL". Later he learned from the investigating officer that by telegraphed order of 26 January 1943, confirmed by Special Orders No. 2, 31 March 1943 (Def. Ex. 3), he had been granted six days extension of leave. He arrived at Abilene, Texas early on the morning of 1 February and learned that the 90th Division had gone to Leesville, Louisiana. He still thought he was absent without leave, but wanted to rejoin his unit, and started for Louisiana by bus and plane. He was displaced on the plane at Houston, Texas, by a passenger with priority, and while waiting there for the next plane met an old acquaintance and began drinking. At a later date another friend met him at Eagle Pass and sobered him up, and the accused started back to his unit. During the period between the time he met a friend in Houston and the time that he sobered up in Eagle Pass, over a month, the accused was drunk and he had "just kind of a hazy recollection of doing things" (R. 64-71).

5. The evidence shows that the accused was absent without leave from 1 February to 24 March 1943. The pleas of guilty and the evidence show that from 9 December 1942 to 19 March 1943, accused drew and cashed 16 checks, aggregating in amount $430, all of which were drawn on banks in which he had no checking account. In each instance he obtained money from the person cashing the check in the amount for which the check was drawn.

The cashing of checks under these conditions was fraudulent and dishonest. The evidence clearly warrants the conclusion that the accused knew that he had no account out of which the checks might be paid and that he intended to defraud the persons who cashed the checks. The Manual for Courts-Martial, in stating instances of violation of the 95th Article of War, includes giving a check on a bank where the drawer knows or reasonably should know there are no funds to meet it, and without intending that there should be (MCM, 1928, par. 151).

6. Careful consideration has been given to letter of 27 June 1943 from the mother of the accused to Honorable Cordell Hull, with attached copy of letter of 6 May 1943 from Colonel H. A. Finch, Camp Commander, Camp Barkeley, Texas, letter of 6 July 1943 from Honorable Hatton W. Sumners to the Secretary of War, and letter of 7 July 1943 from Honorable Francis E. Walter to The Adjutant General.

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 18 June 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 30 June 1942.

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

Lutz S. Bickel, Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, 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 Second Lieutenant John K. Robson (0-1166167), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence, and to warrant confirmation of the sentence. The accused was absent without leave for about 52 days, and made and uttered with intent to defraud 16 checks aggregating in amount $430, all drawn on banks in which he had no checking account. I recommend that the sentence 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 the signature of the Under Secretary of War, 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. Under Sec. of War.
Incl.3- Form of action.

(Sentence confirmed but two years of confinement remitted. G.C.M.O. 231, 11 Sep 1943)

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

SPJGQ
CM 236547

- 9 JUL 1943

UNITED STATES	GREENLAND BASE COMMAND
v.	Trial by G.C.M., convened at APO #858, c/o Postmaster, New York, N.Y., 27 April 1943. Dishonorable discharge and confinement for four (4) years.
Private GORDON F. KILLIAN (37276737), Company "B", 73rd Infantry Battalion (Sep).	

HOLDING by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 93rd Article of War.

Specification 1: In that Gordon Killian, Pvt, Co "B" 73rd Inf Bn (Sep), APO #858 c/o Postmaster, New York, N.Y., did at Section #1, APO #858 c/o Postmaster, New York, N.Y., on or about March 19, 1943, with intent to do bodily harm commit an assault upon Eino J. Haataja, T/4th Gr, 6935363, Co "B" 73rd Inf Bn (Sep), by striking him on the head with a dangerous weapon, to wit a chair.

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

Specification 1: In that Gordon Killian, Pvt, Co "B" 73rd Inf Bn (Sep), APO # 858, c/o Postmaster, New York, N.Y., having received a lawful order from Ralph C. Sheldon, Sgt, 17018813, Co "B" 73rd Inf Bn (Sep), APO #858 c/o Postmaster, New York, N.Y., a non-commissioned officer, who was there in the execution of his office to "go to the Power House and stop fighting", did at Section #1, APO #858 c/o Postmaster, New York, N.Y., on or about the 19th day of March, 1943, willfully disobey the same.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced.

He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for four years. The reviewing authority approved the sentence and forwarded the record for action pursuant to Article of War 50½.

3. The pertinent evidence for the prosecution shows that on the evening of 19 March 1943 Sergeant Eino J. Haataja was in his room in the barracks of Company B, 73rd Infantry Battalion, and, hearing an argument going on between two enlisted men outside of his door, went out and ordered those involved to be quiet. He was ignored. He thereupon went to the officers' quarters and got Lieutenant Woods to come to the barracks. Lieutenant Woods ordered everyone to their beds and the barracks became quiet. Sergeant Haataja shortly thereafter was talking to Private Horn about in the middle of the barracks opposite the door when he was struck on the back of the neck. He was forced to a kneeling position by the blow and was dazed. He looked up and saw a steel folding chair coming at him so put up his hand and stopped it. It looked like a chair to him but he was not certain (R. 5). It was the accused who, he said, attempted to hit him with the chair (R. 5). He could not recall how many blows were struck with the chair. He just "saw the chair coming down once". He did not show or complain of any wound or injury caused by the chair. He did not himself state that the chair even struck him. "The next thing I remember the chair was coming toward me. I tried to avoid it" (R. 7). Asked if he saw a steel chair descending toward him which he attempted to ward off with his hand, "Is that correct?" He replied, "Yes, Sir" (R. 8).

Staff Sergeant Hubert M. Dunn was asleep in the barracks and awoke when Sergeant Haataja fell to the floor. The accused "struck him (Haataja) with the chair, as he tried to make it to the door". Haataja's fall was caused by accused striking him with his fists. Dunn could not state that accused attempted to hit him (Haataja) on the head with the chair - he struck at him with the chair and the blow was caught with the wrist or hand (R. 9).

Private George Martin testified that after he knocked Sergeant Haataja down, accused picked up a steel folding chair and "seemingly attempted to strike" Haataja with it. The latter raised his arm and warded off the blow. Martin described the swinging of the chair as a "half hearted" one (R-12). On cross-examination he said it was difficult to answer the question whether or not the accused was merely moving the chair out of the way (R-12).

4. The accused elected to remain silent.

5. The Specification of Charge I alleges that the accused struck Haataja "on the head with a dangerous weapon, to wit a chair". There was no evidence whatsoever in the record that Haataja was struck on the head with a chair. Nor is a chair a dangerous weapon per se. It, however may be converted into one depending upon the manner in which it is used and the result obtained.

That an assault and battery took place cannot be denied. The degree of the assault is important because an assault may fall into one of three classes: (1) simple assault and battery under Article of War 96, the limit of the confinement of the punishment of which is six months; (2) assault with intent to do bodily harm under Article of War 93, the limit of confinement of the punishment of which is one year; (3) assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, the limit of confinement of the punishment of which is five years. The accused was charged with and convicted of the assault in the third category, assault with a dangerous weapon.

In order to bring the assault within the last class of assault it is incumbent upon the prosecution to prove that the accused intended to inflict great bodily harm upon his victim and in doing so used a dangerous weapon or some other object or thing in such a manner that it constituted a dangerous weapon. Assault with intent to do bodily harm is classified under Article of War 93 with the serious crimes of manslaughter, arson, robbery, larceny and other felonies. The bodily harm intended is serious or great bodily harm. The proof required is set forth in the Manual for Courts-Martial, par. 149m, p. 180 as follows: "(a) That the accused assaulted a certain person with a certain weapon * *; and (b) the facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or <u>great bodily harm</u>".

The intent to do great bodily harm may be inferred from the nature of the weapon or the manner in which the weapon or other thing is used or from the seriousness of the resulting injury. If the assailant uses a knife, a loaded firearm, or some other weapon dangerous <u>per se</u>, in such a manner as to show an intent to injure another, the inference is clear that he intends great bodily harm with a dangerous weapon. The seriousness of the resulting injury is not a determining factor. CM 191876; CM 144295. That type of case falls within the third class of assaults described above. Even in such a case there must be shown at least an attempt to actually harm the intended victim with the weapon employed. CM 231675; CM 209862. Where, however, something other than a dangerous weapon <u>per se</u> is used, then it must be shown that the object used was used in such a manner as to be a dangerous weapon. This is best shown by the seriousness of the injury.

In the following cases various objects were used by the assailant which were not weapons <u>per se</u> but the victims sustained serious head injuries and the objects were held to be dangerous weapons: CM 170728, a bottle; CM 210965, a rock; CM 188152, a sugar bowl; CM 155377, a piece of pipe; CM

172101, a piece of wood.

In the subject case the chair was not a dangerous weapon per se. No injuries resulted from the assault. The only remaining evidence then to support a finding of intent to do great bodily harm is that pertaining to the manner in which accused swung the chair.

The evidence on this subject is very conflicting. The victim himself was dazed by previous blows from the fist and could not give a clear picture of what the accused did with the chair. All he saw was a steel chair descending toward him and he warded it off with his hand without injury even to his hand. Sergeant Dunn said the accused struck at Haataja with the chair, but could not say at what part of his body or his head. Nor did he describe how accused handled or swung the chair. Private Martin said accused swung the chair in a half-hearted manner and even intimated that he might have been moving it out of his way.

There is, therefore, no clear evidence of any intention to do Haataja great bodily harm. There was no evidence that accused used the chair as a dangerous weapon--that is, in such a way as to cause a serious injury. Apparently the fracas was a typical barracks brawl. In any event the prosecution did not sustain the burden of proof beyond a reasonable doubt that accused intended great injury to Haataja with the chair and therefore the assault falls into the first class described--namely a simple assault under Article of War 96.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of the lesser included offense of assault and battery in violation of Article of War 96, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for six months.

William F. Rounds, Judge Advocate

Earle E. Dunn, Judge Advocate

Herbert B. Fredman, Judge Advocate

1st Ind.
31 JUL 1943

War Department, J.A.G.O. - To the Commanding Officer, Greenland Base Command, APO 858, c/o Postmaster, New York, N. Y.

1. In the case of Private Gordon F. Killian (37276737), Company B, 73rd Infantry Battalion (Sep.), I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of Charge I and its Specification be approved as involve findings of guilty of the lesser included offense of assault with intent to do bodily harm, in violation of Article of War 93, and that so much of the sentence be vacated as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. Upon compliance with the foregoing recommendation you will have authority to order the execution of the sentence.

2. In view of the general nature of the disturbance involving other noncommissioned officers and enlisted men, it is recommended that the dishonorable discharge be suspended. It is noted that the action of the reviewing authority failed to designate a place of confinement. Accordingly, it is recommended that the Rehabilitation Center be designated as the place of confinement and that an amended general court-martial order be published in this case.

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

(CM 236547).

AUG 3 - 43 A.M.

T. H. Green,
Brigadier General, U. S. Army,
Assistant Judge Advocate General,
In charge of Military Justice.

1 Incl.
Record of trial.

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

SPJGK
CM 236555

23 AUG 1943

UNITED STATES	)	III CORPS
	)	
v.	)	Trial by G.C.M., convened at Camp Forrest, Tennessee, 4 June 1943. Dismissal.
	)	
Second Lieutenant FRANK JOHNSTON (0-1642238), Signal 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 Charges and Specifications:

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

Specification 1: In that Second Lieutenant Frank Johnston, Headquarters and Headquarters Company, 61st Signal Battalion, was, in a railway passenger car between Atlanta, Georgia, and Florence, South Carolina, on or about May 17, 1943, found drunk while on duty as commanding officer of a detail of enlisted men.

Specification 2: (Finding of Not Guilty).

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

Specification 1: In that Second Lieutenant Frank Johnston, Headquarters and Headquarters Company, 61st Signal Battalion, did, at Troy, North Carolina, on or about May 18, 1943, without authority, wrongfully take and use a motor vehicle commonly called a "jeep", value of over Fifty Dollars ($50.00) property of the United States.

Specification 2: (Finding of Not Guilty).

Specification 3: In that Second Lieutenant Frank Johnston, Headquarters and Headquarters Company, 61st Signal Battalion, did, in a railway passenger car between Atlanta, Georgia, and Florence, South Carolina, on or about May 17, 1943, gamble with enlisted men, including Staff Sergeant Leo E. Joines, Sergeant Fred Eugene Miller and Private First Class Leo V. Wallace, and others.

Specification 4: In that Second Lieutenant Frank Johnston, Headquarters and Headquarters Company, 61st Signal Battalion, did, on or about May 17, 1943, in a railway passenger car between Atlanta, Georgia, and Florence, South Carolina, drink intoxicating liquor with enlisted men, including Private First Class John W. Janas, Staff Sergeant Leo E. Joines, Sergeant Fred Eugene Miller, Private First Class Leo V. Wallace and others

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

3. The evidence for the prosecution showed that accused is a second lieutenant, Headquarters 61st Signal Battalion, Camp Forrest, Tennessee (R. 6). On 17 May 1943, pursuant to paragraph 13, Special Orders No. 134, Headquarters Camp Forrest, Tennessee, accused left Camp Forrest with a detail of 24 enlisted men. Accused was commanding officer of the detail. Their destination was Fort Bragg, North Carolina, where they were to receive a convoy of motor vehicles to be returned to Camp Forrest (R. 19, 20, 71; Ex. 1). The travel to Fort Bragg was by train. The first night, that of 17 May, was spent en route from Atlanta, Georgia, to Florence, South Carolina. The detail was in a day coach "cut off from the rest of the train". The door to the coach was locked to outsiders (R. 15, 18, 19). After the train left Atlanta it was observed that accused had two pints of whiskey (R. 16). He started drinking with enlisted men in the detail and became intoxicated (R. 6-8, 16-18, 26, 27, 36). Also during that night he played blackjack for money with some of the enlisted men (R. 7, 16, 26, 27, 35). Accused was in uniform (R. 25). Four enlisted men testified as to accused's condition. Three of them stated definitely that he was drunk. The fourth, Staff Sergeant Leo E. Joines, stated that accused was slightly intoxicated, that he looked

sleepy, that his judgment had become impaired, and that he was not in possession of his normal faculties, but the witness added "Under no circumstances do I believe the lieutenant was drunk" (R. 8, 17, 18, 27, 36). There was no disturbance in the car (R. 18). Accused was not "noisy" nor "boisterous" and "was most quiet" (R. 20, 39). On the overland trip from Fort Bragg to Camp Forrest the accused, accompanied by Technician Fifth Grade, Benjamin C. Whitney and two girls, drove an Army jeep to a park outside the city limits of the town of Troy in the State of North Carolina. This incident occurred on Tuesday night 18 May 1943 (R. 8-9, 14, 21-25, 27, 28, 71).

For the defense, three enlisted men testified that they did not see accused drinking on the train after leaving Atlanta, or playing cards. One of these witnesses, Private Oscar Schank, observed accused reading books in the front of the coach. This witness went to sleep early but he woke up five or six times during the night, walked to the front of the coach to get a drink, passed the seat of accused and observed him. He did not see the accused drink and did not believe that accused was intoxicated on those occasions (R. 49, 50, 53). Private Albert Ball stated that he sat toward the rear of the coach and that his view of the accused was obscured by a partition. He stated, however, that accused walked through the coach once in the early evening and appeared to be all right. Private First Class William Crofut stated that he sat near the accused until he (witness) went to sleep between 10:30 and 11:00 o'clock. Prior to that time he had the opportunity of observing the condition of accused. Witness stated that he had been a police officer for about six years before entering the Army. Based on this experience "witness would not say" that accused was drunk or under the influence of liquor (R. 59, 60). Master Sergeant Fred E. Miller stated that he was awake until midnight. He saw accused take two or three drinks. In the opinion of Sergeant Miller accused was sober and in full control of his faculties. He talked to accused before he (witness) "went to bed" (R. 63, 65, 67). Sergeant Miller stated that he saw accused take two or three drinks over a period of possibly three hours and that he had one drink with the accused. "The men would come up and ask him to have a drink. He turned down most of them" (R. 69).

Major William T. Davis, 61st Signal Battalion, commanding officer of accused, testified for the defense that he had had no complaints concerning the accused prior to this occasion and that accused's conduct had been excellent (R. 73, 74).

The accused testified that he had been in the Army since March 1941 and that he was commissioned a second lieutenant from the Officer Candidate School, Fort Monmouth, New Jersey. He admitted that he was in command of the detail as alleged and stated that before leaving Atlanta he purchased two pints of whiskey. He kept one pint for his own use and the other pint was "distributed around to the men" (R. 74-76).

He did not drink any whiskey that was offered him by members of the detail - the majority either had "scotch" (which he said he did not drink) or "cheap rye" (R. 83). He drank only from his own bottle and during the evening consumed half of a pint (R. 81-82). Accused very frankly admitted that he played cards and gambled with the enlisted men during the evening. He also stated that on the return trip at Troy, North Carolina, he used a Government jeep during the evening to check the town and keep an eye on the men and that later in the evening he drove two girls about a mile and a half out of town to a fire tower for what "was supposed to be a beautiful sight" (R. 77-78). Accused stated that two of the enlisted men who testified that he was drunk on the train had been disciplined by him for missing bed check during the trip (R. 79).

4. With respect to Specification 1, Charge I, it was proved and not denied, that at the time alleged the accused was in command of the detail of 24 enlisted men en route via train from Atlanta, Georgia and Fort Bragg, North Carolina. Three witnesses (enlisted men) testified that accused began drinking after accused left Atlanta and that accused during the night became drunk. Another witness (a staff sergeant) stated that accused was "slightly intoxicated" and as a result of this condition accused was not in possession of his normal faculties. This evidence, coupled with the admission of accused that he drank about one-half of a pint of whiskey, clearly supports the findings of guilty of Charge I and Specification 1 thereunder. The evidence in support of the other Charge and Specifications of which accused was found guilty, to wit, Charge II and Specifications 1, 3 and 4, alleging respectively, wrongful use of a Government jeep and gambling and drinking with enlisted men, in violation of Article of War 96, is too clear to warrant discussion.

5. Consideration has been given to two letters recommending clemency in behalf of the accused, one from Captain Roger A. Barker, Quartermaster Corps, and the other from Major Benjamin Axleroad, J.A.G.D., Camp Judge Advocate, Camp Forrest, Tennessee. These letters are dated 18 August 1943 and were transmitted through the Commanding General, III Corps, Fort McPherson, Georgia.

6. The accused is 24 years of age. He attended Baldwin (New York) High School three years but did not graduate. He attended Officer Candidate School, Fort Monmouth, New Jersey, from which he was commissioned a temporary second lieutenant, Signal Corps, Army of the United States, 19 January 1943. In recommending accused for Officer Candidate School his commanding officer stated that accused's 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 the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence 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 85.

[signature], Judge Advocate.

[signature], Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O. 30 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 Second Lieutenant Frank Johnston (O-1642238), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence, and to warrant confirmation thereof. Accused was not grossly drunk and created no disturbance. Under the circumstances 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 the attached letters from Captain Roger A. Barker, Q.M.C., counsel for accused, and Major Benjamin Axelroad, J.A.G.D., Camp Judge Advocate, Camp Forrest, Tennessee.

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,
Major General,
The Judge Advocate General.

5 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4-Ltr. fr. Capt. Roger A. Barker, QMC, 18 Aug. 43.
Incl.5-Ltr. fr. Maj. Benjamin Axelroad, JAGD, 18 Aug. 43.

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sentence confirmed but execution suspended. G.C.M.O. 262, 3 Sep 1943)

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

SPJGN
CM 236586

25 JUN 1943

UNITED STATES	)	SECOND ARMY
v.	)	Trial by G.C.M., convened at Lebanon, Tennessee, June 2, 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
Private HORACE J. RIGGS (38115518), Company D, 269th Quartermaster Battalion.	)	

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 64th Article of War.

Specification: In that Private Horace J. Riggs, Company D, 269th Quartermaster Battalion, having received a lawful command from 1st Lt. Henry Feinstein, his superior officer, to "March up the road and load the gasoline cans," did, at Scottsville, Kentucky, on or about midnight, May 13, 1943 willfully disobey the same.

CHARGE II: Violation of the 66th Article of War.

Specification: In that Private Horace J. Riggs, Company D, 269th Quartermaster Battalion, did, at Scottsville, Kentucky, on or about midnight May 13, 1943, cause incite and join in a mutiny in Company D, 269th QM Bn (Serv) by urging seven members of said command concertedly to refuse to obey the lawful orders of their commanding officer to "Return to work" and in the execution of such control causing said soldiers concertedly to disregard and defy the lawful orders of 1st Lt. Henry Feinstein, QMC, their commanding officer, to return to work, with the intent to override, for the time being, lawful military authority.

He pleaded not guilty to both Charges and Specifications thereunder. He was found guilty of Charge I and the Specification thereunder and guilty of Charge II and the Specification thereunder, except the words "cause, incite and", of the excepted words, not guilty. Evidence of one previous conviction for being absent without leave for two days in violation of Article of War 61, 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 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 pursuant to Article of War 50½.

3. Both the Charges and Specifications upon which the accused was arraigned and found guilty are for military offenses, violations of Articles of War 64 and 66. The review of the staff judge advocate fully and fairly sets out the evidence for the prosecution and the defense, and is adopted to that extent; therefore it is not thought necessary to repeat the evidence herein.

4. The charge sheet shows the accused to be 21 years of age; that he enlisted in the service 26 May 1942, with no prior service.

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

the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of death, or such other punishment as a court-martial may direct is authorized, in time of war, for a violation of Article of War 64 or 66.

Chas. L. Olsesson, Judge Advocate.

Abner E. Lifcomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

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

(67)

30 JUL 1943

SPJGH
CM 236612

UNITED STATES NID v. Private First Class ERNEST TYREE (6951487), Detachment Medical Department, Army Air Forces Bombardier School, Midland Army Air Field.	ARMY AIR FORCES GULF COAST TRAINING CENTER Trial by G.C.M., convened at Army Air Forces Bombardier School, Midland Army Air Field, Midland, Texas, 28 May 1943. Dishonorable discharge and confinement for life. United States Penitentiary, Leavenworth, Kansas.

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 92nd Article of War.

Specification: In that Private First class ERNEST TYREE, Detachment Medical Department, Army Air Forces Bombardier School, Midland, Texas, did, at Army Air Forces Bombardier School, Midland, Texas, on or about May 5, 1943 forcibly and feloniously, against her will, have carnal knowledge of Jeannie Ellerbrook.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and imprisonment at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 4 May 1943, Jeannie Ellerbrook, the wife of Second Lieutenant LeRoy W. Ellerbrook, visited her husband who was a patient in the station hospital at Midland Army Air Field, Midland, Texas. As she was leaving the hospital, Mrs. Ellerbrook met and had a brief conversation with accused, the ward boy in her husband's ward. Accused told her that Lieutenant Ellerbrook had "T.B." and would be sent to a hospital in El Paso. When she expressed the hope that she would be permitted to see her husband the following day accused assured her that he would make arrangements for her—"fix it with the doctor", and that she could stay as long as she wished (R. 9, 23, 45).

The next evening while Mrs. Ellerbrook was visiting her husband at the hospital she became thirsty and went out into the corridor in search of a drinking fountain. Accused, who was standing in the corridor told her to follow him and took her down a long hallway to an unoccupied ward reserved for the "WAACS" where she had a drink at a fountain. As they walked back toward her husband's room accused told her that she need not leave the hospital at 8 o'clock as other visitors were required to do but could stay on as long as she liked and that he would show her out at "another entrance". She stayed with her husband until about five minutes after eight o'clock when she decided to leave in order to catch the 8:30 bus. She started to go out by the main front entrance but accused intercepted her, stated that if "they" caught her leaving that way he would be put in the guardhouse and asked her to go out another way with him. She followed him and they went down a hallway toward the "WAAC" ward. He again stated that her husband had tuberculosis but Mrs. Ellerbrook remarked that she had been informed by the nurse that her husband had only a throat irritation and would be discharged from the hospital in a day or two. Accused insisted that Lieutenant Ellerbrook had "T.B.", asserted that he had seen the chart and said to Mrs. Ellerbrook, "Come on and I'll show you the chart" (R. 9-11).

When Mrs. Ellerbrook stepped into an unlighted room at the direction of accused, he quickly closed and locked the door, put his hand across her mouth and warned her that if she made "one sound" he would kill her. He grabbed her by the throat and shook it until she could not breathe. He was as strong "as two men"—"like a wild animal". He squeezed the breath out of her and said "I'll choke you to death. I'll kill you if you don't do what I say". He threw her on the bed, pulled off her panites and started to "attack" her. In an effort to gain time she asked him to help take off her jacket, and when the sleeves were off, slipped from the bed and dashed to the door. When

she kicked the door with her knee accused pulled her away, got her against the wall, told her, "Now you're going to die. I'll choke you to death", and choked her so hard that "everything went black". He threw her on the bed and forced himself on her. He kept one hand close to her mouth and throat and threatened to strangle her if she made a move. He had intercourse with her--inserted his "organ" into her "organ". It hurt her. The sound of men's voices came very close and when the sound died away accused released her, she dressed, walked with him down the hallway, and left the hospital by the sun porch entrance. While they were in the room together accused wore rubber gloves. Mrs. Ellerbrook could not say whether accused ejaculated. She "felt wet" but did not know whether it was perspiration. She stated that she was five feet one or two inches tall and weighed 104 or 105 pounds. Accused weighed 165 pounds (R. 11-14, 19-22, 102).

Mrs. Ellerbrook rode into Midland on the bus, called at the home of an acquaintance, Mrs. Lucille Keith at about 9 p.m., and asked where she could "get hold of a doctor". Mrs. Keith observed that Mrs. Ellerbrook had been crying, that her face was pale, that she was cold and shaky and that the skin on the front part of her neck was quite red. Mrs. Ellerbrook stated that she had been "attacked at the post". At about 10:40 p.m., after she had returned to her home, Mrs. Ellerbrook was examined by Captain Joseph J. Arons, Medical Corps. She was very nervous, was twitching all over, and had a bruise on her neck. When Captain Arons examined her "female region" he found "a lot of vaginal contents spread all over the area down there". About noon the next day he took her to a clinic, examined her "internally" and found a small bruise at the bottom of the vaginal opening. He took six smears for spermatozoa from different parts of the vagina but all of them were negative. At about 11:30 p.m. on 5 May, when accused was brought into Mrs. Ellerbrook's room she identified him as the man who had attacked her that night (R. 13, 32-33, 39-40, 90).

A piece of rubber glove about the size of a dime found on 6 May in the room where the attack occurred and another piece about half of a finger of a rubber glove, found on 7 May about 20 feet from the door of the room were received in evidence (R. 73-75, Exs. 5, 6).

On 7 May 1943, after he had been informed that he did not have to make a statement but anything he said could be used as evidence against him, accused made a sworn statement to the investigating officer, Major Pat R. Warren. In it accused admitted that he told

Mrs. Ellerbrook her husband had tuberculosis and that he had induced her to go to the "WAAC" ward with him by promising to show her the chart of her husband in one of the rooms. Accused had put on some rubber gloves which he had in his pocket to keep from leaving fingerprints. He had picked them up in the hospital about 7 o'clock that evening. After he had pushed Mrs. Ellerbrook into one of the rooms and locked the door, accused put his hand on her mouth, choked her and then threw her on the bed. When she asked him to get her jacket off he helped her but she got up and started kicking on the door. He grabbed her again and told her that if she did not be quiet he would kill her. After that she was quiet. He threw her on the bed, got on top of her and put his penis in her. After he had been on top of her for about two minutes, "she was wiggling", his penis slipped out and he had an orgasm. He did not have his hand on her mouth or throat but was resting his hand on her shoulders. He got up and turned on the light but she made him turn it off again. He helped to get her hair straightened, picked up her purse and they went outside. She promised not to turn him in. The finger tip of one of the rubber gloves came out when they were scuffling in the room (R. 87-90, Ex. 7).

4. For the defense accused testified that after Mrs. Ellerbrook had gone with him to a room in the "WAAC" ward to see her husband's chart, accused grabbed her and said "you know what I want" and she said "yes". He picked her up, laid her on the bed and pulled off her panties. She asked him to help her take off her jacket but when he got one sleeve off she made a break for the door and "went to kicking on it" with her foot. He choked her and told her he would kill her if she "didn't be quiet". She put his penis in her. She was wiggling around and in about two minutes it was all over. He had both hands on her shoulders. Mrs. Ellerbrook did not shriek at him, strike, kick or scratch him or "exactly" make any effort to deny him access to her female organs. He had choked her only once. On cross-examination accused admitted that he had worn rubber gloves but stated that he did not get them "for that purpose" but to take them home with him. He also admitted that before he had intercourse with Mrs. Ellerbrook he said to her "Be quiet, or I'll kill you" (R. 95-100).

5. It clearly appears from the evidence, which, for the most part is not substantially disputed, that when Mrs. Ellerbrook went to visit her husband, who was a patient in the station hospital, accused, a ward boy, falsely informed her that her husband was suffering from tuberculosis and by promising to show her the chart of her husband, induced her to go with accused to a room in an unoccupied ward. There

he put his hand over her mouth, choked her, threatened to kill her if she did not do his bidding and threw her on the bed. When she broke away and started kicking the door he choked her again until "everything turned black", threatened to kill her, threw her on the bed and had sexual intercourse with her. Mrs. Ellerbrook weighed 104 or 105 pounds and accused weighed 165 pounds. In his testimony at the trial accused admitted that immediately before he had intercourse with Mrs. Ellerbrook he had choked her "once" and had threatened to kill her if she did not keep quiet.

Even reluctant consent negatives rape, but where the woman ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity) the consummated act is rape (1 Wharton's Criminal Law, 12 Ed. p. 942). Accused had carnal knowledge of Mrs. Ellerbrook by force and without her consent. Ultimately she submitted because of fear induced by his threats against her life but such submission is not consent. It is the opinion of the Board of Review that the evidence is legally sufficient to support the findings that accused committed the crime of rape upon Mrs. Ellerbrook as alleged in the Specification of the Charge.

6. The charge sheet shows that accused is 21 years of age and that he enlisted on 16 November 1939.

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. A sentence either of death or of imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 22-2801 of the District of Columbia Code.

Victor S. Field Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F J Lotterhos, Judge Advocate

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

SPJGN
CM 236629

13 AUG 1943

UNITED STATES v. First Lieutenant NOBLE H. WARREN (O-559442), Air Corps.	FOURTH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Basic Training Center No. 5, Army Air Forces Technical Training Command, Kearns, Utah, 26 May 1943. Dismissal, total forfeitures and confinement for three (3) years.

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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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that 1st Lieutenant Noble H. Warren, Air Corps, did, at Basic Training Center (No. 5), Army Air Forces Technical Training Command, Kearns, Utah, between the 2nd day of November, 1942, and the 8th day of April, 1943, feloniously embezzle by fraudulently converting to his own use, the sum of five hundred seven dollars and fifty cents ($507.50), good and lawful money of the United States of America, held by him in trust for the use and benefit of civilian employees of Basic Training Center (No. 5), Army Air Forces Technical Training Command, Kearns, Utah, who had been issued civilian employees' identification passes.

He pleaded not guilty to, and was found guilty of, the Charge and Specification thereunder. 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 only so much of the sentence as provides for dismissal from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that under the business method used at Basic Training Center No. 5, Kearns, Utah, civilian employees there were required to deposit the sum of $1.00 as security for identification passes issued to them. This deposit was collected by the officer in charge of the "identification office" and was then delivered, together with a certificate acknowledging the receipt of the money, to the office of "S-2" where it was committed to the keeping of the accused. When a civilian surrendered his identification card, his deposit of $1.00 was refunded to him by the accused, or by someone acting for him. During the course of the accused's service as the custodian of this fund, $853 was collected from civilian employees, and placed in the safe keeping of the accused. $101 of this fund was refunded to various depositors (R. 8-36).

On 20 April 1943, the accused was directed to deliver the above described fund to Captain Romulus W. Stephens, his successor in office. The accused delayed the delivery of the fund by stating that he would deliver it as soon as he returned from a leave of absence. Later Captain Stephens asked the accused to transfer the identification fund in to him. The accused then wrote a check on the Continental Bank & Trust Company, Salt Lake City, Utah, payable to Captain Stephens for the sum of $752, and gave the check to Captain Stephens. The accused then dictated a letter to the bank named in the check requesting that his savings account in the sum of $751 be transferred to a checking account (R. 25-35, Pros. Ex. D).

Thereafter, on 3 May 1943, Captain Stephens received a telegram from the accused worded as follows:

> "SOMETHING WENT WRONG. HOLD THAT CHECK WILL BE DOWN
> IN A COUPLE OF DAYS LT NOBLE H WARREN."

(Pros. Ex. E, R. 29-31).

Following the above action relative to the check which he had given Captain Stephens, the accused, on 11 May 1943, presented Captain Stephens with the sum of $244.50 in partial reimbursement of the identification fund. Subsequently on 25 May 1943, the day before the trial of this case, the accused made a second payment in reimbursement in the sum of $240 (R. 31-32).

The auditor of the Continental Bank & Trust Company, Salt Lake City, Utah, testified that he checked the records of the savings accounts of the bank in which he was employed on 1 May 1943, and did not find a savings account in the accused's name although the accused had a checking account at that time with a balance of $167.54 (R. 36-38).

A voluntary sworn statement made by the accused was introduced into evidence. The important part of that statement is as follows:

> "My name is Noble H. Warren, First Lieutenant Air Corps, 0559442. Approximately October 21, 1942, money that was paid by civilians for passes through the Identification Office at this Post, which was to be later refunded to them upon turning in those passes, was turned over to the S-2 Office for safekeeping and I was given the job of accounting for those funds and safekeeping by Major Bair, Assistant Executive, S-2. On October 21, 1942, the first deposit was received, the money was put in the S-2 office safe. It stayed there for sometime, I believe, until the second deposit was turned over to me and then I borrowed some of the funds with the intention of repaying them. Being unable to do so when the next deposit was received, I kept it in my personal possession. About that time I announced to Sergeant Abrams, NCO, in charge of the Identification Section, that the money would be deposited in a bank. This was never done. As every deposit came into me, I kept it in my personal possession and spent it for payment of old debts and personal pleasures. The money was never used for gambling purposes. All gambling I did at the Officers' Club was done with my own money although some of it was used because my own money never did last long enough - I mean I don't know which is mine and which is the Identification Funds. I never did spend too much of it playing poker. The amount confiscated by me amounts to $752." (Ex. H).

4. The accused testified that between the dates of 2 November 1942 and 8 April 1943, he served as "Assistant S-2 and Assistant Military Intelligence Officer", and received in safe keeping the identification fund previously described. He explained that the deposits of this fund were brought to his office and delivered to him for safe keeping. He also admitted that he took $752 of this fund for his own use. Of the amount which he had taken for his own use he explained he had refunded $482.50 and that he intended to repay the balance of $267.50 (R. 70-74).

Three affidavits were introduced into evidence without objection containing a statement that the reputation of the accused in the community where he then lived for truth, honesty and integrity was good (Def. Ex. 1, 2, 3).

5. The Specification alleges that the accused did, between the dates of 2 November 1942 and 8 April 1943 feloniously embezzle by fraudulently converting to his own use, the sum of $507.50, which was held by him in trust for the use and benefit of civilian employees of Basic Training Center No. 5, Army Air Forces Technical Training Command, Kearns, Utah.

The Manual for Courts-Martial states that:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U. S., 160 U.S. 268).
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship" (par. 148h, M.C.M., 1928).

The evidence clearly shows that between the dates of 2 November 1942 and 8 April 1943, the accused accepted for safe keeping a total of $853, money deposited by civilian employees of Basic Training Center No. 5, and that he wrongfully appropriated $752 of this sum to his own use and for the payment of his own debts and the furthering of his own pleasure. Although the separate deposits were not received by the accused directly from the individual civilian employees, the accused was instructed to hold the deposits in safe keeping for them pending their individual surrendering of

their identification badges. In view of this relationship, a trust arose by operation of law requiring the accused to hold the money so entrusted to his care for the safe keeping of the individual depositors. The breach of this trust relationship, therefore, constitutes the offense of embezzlement. Every element of the offense charged is established by evidence beyond a reasonable doubt.

6. The records of the Office of The Adjutant General show the accused to be approximately 23 years of age, that he had a year of basic training in the reserve officers training corps, University of Idaho, that he entered active service as a soldier on 5 November 1941, and that he attended Officer Candidate School and was commissioned a second lieutenant, Air Corps, on 6 May 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 of the Charge and Specification thereunder, legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of Article of War 93.

ON LEAVE, Judge Advocate

Abner E. Lipscomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 236629

1st Ind.

War Department, J.A.G.O., 19 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 Noble H. Warren (0-559442), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority, and legally sufficient to warrant confirmation thereof. I recommend that the sentence of dismissal, total forfeitures, and confinement at hard labor for three years be confirmed, but that one year of the confinement be remitted, that the sentence as thus modified be carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

(Sentence as approved by reviewing authority confirmed but two years of confinement remitted. G.C.M.O. 255, 21 Sep 1943)

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

SPJGQ
CM 236632

30 JUL 1943

U N I T E D S T A T E S	)	SAN FRANCISCO PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Fort Mason, California, 13 May 1943. Dismissal.
	)	
First Lieutenant LELIUS C. ZANDER, (O-153117) Corps of Military Police.	)	

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.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant Lelius C. Zander, C.M.P., Company "A", 736th Military Police Battalion (Z-I), did, on or about April 2, 1943, by excessive indulgence in alcoholic liquors, incapacitate himself for the performance of an important duty assignment, to wit: guard inspector, second relief, Camp John T. Knight, Oakland, California.

Specification 2: In that 1st Lieutenant Lelius C. Zander, C.M.P., Company "A", 736th Military Police Battalion (Z-I), did, at Camp John T. Knight, Oakland, California, on or about April 2, 1943, fail to repair at the fixed time to the properly appointed place of duty as guard inspector, second relief.

He pleaded not guilty to and was found guilty of the Specifications and the Charge. No evidence of previous convictions was submitted. 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 discloses that a roster of guard inspection duty for the Oakland Branch of the San Francisco Port of Embarkation was prepared and published weekly by Military Guard Headquarters.

On the roster for the week of 29 March to 4 April 1943, accused was detailed as inspector of the guard for the second relief extending from 0800 to 1600 daily, during which hours he was required to perform the duties incident to the office and it was stipulated and agreed that he had knowledge of his assignment and that on 30 March, 31 March and 1 April 1943 he did perform his duties thereunder (R. 9; Ex. 1).

Technician 5th Grade James W. Ball, Company C, 736th Military Police Battalion, testified that on 2 April 1943 it was his duty to act as driver for the guard inspector. As such he reported for duty at 7 a.m. when accused was supposed to meet him but did not do so (R. 11). He thereupon reported to the Battalion Transportation Office to receive his trip ticket and found a note on the desk calendar advising him to pick up accused at his home, at 8:30 a.m. He went to accused's home at that time and found him asleep in his bedroom clad in pajamas (R. 11-13). His wife woke him by calling him two or three times and Ball spoke with accused who told him to go to camp and see whether the men were on their posts and then return at 10:30 a.m. (R. 12, 14). Accused did not seem to be completely awake and was very sleepy looking (R. 12). His eyes were not thoroughly open and he spoke with a thick tongue. At 10:30 a.m. Ball returned and again spoke with accused who directed him to come back at 11:30 a.m. He still appeared to be very sleepy (R. 13). At 11:05 a.m. Ball once more reported as directed and found accused still in bed, his condition unchanged. When he was told to return at 1 p.m. Ball went back to camp and reported the matter to the transportation officer (R. 14).

First Lieutenant James S. Gibson, Transportation Officer of the 736th Military Police Battalion, testified that Ball had been detailed as driver for the guard inspector on 2 April 1943. At about 11:30 a.m. on that day Ball reported to him the situation he had found at accused's home and asked to be relieved from the detail. Thinking this unusual Lieutenant Gibson reported the matter to the Battalion Commander who sent for Ball and received the report personally from him (R. 15, 16).

Major Elmer L. Lents, Commanding Officer of the 736th Military Police Battalion, testified that the general duties of his organization were to furnish security at the Port of Oakland, by the posting of sentries at various places and the detailing of officers to supervise the guard by inspecting such sentries throughout their tour of duty (R. 17). Accused was detailed to perform the duties of guard inspector on the second relief for 2 April 1943 between the hours of 8 a.m. and 4 p.m. At about 12:30 p.m. on said date he received a report from the transportation officer with reference to accused's failure to report for duty, as a result of which he called

accused by telephone, at his home. Accused personally answered the telephone, informed him "he would be down about five o'clock" and when then ordered to report to Battalion Headquarters at once said "All right" (R.18).

Accused having failed to obey this order, Major Lentz then proceeded to post headquarters to inform the executive of the situation. They talked about it and then decided to go to accused's home to learn the reason for his failure to report. At about 2 p.m. they arrived at the home and were advised by Mrs. Zander that accused was in his bedroom where they found him, lying face down upon the bed fully clothed and either asleep or in some sort of a stupor (R. 19). Major Lentz called accused by name, then took hold of his arm and shook him twice. He finally awakened, saying "What the Hell do you want?" He was told that they had come to get him because of his failure to respond to the order to report. Major Lentz took hold of his arm and assisted him in getting up, whereupon he asked to go to the bathroom which he was permitted to do. Upon his return he requested permission to go into the bedroom and close the door. Major Lentz who had gone into the living room refused the request and told accused he would go into the bedroom with him. When they were in the bedroom again accused asked for permission to open a dresser drawer and when asked for a reason, said "Won't you let me take another drink before we go?" (R. 20, 30). Upon being refused accused then accompanied Major Lentz and Captain Rion, the Executive Officer, to their automobile and they proceeded back to camp.

There was very little conversation on the way but accused did ask "Major, what do you intend to do with me? Are you going to cover up for me?", to which Major Lentz replied that he "did not intend to cover up for him any more." Accused then said, "Well, that's all right with me, but there will be an investigation." At one point, although the driver was not driving in excess of 15 miles per hour, accused, who was sitting in the rear with Major Lentz, cautioned him about the 15 mile speed limit in camp and was told by the Major that he was in command and would tell the driver what to do (R. 21).

While in the bedroom Major Lentz had detected a slight odor of alcohol and in the car, while returning to camp, he had smelled a slight odor of liquor (R. 22, 27). Accused's gait and speech, which were normally rapid, were both slow and deliberate, though he was not incoherent (R. 21, 22, 28). He seemed more or less drowsy and mentioned being dizzy (R. 27). In the car he swayed considerably and his head was "noddling around to a certain extent" (R. 22).

Since it was his responsibility to see that accused performed his duty as guard inspector properly, Major Lentz had not permitted accused to go on duty because he thought he was under the influence of liquor and unfit to perform his duties (R. 30).

Captain Howard G. Rion, Executive Officer of the 736th Military Police Battalion, testified that he had gone to accused's home with Major Lentz and was present in the bedroom when Major Lentz shook accused to wake him up.

When he was aroused he looked up, then his head fell back upon the pillow. He lay there a few seconds when the Major again shook him and he raised himself up and said "What in the Hell is going on, anyhow?" He got out of bed with the Major's assistance (R. 31, 32).

On the trip to camp he had heard accused ask "Well, Major, are you going to cover up for me, or not", and the Major's reply "No, Zander, I do not intend to cover up for you any more" (R. 33).

He also had detected a slight odor of alcohol in accused's bedroom (R. 35) and felt that accused's speech was not normal (R. 38, 39).

Captain Ralph S. Walker, Medical Corps, the Dispensary Surgeon at Camp Knight, California, testified that on 2 April 1943, accused was brought to the dispensary by Major Lentz and Captain Rion for a sobriety test. He therefore made an examination of accused touching his motor stability, blood pressure, temperature and memory and took a specimen of his blood for chemical analysis to determine the presence of alcohol, if any. He detected a slight odor of alcohol on accused's breath though he found his speech normal (R. 41). When asked whether, without the laboratory report on the blood test, he could determine the degree of intoxication of accused, he replied he could not though the tests administered, independent of the analysis, showed accused had been drinking (R. 46, 48). Upon receipt of the report of the laboratory test and considering it in connection with the other tests made he concluded accused was intoxicated on 2 April 1943 (R. 80).

Captain John C. Cordona, Medical Corps, Ward Surgeon at the Camp Knight Station Dispensary, testified that he had made an informal examination of accused upon his admission on 2 April 1943. This consisted of his observation of him while he was walking around, undressing and going to and from the bathroom and talking with him, over a period of approximately three-quarters of an hour. While he had a heavy odor of alcohol his conversation was intelligent and his answers to questions correct. He claimed to be very tired, restless and wanting sleep to such an extent that when he was but partially undressed he threw himself on the bed. He was given amytol to quiet him and induce sleep. Witness was of the opinion that any Nembutal which accused had taken on the night previous had been fully excreted as, in his experience, such is generally the case within twelve hours after taking the drug. There was however a tendency "to feel fuzzy" for several hours thereafter and have a cloudy mind, during which period the patient would not be able to think as rapidly as normally. In his opinion accused was mildly intoxicated when he examined him (R. 58, 60, 62).

Lieutenant Colonel Gerson R. Biskind, Medical Corps, chief of the laboratory branch of Letterman General Hospital, testified that he had signed the report of the analysis of the specimen of accused's blood; that the blood analyses were made by enlisted personnel under the supervision of

an officer and that while the responsibility for the work was his, he did not watch or supervise the technicians while performing the tests. He was unable to determine from the report itself who had actually made the test but did recall, that Private Attebery had made the analysis of accused's blood because he had been questioned about it and upon investigation learned the technicians's name (R. 50-52).

He stated that, according to authorities on the subject a person whose blood shows an alcoholic content of 1.5 to 2 milligrams per cubic centimeter was incapacitated to the extent that his mental acuity and physical actions are not normal; that a showing of over 2 milligrams per c.c. demonstrated that the person could not function normally (R. 54). He further stated that a report showing 4 milligrams of alcohol in 1 c.c. of blood, such as in accused's case, indicated a tremendous amount of alcohol and that in the average individual among two or three hundred, it would mean a severe degree of drunkenness, but that one should know the background of the person and each case must be separately evaluated in such light.

When asked to reconcile the report of chemical analysis of accused's blood, showing 4 milligrams of alcohol per c.c. of blood with the report of accused's physical examination, he said "there seems to be some lack of relationship; that the degree of change from the physical standpoint should have been more severe, or there should have been a greater change from the normal" (R. 55).

He admitted, upon cross-examination that when a person is under terrific emotional, mental strain a small amount of alcohol may aggravate the condition and give the appearance of intoxication, though the person may, on the other hand, be susceptible to alcohol and thus be actually intoxicated; but excitement or strain would not increase the alcoholic content of the blood (R. 56).

Private 1st Class Howard R. Attebery, Medical Corps, testified that he was in the general chemical department of Letterman General Hospital making analyses of water and blood. He had studied general chemistry in his first two years at the University of California but had never made any blood analysis until seven months prior to the trial. Since then he had been taught the technique by Lieutenant Krupp of the Medical Corps and Sergeant Apretan, a registered pharmacist serving as a toxicologist. He had made between 15 and 20 blood analyses at irregular intervals, among which was that of the specimen of accused's blood which he made on 4 April 1943 and the results of which showed an alcoholic content of 4 milligrams in 1 c.c. of blood (R. 68-78½).

For the Defense: Mrs. Nioma Beulah Zander, wife of accused, testified that on 1 April 1943 accused came home from camp in a very nervous state, went into the kitchen and took a drink of whiskey out of a pint bottle of Calverts, which was half empty and the only liquor in the house. It had been purchased about three days prior and accused had consumed the other

half pint during that period (R. 83). For a period of a week or two the accused had been emotionally upset and worried because of a number of circumstances, among which were the cancerous condition of his aged father, whom he had just visited, the conduct of a daughter which had troubled both of them, and the physical condition of the wife who had just suffered a stroke. Accused was very much upset because of these things and slept very poorly—talking in his sleep and tossing and turning about so as to disturb her and keep her awake. When she told accused about his restlessness this further disturbed and worried him (R. 84).

On that evening Doctor Drennan, a female physician, who was treating her, visited the house and Mrs. Zander incidentally asked her for advice regarding accused's restlessness. The doctor, without observing accused, suggested that she give him a Nembutal tablet as it might quiet him down and allow him to get some sleep. Mrs. Zander had been taking 1½ grain Nembutal tablets for her own condition. Accordingly, she gave accused one such tablet at about 9:30 p.m. Inasmuch as he did not rest very well after giving him the one she gave him a second tablet at 3 a.m., whereupon accused fell into a deep sleep, sleeping so soundly that she was frightened because she had administered two tablets and feared the result. At the time she gave the first tablet she explained to accused that the doctor said he should take it (R. 85).

At 5:30 a.m. she tried to awaken accused, telling him it was time to get up but he just turned over and went back to sleep. She made no further effort to rouse him until the driver reported at about 8:30 a.m., at which time the driver and accused conversed for a while and then accused again went back to sleep. This worried her very much and she did not know what to do. Accused drank no liquor on that day and she knew there was no liquor in the house other than the half pint accused consumed on the preceding afternoon.

At about 10:30 the driver returned and she asked him to rouse accused without avail. At noon she finally succeeded in arousing him and he got fully dressed. At that time he did not stagger and had no appreciable odor of alcohol on his breath although he seemed very sleepy and dizzy or drowsy. At about 2:15 p.m. there was a telephone call from Major Lentz and she heard their daughter tell her father who the call was from and heard accused mention Major Lentz' name but did not overhear the conversation. Thereafter accused again went back to sleep, fully clothed (R. 87).

At about 3 p.m., Major Lentz and Captain Rion came to the house though she heard none of their conversation with accused. When they left accused accompanied them without assistance.

Accused had not requested her to give him a Nembutal tablet and prior to this occasion she had never known him to use a sedative of any kind:

Accused never drank liquor in front of the children, or when away from home. She had never seen him drink any prior to December, 1942 and since then whenever he did drink he did it at home in her presence. She had never seen him intoxicated and she felt that she was responsible for his condition on 2 April 1943, and that if she had not given him the sleeping tablets "he would have gone to work the same as any other man" (R. 89).

Miss Harriett Talmaege, stepdaughter of accused, testified that she was present at the time Dr. Drennan advised Mrs. Zander to give accused a Nembutal tablet. She recalled her mother trying to arouse accused at 5:30 a.m., 2 April 1943 and that all he wanted to do was sleep, though at noon he got up of his own accord and dressed, after which he again laid down on the bed. She talked with him, asking him how he felt, and he told her he was sleepy (R. 94-96).

At about 2 p.m. Major Lentz called accused on the telephone and she heard her father say he would report at 5 o'clock although he went to sleep again until Major Lentz and Captain Rion arrived at about 3 p.m., and took him back to camp (R. 98).

Accused, having been informed of his rights, elected to be sworn as a witness in his own behalf and testified that for some time prior to 1 April 1943 he had been worried because of the critical illness of his father, a retired Colonel, the conduct of one of his stepdaughters residing in Oregon, and the physical condition of his wife who had shortly before suffered a stroke. His nights had been restless and he had been unable to sleep.

On 1 April 1943 he had come home from his tour of duty at about 3:30 p.m. Two or three days previous he had purchased a pint of Calvert whiskey and there was a half pint remaining which he consumed before he went to bed at 9 p.m. (R. 100-101).

He remembered Mrs. Zander giving him what he was later told was a sedative though he did not know what it was at the time and recalled taking a second dose early on the following morning. His recollections of these and other incidents were vague; the only definite picture of the case being his stupidity, stupefaction or drowsiness. It was impossible for him to arouse himself to action. He did not recall any conversation he had with the driver detailed to accompany him on his tour of duty (R. 101); nor did he remember much of what happened when Major Lentz and Captain Rion came for him. He could not recall asking to have another drink before leaving; nor could he account for such a remark because there was no liquor left in the house. While he had no definite recollections he remembered going to the dispensary and hazily recalled being examined by Captain Walker and talking with Captain Camplan and with officers, after which he entered the hospital. He drank no liquor whatever other than the half pint of whiskey on the afternoon and evening of 1 April (R. 102).

Accused for months prior, had drunk nothing else but beer and very little of that (R. 107).

Doctor Pauline Drennan testified that she had practiced the profession of medicine for almost 40 years. In her professional capacity she had been treating accused's wife who had recently had a stroke. She had prescribed Nembutal as a sedative for her and on the night of 1 April 1943 when Mrs. Zander explained the restless condition of her husband and asked whether it would be all right to give accused one of the capsules she had said that one capsule would not hurt him. In her opinion a person who had taken two 1½ grain Nembutal tablets during the night would be very sleepy and groggy the next day, the effects of such an amount remaining for from 12 to 14 hours (R. 108).

Dr. Joseph Catton, a physician-specialist in nervous and mental disorders and clinical professor of medicine at Stanford University Medical School, testified that he knew of many cases in which a single capsule of Nembutal taken at night still had some sort of toxic effect until the following afternoon although, in his experience, the drug usually "burned out" rapidly, leaving no after effects. Again, when taken in combination with whiskey, it reacted in various ways on various people, although more often than not the one would enhance the effect of the other. It was his opinion that a person who took two 1½ grain Nembutal tablets after drinking a half pint of whiskey would have a more severe "hang-over" because of taking the alcohol and the drug together than would result from either independently, the "hang-over" being due to the joint toxicity of the alcohol and the drug; and that such a person would give certain evidence of being intoxicated from something by his manner of thought, expression of feelings and his general behavior (R. 109-112).

With regard to blood analyses to determine alcoholic content, he stated that while such tests are not infallible they are excellent taken in conjunction with the clinical findings made by competent medical men. When asked to reconcile the clinical report of the examination of accused made by Captain Walker with the laboratory report of 4 milligrams of alcohol in 1 c.c. of accused's blood, he stated he could not do so; that a report of an analysis of blood made by the recognized standard test in a recognized standard laboratory and showing 4 milligrams per 1 c.c. was evidence that the person whose blood was being examined must have been definitely unconscious to such an extent that, if capable of being aroused at all, he would promptly lapse again into unconsciousness. Such a person would not be able to perform the act of clothing himself and would have no memory at all nor would he be able to converse with others intelligently. This situation would be true irrespective of the degree of alcoholic tolerance of the particular individual and anyone, whether a toper or an occasional drinker who showed such an alcoholic blood content, would "be out like a light" (R. 113).

Captain Collin C. Camplan, S-3 at Camp Knight, testified that on the afternoon of 2 April 1943 he and a Major Springford were detailed by Colonel Alfonte to repair to the office of the Executive to determine whether or not accused was under the influence of liquor. They did so, interviewed accused for about twenty minutes, conversed with him and received sensible answers. In comparing accused's general appearance at that time with his appearance in the courtroom he stated he had much the same appearance only that on the former occasion he appeared to be agitated though his face was less flushed. He had appeared excitable but very drowsy and before the interview was over begged that they leave "so he could get a little sleep". He detected an odor of alcohol on accused and though he reported to Colonel Alfonte that he was not in a normal condition stated that he could not say accused was intoxicated for he had no basis on which to form such an opinion. Major Springford was not called as a witness for the reason that he had been transferred to another station on the previous day (R. 90-92).

4. Accused stands charged in Specification 1 with incapacitating himself for the performance of an important duty assignment by excessive indulgence in alcoholic liquors. There are therefore three elements of the offense as to which proof beyond a reasonable doubt is required in order to sustain the finding of guilt; first, that accused had an important duty assignment; second, that he indulged in the excessive use of alcoholic liquor; and third, that such indulgence was voluntary and without justification and incapacitated him from performing the duty. Disgraceful, disorderly or dishonorable conduct are not involved but only that degree of intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties (MCM 1928 par. 145).

There can be no doubt as to the importance of the duty accused was under obligation to perform. He was serving with a detachment of Military Police upon whom rested the responsibility of guaranteeing the security of the Port of Oakland in the immediate vicinity of San Francisco, California during time of war. On the date alleged, as on previous and subsequent dates, he was under detail as the inspector of the sentinels posted as a guard to insure the safety of the port and the troops stationed there. He had apparently satisfactorily performed his duties as such on 30 and 31 March and 1 April 1943 when, on 2 April, he failed to report for duty and was, as alleged, found to be unfit for the performance because of excessive use of alcoholic liquor.

Accused admitted that he had, voluntarily, partaken of a half pint of Calvert whiskey in his home between 3 p.m. on April 1, when he returned after serving his relief as inspector for that day, and about 9 p.m., when he retired that night. He attempted to excuse this indulgence by testimony of his nervous and distraught condition arising out of mental and physical strain resulting from concern for his critically ill father, the conduct of one of his daughters and the present sickness of his wife. This combination of worries had left him sleepless and careworn and it appears that he felt obliged to resort to drinking the whiskey as a solace and for temporary relief.

If this were all that were shown the issue presented might be more readily resolved, for certainly neither mental nor physical fatigue can justify the voluntary use of alcoholic liquors as a stimulant by one who has important duties to perform; and if the condition of accused at the time when he was required to inspect the guard on 2 April had resulted solely from the use of the whiskey he had consumed on the afternoon and evening of the prior day the finding could be justified.

A complication arises, however, because of the fact that accused's wife attempted also to minister to his relief. Being herself in a weakened and debilitated state of health, her husband's condition greatly concerned her, and, on the advice of her own physician she gave him two sedative tablets during the night following the drinking of the whiskey. While there is some confusion in the testimony of the Army and civil medical authorities as to how long the effects of two 1½ grain Nembutal tablets would last there is a unanimity of opinion to the effect that such a dose of the drug, without any additional stimulant would undoubtedly lead to drowsiness, "fuzziness" and mental and physical abnormality on the day following its use by some persons. Since the personal equation is an important factor in this matter and as there was no general and positive rule of measurement advanced as a true test in all cases the benefit of any doubt arising as to this must be given to accused.

Every witness agrees that accused gave evidence of being extremely sleepy on the afternoon of 2 April yet the attendant facts do not support the inference that the drowsiness was the result of excessive use of alcoholic liquor alone. Accused's commanding officer, Captain Rion, the executive, Captain Walker who gave him a sobriety test, Captain Camplan who was sent by the commanding officer to determine whether accused was intoxicated and Captain Cordona who had him under observation in the hospital ward, say that he was intelligent, coherent and was otherwise normal in speech and gait except that both were less rapid than usual. True, the sobriety test showed that his cerebration was retarded, a condition which would necessarily accompany a sleepy or drowsy state, but in all other respects the physical tests showed a normal condition of motor reflexes, pulse rate, blood pressure, temperature and muscular coordination.

As against this, however, stands the report of alcohol content in accused's blood on the date in question. This showed a purported 4 mg. of alcohol in 1 c.c. of blood—a rate so high that according to uncontradicted expert opinion evidence, a person whose blood stream was so infused with alcohol would be in an unconscious state from which stupor he could not be aroused. Both the Army medical officer and the expert called for the defense were asked to reconcile the mental and physical behavior of accused with the report of alcoholic content of his blood at the time and were unable to do so. The former testified that "there seems to be some lack of relationship; that the degree of change from the physical standpoint should have been more severe or there should have been a greater change from the normal". The latter was more positive; he stated frankly that he could not believe it

possible for a person with such a blood content of alcohol to have the behavior characteristics shown on the physical sobriety test sheet. The admission in evidence of the analytical report was strenously opposed by defense counsel and in the light of the uncertain and indefinite testimony regarding the circumstances under which it was made and the expert medical testimony as to the incompatibility of accused's behavior with the alleged alcoholic content of his blood, the doubt as to the accuracy of the report in this case would be and is resolved in accused's favor.

There are various grades of intoxication and, under those which are less pronounced, the party may be able to perform the duty imperfectly--to get through it after a fashion--but not properly. In any such case he is, in general, held to be "drunk" "* * * equally as if he were totally incapacitated, a due, proper and full execution being that which is required of him and his offense being complete when, by becoming intoxicated, he has rendered himself either more or less incompetent for the same" (Winthrop; page 612).

Intoxication may result from the use of either alcoholic liquors or drugs or, as was evidently the situation here, by the combination of both though the rule stated is applicable whatever may have been the cause.

Accused's commanding officer and the doctor who treated him in the hospital ward were of the opinion that he was not fit for the performance of his duty when they observed him and, although the evidentiary facts do not clearly show why, except for the fact that he was not as physically or mentally alert as they thought he should have been, their decision is accepted and need not be disturbed; for granting that he was so incapacitated, it was not shown beyond reasonable doubt that his condition arose solely from the use of alcoholic liquor. If it was caused in part by the contribution of the sedative drugs which were given to him by his wife, in good faith, however poor her judgement, and under the advice of a physician, he should not be held to have voluntarily unfitted himself for his duties by alcoholic intoxication. When a drug has been taken as a medicine only and because of the strength of the dose, a weak head, depreciated health, fatigue or other cause, it has over affected him, accused may offer these circumstances in defense, provided such use had been prescribed by a physician (Winthrop; page 615).

Taking into consideration all of the peculiar facts and circumstances in this case, the record is insufficient to support the findings of guilty of Specification 1.

The record does, however, support the findings of guilt as to Specification 2. There is no reasonable justification or excuse shown for the failure of accused to report his condition so as to be relieved from the performance of his duties. His wife was aware of his languor and drowsiness when she called him at the usual time in the morning so that he could report

for duty. She became increasingly aware of it as the morning passed by and the enlisted driver had repeatedly returned to the house to take accused on his tour. The opportunity was afforded accused when his commanding officer ordered him to report. At no time was any effort made to bring any unusual condition to the attention of any authority which might have relieved him of the consequences of his failure to report. The weight of the testimony shows that accused was, shortly after noon on 2 April 1943, able to walk unassisted and that except for drowsiness and a lack of usual mental acuity he appeared normal in most other respects. He was neither physically nor mentally incapable of reporting in person to his appointed place of duty whatever may have been the degree of his incapacity for its full and proper performance and because of which he could have asked for relief. His failure to do so constituted conduct in violation of Article of War 96 and the record clearly supports the finding of guilt thereon.

5. The records in the office of the Adjutant General disclose that accused enlisted in the 3rd Infantry, Wyoming National Guard (later changed to 148th Field Artillery, 66th Field Artillery Brigade) on 27 July 1917. He served for 18 months in France and Germany during the World War and with the Army of Occupation; he was commissioned a Second Lieutenant, Coast Artillery Corps, on 28 April 1919 and was honorably discharged on 29 July 1920. On 13 November 1924 he was appointed a Second Lieutenant, Field Artillery, Officers Reserve Corps, and was reappointed on 13 November 1929, which commission terminated on 12 November 1934. He was appointed a First Lieutenant, Corps of Military Police, Army of the United States, on 14 May 1942, reported for active duty 29 May 1942 and was assigned to the 736th Military Police Battalion, San Francisco Port of Embarkation where he has been serving since. He is 47 years of age.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is insufficient to support the finding of guilty as to Specification 1 but is sufficient to support the findings of guilty as to Specification 2 and the Charge and to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

William A. Bomds, Judge Advocate.

Dale Stephens, Judge Advocate.

Herbert B. Hodges, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 - 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 Lelius C. Zander (0-153117), 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 finding of guilty of Specification 1 (incapacitating himself for the performance of an important duty assignment by excessive indulgence in intoxicating liquor), but is legally sufficient to support the findings of guilty of Specification 2 (failing to repair at the fixed time to the properly appointed place of duty as a guard inspector) and of the Charge and to support the sentence and to warrant confirmation thereof. I recommend that the finding of guilty of Specification 1 be disapproved and that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

3. Inclosed are a draft of a letter for 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.

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

(Finding of guilty of Specification 1 disapproved. Sentence confirmed but commuted to reprimand. G.C.M.O. 286, 1 Oct 1943)

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

SPJGK
CM 236634

28 AUG 1943

UNITED STATES v. Private PATSY J. PAGE (31009352), 3474th Ordnance Medium Maintenance Company (Quartermaster).	PERSIAN GULF SERVICE COMMAND Trial by G.C.M., convened at Andimeshk, Iran, 26 April 1943. Dishonorable discharge and confinement for life.

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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Patsy J. Page, 3474th Ordnance, Medium Maintenance Company (Quartermaster), then Technician Fourth Grade, 3474th Ordnance, Medium Maintenance Company (Quartermaster), did at Andimeshk, Iran, on or about December 30, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Hussein Bahran, 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 confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, did not designate 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:

On the evening of 30 December 1942 between 4 and 5 o'clock accused, then a sergeant (R. 10, 11, 53, 61) in 3474th Ordnance Medium Maintenance

Company (Quartermaster), stationed at Andimeshk, Iran, in company with First Sergeant Raymond Barton of the same outfit, went to the British Field Security Office where they examined some articles of clothing, towels, two wallets containing 2900 "rials" (R. 5, 7, 8; Ex. A) and a picture which Mess Sergeant Griffin had given to Hussein Bahran, the deceased (R. 20). The latter was a native Persian, who had worked in the company mess kitchen (R. 20, 30) and who was in custody, believed to have stolen this property (R. 30, 32). Sergeant Barton and accused then went to the Persian police station (R. 5, 8, 28, 30), where they were given custody of Hussein Bahran (R. 5) "to do anything we wanted to with him" (R. 9). They were, however, to return "the man" to Persian Police Headquarters (R, 6, 9, 15). Hussein was taken by accused and Barton to the camp and to First Lieutenant Carl Haskel Manley, commanding officer of the 3474th Ordnance Company (R. 30). The three discussed what they would do with Hussein and finally decided to take him to the kitchen, line up the three or four natives who were working there and beat him in the presence of these natives so that they would know what to expect if they were caught stealing (R. 5, 30).

As Lieutenant Manley, Sergeant Barton and accused started from the orderly room to the kitchen with the native, Corporal Franklin followed them and heard Barton say to the native: "Don't we treat you right?" and saw him strike the native (R. 23). On the way from the orderly room to the kitchen, accused suggested that they take "this prisoner" and shoot him. Barton described it this way:

> "We were walking by the Day room, Page (accused) said we should take him out and shoot him. Lt. Manley said, 'No', something in reference to 'give him a trial but if I am not around I would not know what happens'" (R. 8).

Sergeant Barton interpreted these remarks as being made jokingly. However, he considered the lieutenant's "No" as an official statement (R. 14).

When they reached the kitchen Lieutenant Manley lined up the natives and stood there while Sergeant Barton and accused, upon Lieutenant Manley's order (R. 9), beat Hussein with their fists in the face and nose, for between five and ten minutes. Sometimes he was on the ground and they would "haul him up". At the conclusion, "he had bleeding nose and seemed weak" (R. 10, 23, 30). He was not hit or kicked in the groin, nor were any teeth knocked out (R. 10). While Hussein was being beaten accused asked if he could shoot him or "Let me kill him" (R. 24), and Sergeant Barton said: "No" (R. 23). During this time the native offered no resistance, just tried "to cover up" (R. 27). When Lieutenant Manley gave the order to stop

beating the native (R. 5, 10), it was about time for retreat (R. 5). Lieutenant Manley ordered Private Victor Wilson to go to the supply room, get a rifle (R. 11, 23, 52) and guard the native, and to get someone to relieve him when he went to eat, but not to shoot unless the native tried to get away (R. 23, 25, 53). Corporal Franklin, who worked in the supply room, delivered to Victor Wilson a rifle and five rounds of ammunition (R. 23-24,52). Wilson went back, was posted and Lieutenant Manley departed "for retreat". Before Corporal Franklin left to "stand retreat" accused had taken the rifle from Wilson (R. 23, 41). Accused said, "Let me take the gun; I'll guard him" (R. 41).

Among those who were near the kitchen about the time of the shooting in addition to Lieutenant Manley, Sergeant Barton, accused and Hussein, were the following enlisted men: W. A. Johnson, W. A. Rubelman, Lester R. Shaffer, Robert Ballentine, Victor Wilson, Leo A. Bergeron and Herbert A. Blackmore, all of the 3474th Ordnance Company. Also present was Abbas, a native Persian, who worked in the kitchen (R. 34, 37, 40, 45, 48, 52, 61, 64).

Abbas testified that when Lieutenant Manley left, accused, Barton and someone else started hitting the prisoner again. Barton took the rifle from Private Wilson and pointed it at Hussein. "The same time Sgt. Barton pointed rifle to Hussein he was crying and was asking his pardon" (R. 34). About that time the whistel blew for chow and Barton gave the rifle either to Wilson or the accused. Abbas went to the kitchen but watched through the flyproof net. He saw accused with the rifle in his hand sitting on a bench. He heard the rifle "bang", saw Hussein fall and saw accused with the rifle still in his hand. According to Abbas, accused then said: "He kill this man and he has done robbery" (R. 34). The witness was then asked to repeat in the best English he could what accused said and answered: "I kill him; he do to me" (R. 35). Victor Wilson was with accused at the time (R. 35). It was about fifteen minutes between the time Victor Wilson brought the rifle and the "bang" of the rifle (R. 35). Just before Hussein was shot, "He was just like a man paralyzed. He was asking pardon. He was standing" (R. 36) as accused sat on the bench pointing the rifle at him (R. 36).

Johnson testified that he saw accused shoot "the native" (R. 37). He said that he had gone over to where accused was guarding the native and accused had said: "Shall I shoot him" and Johnson answered: "I haven't the gun" (R. 38). About a minute after that accused fired (R. 38). Johnson saw the native fall on his back with the bullet hole just below his chest (R. 37). Johnson walked over to where the native was lying and he was dead (R. 40). Immediately before the shot was fired Hussein (deceased) who "looked beat up" was just standing there (R. 38).

Rubelman went over to the mess hall at the time Victor Wilson was

guarding the native (R. 40). He heard accused ask for the gun, saying: "Let me take the gun; I'll guard him" (R. 42). Rubelman was present when Wilson gave the gun to accused (R. 41, 42, 43). He then went into the mess hall and was there when the shot was fired. He went to the window and the native was on the ground (R. 42), on his back (R. 44).

Shaffer testified that he came up while Wilson was still guarding Hussein (R. 47). He saw Wilson turn the gun over to accused and go away (R. 47). The Persian moved twice and each time accused "hollered" at him and he would move back. When he moved the third time the rifle was discharged (R. 46). The native was facing accused when shot. This witness saw the native fall flat on his back immediately after the gun fired (R. 45, 46).

Ballentine testified that when he went down to the mess hall for chow, he found accused sitting down. He asked accused what was the matter and accused replied he was going to "kill him" (R. 48, 51). Later, accused was standing and pointing the gun at the native who was also standing with his hands down by his side. The native was scared and showed no signs of hitting accused. This witness, also, saw accused fire the gun and saw the native fall backwards. Ballentine could see both accused and the native at the time he was shot. The native made no motion "as to run away" (R. 50).

Clifford H. Wilson was at the scene. He saw Victor Wilson give the gun to accused. He saw the Persian move to the right and come back. He moved again and accused ordered him back and he returned. The third time he moved accused shot while the Persian was standing still and making no attempt to "make any break" or run away (R. 58). Witness saw accused raise the gun and fire it. He saw the native fall (R. 57-58). The Persian was dead (R. 59).

On the way to "early chow", Private Bergeron saw the Persian and noticed that "his face was bloody". Accused had the rifle and Bergeron watched the Persian from the mess hall entrance. Accused raised the rifle and pointed it toward the Persian and when he moved accused "threw a stone at him and told him to get back in position". Again the accused pointed the rifle at the Persian and again he moved. Accused threw another stone at him and said: "Get back there, you son-of-a-bitch, you spoil my aim". Accused raised the rifle a third time and while the Persian was standing "perfectly still", mumbling something, with his hands over his face, Bergeron heard the report (of the rifle), saw the Persian fall, looked back at accused and saw smoke coming from the rifle. The mark of the bullet was in the front of the Persian's coat (R. 61, 63). Prior to the firing of the shot the witness heard accused say: "I'm going to shoot him, Johnny" or "Shall I shoot him, Johnny?", and Sergeant Johnson answer: "You have the gun. I haven't" (R. 63).

When Private Blackmore "came down to go to chow" he found accused guarding the Persian and asked him what the Persian had done and accused answered: "he was accused of stealing stuff" (R. 64). Accused was pointing the rifle at the Persian and witness said to accused: "You better watch out, Pat. Your gun had better be on safety. The gun might go off accidently" (R. 66). Accused then threw a rock at the Persian (R. 66). That was about two or three minutes before the shot was fired. Witness had gone about one foot inside the door of the kitchen when he heard the shot and he turned and saw the Persian on his back (R. 66). After the shooting accused started into the mess hall with the rifle, met Victor Wilson near the door, offered the rifle to him and said: "Here's your gun back" (R. 59, 68). Wilson remarked that he would put a notch in his gun (R. 68).

Victor R. Wilson who gave the rifle to accused before the shooting testified that it had five rounds of ammunition in it at that time and that when accused handed it back, immediately after the shooting, it had only four rounds (R. 56). When Wilson cleaned the rifle he could smell the odor of freshly burned powder and by that could tell that the rifle had been recently fired (R. 56).

Sergeant Barton went from the dispensary to the mess hall and looked at the dead Persian, contacted Lieutenant Manley and "tried to get the man off the premises" (R. 5). About three hours after the shooting the body was taken to the hospital (R. 23) and from there to the morgue by "Corporal Franklin" and two British Military Policemen (R. 5, 23, 28, 69). A certificate of the receipt of the dead body and its burial was, on consent by stipulation, received in evidence as an official record of such facts (R. 29; Ex. B).

Accused declined to testify or to make an unsworn statement and no evidence was offered by the defense.

4. The competent and uncontradicted evidence of the prosecution shows clearly that Hussein Bahran, a native Persian of Iran, was taken by accused and Sergeant Barton from Persian Police Headquarters to their own company area and there cruelly and brutally beaten for about ten minutes. He was then left in the custody of a guard equipped with a loaded rifle whose duties, within a very few minutes, were assumed by the accused. Promptly, accused began to curse, taunt, point the rifle toward, and throw rocks at the Persian who stood there bleeding, frightened, crying, mumbling, "asking his pardon", and making no effort to escape. The deliberation and premeditation of accused arises to the proportion of a fiendish design when measured by his conduct, from the time he first expressed the desire to "take this fellow out and shoot him" through the time he pointed the gun at the Persian, threw rocks at him, and cursed him, until he finally fired the fatal shot.

There was no excuse for the killing. The conduct of the deceased was not provocative, nor as a prisoner did he attempt to escape.

There was substantial evidence that accused did with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Hussein Bahran, a human being, by shooting him with a rifle. The findings of the court and the sentence were warranted and proper. Every element of the offense charged was proven.

5. The charge sheet shows that the accused was 25 years of age as of the date of the trial. He was inducted 13 January 1941 for the duration of the war plus six months.

6. The court was legally constituted and had jurisdiction of the person and the 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 legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence either of death or 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 punished by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 U.S.C. 452, 454).

_____, Judge Advocate.

_____, Judge Advocate.

(On leave) _____, Judge Advocate.

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

SPJGH
CM 236692

30 JUL 1943

UNITED STATES v. Second Lieutenant MERLIN A. PETERSEN (0-1181080), Field Artillery.	)	95TH INFANTRY DIVISION Trial by G.C.M., convened at Fort Sam Houston, Texas, 10 and 14 June 1943. Dismissal, total forfeitures and confinement for five (5) years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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 61st Article of War.

Specification: In that Second Lieutenant Merlin A. Petersen, Three Hundred Fifty-Ninth Field Artillery Battalion, did, without proper leave, absent himself from his station at Fort Sam Houston, Texas, from about May 19, 1943, to about June 2, 1943.

CHARGE II: Violation of the 93rd Article of War. (Finding of Not Guilty).

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

3. Evidence for the prosecution upon the Charge of which accused was found guilty:

The morning reports of Battery A, 359th Field Artillery Battalion for May and June 1943 (Ex. A) show the accused from duty to absent without leave on 19 May 1943, and from absent without leave to absent in confinement at Scott Field, Illinois, 2 June 1943.

The accused after he had been informed of his rights under the 24th Article of War made a sworn statement to Lieutenant Colonel Haney E. Ihlenfeld, the investigating officer, in which accused admitted that he absented himself without leave, went to San Antonio, became drunk and forgot practically everything about himself from that time until he was apprehended in Alton, Illinois, ten or twelve days later. He did remember that he had been on a train (R. 6h-61).

4. For the defense the accused testified that on the evening of 18 May 1943, he and Second Lieutenant James O. Malphurs decided to have a few drinks before going on a division field problem the next day. Accused had seven or eight dollars, borrowed twelve dollars more, and the two officers went to town about 9:00 p.m., where they visited a number of taverns and had drinks with "several fellows". Accused remembered that he had bought two pints. Later, Lieutenant Malphurs and accused separated and the next morning accused awoke about 9:00 a.m. in a hotel room in San Antonio. It was then too late to go on the field exercise. Accused "felt bad" about that, was sick and shaky and still a little drunk, and decided to have another drink. The next thing he remembered except for a brief period while riding on a train, was when he found himself in the Millner Hotel in St. Louis with an extra uniform, which he did not recall acquiring, and a partially empty bottle of rum. In looking through the pockets of a uniform before sending it out to be cleaned, he discovered a railroad ticket to San Antonio. He then went downstairs, found he was registered in his own name, returned to his room and drank the rum. He remembered nothing from that time until midnight on 1 June when, in a dirty uniform and with a four-day growth of beard, he was stopped by the city police as he was about to cross the Lewis and Clarke Bridge in Alton, Illinois. He told them his story and stated that he intended to get his return ticket to St. Louis and go back to San Antonio. He was turned over to the military police from Scott Field, Illinois.

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NAVY DEPARTMENT

The accused stated that during his service of more than two years as an enlisted man he had never been court-martialed or received company punishment (R. 6m-6r).

On cross-examination, accused testified that without authority, he was absent from his organization from the morning of 19 May until 1 June or 2 June (6p-6r).

Lieutenant Malphurs testified that accused had "quite a bit to drink" on the evening of 18 May in San Antonio and that although they were in the same battery, he had not seen accused between that time and the date of the trial (R. 6k-6l).

5. The evidence shows and the accused admits his absence without leave for a period of 14 days as alleged.

The accused states that his absence began when, after an evening of drinking in San Antonio, he woke in a room in a hotel there on the morning of 19 May 1943 at an hour too late to go out on a field problem, that he took another drink and next remembers that after a train ride he was in a hotel in St. Louis, that he then drank some rum and next remembered being stopped by the city police in Alton, Illinois, around midnight 1 June 1943, taken to jail and then to Scott Field, Illinois.

6. The accused is 31 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 1 March 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 22 April 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record of trial is legally sufficient to support the findings of guilty, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

Arthur S. Ulch Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

01964

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 Second Lieutenant Merlin A. Petersen (0-1181080), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence.

The accused absented himself without leave from his organization from 19 May to 2 June 1943. The accused stated that he awoke a little drunk in a hotel in San Antonio, too late to go on a field exercise, decided to have another drink and next remembered being in a hotel in St. Louis. He then drank some rum and remembered nothing until he was stopped by city police in Alton, Illinois.

3. I recommend that the sentence be confirmed but in view of all the circumstances recommend that the confinement and the forfeitures be remitted, and the sentence as modified carried into execution.

4. Inclosed herewith are the 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 carrying into effect the recommendation made above.

Myron C. Cramer

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

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

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 223, 10 Sep 1943)

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

SPJGK
CM 236716

17 AUG 1943

UNITED STATES v. Second Lieutenant PAUL McCAULEY (O-1639609), Signal Corps.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Murphy, Florida, 5 June 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 Charges and Specifications:

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

Specification 1: In that Second Lieutenant Paul McCauley, Signal Corps, did, without proper leave absent himself from his station at Camp Murphy, Florida, from about February 5, 1943, to about February 9, 1943.

Specification 2: In that Second Lieutenant Paul McCauley, Signal Corps, did, without proper leave absent himself from his station at Camp Murphy, Florida, from about February 11, 1943, to about February 12, 1943.

Specification 3: In that Second Lieutenant Paul McCauley, Signal Corps, did, without proper leave absent himself from his station at Camp Murphy, Florida, from about February 18, 1943, to about February 27, 1943.

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

Specification 1: In that Second Lieutenant Paul McCauley, Signal Corps, did, at West Palm Beach, Florida, on or about February 6, 1943, wrongfully and unlawfully marry, take and have for his wife, one Lillian Darville, he, the said Second Lieutenant Paul McCauley, then having a living wife, Adel Smith McCauley.

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

Accused pleaded guilty to Charge I and its Specifications, and not guilty to Charge II and its Specifications. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority disapproved the finding of guilty of Specification 2, Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. In addition to the pleas of guilty the evidence shows that accused was absent without leave as alleged in the Specifications of Charge I (Ex. D).

With reference to Specification 1, Charge II, the evidence shows that accused and Adel Smith were married on 25 September 1941 in Georgia (Exs. B,C). The marital relationship still existed on 6 February 1943 and had not been terminated by death, divorce, annulment, or otherwise (Ex.B).

Miss Lillian Darville, Riveria, Florida, was married to accused on 6 February 1943 by Richard P. Robbins, County Judge, Palm Beach County, Florida. The marriage took place in the courthouse at about 2:30 p.m. (R.14,15; Exs. A,E,F).

Miss Darville testified that she met accused about a week before the marriage and that he told her he was a single man. At the time of the marriage, accused acted normally, and, so far as witness observed, was not drunk (R.15-17). By stipulation, Judge Robbins testified that at the time of the marriage accused appeared perfectly normal and not under the influence of intoxicating liquors. Judge Robbins added that he was very sensitive to the odor of intoxicants and did not smell any such odor on accused (Ex.A).

After the ceremony, Miss Darville returned to work, and she and accused have never lived together either as man and wife or illicitly (R.15).

For the defense, Gladys Wiley, bartender at the Harbor Bar, Riveria, Florida, testified that accused was in the bar between 7 a.m. and 11:30 a.m., 6 February 1943, and consumed several drinks of straight whiskey. In her opinion he was under the influence of intoxicating liquor when he left the place (R.17).

Testifying on his own behalf, accused admitted the first marriage. On Friday (5 February 1943), he became drunk to the point where he had no recollection of his activities. He returned to consciousness several

days later. Being informed of his marriage to Miss Darville, of which he had no recollection whatsoever, he met her by appointment at the court house. He had never met her before (R.18-23).

On 2 April 1943, the marriage was annulled by the Circuit Court, Brevard County, Florida (R.19: Ex. 1).

4. As already noted, the absences without leave were established by the pleas of guilty and the evidence.

The evidence for the prosecution shows that accused and Miss Darville were married on 6 February 1943, and that accused was already married to Adel Smith. In view of the testimony of Miss Darville and Judge Robbins with reference to the condition of accused at the time of the marriage, accused's claim of drunken amnesia is unconvincing. Bigamy is a crime by Section 799.01, Florida Statutes (1941). By Section 741.07, all judicial officers of the state are authorized to solemnize marriages. Accordingly, the second marriage was lawfully solemnized. Accused was guilty of bigamy in violation of Article of War 96.

5. The extract copy of the morning report (Ex. D) was improperly authenticated, but the defect was waived by failure to object (M.C.M. 1928, par. 116a). Likewise, since no objection was made to the introduction of Exhibits C,E, and F, it is unnecessary to determine whether they were properly authenticated.

The trial judge advocate objected to the introduction of the certificate of annulment (Ex. 1), but his objection was overruled (R.23). The court should have sustained the objection, because evidence of the annulment was immaterial. Since the marriage was bigamous, it was properly annulled, and even though the second marriage were void or voidable on grounds other than its bigamous character, this would be no defense (2 Wharton, Criminal Law, 12th ed., sec. 2037).

The stipulated testimony of the first wife was competent. In bigamy cases the wife may testify against her husband without his consent (M.C.M., 1928, par. 120 d), and in the present case the defense consented.

6. War Department records show that accused is 26 years of age and attended high school for two years. He served as an enlisted man from 28 June 1935 until 30 November 1942, when, upon graduation from the Signal Corps Officer Candidate School, Fort Monmouth, New Jersey, he was appointed a second lieutenant, Army of the United States. In recommending accused for appointment to the Officer Candidate School, his commanding officer stated that he had demonstrated outstanding qualities of leadership and that his character was excellent. On or about 16 September 1937, accused was convicted of absence without leave in violation of Article of

War 61.

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 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 under Articles of War 61 and 96.

Henry C. Gee, Judge Advocate.

(On Leave), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 30 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 Second Lieutenant Paul McCauley (O-1639609), Signal 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 thereof. In view of all the circumstances 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 an undated letter from accused to the President of the United States, requesting clemency.

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-Dft. ltr. for sig.
Sec. of War.
Incl.3-Form of action.
Incl.4-Ltr. from accused.

(Sentence confirmed but execution suspended. G.C.M.O. 258, 22 Sep 1943)

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

(109)

SPJGQ
CM 236723

- 7 JUL 1943

UNITED STATES	FIRST AIR FORCE
v.	Trial by G.C.M., convened at Grenier Field, Manchester, New Hampshire, 21, 22 May 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private JOHNNEY COKER (34317873), Company A, 917th Air Base Security Battalion.	

REVIEW by the BOARD OF REVIEW
ROUNDS, HEPBURN 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Johnney Coker, Company A, 917th Air Base Security Battalion, did, at Grenier Field, New Hampshire, on or about April 18, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private John Jackson, Company A, 917th Air Base Security Battalion, a human being by shooting him with a rifle.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the remainder of his natural life. The reviewing authority approved the sentence, designated the United States Federal Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. About 9:00 p.m. on the night of 18 April 1943 the accused, acting in his capacity as charge of quarters, went to the second floor of Barracks T-135 at Grenier Field, New Hampshire, and turned

out the lights. Private John Jackson, who was on his bed opposite the head of the stairs on the second floor, profanely berated him for turning off the lights without warning. An argument ensued. A Sergeant Holmes appeared and stopped the argument and ordered accused to go down stairs. The accused went down the stairs and spoke to Staff Sergeant Reid about the trouble he had had with Jackson. Reid advised him to call the officer of the day (R. 7, 9, 10, 24, 25, 26).

In the meantime Jackson went downstairs, procured a bottle of coca-cola, returned to his bunk, drank the contents of the bottle, undressed, and went to bed (R. 21, 25, 26).

Some time thereafter, variously estimated at from 5 to 15 minutes (R. 21, 25, 26, 52), the accused reappeared with a rifle with fixed bayonet, turned on the lights and said to Jackson, "You don't know who you're fooling with do you" (R. 11, 17, 25, 27). Standing at the top of the stairs, within a few feet of Jackson's bed, the accused pointed the rifle at Jackson and shot (R. 11, 20, 21, 25, 28). Jackson got up from his bed, took a step or two toward the accused to get around a partition, turned away from the accused and ran across a footlocker and several beds, finally falling to the floor, where the accused stabbed him in the back with his bayonet (R. 11, 12, 18, 19, 25, 28, 32, 33, 35).

Captain E. J. Coughlin, Jr., one of the medical officers who performed the autopsy on Jackson's body on 18 April 1943, testified that Jackson had sustained a penetrating wound of small calibre through the right lung, an extensive wound of the heart, almost sectioning it in two pieces, and a lacerating wound in the left lung. There were also several incised wounds, "one on the anterior surface of his chest, one at left arm-pit, and one in his back." This witness attributed the damage to the heart to the explosive action of a bullet entering the chest cavity, and he was of the opinion that the wounds of the heart and lungs were the direct cause of death, the incised wounds not having penetrated deeply enough to have caused death (R. 31). An executed copy of the autopsy protocol, signed by a medical officer who did not testify, was accepted in evidence without objection (R. 31; Ex. 2). The witness stated that the autopsy was made on 18 April 1943, the date of death, and the protocol recites that the autopsy was made at 2230 on that date (R. 30; Ex. 2).

Over the objection of the defense, the signed confession of the accused was accepted in evidence by the court (R. 35, 39; Ex. 3). In this confession the accused stated that:

> "Jackson had hurt my feelings so much that I took my rifle to kill him. I went into the next building upstairs T-135 and turned on the lights and Jackson got up out of bed and cussed me. I fired one shot at him from the top of the stairs shooting from the hip. I was so angry at that time that is all I can remember."

The confession includes no statement regarding the stabbing of Jackson with the bayonet.

The prosecution also introduced in evidence the rifle and bayonet used by the accused, with permission to withdraw the physical evidence at the conclusion of the case and to substitute a description thereof in the record. It was stipulated by defense counsel that the weapon produced was the one used by the accused (R. 39, 40; Ex. 4).

4. The defense called several witnesses, including the accused's commanding officer, who testified that the accused had been a good soldier and had an excellent character, but that Jackson, on the other hand, was a poor soldier and very argumentative (R. 40, 41, 42, 43, 49). There was some evidence that Jackson had been in Lawrence, Massachusetts, that afternoon and had been drinking, and that "he was feeling pretty good" when he returned to Grenier Field between 2000 and 2030 that evening (R. 47, 48).

The defense also called witnesses who heard the abusive language used by Jackson when the accused turned out the lights in the barracks (R. 44, 45, 46, 51). Two of these witnesses further testified that they heard Jackson tell Coker twice that he should "stick" him with his knife and also threaten to throw a coca-cola bottle at him (R. 46, 51). Sergeant Holmes, the man who stopped the argument, also testified for the defense that Jackson threatened to hit the accused with a bottle (R. 49).

Another witness called by the defense testified substantially the same as those called by the prosecution with respect to the actual commission of the crime (R. 52).

The accused elected to take the stand in his own behalf and testified under oath (R. 53). His version of the verbal abuse he received from Jackson did not differ in any important respect from that of the other witnesses (R. 54). He stated, however, that after the argument over the lights he got his rifle "for protection." As explained by the accused:

> "I was going back to talk with him about the way he treated me. No man can walk in and just shoot a man down in cold blood, he has to have a reason."

As to the shooting, the accused testified as follows:

> "I went up the last time and clipped on the lights and when I did, I saw he recognized me and jumped up and said 'God Damn you'. When he said that I just fired on him; I didn't know what he was going to do." (R. 54) "I was angry at the time, madder than I ever been with a man in my life, and when he jumped up I just blew red and the explosion went off." (R. 56)

With reference to the stabbing, the accused testified that he thought he had missed Jackson and that "he was going to touch me." However, he denied intending to stab or kill him (R. 56).

5. 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 * * *" (par. 148a, M.C.M., 1928). 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 term 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.
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> * * * * *
>
> "* * * 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).

The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton's Criminal Law, vol. 1, sec. 420).

The Manual for Courts-Martial, 1928, par. 149a, p. 165-166:

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

"Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.

* * * * * *

"The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.

"In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark.)

"The killing may be manslaughter only, even if intentional; but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists.* * *

* * * * * *

"Instances of inadequate provocation are: Insulting or abusive words or gestures, trespass or other injuries to property, and breaches of contract."

The defense endeavored to show that the act causing the death was committed in the heat of passion caused by provocation. To this end testimony was given that Jackson was a bully, that he had been drinking, that he subjected the accused to profane verbal abuse and threats, and questioned the accused's authority. The defense also attempted to prove that the accused, upon his return to the barracks, was still in the heat of passion caused by the humiliation to which he had been subjected, and to protect himself from an apparent assault from Jackson, he fired the rifle from his hip.

This version of what had happened was contrary to the overwhelming evidence that he fired on Jackson before Jackson said a word and before he could arise from the bed. The bullet went into Jackson's right side and came out the left indicating that he was not even facing the accused at the time.

It was also clearly shown that there was ample time for accused's passion to cool between the time he left Jackson and returned with the rifle. Jackson went down stairs, procured a bottle of coca-cola, consumed its contents, undressed and got into bed during that time.

Applying the principles of law set forth above, it becomes apparent that the accused is guilty as charged. It was an unjustifiable homicide. Insulting and abusive words are not a sufficient provocation for killing. As a sufficient cooling time had elapsed the killing is murder even if the passion persisted in the accused.

The evidence shows beyond a reasonable doubt every element of the crime alleged.

6. The record shows the accused to be 21 years of age. He was inducted into the Army of the United States on 22 August 1942 and had no prior military service.

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 and the sentence. A sentence of imprisonment for life is authorized upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

William A. Jones, Judge Advocate.

Charles S. Blum, Judge Advocate.

Herbert S. Fredericks, Judge Advocate.

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

SPJGN
CM 236725

18 AUG 1943

UNITED STATES v. Second Lieutenant ROY T. HYRE (0-649502), Air Corps.	SECOND DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Army Air Forces Technical Training Command, Sioux Falls, South Dakota, 20 and 21 May 1943. Dismissal, total forfeitures and confinement for ten (10) 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 1: In that 2nd Lieutenant Roy T. Hyre, Air Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about December 25, 1942, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Staff Sergeant William R. Dempwolf, Jr., a male person.

Specification 2: In that 2nd Lieutenant Roy T. Hyre, Air

Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about January 3, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Irvin Berglund, a male person.

Specification 3: In that 2nd Lieutenant Roy T. Hyre, Air Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about January 9, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with George C. Fremder, a male person.

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

Specification 1: In that 2nd Lieutenant Roy T. Hyre, Air Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about December 7, 1942, willfully and wrongfully fondle, embrace, and kiss Floyd Adams, a male person, while he, the said 2nd Lieutenant Hyre, and the said Floyd Adams were lying naked in bed, with the intent and for the purpose of obtaining sexual satisfaction against the order of nature.

Specification 2: In that 2nd Lieutenant Roy T. Hyre, Air Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about December 25, 1942, in a public place, to-wit: the Omar Bar in the Carpenter Hotel, while in uniform, drink intoxicating liquor with the following enlisted men, to-wit: Staff Sergeant William R. Dempwolf, Jr., Private First Class William B. McCollum, Jr., and Private Oscar E. Nagle, and in view of other people.

Specification 3: In that 2nd Lieutenant Roy T. Hyre, Air Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about December 25, 1942, in a public place, to-wit:

the Omar Bar in the Carpenter Hotel, while in uniform, wilfully and wrongfully fondle the person of Private First Class William B. McCollum, Jr., a male person, who was then a minor.

Specification 4: (Motion for finding of not guilty sustained by the court).

Specification 5: In that 2nd Lieutenant Roy T. Hyre, Air Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about February 1, 1943, in a public place, to-wit: the Villa Marie Bar, while in uniform, drink intoxicating liquor with the following enlisted men, to-wit: Sergeant Frank G. Kelley and Corporal Ivan F. Cothern, and in view of other people.

Specification 6: In that 2nd Lieutenant Roy T. Hyre, Air Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about February 11, 1943, in the Seville Apartment Hotel, wilfully and wrongfully fondle, embrace and kiss an unknown noncommissioned officer in the presence of Private Joseph S. Coletta, Private Alex M. Holmes, and several other enlisted men.

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

Specification 1: (Finding of not guilty).

Specification 2: In that 2nd Lieutenant Roy T. Hyre, Air Corps, Army Air Forces Technical Training Command, did, at Sioux Falls, South Dakota, on or about February 11, 1943, wilfully and wrongfully offer, solicit, and endeavor to have, feloniously and against the order of nature, carnal connection with Private Joseph S. Coletta, a male person.

He pleaded not guilty to all Charges and Specifications. The court sustained the motion of the defense for a finding of not guilty of

Specification 4, Charge II. He was found not guilty of Specification 1, Charge III, and guilty of all the other Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for a period of ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3a. The evidence for the prosecution concerning the three Specifications alleging the commission of sodomy (Specs. 1, 2 and 3, Chg. I), shows that on the evening of 25 December 1942, Sergeant William R. Dempwolf met the accused in the Omar Bar in Sioux Falls, and drank intoxicating liquor with him there. Later, Sergeant Dempwolf accompanied the accused to his apartment in the Seville Apartments where they drank more intoxicating liquor. The accused then stripped off his clothing, and after fondling Sergeant Dempwolf for several minutes, placed Sergeant Dempwolf's penis in his mouth and sucked it until Sergeant Dempwolf had an emission (R. 53-57).

On about 3 January 1943, Irvin Berglund, a billing clerk employed in Sioux Falls, met the accused at the Villa Marie bar in Sioux Falls. The accused and Berglund then drank intoxicating liquor together and upon the accused's request Mr. Berglund accompanied the accused to the latter's apartment. There the accused hugged and kissed Berglund and then proceeded to suck Berglund's penis until the latter had an emission (R. 58-59).

About the middle of January 1943, George C. Fremder, a civilian clerk employed in Sioux Falls, met the accused, and in the company of a third man, accompanied the accused to the latter's apartment where they drank intoxicating liquor together. The accused then "made love" to Fremder and they went into the accused's bathroom where the accused proceeded to "unzip" Fremder's trousers and to suck his penis until he had an ejaculation (R. 60-63).

b. The evidence for the prosecution concerning the Specifications under Charge II shows that on the evening of 7 December 1942, Floyd Adams, a civilian, accompanied the accused to the latter's apartment where, after drinking intoxicating liquor, they took off their clothes and lay naked in bed together. On this occasion the accused embraced and kissed Adams and had an emission on Adams' leg (R. 64-70).

The evidence shows further that on the evening of 25 December 1942, the accused, while in the Omar Bar of the Carpenter Hotel, in Sioux Falls, South Dakota, and while in his officer's uniform, drank intoxicating liquor with Staff Sergeant William R. Dempwolf and Privates William B. McCollum and Oscar E. Nagle in the presence of other people (R. 54-57, 70-76, 90; Ex. 2).

On the same evening above described, 25 December 1942, the accused put his arm around the shoulder of Private William B. McCollum, called him "sweet names like darling, dear and angel and sweetheart", and felt around McCollum's private parts. This conduct occurred in the presence of those persons present in the bar. Private McCollum was shown to be twenty years of age (R. 70-75).

On 1 February 1943, the accused was shown to have been in uniform in the Villa Marie bar in Sioux Falls, and on that occasion to have drunk intoxicating liquor with Sergeant Frank G. Kelley and Corporal Ivan F. Cothern in the presence of other enlisted men (R. 78-80, 80-82).

On the evening of 11 February 1943, three or four noncommissioned officers and Privates Joseph S. Coletta and Holmes assembled in the accused's apartment. During the evening the accused embraced and hugged each one of the noncommissioned officers "loving and hugging each other, and so on" in the presence of Privates Coletta and Holmes and the others who were present (R. 82-83).

c. The evidence for the prosecution concerning Charge III and Specification 2 thereunder shows that on the evening described above, 11 February 1943, the accused requested Private Coletta who was in the accused's apartment, to accompany him to the bathroom. The accused then asked Private Coletta if the latter knew why he, the accused, had brought him there. Private Coletta told the accused that "that sort of thing did not appeal" to him. The accused then said "Well, have you ever tried it?" and added "Well, how do you know it doesn't appeal to you?" The accused then informed Private Coletta that "he had tried it, both with women and men, and he said he preferred the male". The accused then turned off the lights and let his hand drop between Private Coletta's legs. When Private Coletta brushed his hand away and told the accused "not to get fresh", the accused said, "he was willing to get on his knees, if it would do any good". The accused explained to

Coletta that one day he had seen him in the barrack and had then made up his mind "that he must have me". The accused, however, upon the refusal of Private Coletta desisted from his purpose (R. 83-84).

4. The accused testified that he was born in Chicago, that he had received a bachelor of arts degree at Cornell University, and that he had attended the Harvard Business School. Before his induction into the Army, he was treasurer of a large automobile repair business in Chicago, and that later he had risen to the position of vice-president of the business organization which was controlled by his father.

The accused frankly admitted his homosexual tendencies and testified that he had indulged in those practices since he was five years of age. He explained that when the urge for unnatural sexual relationships with men came upon him that he was both emotionally and physically disturbed until his urge was satisfied. He testified, however, that if he "was rebuffed, regardless of the urge, why, I would desist, because of fear of force * * *". He asserted that whenever he found anyone who was amenable to his suggestion, that he would "literally wear them out with" his sex demands. He also explained that two of his cousins and an uncle were homosexual, and that he had the bodily form and characteristics of a "true homosexual". In regard as to knowing whether his sexual acts were right or wrong, the accused testified, "Well, for me I would come gradually to think it was right, at least, for me there could be no other possible means of expression, and that I got from reading books on the subject". He also explained that he had reported his homosexual tendencies to the draft board examiner and to the Army medical examiner prior to his induction into the service.

5. At the beginning of the trial the defense raised the issue as to the sanity of the accused and his legal responsibility for the offenses charged.

a. Major Leonard P. Ristine, chief of the neuropsychiatry section of the station hospital, Sioux Falls, South Dakota, testified for the defense that he had examined the accused in response to a request for a "600-500 Board Examination". He explained that his first examination was made on 17 April, a second examination on 18 April and a third examination was made before the Board on 20 May, and still a fourth examination was later made before the Board. Major Ristine testified that the accused is:

> "* * * in the sense of being familiar with his surroundings, being able to remember what goes on, in the sense of not having delusions or false ideas, in the sense of not having abnormal sensations such as sight and hearing are concerned, that is, in the sense of having hallucinations — and those are the fields in which insanity is usually thought of — I would say this man is sane. In the sense of this man being able to act normally, so far as sexual acts are concerned, his feelings are different, his impulses, his instincts, are different, and he is driven by abnormal feelings and instincts; and if that is insanity, then this man is insane." (R. 32).

In addition he testified that the accused, if given an opportunity, would not be able to desist from performing the homosexual acts (R. 29-35). On the other hand he testified that the accused, if he met an individual who appealed to him, would not go so far as to complete the act on a public street.

Dr. H. R. Hummer, Sioux Falls, a witness for the defense testified in substance that:

> "It is my opinion that this lieutenant is relatively normal to the ordinary affairs of life, but definitely abnormal, from my viewpoint, as regards his sexual life and, as a result of that, is not sane in matters pertaining to the question of sex which has rendered him somewhat abnormal in his manner of reacting to his surroundings." (R. 13).

The witness testified further that in his opinion the accused could not resist his abnormal sexual impulses (R. 8-16). He testified further, however, that:

> "I don't consider that his sex urge is any stronger than the normal urge, but I think it has been directed in improper channels so that it is manifested in an abnormal manner." (R. 14).

Doctor F. W. Haas, of Yankton, South Dakota, a witness for

the defense testified that the accused, in his opinion, was "unable to adhere to what he knows is right" (R. 22). He testified, however, as follows:

> "Q. If he received no encouragement from the individual he would be able to resist.
>
> A. No encouragement from the other individual, if the other man held him off. Just the same as the normal individual with a woman, if the woman says she does not desire to have this affair, the man is usually gentlemanly enough to desist." (R. 20).

Doctor Frank V. Willhite, of Redfield, South Dakota, a witness for the defense, testified in substance similar to the other medical witnesses for the defense, expressing the opinion that the accused could not resist an impulse to homosexuality (R. 25). He expressed the opinion also that the accused was above average intelligence.

b. Captain George B. Beaman, Medical Corps, and a qualified psychiatrist, testified for the prosecution that in his opinion the accused:

> "* * * is suffering with a constitutional type of homosexuality; that he is sane; that he is able to distinguish right from wrong; that he is able to adhere to the right in every instance in which we are interested" (R. 36).

He expressed in detail, the reasons for his conclusion as follows:

> "Now, when it comes to the question of whether he was compelled, as a result of his sexual abnormality, to act in such and such a way—was he compelled to indulge in homosexual behavior, the first answer is that so far as the object of his sex urge is concerned he is, I think, unable to select a normal female outlet, but when it comes to the manner in which or by which he commits the sexual act with a man, in other words, the time, the place, the circumstances, I find that he was not at all compelled to indulge when he got the urge. In line with that in my investigation I

asked — Tell me about a time when you felt the most violent urge, and he told me of an instance in civilian life in Chicago where walking on the street one day he met another man and he had a sudden upsweep of feeling towards this man, which he gave as an example of one of the times when he had been most violently upheaved by his sexual emotion, and I asked him — Well, what did you do about it? Well, he passed him, went down the street a few steps, came back and they met, and -- Well, did you have a sexual act there? No, we went to his room. And I asked whether he felt at all compelled to carry through the act, if the circumstances were not right, in that most violent of circumstances. He said no. In other words, I asked him — Well, suppose this man's room had not been handy, what would you have done, would you have done it on the street? Of course not. Or, would he have done it in an alley? Well, I could not say about that, but probably we would have found a place. So that is evidence that he was not compelled to indulge his practice as a result of his complete emotion. That was one bit of evidence. I asked — Well, now, suppose you get the urge at a time when you are on your way to an important business engagement; do you drop the business engagement and carry through the act? The assumption there would be that if he was compelled to act, without any ability to control himself, he would drop the business engagement. But he said — No, if it was an important business engagement and I was going to catch a train, I would certainly put the sexual act aside. I would not say the same, in case the engagement did not seem too important to me; I would perhaps delay my arrival somewhat. So that if other things were of importance to him he was able to select and able to control carrying out the act. Now, in my history, as a third bit of evidence, according to the patient he had never failed to be discreet in his relationship. By that, he had never been arrested for this business, nor reprimanded by others. In other words, he had always taken into account

circumstances, just as any normal person would. I asked, as a fourth point — Suppose you are aroused and you get close to the act with another person, and supposing that person protests, does not want to go through with it? He said — Well, in that case I would cease, I would not go through with it, I would quit. In other words, if he were subject to compulsive behavior, under those circumstances the assumption is that he would proceed to rape the other person against his will, but that is not apparently the case. As a fifth bit of evidence, he told me that he would never allow a third party to observe his sexual behavior, in other words, if a third party was around he would not proceed. And, finally, as a sixth bit of evidence, he told me that he would adapt his role in the sexual act to the other party; although he preferred to take the passive role himself, if the other person also wanted to take the passive role, he would assume the active. In other words, this evidence showed to my mind that at all times and under all circumstances of sexual arousal this person was able to choose and to adjust his behavior to the circumstances, which to my mind added up to the fact that he is not compelled at any time, even under the most violent of circumstances, to behave out of control, and it is on such evidence as that that I conclude that he was not only able to be aware of and tell the difference between right and wrong, but also to adhere to the right insofar as his awareness of and abiding by the circumstances are concerned" (R. 39-40).

Captain Samuel Wick, Medical Corps, a qualified psychiatrist, testified as follows:

"I felt that he could distinguish between right and wrong, on the basis of his past history, since he had adjusted to society and was able to maintain himself; had kept away from conflicts with the law and had been in no difficult situations.

* * *

"I felt that he could adhere to the right in this respect: So far as his sexual impulses were concerned, his desire was directed toward men and that impulse was part of his makeup, so for gratification of the sexual desire he would have to seek men, women would be futile as far as specific sexual impulses were concerned; but the circumstances and the surrounding situations, as the choice of the sexual act, he could be discreet about it, could follow out the inclinations and be able to control the impulse when the situation so warranted" (R. 46).

c. Attached to the record is the report of the proceedings of a Board of Officers which convened at the station hospital, Army Air Force Technical School, Sioux Falls, South Dakota, prior to the trial of the accused. The purpose of the Board as set forth in the order was to determine the mental condition of the accused. The Board consisted of Major Leonard P. Ristine, Captain Charles A. Reid and First Lieutenant John H. Krick. This Board, after an extensive examination as to those perverted sexual offenses which are involved in this case, expressed the opinion that the accused was not able to "adhere to the right" as to those offenses which involve sexual misconduct, but as to the other offenses of which he was accused, that he could adhere to the right. In addition the Board made the general statement that:

"The well known sexual nature of persons constituted as mentioned in 1 above, that is that such persons, while in the ordinary sense are considered sane, are driven and controlled by abnormal motives for which they are not responsible and are therefore unable to act in the right".

d. The above testimony presented to the court an issue as to the mental responsibility of the accused as to each of those acts alleged which involved perverted sexual misconduct. The evidence did not challenge the mental responsibility of the accused for the other offenses alleged.

In determining the type and extent of mental derangement or disease which will relieve one of criminal accountability, we are guided

by the provisions of the Manual for Courts-Martial, 1928, which states that:

> "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right".

The above test as to mental accountability under military law has been approved in a number of opinions by The Judge Advocate General (see CM 116694 James; CM 124243 Harris; CM 223448 Rieseman; see also Winthrop's Military Law and Precedents, reprint 1920, p. 294). It is observed that the Board of Medical Officers who deliberated upon the condition of the accused prior to this trial, reached the conclusion that the accused could not, in respect to his perverted sexual tendencies, adhere to the right. One of the members of that board reasserted that opinion as a witness for the defense, but obviously weakened the force of his opinion by asserting that the accused would not engage in a sexual act on the street. Several civilian doctors expressed similar opinions. All but one, however, weakened his opinion by expressing the further opinion that the accused could restrain himself just as normal men restrain their natural desires. On the other hand the witnesses for the prosecution not only testified that in their opinion the accused could, as to each of the sexual offenses involved in this case, adhere to the right, but they illustrated and explained that the accused was not the subject of compulsive behavior by showing that he took circumstances into account in his conduct and guided himself accordingly. For example, it was illustrated that the accused did not attempt by force to accomplish his sexual desires. Moreover it was shown he never committed perverted sexual acts in the presence of third persons. Captain George B. Beaman in his testimony for the prosecution asserted that the evidence of the accused's past conduct showed:

> "that at all times and under all circumstances of sexual arousal this person was able to choose and to adjust his behavior to the circumstances, which to my mind added up to the fact that he is not compelled at any time, even under the most violent of circumstances, to behave out of control, and it is on such evidence as that that I conclude that he

> was not only able to be aware of and tell the difference between right and wrong, but also to adhere to the right insofar as his awareness of and abiding by the circumstances are concerned" (R. 40).

Furthermore, the testimony of the accused himself seems to indicate that the accused had the ability to restrain himself and that he only gave way to his impulses when he felt safe in doing so. Specification 2, Charge III, alleges that the accused solicited an unnatural relationship with Joseph S. Coletta on 11 February 1943. The facts concerning this Specification show that the accused sought to accomplish his purpose by persuasion but that he desisted in the face of refusal and resentment and exercised normal control in the restraint of his unnatural impulse.

In view of the above evidence, we must conclude that the court had before it evidence from which they might conclude beyond a reasonable doubt that the accused not only understood right from wrong but that he could, as to each offense alleged, adhere to the right. We must conclude, therefore, that the accused was legally sane and responsible for the offenses of which he is charged.

6. The uncontradicted proof offered by the prosecution concerning each Charge and each Specification, clearly establishes beyond a reasonable doubt the guilt of the accused as to each of the offenses concerning which the accused was found guilty.

7. The records of the Office of The Adjutant General show that the accused is approximately 26 years of age, that he was inducted into the service 19 March 1942, attended Officer Candidate School and that he was commissioned a second lieutenant, Air Corps, on 24 October 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and legally sufficient to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of Article of War 93 or 96 and is mandatory upon conviction of Article of War 95.

(On Leave), Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 236725

1st Ind.

War Department, J. A. G. O. 1 SEP 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 Roy T. Hyre (0-649502), 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 legally sufficient to support the sentence, and to warrant confirmation thereof. I recommend that the sentence be confirmed but that five years of the confinement imposed be remitted, that the sentence as thus modified be ordered executed, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, 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 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. ltr. for sig. of Sec. of War.
Incl. 3 - Form of Executive action.

(Sentence confirmed but five years of confinement remitted. G.C.M.O. 290, 2 Oct 1943)

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

SPJGH
CM 236801

3 - AUG 1943

UNITED STATES v. Privates ROBERT O. SMITH (33626768), CHARLES W. SCOTT (32810874), PAUL H. TRUITT (33558730), and GEORGE W. WEEKS, JR. (33455630), all of Company B, First Training Battalion, First Regiment, Infantry Replacement Training Center.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort McClellan, Alabama, 8 and 9 June 1943. Each: Dishonorable discharge and confinement for life. Penitentiary.

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 soldiers named above.

2. The accused were tried upon the following Charge and Specification.

CHARGE: Violation of the 92nd Article of War.

Specification: In that Privates Robert O. Smith, Charles W. Scott, Paul H. Truitt, George W. Weeks, Jr., and, (sic) all of Company B, First Training Battalion, First Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, did, at Fort McClellan, Alabama, on or about May 19, 1943, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Carrilue O'Neal.

Each of them pleaded not guilty to and was found guilty of the Charge and Specification. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority, as to each accused, approved the sentence, designated the United States Penitentiary at 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 that at about 9:00 p.m., 19 May 1943, at Fort McClellan, Alabama, Private Erskine O'Neal and his wife (both colored) went for a walk along a road back of the Colored Service Club. At a point about two hundred yards from the club six colored soldiers, the four accused named above and two others, "jumped" out of the woods bordering the road, one not on trial grabbed O'Neal and three, including accused Weeks, seized Mrs. O'Neal and pushed her off the road into the woods. When O'Neal broke away from the soldier who was holding him and tried to go to the assistance of his wife, her assailants threw stones at him and he threw stones back at them. Mrs. O'Neal screamed once as she was forced into the woods. Private O'Neal kept calling to her and she answered one time "here I am" but did not answer again. After trying without success to get another soldier who was passing along the road to help him, O'Neal ran to the Stockade "hardly" a mile away, to summon the Military Police (R. 15-21, 30, 32-35).

Mrs. O'Neal tried to get away from her assailants and begged them not to take her up into the woods but they held her by the arms and "in the back" and just "carried" her up there anyway. She tried to hold on to a tree but they pulled her away from it and threw her to the ground. She heard her husband calling but when she answered him accused Scott, who was standing right up close to her with a stick about the size of a broomstick in his hand, said "If you answer him again, I kill you, God damn". She did not call out again because she was "scared to". Then they held her on the ground, pulled off her pants and took turns "using" her. At all times one or another of them held her hands back over her head and the one who was on top of her held her legs up so that she could not get her feet on the ground. Each of her six assailants including the four accused put his penis inside her vagina and each of them had an emission. When they had finished with her she jumped up, picked up her hat and pocketbook and ran out of the woods. When she encountered Private Johnnie E. Owens, who was walking along a path near the service club, Mrs. O'Neal ran up to him and cried out "Help me, help me, help me" but she was so nervous that it was about five minutes before she could talk coherently. Then she told Private Owens that she had been raped. She said that one of her assailants had a stick and when accused Scott came walking along with a stick in his hand she said "There he is, that is the one right there". Private Owens and Mrs. O'Neal then went over to the service club and at about the same time they arrived her husband came up with the "M.Ps" (R. 35-44, 60-62).

At approximately twelve o'clock that night, in the presence of Military Police Sergeant Edward L. Jones, Mrs. O'Neal identified the four

accused and another soldier as five of her six attackers. She positively identified all of the accused at the trial and her husband also, at that time, identified them as four of the men who had come out of the woods and made away with his wife. On the night of 19 May the moon was shining brightly and even in the woods where it was somewhat darker than on the road, there was light enough for Mrs. O'Neal to see each of her assailants so as to recognize them again (R. 41, 53-56, 64, 85-88).

The dress, step-ins and stockings worn by Mrs. O'Neal at the time she was assaulted were received in evidence. One of the stockings and each of the other garments were torn (R. 38-40, Exs. A, B and C).

Captain Howard M. Rogers, Medical Corps, examined Mrs. O'Neal at the station hospital at about 3:00 a.m. on 20 May 1943. He "did a vaginal smear on her" and found some dead spermatozoa but no live ones. He found no evidence of any physical injury. In his opinion there had been sexual intercourse within "24 or 48 hours" prior to the examination. The vagina of Mrs. O'Neal was large "as evidence of previous pregnancy" (R. 65-68).

4. For the defense Major Thomas A. Sappington, Medical Corps, testified that at about 1:00 p.m. on 21 May 1943 he gave Mrs. O'Neal a complete physical examination and found no history or evidences of any injury whatsoever. Major Sappington stated, however, that with a negro, a dark skinned individual, it would be more difficult to see bruises or contusions than with a white person (R. 72-74).

Each of the accused elected to remain silent (R. 74).

5. According to the undisputed evidence, as Private O'Neal and his wife (both colored) were walking along a road at Fort McClellan at nine o'clock one night, the accused and two other colored soldiers seized them, pushed Mrs. O'Neal into the woods bordering the road, and when Private O'Neal broke away, threw rocks at him and prevented him from going to his wife's assistance. Mrs. O'Neal was thrown to the ground. When her husband called to her and she answered him, accused Scott, who was standing beside her holding a stick, threatened to kill her if she answered again. While her hands were held back above her head by one or the other of her assailants, each of them in turn, including the four accused, had sexual intercourse with her, penetrated her vagina with his penis and had an emission. She tried to get away from them but was unable to do so. Her dress, step-ins, and one stocking were torn in her struggles with her attackers. As soon as they had released her she ran out of the woods and complained to the first passer-by she met that she

had been raped. It was a bright, moonlight night and she was able to see clearly the men who assaulted her. She positively identified each of the accused about three hours after she was attacked and again identified them at the trial. Private O'Neal also identified accused at that time.

It clearly appears that each of the accused had carnal knowledge of Mrs. O'Neal by actual physical force positively applied. She was induced to refrain from making outcry by a threat against her life. Apparently she did not suffer any serious physical injury as a result of her resistance, but the extent and character of the resistance required of a woman to establish her lack of consent, depends upon the circumstances and the relative strength of the parties (52 C.J. 1019-1020; 44 Am.Jur. 905-906). Manifestly, Mrs. O'Neal alone could not combat six young able bodied men with any hope of success and further or more violent resistance on her part would have been futile. In the opinion of the Board the evidence is legally sufficient as to each of the accused, to support the findings of guilty of rape as alleged in the Specification of the Charge.

6. Privates William T. Cole and Ben Spear originally were named as accused in the Specification of the Charge. A motion for a severance as to Private Cole was granted prior to the entry of his plea (R. 5) and a like motion as to Private Spear, interposed on behalf of the four accused named above in the caption, was granted at the time the prosecution rested its case (R. 71). The trial then proceeded as to these four only.

7. A letter, dated 16 June 1943, directed to the "Commander & Chief of Armed Service" and forwarded to The Judge Advocate General, written by Mrs. Connie M. Southerland, a sister of accused Truitt has been considered by the Board of Review.

8. The Charge Sheet shows that accused Scott is 19 years of age and that he was inducted on 19 February 1943; that accused Truitt is 19 years of age and that he was inducted 20 February 1943; that accused Weeks is 21 years of age and that he was inducted 26 February 1943; and that accused Smith is 19 years of age (at the trial he stated that the Charge Sheet was incorrect and that his true age was 17 years) and that he was inducted 26 February 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of any of the accused were committed

during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as to each of the accused. A sentence either of death or of imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 22-2801 of the District of Columbia Code.

_____, Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

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

SPJGQ
CM 236807

21 JUL 1943

UNITED STATES	)	XV CORPS
v.	)	Trial by G.C.M., convened at Camp Livingston, Louisiana, 12 May 1943. Dismissal.
Captain JOHN N. SHORTLEY (0-300656), 106th Cavalry (Mechanized).	)	

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 Charges and Specifications:

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: In that Captain John N. Shortley, 106th Cavalry (Mechanized) was, at Camp Livingston, Louisiana, on or about 0900, April 10, 1943, found drunk while on duty as Executive Officer, 2nd Squadron, 106th Cavalry (Mechanized).

ADDITIONAL CHARGE: Violation of the 95th Article of War. (Finding of guilty disapproved by the reviewing authority.)

Specification 1: (Finding of guilty disapproved by the reviewing authority.)

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

Specification 3: (Finding of guilty disapproved by the reviewing authority.)

Specification 4: (Finding of guilty disapproved by the reviewing authority.)

Specification 5: (Finding of guilty disapproved by the reviewing authority.)

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 1 and 2 of Charge 1. He was found guilty of Specification 3 of Charge I, and Charge I, and also of Specifications 1, 2, 3, 4 and 5 of the Additional Charge with certain excepted words, and guilty of a violation of the 96th Article of War instead of the 95th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service with a recommendation for clemency. The reviewing authority disapproved the findings of guilty of the Additional Charge and of all Specifications thereunder, approved the findings of guilty of the original Charge and of Specification 3 thereunder, approved the sentence, did not concur in the recommendation for clemency, and forwarded the record of trial for action under Article of War 48.

3. In support of Specification 3 of the original Charge, the prosecution showed by competent evidence that on 10 April 1943 the accused was on duty as Executive Officer, 2nd Squadron, 106th Cavalry, at Camp Livingston, Louisiana. About 9:00 o'clock that morning Lt. Colonel John F. Homfeld met the accused coming toward the squadron headquarters from the direction of the officer's latrine. He noticed that the accused was very unsteady in gait. He accused Captain Shortley of being drunk. The accused replied, "I don't know what you are referring to". The witness then directed accused to return to his hut and remain there until the witness came back from the review that was being held that day. He was of the opinion that accused was drunk but he wanted further proof. When asked whether the accused was drunk the witness could not say whether he was or was not drunk. The definition of drunkeness as it appears on page 160 of the Manual for Courts-Martial, 1928, was read to the witness, but he was still unable to say whether the accused was or was not drunk (R. 31-33).

Colonel Homfeld, after leaving the accused, ordered that a medical officer be sent to Captain Shortley's hutment, primarily to ascertain whether or not Captain Shortley was drunk. As a result of this order Captain Cleveland H. Pardue, Regimental Surgeon, went to Captain Shortley's hutment on 10 April 1943 and took the accused to the hospital in an ambulance to have a blood alchohol test made. Captain Pardue testified that in his opinion, when he saw Captain Shortley that morning, the latter was definitely under the influence of liquor. In his opinion he was drunk (R. 35). He based these conclusions upon the accused's lack of coordination, the way in which he

spoke, his gait, and the odor of alcohol on his breath.

He was present that day when blood was taken from the accused for the purpose of making an analysis. Subsequently, he received a report indicating that the blood removed from the accused at 9:40 a. m., 10 April 1943 showed 2.5 miligrams per cubic centimeters (Ex. B). The witness expressed his opinion that he believed that such an analysis was an indication of drunkenness. He admitted that the test was not infallible as the capacity of the person would have to be taken into consideration and that therefore it would be possible for an individual with a great capacity to have blood containing 2.5 c.c. and not be drunk (R. 34-37).

4. The accused having been advised of his rights elected to testify in his own behalf. With reference to Specification 3 of the original Charge he admitted that he was the Executive Officer of the 2nd Squadron (R. 80). He recalled that on the morning of the proposed review, 10 April 1943, Colonel Homfeld had ordered him to his hutment and shortly thereafter Captain Pardue visited him there. He accompanied Captain Pardue to the Station Hospital where he submitted to a blood test. He admitted that the test showed 2.5 c.c. He denied, however, that he was drunk at that time (R. 88-89). He claimed that he was sober and that he had no faith in the blood analysis test. He offered to have another blood test taken at the time he was testifying which might show that his blood still contained 2.5 c.c. He explained Colonel Homfeld's conception of his staggering by the fact that he was half running at the time on his way to headquarters and the Colonel could have mistaken his gait as a stagger (R. 90).

5. Drunkenness is described in the Manual for Courts-Martial, 1928, par. 145, p. 160, as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties".

On such an issue evidence is admissible not only of the conduct and demeanor of the accused, but also the opinion of a witness.

Colonel Homfeld was of the opinion that the accused was drunk on duty on the morning of 10 April 1943 because of his unsteady gait. He was not sure of his own opinion and therefore would not definitely state that the accused was drunk. Acting upon his belief he did that which was the wisest thing under the circumstances. He ordered the accused to be examined by a medical officer. Captain Pardue was the regimental surgeon. It must be assumed that as such he had had a medical training and therefore was experienced in determining the condition of an individual. He observed the accused that morning for the very purpose of ascertaining his condition with reference to sobriety. He was emphatically of the opinion that accused was drunk and gave a description of the facts upon which he based this conclusion. In this he was corroborated by the blood test given the accused.

The blood test report was not properly admitted in evidence as it constituted hearsay evidence when offered. However, this error did not affect the substantial rights of the accused because the accused himself admitted the test showed 2.5 c.c.'s and the evidence of drunkenness was clearly proven by the testimony of the two witnesses without the blood analysis.

The only evidence in contradiction was the testimony of the accused denying his drunkenness.

The court has accepted as true the opinion of Captain Pardue supported by the belief of Colonel Homfeld and the blood test analysis. This evidence is ample to support the finding of guilty of this offense. The weight of the evidence favors that conclusion.

It was not disputed that the accused was on duty when he was found in the condition described. He was the Executive Officer of the Second Squadron. In time of war under the circumstances the accused may properly be considered as continuously on duty within the meaning of Article of War 85: CM 222739; 230201, M.C.M. par. 145, p. 160. The finding of guilty of the offense charged is therefore supported by the evidence.

6. To the sentence of dismissal the court added "with a recommendation of clemency". Six members of the court of seven recommended that clemency be extended by commutation to a sentence not including dismissal because of the accused's satisfactory record. Colonel Hiram E. Tuttle certified to the excellent, efficient and satisfactory manner in which the accused performed his military duties as Assistant S-4 of the Cavalry School, Fort Riley, Kansas, from October 1942 to 22 January 1943. To the contrary there was attached to the review of the staff judge advocate a reprimand imposed by Major General Wade H. Haislip upon the accused under Article of War 104 for the alleged offense on 15 May 1943 of failing to be present to perform a military duty specifically ordered, and, instead, being found in bed asleep and in a highly intoxicated condition, and thereafter having lied about his whereabouts. The accused by indorsement acknowledged the punishment and elected to take no appeal. The reviewing authority did not concur in the recommendation of clemency.

7. War Department records show accused to be 32 years of age. He attended high school and graduated from the New Mexico Military Institute. Upon completion of R.O.T.C. training he was appointed a second lieutenant, Cavalry Reserve, on 12 September 1932. He was on active duty with the Civilian Conservation Corps from 15 September 1933 to 14 March 1936, both dates inclusive, and from 8 April 1936 to 18 May 1936. He was promoted to first lieutenant, Cavalry Reserve, on 7 June 1937; was ordered to active duty on 21 October 1940, and promoted to captain, Cavalry Reserve, on 8 November 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 85.

William H. Founde, Judge Advocate.

Carlos Blum, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 - 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 N. Shortley (0-300656), 106th Cavalry (Mechanized).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to the recommendation for clemency signed by six of the seven members of the court requesting commutation to a sentence not including dismissal because of accused's satisfactory previous record, and to a letter of recommendation signed by Colonel Hiram E. Tuttle, Commanding Officer of the Cavalry School, Fort Riley, Kansas, where accused served as Assistant S-4 from about 1 October 1942 to 22 January 1943. Subsequent to the trial in the instant case a reprimand by Major General Wade H. Haislip was imposed upon the accused under Article of War 104 for being drunk in bed on 15 May 1943, instead of performing his military duties. In the reprimand General Haislip charged that,

> "Repeatedly you have disgraced and degraded yourself in the eyes of those who have come into contact with you and whose patience and tolerance you at last exhausted, but this instance, following closely upon your trial by General Court-Martial, demonstrates clearly that you are morally unfit to associate with officers and gentlemen or to command troops."

In view of this circumstance I do not concur in the clemency recommendation.

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.

3 Incls.
1 - Record of trial
2 - Draft ltr. sig. USW
3 - Form of action

(Sentence confirmed but execution suspended. G.C.M.O. 269, 27 Sep 1943)

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

M.D. (141)

SPJGH
CM 236819

9 AUG 1943

UNITED STATES	)	NINTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Second Lieutenant GILE SOLANDER (0-1577869), Quartermaster Corps.	)	Trial by G.C.M., convened at Presidio of San Francisco, California, 7 June 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 Second Lieutenant Gile Solander, Quartermaster Corps, Station Complement, did, at Camp Livingston, Louisiana, on or about October 7, 1942, with intent to deceive Major John R. Tindall, Infantry, Camp Inspector, Camp Livingston, Louisiana, officially state to the said Major John R. Tindall that the said Second Lieutenant Gile Solander was not the husband of Winifred H. Solander, that he had never lived with Winifred H. Solander, that he was not the father of her child Stanford Dwight Solander, that a half brother of the said Second Lieutenant Gile Solander by the name of Arthur Gile Solander existed, that Winifred H. Solander was the wife of his half brother Arthur Gile Solander, that the said Second Lieutenant Gile Solander had left the United States the latter part of August, 1934, and did not return to the United States until July, 1935, and that the said Second Lieutenant Gile Solander was not Arthur Gile Solander, which statements were known by the said Second Lieutenant Gile Solander to be untrue in that the said

Second Lieutenant Gile Solander was the husband of Winifred H. Solander, in that he had lived with Winifred H. Solander, in that he is the father of her child Stanford Dwight Solander, in that no half brother of the said Second Lieutenant Gile Solander by the name of Arthur Gile Solander ever existed, in that Winifred H. Solander was not the wife of a half brother of the said Second Lieutenant Gile Solander, in that the said Second Lieutenant Gile Solander did not leave the United States the latter part of August, 1934, and remain absent from the United States until July, 1935, and in that the said Second Lieutenant Gile Solander is the same person as Arthur Gile Solander.

Specification 2: In that Second Lieutenant Gile Solander, Quartermaster Corps, Station Complement, did, without due cause, at Camp Lee, Virginia, Fort Sam Houston, Texas, and Camp Livingston, Louisiana, from on and about August, 1942, to on or about March, 1943, dishonorably fail and neglect to provide for the support of his minor child, Stanford Dwight Solander.

Specification 3: In that Second Lieutenant Gile Solander, Quartermaster Corps, Station Complement, did, without due cause, at Camp Lee, Virginia, Fort Sam Houston, Texas, and Camp Livingston, Louisiana, from on or about August, 1942, to on or about March, 1943, dishonorably fail and neglect to pay to Winifred Frances Solander the sum of Fifteen and No/100 ($15.00) Dollars per month as and for the support of the minor child of Winifred Frances Solander and the said Second Lieutenant Gile Solander, to-wit, Stanford Dwight Solander, which sums the said Second Lieutenant Gile Solander was ordered to pay by valid decree dated November 22, 1940, rendered by a court of competent jurisdiction in the case of Winifred Frances Solander, Plaintiff, versus Arthur Gile Solander, Defendant, same being Cause No. 149852 in the Superior Court of the State of California, in and for the County of Alameda, California.

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

Specification 1: In that Second Lieutenant Gile Solander, Quartermaster Corps, Station Complement, then Staff Sergeant, Company L, 29th Quartermaster Regiment, did, without due cause, at Fort Mason, California, Camp Murray, Washington,

Fort Richardson, Alaska, and Camp Lee, Virginia, from on or about June, 1941, to on or about August, 1942, wrongfully and dishonorably fail and neglect to provide for the support of his minor child, Stanford Dwight Solander.

Specification 2: In that Second Lieutenant Gile Solander, Quartermaster Corps, Station Complement, then Staff Sergeant, Company L, 29th Quartermaster Regiment, did, without due cause, at Fort Mason, California, Camp Murray, Washington, Fort Richardson, Alaska, and Camp Lee, Virginia, from on or about June, 1941, to on or about August, 1942, wrongfully and dishonorably refuse and fail to pay to Winifred Frances Solander the sum of Fifteen and no/100 ($15.00) Dollars per month as and for the support of the minor child of Winifred Frances Solander and the said Second Lieutenant Gile Solander, to-wit, Stanford Dwight Solander, which sums the said Second Lieutenant Gile Solander was ordered to pay by valid decree dated November 22, 1940, rendered by a court of competent jurisdiction in the case of Winifred Frances Solander, Plaintiff, versus Arthur Gile Solander, Defendant, same being Cause No. 149852 in the Superior Court of the State of California, in and for the County of Alameda, California.

He pleaded not guilty to all the Charges and Specifications. He was found guilty of Specification 1, Charge I, except the words "in that no half brother of the said Second Lieutenant Gile Solander by the name of Arthur Gile Solander ever existed, in that Winifred H. Solander was not the wife of a half brother of the said Second Lieutenant Gile Solander"; guilty of Specification 1, Charge II, except the words "June, 1941", substituting therefor the words "January, 1942"; and guilty of all other Specifications and all Charges. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of Specification 2, Charge II, as involves a finding of guilty of the offense charged for the period from on or about January 1942 to on or about August 1942, 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:

Winifred Frances Hackett Solander, then Miss Hackett, met the accused in California in July of 1934. His full name was Arthur Gile Solander, but he generally went by the name of Gile Solander and

was occasionally called Walter Solander. She saw him frequently beginning in August 1934, and they were married in San Francisco on 24 December 1934. Before their marriage, accused lived in a boarding house at 1328 Pierce Street. After their marriage they lived there as husband and wife until July 1935. During this period, accused worked for Swift & Company and others. In June 1935, he suffered a leg injury in a motorcycle accident, which left a deep scar on the inside of his right calf. He was confined to his bed at home for a month or six weeks and then used crutches for some little time. In late July or early August 1935, accused told his wife he was going to Nicaragua to work for the United Fruit Company. He was gone approximately six weeks and when he returned stated that he had been in San Francisco all of the time. Later accused told her that during the period of his absence he had reenlisted in the army as a single man. On 8 October 1935, accused left for China. On 21 December 1935, a child was born to Mrs. Solander and the accused. During the absence of accused in China, his wife received quite a number of letters from him, and when the baby was born, she notified him of the fact by cablegram. In one letter, accused stated that he could hardly believe that he was a father, and that he wished his wife to obtain fingerprints and footprints of the baby and herself and send them to him. This was done, and subsequently accused returned them to his wife with her letters. She received no help or assistance from accused during the time he was in China, but he did not then deny that he was her husband or the father of her child. In January 1938, Mrs. Solander obtained an interlocutory decree of divorce from the accused. In June 1938, she learned that he had returned to the United States, and on inquiry at Fort McDowell in San Francisco was informed that he had been transferred to Fort George Wright, Washington. In January 1939, she took the child and went to see what arrangements accused would make to support it. Accused met them at the train in Spokane and all three went to the home of the mother of Mrs. Solander at Opportunity, where they spent the night. Accused then returned to his station, but Mrs. Solander remained with her mother for a visit, and saw accused a number of times in Spokane. He asked her not to go through with the divorce proceeding which had been commenced. In April 1939, accused went to San Francisco, and had dinner with Mrs. Solander at different times at the house where she was living. Between February 1939 and October 1940, accused paid Mrs. Solander $40 to reimburse her for the money she had spent for railroad fare and not over $40 toward the maintenance of the child. In May 1939 or May 1940, Mrs. Solander obtained a final decree of divorce and custody of the child. Meanwhile accused had reenlisted, and on 22 November 1940, after service on accused of an order to show cause, the decree was amended to require accused to pay Mrs. Solander the sum of

$15.00 per month for the support of their minor child, Stanford Dwight Solander. When the order was served on accused at Fort Mason, in Mrs. Solander's presence, he refused to accept it, because as he stated, it was addressed to Arthur Gile Solander and his name was Gile Solander. This was the first time he had denied in the presence of Mrs. Solander that he was her husband. Accused complied with the amended decree by making payments of $15 each from December 1940 through July 1941. In November 1941, Mrs. Solander received another payment of $15.00 from accused, who was then in Alaska. That was the last payment which he made. Accused was ambidextrous. He never mentioned to Mrs. Solander that he had a half-brother. The child's resemblance to accused was unmistakable (R. 10-27, 31; Ex. 4).

Miss Belle Walters and Winifred Hackett were employed in 1934 at the Federal Land Bank in Oakland, California. Miss Walters was introduced to the accused by Miss Hackett and saw him "any number of times" when he came to see Miss Hackett. Miss Walters saw the marriage license showing accused and Miss Hackett were married on 24 December 1934. She saw them a dozen times between December 1934 and the fall of 1935, while they were living together as husband and wife on Pierce Street, San Francisco. A boy, Stanford, was born to Mrs. Solander and the accused in December 1935, about three months after accused had left for China. Miss Walters had frequently seen the child who bore a very decided resemblance to accused (R. 31-36).

Mrs. Larissa Kappel had a boarding house at 1328 Pierce Street. The accused looked very much like the man "Walter" Solander who had lived in her house as a bachelor in 1934, had then married, and had lived there with his wife for some months. While she was in New York "Walter" Solander had an accident to his leg, and had a crutch which was still in her house. The Solanders had moved away before she returned from New York, but in August 1935, "Walter" Solander came to her home, and said that he had found a job on some kind of ship going to China. That was the last time Mrs. Kappel saw him (R. 36-38).

Mrs. Clara Dorcas Hackett identified the accused as the husband, now divorced, of her daughter Winifred Solander. One night in November 1938, when accused had come to her house in Opportunity, Washington, she asked him why he had "run out on" her daughter and he stated that he thought she would be better off without him. In January, her daughter and accused and their little boy stayed all night at her house. The child bore a very great resemblance to the accused (R. 38-42).

It was stipulated that Major John R. Tindall, if called as a witness, would testify that on or about 7 October 1942, at Camp Livingston, Louisiana, the accused officially stated to him that the accused was not the husband of Winifred H. Solander, that he had never lived with her and was not the father of her child, Stanford Dwight Solander, that a person alleging himself to be a half-brother of accused, using the name of Arthur Gile Solander existed, that Winifred H.

Solander was the wife of the alleged Arthur Gile Solander, that accused had left the United States in late August 1934 and did not return until July 1935, and that the accused is not Arthur Gile Solander (R. 9-10; Ex. 1).

4. For the defense, Fred Russell Brown, a saloon keeper, testified that he had known accused since June 1939, but knew only his last name; that accused visited his saloon quite often with "the rest of the boys"; that he never saw accused with a woman; that the accused was talked about only as a good fellow; that his reputation for honesty and integrity was "above reproach"; that accused had always repaid money borrowed from him; and that he trusted accused (R. 43-45).

The accused testified that he was born in Sacramento, California, the son of Arthur Wesley Solander and Nellie Solander, both now deceased. He did not recall ever seeing either parent, although he had some correspondence with his mother up to about 1935, at which time he gave her address as Harbin, Manchukuo. Accused was a professional soldier and had been in the United States Army almost continuously since 1934 except for the period from 26 June 1934 to 1 August 1935, when he spent about eleven months in Manchuria. At Mukden in March of 1935, he was called for questioning as a foreigner, and in attempting to escape received a bayonet wound in the right leg. In July or August 1934, accused met a man on the street in San Francisco, named Arthur Gile Solander, who claimed to be a son of the father of accused. A few days later accused was invited by Arthur Gile Solander to the boarding house at 1328 Pierce Street where the latter and Winifred Hackett Solander were living, as husband and wife, and was introduced to her. Accused saw them "fairly" frequently after that. The last time he saw Arthur Gile Solander was in July 1935, or the 10th or 11th of August 1935. On cross-examination he stated that he knew Arthur Gile Solander, "Two months, or less". On 1 August 1935, accused reenlisted in the Army and on 8 October 1935 sailed with a casual detachment for China. He remained in China for three years and during that time corresponded with Winifred Solander and sent her money, but he did not ask for fingerprints and footprints of the child. In one letter to accused, Mrs. Solander said she had been deserted. On his return to the United States in 1938, accused attempted to call on Mrs. Solander and while he was stationed at Fort Wright, Washington, Mrs. Solander came to see him, "apparently" to gain information about her husband. She was accompanied by a child, but accused did not meet her at the train and did not call at the home of her mother. He "probably" gave her $60 between 10 and 20 April 1939. Accused also contributed money to Mrs. Solander for the alleviation of domestic contingencies and the support

of her child at various times between 1 August 1940 and January 1942, but he made no payment after January 1942. He was never employed by Swift and Company. He never worked in any civilian capacity. He was not married to Winifred Hackett Solander, did not live with her and was not the father of her child. He never lived or boarded at 1328 Pierce Street, and did not know Mrs. Larissa Kappel. He never was in Opportunity, Washington and could not recall having seen Mrs. Hackett, the mother of Mrs. Solander, at any time before the trial. He did recall Miss Walters as one of the ladies to whom he was introduced by "Miss Hackett Solander" with the words "This is my husband". He discontinued calling upon Winifred Solander after she had introduced him to a houseful of people in Oakland as "My husband, Arthur". When asked whether he had denied to those present that he was her husband, he answered that he had objected to it and that the objection was made to Winifred Solander. In answer to questions concerning the reasons for his payments to Mrs. Solander, he stated that "I got a song and dance about the lady needing assistance", "I had been more or less advised it would be a good way to keep my nose clean until something went one way or the other" and that he had been informed that he could be reduced in rank if he did not make the payments. In connection with his statements to Major Tindall, which were substantially true to the best of his knowledge and belief, accused testified that Lieutenant Fink advised him at the time that anything he said might be used against him, and that he was aware of the fact and that "any statement an officer makes is an official statement". Accused was told by Major Tindall that if he were guilty it would be advisable to make a confession to his commanding officer, but accused did not do so, and there were no threats, intimidation, or coercion by Major Tindall or the investigating officer. Notice of a decree of divorce or a summons against Arthur Gile Solander was handed to accused while he was stationed at Fort Mason, California in 1939, but accused did not appear in court because the summons was addressed to Arthur Gile Solander. Accused married Marie Olmstead 17 July 1941 while stationed at Fort Mason, and a daughter was born of that marriage (R. 46-52, 54-59, 61, 63-64, 67-76).

5. a. The evidence for the prosecution, that accused was the husband of Winifred Hackett Solander and the father of her child, was flatly contradicted by accused. Mrs. Solander, Mrs. Hackett and Miss Walters definitely identified accused as the husband of Mrs. Solander and testified that her child closely resembled him. Accused admitted that Winifred Solander introduced him to friends as "My husband, Arthur", yet he neither denied the fact of the marriage to them, nor, apparently, protested against being called "Arthur". Accused also admitted that he contributed money to Mrs. Solander over a period of years and that he did not discontinue the

payments until the end of 1941, after his marriage to Marie Olmstead. Accused claimed that he met Arthur Gile Solander in July 1934, was introduced by him to Mrs. Solander, saw the couple quite frequently after that, was in Manchuria for eleven months during the period from July 1934 to July 1935, last saw Arthur Gile Solander in July or August 1935 and knew Arthur Gile Solander for two months or less.

In the opinion of the Board of Review the evidence establishes beyond any reasonable doubt that the accused was the husband of Winifred H. Solander and that Stanford Dwight Solander was their child; that the statement made by accused to Major Tindall was untrue and known by accused to be untrue (Spec. 1, Chg. I); that he dishonorably failed and neglected to pay from about August 1942 to about March 1943, $15 per month for the support of his minor child under the decree of the court (Spec. 3, Chg. I); that he dishonorably failed and neglected to provide for the support of his minor child from about August 1942 to about 1 March 1943 (Spec. 2, Chg. I); that as an enlisted man he wrongfully and dishonorably failed and neglected to pay, from about January 1942 to about August 1942, $15 per month for the support of his minor child under the decree of the court (Spec. 2, Chg. II); and that he wrongfully and dishonorably failed and neglected to provide for the support of his minor child from about January 1942 to about August 1942 (Spec. 1, Chg. II).

b. The offenses alleged in Charge II were committed while accused was an enlisted man and prior to his acceptance of a commission on 14 August 1942. An enlisted man who accepts a commission does not lose his military status, and jurisdiction for an offense committed while an enlisted man does not terminate upon acceptance of a commission (CM 121586; Dig. Ops. JAG 1912-40, sec. 369(3)).

c. Specifications 1 and 2, Charge II, allege different aspects of a single offense, failure to support his minor child during the period from about January 1942 to about August 1942, the first based upon his general obligation and the second under the decree of the court. Specifications 2 and 3, Charge I, likewise allege different aspects of a single offense, failure to support his minor child during the period from about August 1942 to about March 1943, Specification 2 based upon his general obligation and Specification 3 under the decree of the court. With respect to punishment the two Specifications under each Charge should respectively be considered as a single offense and the four Specifications may well be considered as a single offense covering the entire period.

6. The three Specifications, Charge I, are alleged in violation of the 95th Article of War.

As to Specification 1, 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 and cognizable under the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 713).

With respect to Specifications 2 and 3, Charge I, the evidence shows no circumstances other than that accused failed to pay for the support of his child during the periods alleged. A failure to support his child and a failure to make payments for that purpose under a decree for alimony are both cognizable under the 96th Article of War (Dig. Ops. JAG 1912-40, sec. 454 (48)). The record of trial is legally sufficient as to Specifications 2 and 3, Charge I, to support only so much of the findings of guilty as involve findings of guilty in violation of Article of War 96.

7. Consideration has been given to a letter addressed to The Judge Advocate General, dated 8 June 1943, by Mrs. Winifred H. Solander, ex-wife of accused, requesting clemency and his retention in the service.

8. The accused is 33 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service 23 June 1928, to 26 June 1934, and from 1 August 1935; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty 14 August 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 only so much of the findings of guilty of Specifications 2 and 3, Charge I, as involve findings of guilty in violation of the 96th Article of War; legally sufficient to support the findings of guilty of Specification 1, Charge I, and of Charge I; legally sufficient to support the finding of guilty of Specification 1, Charge II and of the approved finding of guilty of Specification 2, Charge II, and of Charge II; 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 95th Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.
12 AUG 1943

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 opinion of the Board of Review in the case of Second Lieutenant Gile Solander (0-1577869), 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 findings of guilty of Specifications 2 and 3, Charge I, as involve findings of guilty in violation of the 96th Article of War, legally sufficient to support the findings of guilty of all other Specifications and Charges and the sentence and to warrant confirmation of the sentence.

The accused made with intent to deceive a false official statement to the camp inspector involving his marital status (Spec. 1, Chg. I), dishonorably neglected to provide for the support of his minor child from about August 1942 to about March 1943 (Spec. 2, Chg. I) and to pay $15 per month for the same period for the support of the child under a court decree (Spec. 3, Chg. I), while an enlisted man had failed to provide for the support of his child from about January 1942 to August 1942 (Spec. 1, Chg. II) and to pay $15 per month for the support of the child for the same period under a court decree (Spec. 2, Chg. II).

I recommend that only so much of the findings of guilty of Specifications 2 and 3, Charge I, be approved as involve findings of guilty in violation of the 96th Article of War and that the sentence to dismissal be confirmed and carried into execution.

3. Inclosed herewith are the 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 carrying into effect the recommendation made above.

Myron C. Cramer

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

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

(Only so much of findings of guilty of Specifications 2 and 3, Charge I, approved as involve findings of guilty in violation of the 96th Article of War. Sentence confirmed. G.C.M.O. 253, 21 Sep 1943)

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

SPJGK
CM 236865

20 AUG 1943

UNITED STATES v. Second Lieutenant WILLIAM E. ROBERSON (O-1016985), Infantry.	20TH ARMORED DIVISION Trial by G.C.M., convened at Camp Campbell, Kentucky, 11, 15 June 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 Charges and Specifications:

CHARGE: Violation of the 85th Article of War.

Specification: In that Second Lieutenant WILLIAM E. ROBERSON, Regimental Headquarters Company, 480th Armored Infantry Regiment, was, at Camp Campbell, Ky., on or about May 21, 1943, found drunk while on duty as officer in charge of a group of trainees.

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

Specification: In that Second Lieutenant William E. Roberson, Regimental Headquarters Company, 480th Armored Infantry Regiment, did, at Camp Campbell, Kentucky, on or about May 21, 1943, without proper leave, go from the properly appointed place for duty as officer in charge of a group of trainees, after having repaired to said place and been entrusted with said duty by superior authority.

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

Specification: In that Second Lieutenant William E. Roberson, Regimental Headquarters Company, 480th

Armored Infantry Regiment, did, at Camp Campbell, Kentucky, on or about May 21, 1943, without proper leave, wrongfully use a government vehicle, to wit a half track car, for his private purpose.

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 dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 21 May 1943, accused was in charge of a group of trainees. In that duty he was under the command of Captain James B. Dunlap, 480th Armored Infantry Regiment. He was to supervise the day's training of his group at the 37 mm range, and his duties included assembling the men at the point of departure, looking after them during the day, keeping records and field data cards, seeing that the men were properly fed, and getting them back to camp at the end of the day's training. The men were taken to the range in "halftracks" (R. 10-13, 30, 31, 34, 35). The detail left camp for the range at about 8 a.m. It was a hot day. Accused rode in a halftrack driven by Private First Class James E. Mulford, Service Company, 480th Armored Infantry Regiment. On the way to the range, Mulford noticed nothing unusual about the behavior of accused. However, shortly before the arrival at the range, accused took a drink from a pint bottle which he had in his possession. Mulford said that it looked like a whiskey bottle but that he did not know that it was (R. 15, 19, 28, 35).

In accordance with the customary routine, Captain Dunlap left the training area during the early part of the morning, and returned to camp to obtain water and the noon meal for the trainees. Before leaving he directed accused to stay near the training area "C.P." (Pros. Ex. A). After Captain Dunlap's departure, accused told Mulford to get into the halftrack. Mulford and accused entered the vehicle, and, with accused at the wheel, drove back to camp. On the way, accused handed a pint bottle to Mulford and told him to throw it out, which he did. Mulford thought it was the same bottle from which accused had taken a drink earlier in the morning. There was about a half inch of some liquid in it (R. 15, 17, 20, 22). From camp, they drove to accused's home near Woodlawn. Accused entered his home and remained there about 30 minutes, leaving Mulford outside. Then they went to Woodlawn, where accused stopped at a store for about 15 minutes, thence back to accused's home. This time Mulford went into the house with accused. Accused drank a can of beer, and they stayed there about 30 minutes (R. 15-17, 20). Captain William E. Dargan, commanding officer of accused's company, testified that accused's duties in the training detail did not include going to his home in a halftrack (R. 35).

Leaving accused's home, they headed for camp, accused still at the wheel. According to Mulford accused drove "sorta unsteady" and "weaved

around in the road coming into camp". He crossed the center line of the road two or three times (R. 17, 18). Another vehicle passed them and stopped in front of them. A second lieutenant emerged from it and asked accused whether he could drive, to which accused responded that he was not a very good driver. The lieutenant suggested that the regular driver "take over". Accordingly, Mulford drove from there back to the range. Mulford testified that there was nothing wrong with the vehicle (R. 18).

They reached the range about 4:30 p.m. Captain Dunlap and Second Lieutenant Peter J. Bedsaul, Division Trains Headquarters Company, 20th Armored Division, testified that accused seemed perfectly normal at the time and during the few minutes before the detail left for camp. Lieutenant Bedsaul saw accused talking to Captain Dunlap. The latter testified that he was not close enough to accused to detect the presence of liquor on his breath (R. 18, 20, 26; Pros. Ex. A).

On the way back to camp, accused rode with Mulford and Lieutenant Bedsaul. Lieutenant Bedsaul stated that at the beginning of the trip he may have exchanged a few words with accused. There was nothing unusual about accused's behavior. However, very shortly after the halftrack started for camp, accused fell asleep and slept during the entire trip (R. 18, 19, 24-26).

Arrived at camp, Lieutenant Bedsaul tried unsuccessfully to wake accused by shaking and calling him. Lieutenant Bedsaul reported the matter to Captain Dunlap, who ordered Corporal Otis R. Ereccesen of accused's company to assist accused from the halftrack to the orderly room. Ereccesen found accused unconscious and flushed of face. He tried to wake accused, and, unable to do so, carried him into the orderly room. Ereccesen did not detect the odor of alcohol on accused's breath and did not know whether accused was drunk (R. 18, 19, 24, 25, 27-29; Pros. Ex. A). Mulford testified that he did not see accused take any drinks except the two already referred to (R. 20).

Ereccesen laid accused on a cot in the orderly room, unbuttoned his fatigue clothes, and removed his helmet liner, at which point accused said, "Oh, my God!" (R. 27, 28). Captain Dunlap summoned Captain Dargan, who testified that when he arrived accused was lying on the cot, apparently unconscious. When Captain Dargan bent over accused, he smelled the odor of alcohol on him. By shaking and questioning accused, Captain Dargan aroused him and asked him what was wrong with him. At first accused raised himself and asked the time. He seemed to think it was early morning. He asked how many recruits there were to go out for training, and "made statements which weren't exactly coherent" (R. 31).

After a few minutes accused stood up, unaided. He was "rather

unsteady" (R. 31). Captain Dargan told accused that he wanted accused to go with him to see the regimental commander and asked whether accused felt that he could walk to regimental headquarters. Accused replied that there was nothing wrong with him and that he could walk. Thereupon, accused and the two captains walked to regimental headquarters. Accused did not stagger and did not require support, but his walk was "rather unsteady" and occasionally he "seemed to have to catch himself". He did not walk in a straight line, but "was stepping around in order to maintain a balance" and "sometimes had to step to the side to keep his balance" (R. 32, 33).

The regimental commander not being at headquarters, the three officers rode to the officers' quarters, where Captain Dargan directed accused to go to his quarters and stay there. Although accused was "moving under his own power", Captain Dargan considered him drunk. However, Captain Dargan believed him sufficiently in command of his faculties to understand the order, and accused's reply indicated that accused understood the order and was capable of complying with it (R. 32-34).

Captain Dargan then located "Colonel Colson", the regimental commander; and thereafter, under instructions from the colonel, Captain Dargan and Major George P. Kinnard, Medical Corps, Regimental Medical Officer, went to accused's room. This was only a few mintues after Captain Dargan had ordered accused to go to his quarters. Major Kinnard gave accused a "look over". Accused told Major Kinnard that he had been drinking some the night before and that he had partaken of a drink or two during the day. He also said that he was "rather tired". Major Kinnard considered the appearance of accused "very good", but testified that his gait was unsteady and that he had a "slight inability to focus his eyes and his consonants were slurred and speech irregular, and he was unable to maintain his position steadily" (R. 32, 34, 36, 37).

Major Kinnard directed Captain Dargan to accompany accused to the Station Hospital for a blood test, and Captain Dargan and accused rode there in Major Kinnard's car. Major Kinnard did not go with them and was not present at the test (R. 33, 34, 37).

The tests were made, and Captain Dargan and accused then returned to the officers' quarters. Thereafter, the result of the test was "checked" by Captain Aaron Learner, Medical Corps, 1580th Service Unit, who was not present when the blood sample was taken (R. 33, 44-47, 49, 50). The report of the test was admitted in evidence, and showed "2 mgms per c.c. blood" (R. 47; Pros. Ex. B).

The report was sent to Major Kinnard, who explained that it indicated two milligrams of alcohol per "CC" of blood. He explained further that this was "a larger amount of alcohol in his blood than should be there in

any normal condition", and that according to accepted standards, 1.5 milligrams per CC of blood "is held as intoxicate or state of intoxication" (R. 52, 53). On cross-examination, Major Kinnard stated that most of his work in interpreting alcoholic blood tests had been done since his entrance into the Army, and that this was his fifth case in the last few months. He stated further that the alcohol blood test determines the amount of alcohol in the blood rather than the ability of the individual to overcome the effects of the alcohol on his mind and body (R. 54).

Major Kinnard testified that at the time he saw accused, he determined, in view of the history of the case (apparently referring to what accused told him), plus his observation of accused, that accused "was not in complete control of his faculties" and that there was an "impairment of judgment". When he received the blood report, "it was a natural assumption that that was the cause of the impairment of his judgment" (R. 53).

For the defense, Technical Sergeant John Romanovsky, 480th Armored Regiment, testified that accused left the range shortly after Captain Dunlap's departure and did not return until about 4 or 4:30 p.m. When accused descended from the halftrack and walked over to witness, ac[illegible] did not stagger. Witness saw accused talking to Captain Dunlap [illegible] minutes. They were seated. Witness was six or eight feet away and observed nothing unusual about accused's actions (R. 55, 56, 58).

Staff Sergeant Eden M. Plesz, Headquarters Company, 1st Battalion, 480th Armored Infantry Regiment, testified that he talked with accused at the range for five minutes at about 4:30 p.m. Accused gave witness instructions about the field data cards and looked them over to make certain that they were in order. During the conversation accused did nothing unusual or of a nature which would lead witness to believe him drunk. After the conversation, accused "went back for the men", who were lining up for the trip to camp (R. 59-61).

Accused elected to remain silent (R. 62).

4. The evidence proves without dispute that accused, without proper leave, left his place of duty, as alleged in the Specification, Additional Charge I, and that without proper leave he wrongfully used a government halftrack car for his "private purpose", as alleged in the Specification, Additional Charge II.

With reference to the Charge under Article of War 85, the evidence shows that accused was in charge of a group of trainees and that his duties did not terminate until the return of the men to camp at the close of the day's training. Although accused did not act in an abnormal manner while at the range, he had previously exhibited an inability to drive

properly. In fact, his driving was so erratic that an officer in another car suggested that he relinquish the wheel to Mulford. The cause of his deep sleep on the trip back becomes apparent from his condition upon his eventual return to consciousness. His unsteadiness and "slurred" speech, together with the odor of alcohol on his breath and his admission of having done some drinking the night before and of having consumed a drink or two during the day, lead to the inevitable conclusion that he was in a drunken slumber. Had he been called upon to take some action with respect to his duty during the trip to camp, his condition undoubtedly would have prevented his doing so in an efficient manner. As stated by Major Kinnard shortly thereafter, accused was not in full possession of his faculties and his judgment was impaired. That is enough under Article of War 85 (MCM, 1928, par. 145). In passing, it should be noted that accused was out of Mulford's sight on two occasions and that he had ample time to consume more liquor during those periods.

5. Accused objected to the introduction of the blood test report and all evidence concerning it (R. 38, 46, 47). Since the other evidence was sufficiently compelling to establish guilt, it is unnecessary to decide whether the report was competent.

6. War Department records show that accused is 27 years old and that he graduated from high school and attended a preparatory school for one year. He served as an enlisted man from 20 July 1940 until 20 March 1943, when, upon graduation from the Armored Force Officer Candidate School, Fort Knox, Kentucky, he was appointed second lieutenant, Army of the United States.

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 of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 85 and authorized under Articles of War 61 and 96.

Irving G. Eson, Judge Advocate.

(On Leave), 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 Second Lieutenant William E. Roberson (O-1016985), 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 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 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.

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 execution suspended. G.C.M.O. 296, 4 Oct 1943)

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

SPJGN
CM 236868

U N I T E D S T A T E S	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Sarasota Army Air Field, Sarasota, Florida, 9 June 1943. Dismissal and total forfeitures.
Second Lieutenant THOMAS W. MINTON (0-1588179), Quartermaster Corps, 513th Base Headquarters and Air Base Squadron.	)	

OPINION of 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 Charges and Specifications:

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

Specification: In that 2nd Lt. Thomas W. Minton, QMC, 513th Base Hqs and AB Squadron did, without proper leave, absent himself from his organization at Sarasota Army Air Field, Sarasota, Florida, from about 0830 May 16, 1943 to about 1630 May 18, 1943.

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

Specification: (Finding of not guilty).

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that 2nd Lt. Thomas W. Minton, QMC, 513th Base Hqs and AB Squadron, was at Sarasota Army Air Field, Sarasota, Florida, on or about May 21, 1943, from 1300 EWT to about 1800 EWT, drunk, while in arrest to the limits of the Base.

Specification 3: In that 2nd Lt. Thomas W. Minton, QMC, 513th Base Hqs and AB Squadron, did, at Sarasota Army Air Field, on or about May 20, 1943, wrongfully entice Private Roland J. Gagne, who was then on duty at the Base Dispensary, to drink intoxicating liquor, which he then said 2nd Lt. Thomas W. Minton gave to the said Private Roland J. Gagne, which was a disorder and neglect to the prejudice of good order and military discipline.

He pleaded guilty to Charge I and the Specification thereunder, and not guilty to the other Charges and Specifications. He was found guilty of Charge I and its Specification, and of Charge III and Specifications 1, 2 and 3 thereunder, and not guilty of Charge II and its Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for six months. The reviewing authority disapproved the finding of guilty of Specification 1, under Charge III, approved only so much of the sentence as provides for dismissal from the service and forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution relative to the findings approved by the reviewing authority (the Specification, Charge I, and Specifications 2 and 3, Charge III) shows that the accused absented himself without leave from his organization at Sarasota Army Air Field from about 16 May 1943 to 18 May 1943 (R. 5; Ex. 1).

The evidence for the prosecution shows further that on 18 May 1943, the accused was carried to the base dispensary in an acute alcoholic condition, placed under arrest, and restricted to the limits

of the base (R. 27). On 21 May, Private Roland J. Gagne, who was on duty at the Base Dispensary, found the bathroom door locked. He knocked on the door and the accused unlocked it, and let him and another enlisted man into the room. The accused was drinking whiskey, and he passed the bottle to Private Gagne. The accused and each of the enlisted men had several drinks (R. 38, 39, 44-46).

On the same day the accused was found lying on his bed in the dispensary in a drunken stupor (R. 18-19, 27).

4. The accused testified that he enlisted in the Army on 21 June 1940, and was commissioned a Second Lieutenant on 12 February 1943. When he was five years of age his father deserted his mother. At the age of twenty-one he entered into an unhappy marriage which lasted only two years (R. 48-50).

On the morning after entering the dispensary he secured some whiskey from his car and had a drink in the bathroom of the dispensary. Later Gagne came over to the accused, and told him that he wanted a drink. The accused told him that there was some liquor in the bathroom whereupon Gagne went into the bathroom and drank the rest of the accused's liquor. On the following day the accused told Private William Burke that he had some liquor in his (the accused) car, and Burke secured the liquor and hid it in the bathroom for the accused. Later the accused secured a coke and went into the bathroom where he mixed a drink and hid the bottle in a different place. Gagne and Burke then knocked on the door and the accused unlocked it, and they entered. The accused then put up his coke, and returned to his bed. Later he found that the whiskey he had left hidden in a different place in the bathroom was gone. The accused testified that he never at any time asked or encouraged either Private Gagne or Burke to take a drink (R. 52-54).

5. The Specification, Charge I, alleging that the accused was absent without leave from 16 May 1943 to 18 May 1943 is established not only by the accused's plea of guilty but by uncontradicted evidence.

Specification 2, Charge III, alleges that the accused was at Sarasota Army Air Field on 21 May 1943 drunk while in arrest of the limits of the Base. The evidence, beyond a reasonable doubt, sustains the finding of guilty under this Specification.

Specification 3, Charge III, alleges that the accused, did, at Sarasota Army Air Field, on or about 20 May 1943 wrongfully entice

Private Roland J. Gagne who was then on duty at the Base Dispensary, to drink intoxicating liquor, which he, the accused, gave to him.

The evidence shows very clearly that at the place and on or about the date alleged, the accused gave Private Gagne several drinks of whiskey. The evidence shows, however, that the accused merely gave or handed Private Gagne a bottle of whiskey, and fails to show that the accused inveigled, suggested, or urged Private Gagne to drink it. The evidence fails, therefore, to show that Private Gagne was enticed to drink whiskey by the accused. The evidence is sufficient, however, to sustain the lesser included offense of wrongfully giving Private Gagne whiskey while the latter was on duty.

6. The records of the Office of The Adjutant General show the accused to be approximately 37 years of age. He enlisted on 21 June 1940, attended Officer Candidate School, and was commissioned a second lieutenant, Army of the United States, on 12 February 1943.

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 of the Specification, Charge I, and Specification 2, Charge III; legally sufficient to support Charges I and III; and legally sufficient to support so much of the findings of guilty of Specification 3, Charge III, as involves a finding that the accused, did, at the time and place alleged, wrongfully give Private Roland J. Gagne, who was then on duty at the Base Dispensary, intoxicating liquor to the prejudice of good order and military discipline; legally sufficient to support the sentence, and to warrant confirmation thereof. A sentence of dismissal is authorized upon convictions of Article of War 61 or 96.

Elwood Isaacson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Geeser, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 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 Second Lieutenant Thomas W. Minton (0-1588179), Quartermaster Corps, 513th Base Headquarters and Air Base Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and the Specification thereunder (being absent without leave for two days), of Charge III and Specification 2 thereunder (being drunk while in arrest) and so much of Specification 3, Charge III, as involves a finding that the accused did, at the time and place alleged, wrongfully give Private Roland J. Gagne, who was then on duty at the Base Dispensary, intoxicating liquor to the prejudice of good order and military discipline, 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 the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached letters from accused's mother, dated 22 June 1943, and from accused, dated 4 July 1943, urging 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 foregoing recommendation, should such action meet with your approval.

Myron C. Cramer

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

5 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. from accused's mother.
Incl 5 - Ltr. from accused.

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(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. G.C.M.O. 252, 21 Sep 1943)

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

SPJGQ
CM 236888

15 JUL 1943

UNITED STATES	XV CORPS.
v.	Trial by G.C.M., convened at Camp Livingston, Louisiana, 28 May 1943. Dishonorable discharge (suspended), total forfeitures and confinement for five (5) years. Rehabilitation Center, Eighth Service Command, Camp Bowie, Texas.
Private ANDREW L. HAMILTON (12150172), Battery A, 353rd Field Artillery Battalion.	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part. The Board of Review has now examined the record 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 69th Article of War.

Specification 1: In that Private Andrew L. Hamilton, Battery A, Three Hundred and Fifty-third Field Artillery Battalion, having been duly placed in arrest in quarters on or about April 27, 1943, did, at Camp Livingston, Louisiana on or about April 28, 1943, break said arrest before he was set at liberty by proper authority.

Specification 2: In that Private Andrew L. Hamilton, Battery A, Three Hundred and Fifty-third Field Artillery Battalion, having been duly placed in arrest in quarters on or about April 27, 1943, did, at Camp Livingston, Louisiana on or about May 5, 1943, break said arrest before he was set at liberty by proper authority.

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

Specification: In that Private Andrew L. Hamilton, Battery A,

Three Hundred and Fifty-third Field Artillery Battalion, having received a lawful command from Captain John M. McKay, his superior officer to put down a soft drink bottle and go outside the Camp Exchange, did, at Camp Livingston, Louisiana, on or about May 6, 1943, willfully disobey the same.

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

Specification 1: In that Private Andrew L. Hamilton, Battery A, Three Hundred and Fifty-third Field Artillery Battalion, did, at Camp Livingston, Louisiana on or about May 6, 1943, offer violence against Captain Rudolph P. Lewis, his superior officer, who was then in the execution of his office, in that he, the said Private Hamilton, did use the following threatening and insubordinate language to the said Captain Lewis to wit. "If you didn't have that pistol on I would knock you on your - - -."

Specification 2: In that Private Andrew L. Hamilton, Battery A, Three Hundred and Fifty-third Field Artillery Battalion, did, at Camp Livingston, Louisiana on or about May 6, 1943 offer violence against second Lieutenant John A. Lamb, his superior officer, who was then in the execution of his office, in that he, the said Private Hamilton, did use the following threatening and insulting language to the said second Lieutenant Lamb to wit: "If you will take that gun off I will whip your - - -."

The accused pleaded not guilty to all of the Charges and Specifications. A motion for findings of not guilty as to Charge II and its Specifications was denied. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced during the trial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined to hard labor for five years. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge and designated the Rehabilitation Center, Eighth Service Command, Camp Bowie, Texas, as the place of confinement. The proceedings were published in General Court Martial Orders No. 7, Headquarters XV Corps, Camp Beauregard, Louisiana, 17 June 1943.

3. It was shown by the prosecution that accused was a member of

Battery A, 353rd Field Artillery Battalion, commanded by Captain John M. McKay (R. 7). On 26 April 1943 accused was apparently placed under arrest in quarters by Lieutenant West, acting under orders from Captain McKay (R. 9-10). Sometime later, whether on the 28th or 29th April is uncertain, Captain McKay personally told accused he was in arrest and reminded him to remain in the Battery area "except for training" (R. 10). On 5 May 1943 the Captain received a report from military police "in the Alexandria Area" that accused was picked up in Pineville and delivered to his organization in arrest and he was thereupon placed in the stockade (R. 7). Thereafter, at about 2:30 p.m. on 6 May 1943 Captain McKay was notified that accused had broken away from a guard and instructions were given "to get the Battery out to look for him" and 40 men thereupon went throughout the brigade area to make a search (R. 7). Accused was found in the post exchange with a group of soldiers. He was at the soft drink counter drinking a "Coca-Cola". The captain ordered him to "put down the coke bottle and leave the PX." Accused took another drink from the bottle "and then was slow about turning at a second command to go outside" (R. 8, 10, 13, 14). He walked slowly from the place. The captain told him to move faster and gave him a push. Captain Rudolph P. Lewis, who was Group Officer of the Day for the 353rd Field Artillery Battalion on 6 May 1943 and under arms, was present, moved to the right of accused and attempted to, or did grasp his right arm saying "Come on, lets go" (R. 8, 12). Accused then said "Man, turn me loose" and mumbled words which Captain Lewis did not hear (R. 12) but which Captain McKay stated were as follows: "If you didn't have that gun on your side, I'd knock you on your ass" (R. 8, 9). Captain Lewis and Sergeant Dry then conducted accused to the guardhouse (R. 9), during which interval Captain Lewis testified,

> "he acted in a very insubordinate manner. He did not heed my pushing and he acted like he wasn't supposed to mind me or pay any attention to my order" (R. 13).

Sergeant Hershell Dry testified that as they approached Battery A mess hall on the way to the guardhouse, Captain Lewis asked accused whether he could walk any faster and that accused "told him if he didn't have that gun he'd knock him on his ass" (R. 16). Later in the afternoon, Second Lieutenant John A. Lamb, who was Group Officer of the Guard at the time, was interrogating accused in the guardhouse, whereupon accused said to him that if he "didn't have a gun he would whip my ass" (R. 20). Sergeant Ben Smith, who was Sergeant of the Guard on 6 May 1943 was present and heard accused make the statement (R. 19).

4. From the vague, uncertain and conflicting testimony, a great part of which is clearly hearsay it is impossible to determine whether accused was in fact placed in arrest prior to 28 April 1943. It happens that Captain McKay did personally advise him of his arrest and cautioned him regarding it on 28 April 1943. While the record is therefore legally insufficient to show that there was a breach of arrest by accused on 28 April 1943, as alleged in Specification 1 of Charge I, there is no question about the breach of arrest by accused on 5 May 1943, when, after having been warned by his commanding officer with respect to the limits of his arrest, he was apprehended by military police in Pineville, returned to his organization and placed in the stockade.

The gravamen of the offense alleged in Charge II is willful disobedience or intentional defiance of authority- - -in other words, a deliberate refusal or omission to do what was ordered. Mere wrongful omission or neglect to obey is not willful disobedience (CM 223336). Viewed in the light of the evidence most favorable to the prosecution, the testimony, at best shows merely that accused was "slow" in his obedience although he did obey. It is conceivable that alacrity and promptness may, on occasion, be of the essence of a lawful command by a superior officer but in the situation here presented there was no necessity for haste in obedience to the order and however tardily accused acted in responding to the lawful command it cannot be said that there was a willful disobedience contemplated by Article of War 64, indeed, under the facts, there was no failure to obey in any respect but a compliance with the order, however, slowly and reluctantly performed. The motion for findings of not guilty of Charge II and its Specification was well founded and should have been granted.

The Specifications of Charge III, though laid under Article of War 63, were evidently framed upon the model Specification No. 25 under Article of War 64 as provided in the Manual for Courts Martial, 1928 (page 242). But the violence contemplated in this offense where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the article (MCM, 1928, par. 134a). There is no evidence of any attempted or menaced physical violence by accused toward either Captain Lewis or Lieutenant Lamb and the conduct of accused did not constitute a violation of Article of War 64. His opprobrious language used on each occasion did, however, clearly indicate a disrespectful attitude by accused toward his superior officers and such disrespectful behavior is a violation of Article of

War 63. With appropriate exceptions and substitutions the findings can be supported. Confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period is authorized upon conviction of a violation of Article of War 69 and confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period is authorized upon conviction of violation of Article of War 63. Although dishonorable discharge is not authorized as punishment for violation of either Article of War 63 or Article of War 69, accused was found guilty of more than two offenses for which authorized confinement without substitution is more than six months and dishonorable discharge and total forfeitures are, therefore authorized in this case (MCM 1928, par. 104. sec. B).

5. The records show that accused is 18 years of age, that he was inducted on 3 October 1942 and has had no prior service.

6. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 2 of Charge I and of Charge I and of Charge III and its Specifications, excepting in each Specification the words "offer violence against" , and substituting therefor the words "behave with disrespect toward" legally insufficient to support the findings of guilty of Specification 1 of Charge I and of the Specification and Charge II, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year and three months.

William H. Rounds, Judge Advocate

Paul Heflin, 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 your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Andrew L. Hamilton (12150172), Battery A, 353rd Field Artillery Battalion.

2. I concur in the opinion of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Specification 1, Charge I (breach of arrest - A.W. 69), and Charge II and its Specification (willful disobedience of lawful command of superior officer - A.W. 64), be vacated; that only so much of the findings of guilty of the Specifications, Charge III (offering violence against superior officers - A.W. 63, 2 Sps.), be approved as involves findings that accused did, at the place and time and in the manner alleged in each Specification, behave with disrespect toward his superior officer, in violation of Article of War 63; that so much of the sentence be vacated as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and three months, and that all rights, privileges and property of which accused has been deprived by virtue of those portions of the findings and sentence so vacated be restored.

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

Myron C. Cramer

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

2 Incls.
Incl.1-Record of trial.
Incl.2-Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. So much of sentence vacated as in excess of dishonorable discharge, total forfeitures, and confinement at hard labor for one year and three months, by order of the Acting Secretary of War. G.C.M.O. 169, 29 Jul 1943)

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

SPJGN
CM 236902

9 JUL 1943

UNITED STATES	)	77TH INFANTRY DIVISION
V.	)	Trial by G.C.M., convened at Camp Hyder, Arizona, 4 June 1943. Dishonorable discharge, suspended, and confinement for five (5) years. Rehabilitation Center, Turlock, California.
Private JAMES F. FOOSE (33164704), Headquarters Company, Second Battalion, 305th Infantry.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James F. Foose, Headquarters Company, Second Battalion, 305th Infantry, did, at Fort Jackson, South Carolina on or about

> December 2, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Third Service Command, Harrisburg, Pennsylvania, on or about April 13, 1943.

The accused pleaded not guilty to the Charge and Specification and was found of the Specification, 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, and of the Charge, not guilty but guilty of the 61st Article of War. Evidence of two previous convictions, for violations of the 61st Article of War, 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 five years. The reviewing authority approved the sentence, ordered it executed but suspended the execution of the dishonorable discharge until the accused's release from confinement and designated the Ninth Service Command Rehabilitation Center, Turlock, California, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 39, Headquarters 77th Infantry Division, 21 June 1943.

3. The only question requiring consideration is whether the record of trial is legally sufficient to support the sentence.

The prosecution introduced as Exhibit "A", the extract copy of the morning report of Company "A", Second Battalion, 305th Infantry, identified by Captain Clesson M. Duke, certified by him as Captain and Personnel Officer and as official custodian of the original morning report. He further testified that about 20 February, the training regiment was closed and all men on duty returned to their ogranization. This extract copy shows on 2 December 1942, the accused from duty to A.W.O.L. as of 1 December (R. 6-8).

The prosecution and defense stipulated that the absence of the accused was terminated by apprehension at the Third Service Command, Harrisburg, Pennsylvania, on or about 13 April 1943 (R. 10).

4. After his rights had been explained to him the accused, at his own request, was sworn and testified. He answered to the question as to

his duties "on or about December 2, 1942" that he was "K.P. for the new boys that came in at Fort Jackson", "Yes sir - but not on the second". He received word that his mother had a stroke, asked his company commander for a furlough, did not get it, so just took one. He lived on a farm in Perry County, Pennsylvania. His father was not able to work, so the accused went there, helped on the farm, never intended to remain away from military service, but to return. He bought a round trip ticket from Fort Jackson to Harrisburg, and used part of this ticket, which he purchased at Fort Jackson on 1 December. Part of his ticket introduced in evidence as Exhibit "C" (R. 13), is for return passage from Harrisburg to Columbia, S.C. with date of sale stamped on back, as "Dec. 1, 1942", good for ninety days from that date (R. 11-16).

5. The accused was found guilty of absence without leave for the time alleged, in violation of the 61st Article of War. However, the evidence shows beyond a reasonable doubt that the absence of the accused began on 1 December 1942, and terminated on 13 April 1943. On 1 December 1942, the maximum punishment for A.W.O.L., for more than sixty days, was dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months. Therefore, all of the sentence in excess of this maximum is excessive and invalid. It has been held in CM. 230704, 1943, that the Executive Order 9267, dated 1 December 1942, suspending the limit of punishment for violations of the 61st Article of War, applies only to absences beginning on or after 2 December 1942.

5. The charge sheet shows that the accused, with no prior service, was inducted 20 March 1942 to serve for the duration, plus six months.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.

Charles Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 10 JUL 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937, (50 Stat. 724; 10 U.S.C. 1522) is the record of trial in the case of Private James F. Foose (33164704), Headquarters Company, Second Battalion, 305th Infantry, together with the opinion of the Board of Review.

2. I concur in the opinion of the Board of Review and recommend that so much of the sentence to confinement at hard labor as is in excess of six months, be vacated.

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

Myron C. Cramer

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

2 Incls
Incl 1 - Record of trial.
Incl 2 - Form of action.

(So much of the sentence to confinement as in excess of confinement at hard labor for six months vacated, by order of the Acting Secretary of War. G.C.M.O. 150, 19 Jul 1943)

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

SPJGN
CM 236914

3 JUL 1943

UNITED STATES	)	44TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 15 June 1943. Dishonorable discharge and confinement for two and one-half ($2\frac{1}{2}$) years. Disciplinary Barracks.
Private GEORGE P. MICILLO (32019094), Company I, 71st Infantry.	)	

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 Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Pvt George P. Micillo, Company I, 71st Infantry did, at Wadesboro, No. Carolina on or about October 6, 1941 desert the service of the United States and did remain absent in desertion until he was apprehended at Brooklyn, New York on or about May 6, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for violation of Article of War 61 was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Since the record shows that the accused deserted the service on 6 October 1941, and remained absent in desertion until 6 May 1943, the only question requiring consideration is the legal sufficiency of the evidence to sustain that part of the Specification alleging that the accused "remained absent in desertion until he was apprehended". In an effort to show the apprehension of the accused, there was introduced over the objection of the defense, an alleged statement by Corporal Robert Krendell, asserting that the accused was apprehended upon the date alleged in the Specification. This statement was not authenticated in any manner. The trial judge advocate asserted that it was an official document and apparently upon the faith of his assertion it was received into evidence (R. 9; Ex. 3). This statement does not appear to have been made under oath, Corporal Krendell was not present to confront the court, and he was not subject to the inquisitive test of cross-examination. The reception of this instrument into evidence offended, therefore, every principle of proof the hearsay rule was designed to protect. The Manual for Courts-Martial asserts that "Hearsay is not evidence" (par. 113, M.C.M., 1928). Since no evidence was presented to show that the accused was apprehended, that part of the Specification alleging apprehension is unsupported by proof. It follows moreover since the apprehension of the accused is not proved, that we must consider, for the purpose of punishment, that his absence was terminated by surrender.

The maximum punishment prescribed for desertion terminated by surrender, after an absence of more than 60 days, prior to the suspension of the maximum limits of punishment for desertion on 3 February 1942, was dishonorable discharge, total forfeitures, and confinement at hard labor for 1½ years (par. 104c, M.C.M., 1928; Executive Order #9048, 3 February 1942). It follows, therefore, since the desertion in the present case occurred prior to the suspension order of 3 February 1942, that the maximum limit of punishment prescribed for peace-time desertion terminated by surrender is the maximum legal punishment which may be enforced against the accused (CM 221662).

4. The court was legally constituted. For the reason stated the Board of Review holds that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification as involves finding that the accused did, at Wadesboro, North Carolina, on or about 6 October 1941, desert the service of the United States and did remain absent in desertion until his absence was terminated in New York on 6 March 1943, in some manner not shown, legally sufficient to support the Charge, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 1½ years.

Chas. L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(178)

SPJGN
CM 236914

1st Ind.

War Department, J.A.G.O., 6 - JUL 1943 - To the Commanding General, 44th Infantry Division, Fort Lewis, Washington.

1. In the case of Private George P. Micillo (32019094), Company I, 71st Infantry, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated, recommend that only so much of the finding of guilty of the Specification be approved as involves finding that the accused did, at Wadesboro, North Carolina, on or about 6 October 1941, desert the service of the United States and did remain absent in desertion until his absence was terminated in New York on 6 March 1943, in some manner not shown, in violation of Article of War 58, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 1½ years. Upon compliance with this recommendation 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 236914)

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

RECEIVED JUL 12 1943 HQ. 44th INF. DIVISION AG

JUL 8 - 43

DISPATCHED WAR DEPARTMENT SERVICES OF SUPPLY J.A.G.O.

RECEIVED JUL. 12 1943 JAO: HQ: 44th DIV.

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

SPJGQ
CM 236937

26 JUL 1943

UNITED STATES v. Second Lieutenant LLOYD J. KENT (0-1895116), Army of the United States, Service Command Unit 1962.	NINTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Ford Ord, California, 1 June 1943. Dismissal and total forfeitures.

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 Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that 2nd Lt. Lloyd J. Kent, AUS, Service Command Unit 1962, Fort Ord, California, did, at Monterey, California, on or about April 11, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by mouth with one Private Thomas F. Ivy.

Specification 2: In that 2nd Lt. Lloyd J. Kent, AUS, Service Command Unit 1962, Fort Ord, California, did, at Monterey, California, on or about May 1st, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by mouth with one Private Thomas F. Ivy.

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

Specification 5: In that 2nd Lt. Lloyd J. Kent, AUS, Service Command Unit 1962, Fort Ord, California, did, at Monterey, California, on or about May 14, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by mouth with one Private William Ward.

He pleaded lack of jurisdiction of the court. The court overruled the plea. He pleaded not guilty to the Charge and to the Specifications. He was found guilty of the Charge and of Specifications 1, 2 and 5 except, as to Specification 5, not guilty of the words "did", "commit", and "having" but guilty of the substituted words "did attempt to commit" and "attempting to have". He was found not guilty of Specifications 3 and 4, and not guilty of violation of Article of War 93 with reference to Specification 5, but guilty of violation of Article of War 96. No evidence of any prior convictions was submitted. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused pleaded to the jurisdiction of the court. By stipulation it was established that accused on 7 May 1943 tendered his resignation as an officer of the Army of the United States for the good of the service (R. 11). On 26 May 1943 Headquarters Ninth Service Command published Special Orders 145 which, in paragraph 54 thereof, relieved accused from assignment and further active duty in the military service of the United States, effective at such time as to enable him to arrive at his home 1 June 1943 on which date "he will revert to inactive status" (Ex. A). On 29 May 1943 the same authority, by paragraph 20 Special Orders 148, revoked paragraph 54, Special Orders 145 (Ex. 1).

It was contended by defense counsel that the publication of paragraph 54 Special Orders 145, was tantamount to an acceptance of the resignation of the accused and that therefore he was no longer in the military service and no longer subject to the jurisdiction of the court.

The proper method of acceptance of a resignation tendered by an officer is set forth in AR 605-275, 25 September 1928, which provides, in substance, that the proper form of acceptance shall expressly set forth that the resignation is accepted by the President and shall be effective either upon a specific date or upon notice to the officer. In the instant case paragraph 54 Special Orders 145 pertaining to accused was not an acceptance of his resignation, nor was it ever intended to be. In the case of officers of the Army of the United States it is the practice, as a step in the administrative procedure preliminary to acceptance of a resignation, to revert the officer to an inactive status so as to discontinue his pay. The letter or other

notice of acceptance of the resignation might or might not follow. Until it is actually issued and the officer is notified thereof he remains in the military service and is subject to military court-martial jurisdiction under Article of War 2. The accused's special plea to the jurisdiction was therefore properly overruled.

4. The prosecution called as a witness Private Thomas F. Ivy, Medical Section, Service Command Unit 1962, who was instructed by the court that he need not answer any questions which might tend to incriminate him. He testified that he first met the accused about 11 April on a street in Monterey, California, and accompanied him to a hotel room to obtain a drink. They returned to the streets and had several more drinks. They then visited Pacific Grove and returned to Monterey when it was almost night. He refused to answer any further questions regarding the meeting or what followed that night (R. 21-22). He again met the accused about 14 May at the bus station and went uptown and had several drinks. He refused further information regarding this meeting (R. 22-23).

By stipulation it was established that the accused was at the San Carlos Hotel in Monterey, California, over the weekend of 9-11 April. The switchboard operator of the hotel saw the accused come into the hotel with an unidentified enlisted man at a time of day not fixed during that weekend and that accused made some telephone calls. A bellboy of the same hotel conducted accused and an enlisted man to a room in the hotel on the night of 30 April 1943 (R. 23).

On 15 May 1943 accused came to the office of the Staff Judge Advocate of Camp Ord and, after being warned under the provisions of the 24th Article of War, voluntarily, without coercion, threats, or promises (R. 38) partially dictated, subscribed, and swore to a typewritten statement in the presence of Captain John B. Mohun (R. 47), and Lieutenant John S. Gilbert (R. 38, 40) both Judge Advocate General's Department, in which, among other things, he admitted that he was a homosexual and described his conduct of 11 April and 1 May as follows:

> "I was walking down Alvarado Street in Monterey one Sunday morning, April 11, 1943 and stopped and talked to a Private whom I discovered later to be Private Ivy and in the course of the conversation I asked the Private if he would care to have a drink with me at the hotel, since I had a bottle of whisky there. He came up to the hotel room and we had several drinks and spent the rest of the afternoon in Pacific Grove, returning to Monterey in the evening where we had dinner. After eating we went to a few of the bars and spent the rest of the evening drinking. He stayed all night at the hotel Sunday night with me in my room, sleeping together in the one bed naked, and during the night I put my hand on his penis and excited it and after an erection I put the penis in my mouth until the emission took place in my mouth. We got up about 5 o'clock in the morning and took a taxi back to camp.

"On Saturday afternoon, May 1, 1943, I went to Monterey where I met Private Thomas F. Ivy on the street. We stopped in a bar and had a few drinks. I then bought a pint of whiskey and this Private and I went up to the hotel room together. When we got up to the hotel room, we took off our clothes and went to bed and I started playing with his penis until he had an erection at which I then copulated with my mouth. Then we left the hotel and had dinner together, afterwards going to a few more bars and drinking." (Ex. 2)

With reference to Specification 5 of the Charge in the same statement accused described the occurrence of 14 May 1943 as follows:

"I met Private Ward Thursday night, May 13th sometime after 10 o'clock. I had been drinking all evening and was quite drunk when I saw him. I was with another Lieutenant whose name I do not know. This Lieutenant left shortly and I started talking to Private Ward and I believe I bought him a drink. Private Ward said he had a hotel room and was staying by himself and if I wanted to stay with him, I could pay the difference and share the room with him. We went to the hotel and took off our clothes and went to bed. I got sick and had to get up once to throw up. Upon returning to bed I reached over and started to play with Private Ward's penis until he got an erection and then I copulated with my mouth, causing him to discharge in my mouth. Sometime later, during the night, I did the same thing again. I left in the morning to come back to camp but was still ill after I got here and did not go to work in the morning. The afternoon was my afternoon off and I went back to Monterey in the afternoon. I had just gotten into town when I ran in to Private Ward on the street. We went to the Brown Derby and had a bottle of beer a peice and I began to get ill again and asked him if he still had his hotel room. He said he had turned the key in so I gave him some money to go up and get the room again. He came back shortly, to the bar and told me the room number and I left and went to the hotel room and went to bed. In about 15 or 20 minutes, Private Ward came in and came to bed. I started to play with his penis when I heard a noise out in the hall and quit, layed on my back and simulated sleeping. In a few minutes the door opened and the Military Police came in and told us to dress and took us to the Police Station." (Ex. 2).

Private William Ward, Military Police Section, Service Command Unit 1962, was called as a witness and instructed by the court that he was not required to answer any questions which might tend to incriminate him. He testified that he had first met accused in May in a cafe named the Brown Derby where they had a few drinks together. He refused any further material information (R. 23-25).

About 2:30 p.m. on 14 May 1943 Corporal Joseph Nesladek, Military Police Section, Service Command Unit 1962, as a result of a conversation he had had with Private Ward 10 or 15 minutes earlier, together with a police officer, Private Fuqua, Private First Class Albert Howard, and Private First

Class William Castner went to Room 22 of the Royal Hotel in Monterey, California and there he saw accused and Private Ward lying on their backs, on the same bed, naked, except for their undershirts (R. 30). The door was unlocked. Accused had his eyes closed as if asleep and hands folded across his chest (R. 32). Ward's hands were behind his head and his penis was in a state of erection (R. 34). Private First Class Albert Howard corroborated Nesladek that the two were lying together in bed dressed only in undershirts in the hotel room described about 3:30 p.m. 14 May 1943 (R. 35-36). It was shown that Private Ward, on the morning of the 14th, had supplied Corporal Nesladek with information concerning the accused so that it was arranged between them that if Ward had any further meetings with accused he was to get word to Nesladek. Fifteen minutes before entering the hotel Ward talked to Nesladek and as a result Nesladek and Ward planned to catch accused in some criminal act (R. 29). Nesladek gathered the others together, gave Ward an opportunity to get to the room, and then entered the room with the anticipation of catching accused in a criminal act (R. 32).

5. The rights of the accused were explained to him and he elected to remain silent (R. 52).

6. With reference to Specifications 1 and 2 of the Charge the accused was found guilty of committing sodomy on Private Thomas F. Ivy on 11 April and 1 May, respectively. The accused's legally voluntary and admissible confession admits the commission of the two separate offenses and describes the time and place. The first offense occurred during the night of 11-12 April 1943. The second offense occurred on Saturday afternoon 1 May 1943.

The Manual for Courts-Martial, paragraph 114, page 115 provides:

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself".

While it is true that the necessary additional evidence need not be full, conclusive, or sufficient to prove the offense beyond a reasonable doubt, yet there must be some evidence, and it must have some bearing upon the offense charged. It must tend to show that the offense was probably committed. It should at least be corroborative of the offense.
CM 120063; 125463; 213301; Sec. 395 (11) Dig. Op. J.A.G. 1912-40.

The prosecution showed that the accused and Private Ivy were together during the day of 11 April 1943. The offense under Specification 1 occurred during the night of 11-12 April 1943. Ivy's testimony was not therefore corroborative of the commission of the offense. It threw no light on the subject whatsoever other than that the two knew each other and spent

Sunday together at various places. It did not even show that they were together that night, or occupied the same room. The switchboard operator's testimony had no probative value. It corroborated the fact that the accused occupied a room in the San Carlos Hotel during the week end of 9-11 April 1943. The mere fact that he occupied a room in a hotel does not tend to prove that he committed sodomy in that room. Nor did the fact that he was seen coming into the hotel with an enlisted man at some time during that week-end tend to prove that he took the enlisted man to his room and committed sodomy on the night of 11-12 April. The finding of guilty of Specification 1 cannot therefore be sustained because of the failure to prove the corpus delicti.

The Board is of the same opinion with respect to the finding of guilty of Specification 2. Ivy supplied no evidence at all regarding this occasion or offense. Neither did the switchboard operator. A bellboy told about conducting the accused and a soldier to a room on the night of 30 April but that would have no bearing upon what took place the night of May 1.

With reference, however, to Specification 5, the Board is satisfied that the prosecution has supplied sufficient evidence of the probability of the commission of the offense. The evidence was clear that accused had invited an enlisted man to join him in a room in a hotel on an afternoon. Fifteen minutes later the two are lying on the same bed together, each clothed in nothing but an undershirt and the pathic's penis is in a state of erection. The confession disclosed the procedure followed by the accused in his homosexual practices. He would invite his intended victim to his hotel room, get in bed with him, excite him sexually with his hand, and then copulate with his mouth. The military police walked in just as he was about to copulate. Their arrival alone prevented the commission of the crime of sodomy. The court therefore rightfully found him guilty of an attempt to commit sodomy. The confession alone sustains the finding. The corroborating evidence of the two in bed together as described supplies the corpus delicti so as to legally sustain the confession. The sustained conviction of Specification 5 is sufficient in turn to support the sentence of dismissal under Article of War 96. Defense counsel's contention that the entire evidence supporting the finding is inadmissible because of the alleged entrapment of accused is not well founded. The principle of entrapment applies only when those who seek to entrap plan the commission of the crime, and incite or lure the accused into committing it. It does not apply to situations where the accused is the instigator. In the case at hand it was the accused who arranged for the rendezvous with the pathic. The testimony of those who caught him was therefore properly admitted. Dig. Op. J.A.G. 1912-40, Sec 395 (35); CM 227195.

7. War Department records show that accused is 31 years of age. Upon graduation from high school he attended the University of Iowa, graduating therefrom in 1933 with the degree of B.S.C. He served as an enlisted man from 11 February 1941 to 15 September 1942, when he was appointed warrant officer, junior grade. He graduated from the Army Finance School in 1942. Upon completion of the course of instruction at the Finance Officer Candidate School he was appointed second lieutenant, Army of the United States, on 17 March 1943 and entered on active duty on that date.

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 not legally sufficient to support the findings of guilty of Specifications 1 and 2 of the Charge and of violation of Article of War 93, but is legally sufficient to support the findings of guilty of Specification 5 as amended of the Charge and of the Charge in violation of Article of War 96 and 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 R. Arnold, Judge Advocate.

Paul A. Sifflum, Judge Advocate.

Herbert B. Frederick, 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 Second Lieutenant Lloyd J. Kent (0-1895116), Army of the United States, Service Command Unit 1962.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specifications 1 and 2 of the Charge (sodomy per os upon Private Thomas F. Ivy) and of the Charge (AW 93), but is legally sufficient to support the findings of guilty of Specification 5, as amended, of the Charge (attempted sodomy per os upon Private William Ward) and of the Charge as amended (AW 96), and legally sufficient to support the sentence and to warrant confirmation thereof. Accused was found not guilty of Specifications 3 and 4 of the Charge (sodomy per os upon Private William Ward). I recommend that the findings of guilty of the Charge and Specifications 1 and 2 thereunder be disapproved and that the sentence be confirmed and carried into execution.

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

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

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

(Findings of guilty of Charge and Specifications 1 and 2 thereunder disapproved. Sentence confirmed. G.C.M.O. 239, 17 Sep 1943)

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

(187)

N.D.

SPJGH
CM 236966

30 JUL 1943

UNITED STATES	)	DESERT TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened
	)	at Camp Young, California,
Second Lieutenant RICHARD	)	17 June 1943. Dismissal.
G. GOSPODAR (O-1107442),	)	
Corps of Engineers.	)	

OPINION 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 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 61st Article of War.

Specification: In that Second Lieutenant Richard G. Gospodar, Company C, 854th Engineer Aviation Battalion, did without proper leave, absent himself from his company at Banning, California from about 0800 hours, June 7, 1943 to about 0800 hours, June 10, 1943.

He pleaded guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The morning report of Company C, 854th Engineer Aviation Battalion shows the accused from duty to absent without leave at 8 a.m., 7 June 1943, and from absent without leave to duty at 8 a.m., 10 June 1943 (Ex. 1). Second Lieutenant Frank L. Beardsley, Commanding Officer of that company, to which the accused belonged at that time, saw accused on duty at Banning, California on 5 June and rode to Riverside in the same car with accused on that day (Saturday). There was a standing order that officers could be absent from noon on Saturdays to Monday morning. Lieutenant Beardsley did not see the accused again until the morning of

10 June, and the accused was not present for duty in the interim. The accused was required to report each morning at 8 o'clock, and had no authority to be absent after 8 a.m. on Monday, 7 June (R. 7-16).

4. The accused made an unsworn statement as follows:.

"Well, the whole reason for my absence for 3 days was responsible due to liquor. I had intended to come back Monday. I was down town - I was in Hollywood at the time. I started down town. I happened to take a few more. I had a few companions and after one day, it seemed to build up just a little bit too fast, and the whole thing is just due to liquor. And I would like to say at this time, regardless what the opinion of the court is, that I am going to lay off it." (R. 16)

5. The evidence shows conclusively that the accused was absent without leave as alleged.

6. Careful consideration has been given to a letter dated 21 June 1943 from the Commanding Officer of the 854th Engineer Aviation Battalion to the Commanding General, Desert Training Center, recommending clemency, and a certificate of two previous offenses, upon which he was punished under the 104th Article of War (absence without leave for two days in each instance), attached thereto; and to a letter from the accused to the Commanding General requesting clemency, first indorsement by the Commanding Officer of the 854th Engineer Aviation Battalion approving the request and second indorsement by the Commanding Officer of the IV Air Support Command stating "Clemency not recommended".

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 second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 9 December 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is 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 61st Article of War.

Robert H. Kiel Jr., Judge Advocate

Samuel M. Gruber, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 5 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 Second Lieutenant Richard G. Gospodar (0-1107442), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was absent without leave for three days. The Commanding Officer of the battalion to which accused belonged recommended that for the good of the service the accused be retained in the Army as an officer, because of his belief that the accused was, but for his unauthorized leaves (he was absent without leave for two days on each of two prior occasions, for which he was punished under the 104th Article of War), entitled to an efficiency rating of excellent as a general platoon leader and superior as a weapons instructor. I recommend that the sentence to dismissal be confirmed, but, in view of all of the circumstances, 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 carrying into effect the recommendation made above.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 318, 23 Oct 1943)

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

(191)

SPJGK
CM 236967

1 SEP 1943

UNITED STATES	)	DESERT TRAINING CENTER
v.	)	Trial by G.C.M., convened at Camp Young, California, 17-18 June 1943. Dismissal, total forfeitures and confinement for one (1) year.
First Lieutenant CARLE R. VICKERS (O-483651), Dental Corps.	)	

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

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

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

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

Specification 1: In that 1st Lt Carle R. Vickers, DC, Medical Detachment, 537th QM Service Battalion, did, at Camp Young, California, on or about May 26, 1943, feloniously take, steal and carry away, one (1) crate of eggs valued at $12.60, one (1) ham valued at $4.32, four (4) sides of bacon valued at $13.20, one (1) case of lard valued at $8.64, one (1) sack of sugar valued at $5.00, one (1) basket of green peas valued at $3.60, two (2) lamb carcasses valued at $30.90 of the total value of about $78.26, the property of the United States furnished and intended for the military service thereof.

Specification 2: In that 1st Lt Carle R. Vickers, DC, Medical Detachment, 537th QM Service Battalion, did, at Camp Young, California, on or about May 26, 1943, feloniously take, steal and carry away, ten (10) gallons of gasoline of the value of $0.82, the property of the United States furnished and intended for the military service thereof.

CHARGE II: Violation of the 95th Article of War.
(Motion to strike sustained)

Specification 1: (Motion to strike sustained).

Specification 2: (Motion to strike sustained).

Upon the arraignment the court sustained a motion by the defense to strike Charge II and the Specifications thereunder. Accused then pleaded not guilty to and was found guilty of Charge I 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 is substantially as follows:

Accused is a first lieutenant, Dental Corps, assigned to the Medical Detachment of the 537th Quartermaster Battalion, Camp Young, California (R. 34). Staff Sergeant Russell Z. Cole, Company B, 537th Quartermaster Battalion, stated that on 26 May 1943 he was Motor Sergeant and as such was charged with the responsibility of drawing and issuing gasoline to government vehicles of the battalion. About 9:30 p.m. of that day accused drove a car - a maroon colored Chevrolet - to the truckhead where the gasoline was in storage and ordered witness to put two five-gallon cans of gasoline in his car. The gasoline was the property of the United States Government and was furnished and intended for the military service. Witness understood the directions of accused as an order (R. 17, 26, 28, 29, 51). Sergeant Cole stated that while he was pouring the gasoline into the accused's car "Lieutenant Freed", the Officer of the Day, came up. Accused was standing by the car. After the gas had been poured into the car accused drove away. The Officer of the Day asked witness the name of accused and witness "told him" (R. 33).

It was stipulated that if Second Lieutenant Harry F. Freed, 537th Quartermaster Battalion, Camp Young, were present, he would testify that he was Officer of the Day, 26 May 1943 and that while making his inspection at about 9:45 p.m. he observed Staff Sergeant Cole pouring gasoline from two five-gallon GI cans into the tank of accused's car parked near the motor maintenance tent (R. 34; Ex. 1). It was also stipulated that the unit price for the gasoline as set forth in Specification 2, Charge I, was the official government price prevailing at Camp Young for the month of May 1943 (R. 35).

Corporal Van Leer D. Britt, Company B, 537th Quartermaster Battalion, stated that he had charge of the storage and issue of food from the Class I truckhead, sometimes called railhead, at Camp Young. Witness stated that

on the night of 26 May 1943 accused came to the truckhead, witness addressed him and accused remarked that witness was not the party whom he was looking for. From the description which he gave it was evident to witness that accused was looking for "Corporal McClanahan". Witness informed accused that Corporal McClanahan would be "along in a few minutes" (R. 10, 11).

Corporal Julius B. McClanahan, 537th Quartermaster Battalion, stated that he was the guard and "clean up" clerk at the railhead. When he arrived at the railhead about 11 o'clock on the night of 26 May 1943, he saw accused on the porch. Witness approached and saluted. Accused said, "Have you got any groceries?" Witness replied, "Yes, sir, we have some here." Accused then said, "How about getting a few groceries?" Witness and accused then went into the building and accused pointed out "what he wanted". At the direction of accused the witness placed in accused's car 2 lamb carcasses, 4 sides of bacon, a broken crate of eggs, a 100-pound sack of sugar, 30 pounds of lard and one ham. Accused also got a basket of peas which accused himself took to the car. The property which was thus placed in the accused's car was owned by the United States Government and furnished and intended for the military service thereof. Witness stated that although he had never seen accused before and accused presented no credentials entitling him to the supplies, he knew accused was an officer and in giving him the supplies he was merely carrying out the orders of the accused (R. 12-16). Witness stated that he thought accused was getting the supplies for the officers' mess (R. 19).

Lieutenant Colonel Albert T. Anderson, Commanding Officer, 537th Quartermaster Service Battalion, stated that the organization served the camp installations including the truckhead. The function of the truckhead was to consolidate requisitions and issue supplies. He stated that if accused had had authority to draw rations, he (witness) would know it, and that accused did not on 26 May 1943, or at any other time, have such authority. Witness further stated that he had never authorized an officer under his command "under any conditions to draw gasoline and put same into their own auto". No such authority had been given accused (R. 41).

Private First Class Jerry S. Bartell, 744th Military Police Battalion, Company D, Indio, California, identified accused as an officer apprehended by him about 1:30 a.m., 27 May 1943. In this connection witness stated that he and a civilian officer of the Indio City Police Force were patrolling the streets of Indio. Pursuant to information which they had received they were looking for a 1941 model maroon-colored Chevrolet. Shortly after receipt of this information witness saw a car of this description "heading down 46 towards Highway 99". Witness and his companion chased the car and overtook it within about one-quarter of a mile (R. 36). The car was on the

Palm Springs Highway headed "in the direction of Camp Young" (R. 38). Accused was asked what he had been doing "lurking around the alleyway" and accused stated, "Well, I know some people". Witness stated that at this point he noticed a Government Issue blanket on the back seat which gave the appearance of "covering up something". He asked the accused if anyone was sleeping under the blanket. Accused said, no, that "it was just a blanket". Witness and his companion opened the door of the car and lifted the blanket under which were observed two slabs of bacon - a sack of sugar and parts or carcasses of lamb. " * * * I just raised up the blanket, just enough to see the sugar and bacon * * * and the lamb carcasses". Witness did not ask accused what he was doing with the supplies and accused made no statement with reference thereto. Accused was taken to military police headquarters and the keys of his car were turned over to the military police authorities (R. 37).

It was stipulated that the unit prices of the articles set forth in Specification 1, Charge I, were official government prices prevailing at Camp Young, California, for the month of May 1943.

4. The accused did not testify and no evidence was offered by the defense.

5. The undisputed evidence thus shows that the accused at the place and time alleged went to the truckhead at Camp Young in the nighttime and without any color of authority ordered enlisted men at the truckhead in charge of the property to place in his car gasoline and other government property furnished and intended for the military service. It is unnecessary to elaborate upon the subsequent events such as the apprehension of accused several hours later-with a part of the stolen supplies concealed under a blanket on the rear seat of his car - and his false statement to the police officers that nothing was under the blanket. Going to the truckhead under cover of darkness and fraudulently procuring and carrying away government property, as shown by the facts and circumstances fully warranted the court in finding accused guilty of larceny in violation of Article of War 94 (CM 220398).

6. War Department records show that accused is 28 years of age. He attended Hampton Institute from 1928 through 1934 and Alabama State Teachers College from 1934 to graduation in 1937. He was graduated at Howard University College of Dentistry, Washington, D. C., on 5 June 1942. He was appointed first lieutenant, Army of the United States on 14 June 1942.

7. The court was legally constituted and had jurisdiction of the person and 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 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 94.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave) _____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 SEP 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 Carle R. Vickers (O-483651), Dental Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 293, 2 Oct 1943)

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

SPJGN
CM 236974

11 AUG 1943

UNITED STATES	)	92ND INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Atterbury, Indiana, 4 and 5 May 1943. Dismissal, total forfeitures and confinement for five (5) years.
	)	
Second Lieutenant ALBERT L. BARKSDALE (0-1294733), 365th Infantry.	)	

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

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

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

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

Specification 1: In that 2nd Lieut Albert L. Barksdale, did, at Camp Atterbury, Indiana, on or about January 7, 1943, feloniously embezzle by fraudulently converting to his own use good and lawful money of the United States of America of the value of $39.00, the property of Camp Atterbury Officers Mess #3, intrusted to him by the said Camp Atterbury Officers Mess #3.

The six subsequent Specifications are identical with Specification 1 except as to date and amount, as indicated below:

Specification 2: 21 January 1943; amount $16.55.

Specification 3: 27 January 1943; amount $31.05.

Specification 4: 3 February 1943; amount $27.00.

Specification 5: 10 February 1943; amount $34.40.

Specification 6: 17 February 1943; amount $28.90.

Specification 7: 24 February 1943; amount $20.00.

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

Specifications 1 through 7: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and all Specifications thereunder; not guilty of Charge II and all Specifications thereunder. 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 and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that during the accused's tenure as officer in charge of Officers' Mess No. 3 at Camp Atterbury, Indiana, the mess-hall equipment included a coin operated phonograph, classed as an amusement machine, owned by an automatic music concern, placed there under an arrangement whereby, once a week, the owner's agent and the mess officer jointly opened the contraption, and divided equally the money found therein, one-half belonging to the owner, the other to the mess. At the same time the owner's agent, in each instance, prepared a collection report in triplicate, showing the amount divided, which report the mess officer always signed, receiving a copy along with the share of the cash belonging to the mess. As mess officer of Mess No. 3,

the accused was required to submit daily written steward's reports to Mess No. 1, itemizing the previous day's intake from all sources, including "amusement machines". On the dates set out in the Specifications under Charge I, ranging from 7 January 1943, to 24 February 1943, the accused collected the amounts alleged to have been embezzled, varying from $16.55 to $39.00, aggregating $196.90, the share of the proceeds derived from the phonograph machine alloted to Mess No. 3, but failed entirely to account for such receipts in any manner whatsoever. When a remark made by the owner's representative on 26 February 1943, that a total of $40 had been collected from the phonograph machine in Mess No. 3 on 24 February 1943, resulted in a check of the accused's subsequent daily reports, it was discovered the Mess's share of this collection had not been reported. The accused, being questioned, asserted that the machine had indeed been checked on 24 February 1943 but there was no money taken out because "there wasn't enough in it". The accused's signed receipt for $20 as Officers' Mess No. 3's share of the machine's proceeds on that date was introduced in evidence, as were his signed receipts for each of the other unreported collections alleged in the Specifications, and all of his daily reports for the period covered thereby (R. 7-26, 36; Exs. 1-9).

4. The evidence for the defense shows that enlisted employees as well as the accused sometimes made out the daily steward's reports, and that the accused sometimes signed them in blank to be filled out by others. Money received in operating the mess was loosely handled, and various employees had access to the till. The accused, in turning the mess fund over to his successor, personally made up a shortage of some $28, representing no part, however, of the unreported collections from the phonograph machine (R. 27-34).

5. The accused, after being properly advised of his rights as a witness, elected to remain silent (R. 36-37).

6. Specifications 1-7, Charge I, allege the accused's fraudulent conversion to his own use of the unreported sums belonging to Officers' Mess No. 3, collected by the accused from the phonograph machine. The uncontradicted evidence shows that the accused, in each instance, received, in his capacity as mess officer, the sums alleged to have been embezzled; that he failed to report or account for them; and when asked why the last one failed to appear on his daily report, falsely denied its receipt, precipitating the investigation which revealed six additional unreported collections from the phonograph machine, despite the fact that he had

signed receipts for each one of them and had properly reported and accounted for previous collections from the same source. The circumstances surrounding his failure to either report or account for the seven involved here, leave no basis for questioning the fraudulent intent which motivated the accused in appropriating to his own use these funds, belonging to the mess and received by him in his capacity as mess officer, instead of reporting and turning them in along with funds from other sources received by him in the same capacity.

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come" (Moore v. U.S., 160 U.S. 268).

> "The gist of the offense is breach of trust.* * * The offense exists only where the property has been taken or received by virtue of such relationship" (par. 149h, pp. 173-174, M.C.M., 1928).

Every element of the offense of embezzlement is alleged and established in connection with each of the seven Specifications under Charge I.

7. The accused will be 21 years of age on 6 September 1943. He was inducted at Fort Dix, New Jersey, 10 March 1941; honorably discharged for the convenience of the Government, 28 September 1942; and temporarily commissioned a second lieutenant of Infantry, in the Army of the United States 29 September 1942.

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

Chas. L. Bresson, Judge Advocate.

Abner E. Lefcourt, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 236974

1st Ind.

War Department, J.A.G.O. 20 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 Second Lieutenant Albert L. Barksdale (O-1294733), 365th 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 of dismissal, total forfeitures, and confinement at hard labor for five years be confirmed, but in view of the youth of the accused (the accused will be twenty-one years of age on 6 September 1943), I recommend further that three years of the confinement imposed be remitted, that the sentence as thus modified be ordered executed, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, 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 recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed but four years of confinement remitted. G.C.M.O. 256, 22 Sep 1943)

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

SPJGQ
CM 236985

21 JUL 1943

UNITED STATES v. Private CARL E. DOUGLAS (36393459), Unassigned, Attached First Receiving Battalion, Reception Center #1773, Fort Leavenworth, Kansas.	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Leavenworth, Kansas, 10 June 1943. Dishonorable discharge and confinement for thirty-seven (37) years. Penitentiary.

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HOLDING 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 soldier named above has been examined by the Board of Review.

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

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

Specification: In that Private Carl E. Douglas, Unassigned, Attached First Receiving Battalion, Reception Center #1773, Fort Leavenworth, Kansas, did, at Fort Leavenworth, Kansas, on or about May 19, 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Wayne, Detroit, Michigan, on or about June 4, 1943.

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

Specification 1: In that Private Carl E. Douglas, Unassigned, Attached First Receiving Battalion, Reception Center #1773, Fort Leavenworth, Kansas, did, at Leavenworth, Kansas, on or about May 19, 1943, by force and violence and by putting him in fear, feloniously take, steal and drive away from Ray Collins, American Cab Driver, Leavenworth, Kansas, one Plymouth Automobile, Cab No. 4, 1941

model, sedan, Motor No. P12-487985, Kansas State License No. 7-6575, value about $800.00, owned by Jack O. Brushwood and Albert Duhrels, operating under the name of the American Cab Company, Leavenworth, Kansas.

Specification 2: In that Private Carl E. Douglas, Unassigned, Attached First Receiving Battalion, Reception Center #1773, Fort Leavenworth, Kansas, did, at Leavenworth, Kansas, on or about May 19, 1943, with intent to commit felonies, viz; murder and robbery, commit an assault upon Ray Collins, American Cab Driver, Leavenworth, Kansas, by wilfully and feloniously striking the said Ray Collins on the head with a dangerous thing, to-wit: a rock.

He pleaded not guilty to and was found guilty of all the Charges and Specifications. The offenses were committed in time of war. Evidence of one prior conviction by general court-martial for desertion 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 might direct for 75 years. The reviewing authority approved the sentence but remitted 38 years of the confinement imposed, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The pertinent evidence for the prosecution shows that the accused arrived at the Reception Center at Fort Leavenworth, Kansas, on the morning of 19 May 1943. That afternoon he planned with two other colored soldiers to go "over the hill" to Detroit, where accused's family resided. The three then left by bus for Leavenworth. There they had a few drinks and searched the streets for an unlocked car that they could steal. They were unsuccessful in their search, so planned to get a cab. Through some woman in a restaurant they sent for a cab. Accused was handed a rock by one of his companions while waiting for the cab to arrive and told to wrap it in a piece of paper and to sit in back of the cab driver and then to hit the driver on the head with the rock (Ex. 2).

Ray Collins, a cab driver for the American Taxi Cab Company arrived with his cab. The three got in. The accused sat in back of the driver and after the cab had been driven a short distance struck the driver three or four blows on the head with the rock (Ex. 2, R. 6). The cab stopped. The three soldiers hauled the driver over into the back seat. There the accused struck the driver a few more times on the head with the rock. The accused then got out of the cab and got into the driver's seat. As he started the cab, according to the driver Collins, Collins seized the door handle and got out (R. 6). The accused thought Collins fell out on the road and was dead (Ex. 2).

Collins, the cab driver, was able to walk to a hospital where he was confined for nine days receiving medical care and treatment, including the taking of 36 stiches to sew up the wounds in his head (R. 6, 10).

The accused and his companions abondoned the cab in an unnamed town and from there hitch-hiked their way to Detroit. They got rid of their jackets and gloves which were covered with blood (Ex. 2).

It was shown that the value of the cab taken by the accused and his companions was over $800 at that time (R. 12).

An extract copy of the morning report of the accused's military organization showed him to be AWOL as of 7 p.m. 19 May 1943 (Ex. 1). Accused surrendered to military control at Fort Wayne, Detroit, Michigan on 4 June 1943 (R. 12).

4. It was stipulated that on 24 May 1943 a telegram signed by the accused's mother was sent to the Commanding General, Fort Leavenworth, setting forth that the accused arrived to see his parents and was on his way back (R. 17).

Accused, conversant of his rights, made an unsworn statement that he did not intend to desert but went directly to his home to visit his wife, a daughter and grandmother in Detroit; that his grandmother told him about a telegram she received from Fort Leavenworth on 24 May 1943; that on 4 June, he went to the Army Post at Fort Wayne and told them he was AWOL and wanted to return to Fort Leavenworth; that he wore his uniform all the time and did not do any work; that he got drunk on 19 May and does not remember all the things that were put in the statement (Exhibit 2) but he guessed that the facts set forth in the statement were "approximately" correct; that on the night of 19 May he was trying to "travel away" from Leavenworth and did not intend to do anyone any harm.

5. With reference to the charge of desertion (Charge I,) the evidence is clear that the accused on 19 May 1943, left his post at Fort Leavenworth, Kansas, without authority and with the admitted intention of going "over the hill". Sixteen days later he surrendered in Detroit, Michigan. Not only is the intention to desert admitted by his unsworn statement, but also corroborated by the proof of the length of time during which he was absent, the distance between his post and the point of surrender, and the incentive to remain away to avoid punishment for the crimes that he committed, hereinafter discussed. There was therefore ample proof of desertion.

With reference to the charge of robbery (Charge II, Spec. 1) it was not only proven by the prosecution, but also admitted by the accused that he and the other two soldiers called a cab with the intention of stealing it from the driver. This intention was carried out with force and violence. The accused himself drove the cab away after disposing of the driver.

The Manual for Courts Martial, paragraph 149 provides: "Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."

It was apparent therefore that the accused committed a robbery in that he took a cab, which is personal property, from the presence of Collins, by force and violence, with the intention of stealing it. All of the requisite elements of the crime were present.

With reference to Specification 2 of Charge II the alleging that the accused committed an assault with intent to commit the two felonies of murder and robbery, the evidence is clear that the accused struck the cab driver, Collins, viciously on the head with a rock with the intention of stealing his cab. The intent to rob was admitted by the accused and clearly shown by the accused's preparation and his execution of his plan of stealing the cab. The finding of guilty of this particular offense is clearly supported by the evidence. The charge, however, includes assault with the intent to murder. To prove such an offense the specific intent to murder must be shown beyond reasonable doubt. There was no proof that he intended to kill the driver. True it is that he, according to his confession, thought that the driver had fallen out of the cab and was dead. Whether accused thought death was caused by the fall from the cab or from the beating with the rock is not shown. The Board is of the opinion that the proof of intent to murder has not been shown beyond a reasonable doubt and therefore the evidence does not sustain that part of the findings. A general felonious intent or specific design to commit another felony is not sufficient to show intent to murder. Manual for Courts-Martial, 1928, par. 149 l, page 179.

6. The record shows the accused to be 23 years of age. He was inducted into the service on 12 August, 1942 at Chicago, Illinois. He was previously convicted by general court-martial on 14 January 1943 of desertion from 6 October 1942 to 27 December 1942. His sentence was remitted on 11 May 1943.

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 holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Charge II and Specification 1 thereunder, legally sufficient to support only so much of the finding of guilty of Specification 2, Charge II, as finds the accused guilty of assault, at the place and time and in the manner and upon the person alleged, with intent to commit a felony, viz, robbery, and legally sufficient to support the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of robbery and also for the offense of assault with intent to murder or to rob, all of which are recognized as offenses of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (13 U.S.C. 452, 454).

William H. Founds, Judge Advocate

Paul Stephens, Judge Advocate

Herbert R. Anderson, Judge Advocate

1st Ind.

War Department, J. A. G. O. 31 JUL 1943 - To the Commanding General, Seventh Service Command, Army Service Forces, Omaha, Nebraska.

1. In the case of Private Carl E. Douglas (36393439), Unassigned, attached 1st Receiving Battalion, Reception Center No. 1773, Fort Leavenworth, Kansas, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of Specification 2, Charge II, be approved as finds accused guilty of assault, at the place and time and in the manner and upon the person alleged, with intent to commit a felony, viz, robbery. Upon compliance with the foregoing recommendation you will have authority to order the execution of the sentence.

2. The sentence imposed is legal for the conviction of desertion, robbery and assault with intent to rob, but in view of the insufficiency of the record to support the finding of guilty of assault with intent to murder, it is recommended that the period of confinement be reduced to twenty-five years.

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

(CM 236985).

T. H. Green,
Brigadier General, U. S. Army,
Assistant Judge Advocate General,
In charge of Military Justice.

1 Incl.
Record of trial.

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

SPJGQ
CM 237017

4 AUG 1943

U N I T E D S T A T E S	)	DESERT TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Camp Young, California, 8 June 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant GERALD R. SMITH (0-1109672), Headquarters 1120th Engineers Combat Group	)	

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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that 2nd Lt. Gerald R. Smith, Group Headquarters, 1120th Engineer Combat Group, did, without proper leave, absent himself from his station at Camp Young, California from about May 3, 1943 to about May 12, 1943.

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

Specification 1: In that 2nd Lt. Gerald R. Smith, Group Headquarters, 1120th Engineer Combat Group, did, at Camp Young, California, on or about May 12, 1943, with intent to deceive Colonel KEITH R. BARNEY, 1120th Engineer Combat Group, his commanding officer, officially state to said Colonel KEITH R. BARNEY, that he, 2nd Lt. Gerald R. Smith was too sick during his absence from his station from about May 3, 1943 to May 12, 1943, to report back to his station, which statement was known by the said 2nd Lt. Gerald R. Smith to be untrue, in that he was not too sick to report back to his station during said period of absence.

Specification 2: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Specification 2, Charge II. He was found guilty of the Specifications and Charge I and Specification 1 of Charge II and Charge II. There was no evidence of any prior convictions submitted. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The prosecution showed by competent evidence that the accused was assigned to the 1120th Engineer Combat Group stationed at Camp Young, California. On Saturday 1 May 1943 he was granted verbal permission by his commanding officer, Colonel Keith R. Barney (R. 10) to be absent over the weekend, with the understanding that he should return for duty Monday morning 3 May 1943. Colonel Barney, although he was on duty at the post, did not see the accused at the post from that time until about 8:30 p.m., 12 May 1943, at which time the accused reported to him. The accused had no authority to be absent during this period of time other than for the period designated. The following conversation took place between the colonel and the accused upon the latter's return:

> "Then I asked him where he had been. He replied he was at Yuma where he was ill and where they took very good care of him. That expression struck me. I asked him if he had any medical evidence to support this. He replied, 'not except for 2 days.' I then asked him if he had been too sick at any time during his absence to report back and he replied he had been to sick at all times during his absence. I asked him if he desired to see a doctor. 'No', he replied. I then placed him in restriction pending further investigation."

On Tuesday 4 May 1943 Colonel Barney was informed by Lt. Keskey that the accused had telephoned on Monday 3 May 1943 to the effect that he was sick in Yuma and would arrive on Tuesday. Lt. Keskey was an instructor of a class which accused was supposed to attend on that particular Monday (R. 13).

Extract copies of the morning report of the accused's organization was received in evidence and showed the accused absent without leave as of 3 May 1943 (Ex. I).

Miss Helen J. Gordon, a registered nurse at Yuma, Arizona, testified that accused came to the office of Dr. Calvin A. Eaton, in which she was employed, about 3:30 p.m., Monday 3 May 1943 and complained that he was ill from diarrhea and had to get off the train the night before, and asked for a letter with which to get back to camp. He requested that the letter state that Dr. Eaton had taken care of him. The witness administered first aid by providing the accused with a small bottle of paragoric. Dr. Eaton's secretary prepared, signed and delivered to the accused a letter (Defendant's Ex. 2) dated 3 May 1943, reading as follows:

"May 3, 1943

TO WHOM IT MAY CONCERN

This is to certify that Lt. G. R. Smith has been ill and under my care since 10:00 P.M., May 2nd, and was unable to reach Camp Young at the designated time.

Signed,

(S) C. A. Eaton
Calvin A. Eaton, M.D.

CAE:kb"

On the afternoon of 6 May 1943 accused again called at Dr. Eaton's office and requested a letter from Dr. Eaton to the effect that Dr. Eaton had taken care of him. He wanted the letter in order that he might go back to camp. Dr. Eaton refused to give it to him (R. 18).

Dr. Eaton testified that he did not see the accused upon his visit to the doctors office on 3 May 1943, but did see him on the 6th. On the latter date accused asked the doctor to telephone the camp and state that he (accused) was sick and unable to go to the 54th Evacuation Hospital there in Yuma. Accused also asked for a letter to the effect that he was sick and could not return to camp. He wanted it to cover the period of time between May second and May sixth. In Doctor Eaton's opinion the accused was not ill at the time (R. 33). He made no examination of him. He refused to provide the accused with the letter requested because he did not consider the accused sick (R. 27). Accused said he wanted the letter as his excuse so that he wouldn't have to report to camp as he had nothing to do there and he could rest there in Yuma where his girl friend was located (R. 28, 30).

Corporal Thos. J. Spidella (R. 30), Sergeant Joe Fiora (R. 33) and Captain Charles W. Hain, Jr. (R. 34) saw accused in Yuma, Arizona on the afternoon and evening of 4 May 1943 (Tuesday). In the afternoon he was in a store, and the evening he was walking along a street in company with a girl (R. 33, 35).

4. For the defense John H. Fay of Yuma, bus driver, testified that he knew the accused. Accused stayed at Fay's home from May 1, 1943 to May 11, 1943. Accused refused to take his meals there as he felt he would be imposing, so he ate out. He called the accused early Monday morning (May 3rd) so that he could catch the train for camp. Accused said he felt sick. He left but came back later "deathly sick. He was throwing up and purging". He felt better about noon and better the next day, but looked pale and peeked (R. 37). He was in bed part of the time; would go out once in a while; but was around the house most of the time. Mr. Fay was very fond of "Gerry", the

accused. He had a 23 year old daughter living there at the house who escorted accused when he went out. In fact, the accused and the daughter were together every evening (R. 43). During the last six or seven days of his visit accused was "fairly good" (R. 40).

It was established by stipulation that accused on 3 May 1943 telephoned Lt. W. J. Keskey at Camp Young and told him he was sick in Yuma, Arizona. Lt. Keskey told the accused that he had better get some papers or credentials so that he would be protected when he returned to camp (R. 44).

The accused was sworn in his own behalf as a witness and testified that he had been in the Army for more then 6 years as an enlisted man until January 20, 1943, when he graduated from an O.C.S. School, and related his various duties and assignments. Colonel Barney was the commanding officer of his organization while Lt. Keskey was his instructor. He made a trip to Yuma, Arizona, May 1, 1943 on the authority of a VOCO from Colonel Barney (R. 45, 46), understanding at the time that he was to return for duty Monday morning at 7:30 a.m. He arrived at Yuma at about 5 o'clock in the afternoon, proceeding to the home of Mr. Fay. On Monday morning (May 3rd) he went to catch the 2 o'clock train and on the way became quite ill resulting in vomiting. He had a round trip ticket but upon becoming sick he went back to the home of Mr. Fay, going to bed immediately and remaining there until 11:30 Monday morning (R. 46). When he recuperated sufficiently he called Lt. Keskey and explained that he had been ill but would return to camp the following morning (R. 46). Lt. Keskey suggested that accused get a note from a doctor explaining his illness (R. 46). Accused then went back to bed. About 4:30 the same afternoon he called at Dr. Eaton's office and obtained a letter stating that he had been ill. He explained that he had told the doctor that he was ill pointing out the symptoms of his illness and concluding that he had diarrhea (R. 47). A nurse at the doctor's office gave him a small bottle of medicine and a certificate signed by Dr. Eaton, which certificate was admitted in evidence as Defense's Exhibit #II (R. 47). He returned to the home of Mr. Fay, took a dose of the medicine and went to bed (R. 47, 48). During the night he suffered with intermittent periods of vomiting and remained in bed the following day, Tuesday, May 4. That afternoon accused and Miss Emma Fay went to town and did some shopping. Accused met Corporal Spidella as well as Captain Hair (R. 48). After going to a restaurant and eating something accused again became sick and returned to the Fay home staying there until Thursday. Upon feeling better he returned to the doctor's office and requested that the former certificate be changed or an additional letter stating that he was still ill be written (R. 48). Feeling better that evening accused went for a walk and upon returning to the Fay house learned that the M.P.'s had called. Later the Provost Marshal came back and ordered accused to go to his headquarters (R. 48). Shortly thereafter accused again became ill but on Wednesday morning returned to Camp Young (R. 49), signing the register upon arrival. He reported to his commanding officer explaining his illness (R. 49). When accused reported, the following took place: "I walked in and said 'Reporting'. He said, 'Aren't you the one who has been away?' He said, 'Where have you been?' I said, 'In Yuma, Arizona, where I was ill'. He asked if I had ever been too ill to come back to camp. I said 'Yes', and said I had been staying in a private home where I had been well taken care of or something to that effect." (R. 49) Accused insisted

that at the time he made the statement to his commanding officer he believed it to be true, explaining that while he was not sick every minute he had suffered from relapses. Accused did not make a statement to the doctor to the effect that he was not needed at Camp Young, nor did he think it was his duty to report to the Army Hospital because, in his own estimation, he was not a hospital case (R. 49) and thought that the telephone call to Lt. Keskey was sufficient notice to his organization of his illness (R. 49).

5. As to the Specification of Charge I, it was clearly shown by the evidence produced by the prosecution, and admitted by the accused, that he remained away from his station without leave or authority from 3 May 1943 until he voluntarily reported back on the evening of 12 May 1943. He offered as his only defense that he was ill during this period of time. Such a defense may be considered in mitigation of the offense but not as a defense. The findings of guilty of this Specification and the Charge are amply supported by competent evidence.

As to Specification 2 of Charge II accused's commanding officer testified that the accused told him that he had been too ill at all times during his absence to report back.

Colonel Barney was accused's commanding officer to whom it was his duty to report upon his return, and accused did formally report to the Colonel upon his return. The accused claims that the Colonel asked him if he had "ever been too ill to come back to camp" to which he replied, "yes". Such a question under the circumstances would have been meaningless. The Colonel wanted to know why accused had not returned for almost ten days. He had received the report that accused had been sick the first day of absence. The question put to the accused was whether he had been too ill at all times during his absence to report back to duty.

The weight of the evidence supports the finding that accused's answer was false. It was apparent that the bus driver's daughter played a stronger part in delaying the accused's return than did the brief illness of his first day. His story of continuous illness when coupled with trips to the "movies", shopping, and various attempts to obtain false doctor's certificates is obviously incredible. It is clear therefore that accused deliberately lied to Colonel Barney when explaining his absence.

In the opinion of the Board the false statement was official as it was made by the accused to his superior officer in response to an inquiry made by the superior officer in the performance of his duty to ascertain an explanation of the accused's unauthorized absence. Colonel Barney was officially engaged in the line of his duty at the time. Accused's false statement to him in response to his inquiry constitutes an offense under Article of War 95. C.M. 153703.

The finding of guilty of this specification is therefore supported by the evidence.

6. The record shows the accused to be 28 years of age. He was commissioned Second Lieutenant, January 20, 1943, after serving as an enlisted man for approximately six years. The records of The Adjutant General show that the accused was born and raised in Montrose, Pennsylvania, where he graduated from high school. He was employed as an inspector by the Department of Highways of Pennsylvania for several years. He enlisted in the United States Army May 5, 1937, and served in various non-commissioned officer's grades until he was commissioned in January 1943.

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 mandatory upon conviction of Article of War 95, and is authorized by the conviction of violation of Article of War 61.

William H. Pounds, Judge Advocate.

Earle Deflum, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 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 Second Lieutenant Gerald R. Smith (0-1109672), Headquarters 1120th Engineers Combat Group.

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 that part of the sentence providing for total forfeitures be remitted and the sentence thus reduced to dismissal 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

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

3 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. USW
3 - Form of action

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 237, 16 Sep 1943)

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

(217)

- 2 SEP 1943

SPJGH
CM 237022

UNITED STATES v. Private NORRIS J. HUGHES (38425676), Reconnaissance Company, 704th Tank Destroyer Battalion.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Wolters, Texas, 4 June 1943 and Headquarters Eighth Service Command, Dallas, Texas, 7, 8 and 9 June 1943. Dishonorable discharge and confinement for life. Penitentiary.

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 92nd Article of War.

Specification: In that Private Norris J. Hughes, Reconnaissance Company, 704th Tank Destroyer Battalion, did, at Dallas, Texas, on or about May 26, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ivona Hughes, a human being, by choking and smothering her to death.

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 term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution is in substance as follows:

Accused and Ivona Hughes, the deceased, were married in August 1940. She was then seventeen years of age. In the fall of 1942 they lived in Dallas, Texas, in half of a double house, the other half of which was occupied by Mrs. Jessie Matthews, and her daughter Joan, aged fourteen. Accused worked for Sears-Roebuck and was out of town at times on business. Margaret Sikes, a girl of fourteen, lived with accused and his wife from August 1942, until December 1942 "two or three days after accused went into the Army". Mrs. Hughes knew a man named Rudolph who worked at a local filling station and came to see her one night when accused was away. About a month and a half before accused went into the Army, Margaret saw a letter, which mentioned Rudolph and Jack, received by Mrs. Hughes from a girl, and Margaret was present during an argument between accused and his wife about the letter. About 5 January 1943, accused was inducted and on 21 May 1943, returned home on furlough. On 24 May he purchased from a pharmacist in Dallas, a quarter pound bottle of chloroform, stating that he had a sick dog which he wished to put out of its misery. He asked the pharmacist if it would be dangerous to the person administering it and was told that it would not be dangerous in the quantity necessary for a small dog. After Margaret Sikes left the Hughes' apartment she went to live with her sister, but in May 1943, came to visit the Matthews family in the other half of the double house. On 26 May 1943 at 10:15 a.m. Margaret was in the Matthews' apartment in the living room, which is separated by a wall from the Hughes' living room, when she distinctly heard Mrs. Hughes cry out "No, Norris, come back". She heard her walking in the living room and heard her say "Norris, if you are going to kill me, don't strangle me". She also heard accused talking but could not distinguish what he said. She then heard Mrs. Hughes say "Norris, I'm afraid" and "Norris, please don't touch me". After that she heard accused walking around, and a noise "as if somebody was pulling the windows down, or closing the doors, or something like that". She was too frightened to do anything at the time, but about 11:00 a.m. left the house, met Joan Matthews, told her what had happened and returned about noon. At 12:30 p.m. Margaret mentioned the matter to a gas man who came to the house, asked him to accompany her, and knocked on the door of the Hughes' apartment. There was no answer, the windows and shades were down and the doors closed. Margaret smelled gas, but the gas man did not, and Margaret returned to the Matthews' apartment. At about 4:30 p.m. she called a neighbor, who a little later went with Margaret and Joan to the Hughes' apartment, where they raised the back window and saw Mrs. Hughes lying on her back on the floor of the bedroom. There was a distinct odor of gas. One of them called the police (R. 8-29, 32-37, 141-148).

Officers Lewis V. Lawson and E. L. Munday arrived in a police car a few minutes later, followed by an ambulance. The policemen found accused lying on his stomach on the floor of the back bedroom, with his right cheek to the floor and his face almost against an open gas faucet in the baseboard of the room. He was conscious but very weak, and was taken out through the back window. Mrs. Hughes, clad in a slip, a waist and one shoe, was lying on her back on the floor with her clothes in order, her hands folded across her chest, and her head about 6 or 8 inches from accused's head, according to Lawson, or about three feet away, according to Munday. There was a very strong odor of chloroform and gas in the room. Munday stated that the body of Mrs. Hughes was stiff and a little dark and her muscles were set. He did not examine her too closely, but there was a chloroform odor on her face. He did not smell chloroform or Lysol on accused, but didn't take time to examine him closely. Lawson "got pretty close" to the body of Mrs. Hughes and could smell chloroform. There was an ice pick lying close to the accused, about a foot from the body of the deceased, and an empty chloroform bottle a short distance from her head. There was no covering on the face of accused and no rags or cotton or gauze nearby. According to homicide detective E. R. Gaddy, the skin of the deceased was beginning to turn blue, indicating that she had been dead several hours (R. 48-51, 55-60, 76-78, 100).

The ambulance driver arrived on the scene about 6:00 p.m., examined Mrs. Hughes and found her dead. Rigor mortis had already set in. In the room he smelled the odor of natural gas but nothing else. He saw an empty Lysol bottle in the bathroom. When Doctor Leo Friedman examined the body at about 6:30 p.m. there was no perceptible heart beat, rigor mortis had set in and there were some red, bluish discolorations. From those facts and the temperature of the body, his opinion was that Mrs. Hughes had been dead from four to eight hours (R. 63-70).

John L. King embalmed the body of Mrs. Hughes at about 8:00 p.m. on 26 May. He noticed a discolored bruise on the right side of the face even with the eye, bruises on both lips, and there was a break in the skin on the inside of the lip. The swelling came out after the embalming had started. He restored the lips to normal and covered the discolorations. He did not notice any burn, but there was an odor of chloroform around the face (R. 71-74).

Dr. J. M. Pickard, the Health Officer of Dallas County, performed an autopsy on the body of Mrs. Hughes at 10:00 p.m. on 26 May 1943.

The examination showed a marked swelling and a bluish discoloration over the eye which could have been caused by a blow from a fist or by a fall; the lower lip was swollen and cut, but there was no cut inside the lip; there were two or three small brownish discolorations not over a quarter-inch in diameter over the thorax below the throat, which he thought might have been burns from chloroform; there was nothing unnatural about the interior of the throat or the position of the tongue, no injury to the lung, no blisters, no fracture of the skull, no hemorrhage in the cranial cavity, no injury to the brain. In his opinion the blow on the head was sufficient to bring on unconsciousness but not to cause death. The face was bluish and rigor mortis had set in. He placed the time of death at from four to six hours prior to the autopsy, i.e., from 4:00 to 6:00 p.m. He removed the stomach with contents intact, the right kidney, parts of the liver and right lung and sent them with about 10 cubic centimeters of blood to the chemical laboratory, requesting that an examination be made of the specimens for the presence of poison. Dr. Pickard read to the court a report from Department of Public Safety at Austin, Texas, stating that the specimens had been received on 28 May 1943 and examined, and that no poison was found. If a quantity of chloroform sufficient to cause death had been administered to the deceased, it would have been detected and would show in the report. In his opinion, Mrs. Hughes was knocked unconscious and then smothered to death. He looked particularly for bruises on her throat such as would appear had she been choked to death but did not find them. If she was unconscious she would not have put up any struggle, and he thought that it would have been a very easy matter to smother her or put enough pressure on the throat to strangle her to death. On examination by the court, Dr. Pickard stated "that death was caused from strangulation, that is, an obstruction of the air passing through the lungs". Sufficient pressure on the trachea can cause obstruction enough to result in death, but the trachea will immediately begin to get in normal position (R. 41-46, 150-154).

After accused was helped through the window by the police officers, he lay on the ground for a minute and then got up without assistance. He was weak and "kind of addly-like", in a dazed condition, highly nervous and highly excited. Two and a half-minutes after the officers first found him he gave his name, occupation, station, stated that he was supposed to be back at camp the following Wednesday and seemed to be normal. He told the ambulance driver that he felt all right. He didn't complain of his condition nor vomit. He had three "ice-pick holes, looked like, right over his heart" and a burn on one cheek about the size of a half dollar or larger (R. 51-54, 57, 61, 66, 87).

On the ride to the City Hall, where he was taken by two detectives, accused answered questions put to him and appeared to be physically all right, except that he was spitting quite often. At the City Hall after accused had been told that he did not have to make a statement and that any statement he might make could be used against him, he made a statement which was first taken down in longhand and then typewritten (Ex. C). After accused called attention to a mistake, a correction had been made in ink, and the statement had been read aloud, accused signed it. No threats were made to accused nor was any consideration whatever offered him (R. 79-85, 100-111, 113-116).

The pertinent part of the statement of accused is as follows:

"* * * Ever since last December I have suspected my wife of running around with other men. I know that she did run around with a men (sic) named Zerrel Owens before he went to the Army. He has been in the Army now about four months. We have had several arguments over this. Ever since I have been home on my furlough I have been planning to kill her and then kill myself. While I have been at home on my furlough I found a letter which she had written to Owens. This morning I asked her about it and to tell me the truth about everything. She denied everything and would not tell me anything. We were in the living room of our apartment when we had this argument. I grabbed her around the neck and choked her to death. I guess she was dead, I choked her until she became perfectly still. I then carried her to the back room and laid her down on the floor. This was about 11:00 A.M. I then attempted to kill myself by turning on the gas. I laid in the floor breathing the gas from the jet but did not have any luck. I then tried to kill myself by saturating a cloth in Chloroform and inhaling it, but could not go to sleep. I then drank a bottle of Lysol in trying to kill myself but the Officers came before I was successful. * * *" (Ex. C).

Accused seemed extremely depressed at the City Hall. He was spitting up something and said that he had taken some Lysol. Dr. C. E. Harrington, a Health Department physician examined accused. He concluded that accused was in no immediate danger but was "groggy" and mentally disturbed and advised the detectives to send him to the Psychopathic Ward for the night. When asked whether accused's mouth showed signs of his having taken Lysol, Dr. Harrington replied "So slightly that I couldn't say it did". Accused was then taken to the Sheriff's office and later to Parkland Hospital where his stomach was pumped out (R. 89, 93-97, 99, 106-107, 109-110, 115).

4. Major Frederick H. Adams, Medical Corps, Chief of the Neuropsychiatric Service of the Station Hospital at Camp Wolters, called as a witness for the court, stated that he had examined accused on five occasions after his admission to the hospital on 28 May 1943, and that although accused demonstrated certain peculiarities in personality, he showed no evidence of insanity, was "quite stable" emotionally and that in his opinion accused had the mental capacity to distinguish between right and wrong and was not insane at the time of the performance of the alleged act on 26 May 1943. The inside of the mouth of accused appeared to have been burned with some chemical, he had a little difficulty in swallowing, and there was a burn on his left cheek due to some caustic (R. 156-162).

5. For the defense, seven character witnesses, including two former employers of accused, testified that his reputation for truth and veracity and as a peaceable and law-abiding citizen was good (R. 119-135).

Two aunts of accused testified that they had seen Mrs. Hughes with other men, but did not report the matter to accused (R. 172-179, 188-192).

A city police sergeant testified that he had seen Mrs. Hughes and other girls drive off with Zarrell, doorman at the Texas Theatre, a few times after the Saturday midnight show, and once had seen Mrs. Hughes kiss Zarrell in public, but that on all these occasions, she was accompanied by other girls (R. 167-171).

A sister of accused, Mrs. V. B. Sheffield, testified that Mrs. Hughes had stated on 4 December 1942 that she was tired of accused and did not love him, but "I won't leave him now, with him going into the Army". Mrs. Sheffield said "you want that allotment you will get from him" and Mrs. Hughes answered "You're darned sure I do". Mrs. Sheffield did not repeat the conversation to accused (R. 234-236).

Miss Edna Earl Harrell, a cousin of accused, had been living with Mrs. Hughes for six or seven weeks prior to 26 May 1943. During that time Mrs. Hughes was away from home all night on the average of once a week, but Miss Harrell never saw deceased "run around" with any man. A few days before 26 May, she told Miss Harrell that accused was coming home on furlough and gave Miss Harrell a check for $30, requesting that she cash it and wire the proceeds to accused. On the day that

accused was to arrive, Mrs. Hughes secured a permanent-wave and stated that she had arranged to be absent from work during the visit of accused (R. 227-230).

Joan Matthews testified in her deposition taken upon oral interrogatories that she lived with her mother and that accused and deceased lived next door for about two months before he entered the Army. Deceased nagged accused "some" about little things. Joan never saw accused lose his temper. After accused was inducted, Mrs. Connie Daniels lived with Mrs. Hughes for awhile, but when Mrs. Daniels returned from a visit to her husband in California, they were not on good terms and Mrs. Daniels moved away. Joan heard Mrs. Hughes say that this was because Mrs. Daniels while in California had told the accused that his wife "was going out, that she had some men over to the apartment and things like that". In February 1943 Joan and Mrs. Hughes went to the show one night and Mrs. Hughes talked to Zarrell for about twenty minutes. In March 1943, Rudolph, the manager of a filling station in Humble, called on Mrs. Hughes while Joan was present and stayed about thirty minutes. Jack Reid was at the apartment with Mrs. Hughes one night and remained after Joan left. The manner of Mrs. Hughes toward these men was "just natural". Joan never saw her do anything indiscreet. After Mrs. Daniels returned from California, Mrs. Hughes received a long distance telephone call from accused. Before that Joan had heard Mrs. Hughes ask Mrs. Matthews what to say when accused asked her "if she had been running around, whether she should openly admit the truth or mislead him". Mrs. Hughes bought quart bottles of beer, but the only occasion on which Joan saw her drunk was about the middle of May 1943. At noon on Wednesday, 26 May 1943, Joan met Margaret Sikes on the street while the latter was shopping for hair ribbons. Margaret was very scared and upset, and told Joan of an argument she had overheard that morning between accused and deceased. Joan reached home at 3:30 p.m. and was present when the others raised the back window of the Hughes' apartment (R. 198-223; Def. Ex. 1).

Bill Decker, Chief Deputy Sheriff of Dallas County, was present at 7:40 p.m. on 26 May when accused was brought to the sheriff's office and committed to jail. Accused stated to a turnkey that he had taken poison, and after examination by the house doctor was taken in an ambulance to Parkland Hospital. Decker looked in accused's mouth and "It appeared to be white like * * * it looked like a sear". Decker also smelled the odor of Lysol. At the hospital after some liquid was pumped into accused's stomach, accused vomited

and the fluid that came back through his mouth was "very strong of Lysol" (R. 224-226).

At 8:50 p.m. that evening Dr. Charles M. Cole of the Parkland Hospital examined the mouth of accused and washed out his stomach. There was evidence that some caustic substance had been in his stomach, which Dr. Cole could not identify as Lysol, because there was not enough of it and it was mixed with stomach secretions. Accused had burns in his mouth, mostly along the tongue and toward the back of the throat, and a burn on one cheek. The foreign substance in the stomach was present in quantity large enough, possibly, to cause death, if left in there (R. 193-196).

Accused testified that in 1937 he left the farm of his father and obtained employment in Dallas. Two years later, while working for Sears-Roebuck, he met and married Ivona Wright, who was then seventeen years of age. He changed employers several times but in October 1942 was living with his wife, the deceased, at 821 North Crawford Street, Dallas. He made two business trips in the fall of 1942 and on his return from one of them, found a letter which some soldier had written to his wife. On 7 December 1942 he attempted to enlist in the Air Corps but was rejected. On 29 December 1942 he was inducted into the Army and given a seven day furlough which he had not expected. A friend of his wife, named Mavis, left Dallas just before Christmas knowing that accused was supposed to go into the Army on 29 December. About 1 January 1943 accused read a letter from Mavis to Mrs. Hughes, dated 30 December (Def. Ex. 2), which stated in part "Listen honey how's my and your boy friends getting along--I mean Rudolph and Jack--? he ha" and "There's a flying school here in the suburbs of Lake Charles and plenty of soldiers here too--I mean plenty". Prior to that time his wife had never given accused any reason to suspect that she knew or had anything to do with other men. When accused asked her about the two boys mentioned in the letter she remarked that Mavis was "just kidding". Several days later accused found a letter written by his wife to Mavis stating "You have really fixed me by writing while Norris was here. He didn't leave". It said she had seen Zarrell and that Rudolph had called her one night when accused was there and that she had told accused it was a girl. Accused and his wife had "a pretty big argument" about that letter, but she promised to stay home and be true to the accused, and he believed and forgave her. While in the Army, accused met Private Eddie Daniels and saw him daily. Daniels' wife, Connie, became acquainted with Mrs. Hughes and shared the latter's apartment with her for six or eight weeks in the spring of 1943. While there

Connie Daniels wrote to her husband daily. She mentioned drinking beer and stated that some boys were coming to the house, that a boy who was a friend of hers and of Mrs. Hughes had come to see them. Daniels showed these letters to accused, and accused wrote to his wife about them. His wife denied that anything was going on. Accused saw Connie Daniels in California before going to Dallas and was told by her that his wife had been "going out", that boys had been coming to the house and drinking beer and whiskey and that his wife "had passed out there at home with the boys there", and that she went off alone with the boys. Accused telephoned his wife that he was coming home on furlough and asked her to send him some money to buy a ticket. She suggested that he wait two weeks longer, but sent him $25. When accused reached Dallas at 11:00 p.m., on Friday, 21 May, his wife met him at the station (R. 242-257, 275-281, 287-289).

Mrs. Hughes was cold and distant and acted as if she were not very glad to see accused. They went home. She insisted that he take a bath. While he was in the tub, his wife went to the kitchen and he thought he heard her "fooling" with the wastebasket. They went to bed about midnight. Accused had been continent for five months and was ready to "see" his wife. She said "It is late and I am sleepy. Why not wait? Let's don't do anything tonight". That hurt accused but he acceded. They arose about 9:00 o'clock the next morning and arranged to have breakfast with members of the family of accused who were staying with a relative in Dallas. Before leaving the house, accused started to take some folded newspapers to the trash can in the backyard when his wife said "No, don't take them out, just leave them in there, they are not in the way, don't take them". Previously, she had always insisted that he carry things out of the house. He took the papers out and saw a letter lying on the ground beside the trash can. Later in the day he procured the letter, a three page letter written by his wife to Zarrell Owens at Fort Logan, Colorado. In it she mentioned having received letters from Owens and stated "I have been lying to Norris. I think he believes me, but I wonder if he does" and "I am sorry the way I treated you the last time I was with you". Accused put the letter in his pocket and said nothing about it because his family had come for dinner and he did not wish to cause a disturbance. That night, Saturday, accused "almost insisted" upon intercourse and his wife finally agreed. She asked if he had brought any "rubbers" home with him, and when he replied that he had not she said that she wanted him to get some while he was there. Afterward she took a Lysol douche which accused prepared. Before accused entered the Army, they had planned on having a child, but when he came home on his furlough, his

wife said that she did not want any child and "You are going to use something to prevent it". On Sunday night accused and deceased did not have intercourse because she wished to wait until he had obtained the rubbers. On Monday afternoon he bought some. When his wife saw them, she said "Why didn't you get Sheik?" and "They are supposed to be the best". Accused asked her how she knew that and she replied that a girl had told her that they were the kind to get. In bed that evening, she asked accused if he had "checked" the rubber and when he asked the method, she mentioned three different ways of checking which the same girl had told her. He was surprised and shocked at her knowledge. She became angry at his questioning and said "We won't do anything tonight". On Monday afternoon or evening accused bought chloroform at the drug store, substantially as testified to by the druggist, and put it on a shelf in the bedroom closet. Accused had no pet animal and did not intend to kill his wife. He bought the chloroform intending to take his own life because he was "so worried, and you might say disgusted". He had been suspicious when he came from California, then he had found the letter, on Saturday a man had called on the telephone and hung up without giving a message, and on Monday afternoon a man had telephoned and his wife had answered but when accused entered the room, she hung up and stated that she had been talking to a girl. Accused was upset and his mind was in a turmoil. On Tuesday evening, accused, his wife and Rubene Anderson, a friend of his wife, went to the Palace Theatre. During the show and at a drug store afterwards the women whispered together, and when accused and his wife returned home, she stated that she had decided she would meet Mrs. Anderson the next day, alone, instead of with accused (R. 258-269, 281-284).

It had been planned that accused should visit his friends at Sears-Roebuck on Wednesday, and before breakfast that morning accused remarked that he would see Mrs. Anderson while he was downtown and would get from her the pay due his wife. She said "I will go downtown this afternoon by myself. If you go, I just won't go, I just won't go down there if you are going with me". She was angry. Accused then asked her if she had received any letters, ever written any, and "Why don't you go ahead and tell me the truth about everything?" She stated that she had not done anything. Accused pulled from his pocket the letter which he had found near the trash can. She "really got mad then". She said that the letter did not mean anything and that she did not know why she had written it. They went into the living room and accused asked her if she wanted a divorce,-- "If you do I will give you one. You just tell me the truth, and I will get a divorce and go on back". She said "Norris, God-damn it,

you already know, you act like you know, you said I had been running around with other men. Well, I have been going out drinking and men have been here in the apartment with me". "I didn't want to tell you, but now you act like you know it. Now I will tell you. Why don't you go back to that damned camp where you belong?" Accused then "grabbed ahold of her by the neck". He remembered her falling to the floor, but he did not hear her say a thing. He could not remember what happened after that until he went into the bedroom at about 11:00 a.m., got the chloroform, put it all on a handkerchief, put it to his face, laid on the floor and turned the gas on. The chloroform did not seem to affect him. He lay there until 2:00 or 2:30 p.m., then went to the bathroom, took a bottle of Lysol--the 25 cent size--which was full except for two or three teaspoonfuls, and drank it all, putting it away back in his mouth. His stomach felt as if it were burning out. He had the urge to vomit, but restrained it, and the next thing he remembered was being in the yard and going to the car. He did not remember taking his wife into the bedroom where she was found. He did not intend to kill her when he seized her by the throat. He did not strike her (R. 269-273, 284-286, 290-293).

The officers took him to the City Hall. He remembered talking there and answering "Yes" or "No" to questions but he stated that at the time "I wasn't caring what they were asking me, I didn't know but what any time I might just go ahead and pass out" and "my stomach was hurting so bad, I didn't care what I said". They took him out and fingerprinted him. When he returned, someone picked up a paper and read it to him, handed him a fountain pen and he signed it. He remembered making the correction to Exhibit C and signing it. They then took him to the city jail. He was in intense pain and after awhile he was taken to the hospital, where he was strapped to a bed and forced to vomit. The contents of his stomach blistered the inside of his mouth (R. 273-274, 283-286).

Accused had never before been charged with any offense except two traffic violations (R. 293).

It was stipulated that if one Nelson were called as a witness he would testify that he was the ice man serving the apartment where Mrs. Hughes resided, and that after accused was called into the Army, there was an increasing number of empty beer bottles, many times two to three dozen, on the back porch.

6. Accused is charged with murdering Ivona Hughes by choking and smothering her to death. Murder is the unlawful killing of a human being with malice aforethought (MCM 1928, par. 148a). Malice is implied in every intentional and deliberate or premeditated homicide unlawfully committed if there are no circumstances serving to mitigate, excuse or justify the act (29 C.J. 1091-1092; People v. Weeks (Cal.), 286, P. 514).

The evidence shows that three days after accused came home on furlough he purchased from a pharmacist a small bottle of chloroform, stated that he wanted it to kill a dog and inquired if it would be dangerous to the person administering it. Two days after making the purchase, at about 10:15 a.m., accused, at the apartment where his wife resided, quarreled with her over her activities with other men. A young girl in adjoining quarters heard Mrs. Hughes say "Norris, if you are going to kill me, don't strangle me" and "Norris, I'm afraid * * * please don't touch me". Shortly before 6:00 p.m. on the same day when police officers entered the apartment they found Mrs. Hughes dead on the floor of a back bedroom and accused lying near her, his face almost against an open gas jet, conscious but very weak and dazed. A physician who examined the body of Mrs. Hughes at about 6:30 p.m. found that rigor mortis had set in and was of the opinion that she had died from four to eight hours previously. Another physician who performed an autopsy observed a bruise over one eye that could have been caused by a fist or a fall and expressed the opinion that Mrs. Hughes had been knocked unconscious, then smothered to death, and that death was due to strangulation, "that is, an obstruction of the air passing through the lungs". There were no bruises on her throat but he thought that if she was unconscious it would have been an easy matter to smother her or to put enough pressure on her throat to strangle her.

Accused in a signed voluntary statement admitted that he and his wife had had several arguments about her keeping company with other men and that he had been planning to kill her and then kill himself ever since he came home on furlough. On the day following his arrival he had found a letter which she had written to another man. On the morning of her death he asked her about the letter and urged her to tell him everything. She would not tell him anything and he "grabbed her around the neck and choked her to death". He choked her until she became perfectly still, carried her to the back room, laid her on the floor and unsuccessfully attempted to kill himself by opening a gas jet, by administering chloroform and by swallowing Lysol.

Accused, according to his own confession, choked his wife to death after he had planned for several days to kill her. That the act

was premeditated is also evidenced by the circumstance of his purchase of the chloroform. The fact that Mrs. Hughes begged him not to strangle her to death indicates that he had formed an intention to kill her by that method and by words or actions had communicated to her that intention before proceeding to carry it into execution. Malice aforethought on the part of accused may be inferred from the circumstances of the homicide. There was no legal excuse or justification for the killing of his wife and no such provocation as to reduce the degree of the homicide to manslaughter. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of murder.

7. The accused is 23 years of age. The charge sheet shows that he was inducted 29 December 1942.

8. Careful consideration has been given to a letter of Mr. L.B. Sheffield, dated 28 July 1943, addressed to the President, requesting clemency and attached to the record of trial.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty 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 under Article of War 42 for the offense of murder, by sections 273 and 275, of the Criminal Code of the United States (18 U.S.C. 452, 454).

Arthur S. Hill, Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

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

4 - AUG 1943

SPJGH
CM 237032

UNITED STATES	)	SAN FRANCISCO PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Fort Mason, California, 2 and 3 June 1943. Dismissal.
	)	
Lieutenant Colonel GREER B. NELSON (O-195554), Cavalry-Reserve.	)	

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 Lieutenant Colonel Greer B. Nelson, Cavalry, on or about December 9, 1942, on the Southern Pacific Train No. 76, en route from San Francisco, California, to Los Angeles, California, while jointly occupying a bedroom with John H. A. Cross, an applicant for induction in the Army, did conduct himself in a manner unbecoming an officer and a gentleman, in that he induced the said John H. A. Cross while robed in pajamas to lie on the bed beside him and did repeatedly place his hand upon and pat the body and on two occasions did wilfully twitch the penis of the said John H. A. Cross.

Specification 2: In that Lieutenant Colonel Greer B. Nelson, Cavalry, on or about October 2, 1942, at Austin's Resort, Clear Lake, California, did conduct himself in a manner unbecoming an officer and a gentleman, in that he did invite and induce one Norman A. Wagner, a male person, to occupy jointly with him a cabin equipped with one double bed, and while jointly occupying said bed, did speak in

endearing terms to, and did embrace and fondle, the said Norman A. Wagner, in a manner to arouse the suspicions of the said Norman A. Wagner as to his intentions.

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

Specification 1: In that Lieutenant Colonel Greer B. Nelson, Cavalry, then Executive Officer, Camp Stoneman, California, on or about the month of October, 1942, did, at Camp Stoneman, California, wrongfully invite and induce Master Sergeant Walter G. Atgalainis, 14th Port of Embarkation, Transportation Corps, then Staff Sergeant on duty at Camp Stoneman, California, to go on a weekend pleasure trip with him to a tourist camp located near Modesto, California, where he engaged a room in a motel equipped with one bed which he occupied jointly and unnecessarily with said Master Sergeant Walter G. Atgalainis to the prejudice of good order and military discipline.

Specification 2: In that Lieutenant Colonel Greer B. Nelson, Cavalry, then Executive Officer, Camp Stoneman, California, on or about the month of October, 1942, while on an official trip to Guerneville, California, accompanied by his chauffeur, Technician Fourth Grade Jack Putnam, Headquarters Unit, Camp Stoneman, California, did, at Guerneville, California, wrongfully arrange for and occupy jointly and unnecessarily a double bed in a tourist cabin at Guerneville, California, with the said Technician Fourth Grade Jack Putnam to the prejudice of good order and military discipline.

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 words "and induce", the words, "speak in endearing terms to, and did," and the words "in a manner to arouse the suspicions of the said Norman A. Wagner as to his intentions"; guilty of Specification 1, Charge II except the words "wrongfully", "and induce" and except the word "to" in the phrase "to a tourist camp" in said Specification, substituting therefor the words "and at" [a tourist camp] and except the word "where"; and guilty of Specification 2, Charge II except the words and figures "month of October, 1942" substituting therefor the words and figures "7th day of September 1942" and except the word "wrongfully". 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 is substantially as follows:

a. Specification 1, Charge I: Early in September 1942, John Cross, a 22 year old civilian employee at the San Francisco Port of Embarkation, who had been considering enlisting in the Army, arranged through a friend to meet the accused at his office in the administration building at Camp Stoneman, California. Cross told accused what work he had been doing in the Ordnance Department and what training he had taken at the Rock Island Arsenal. Accused seemed to be interested and stated that he would get in touch with Cross later. He also promised to "keep his eye on" Cross and, if he proved worthy, to see what could be done about sending Cross to Officer Candidate School. After learning that Cross had walked out to the camp from Pittsburg, accused had a car brought around, took Cross for a short ride around the camp and directed the driver to take Cross to the bus station. Subsequently, Cross received from the office of accused a letter containing a form of release to be sent to his selective service board (R. 36-38).

Early in December 1942, after an "edict against enlistments" had been issued, accused telephoned Cross that he had some additional information on his case and asked Cross to meet him at the railroad station in San Francisco to discuss the matter on the evening of 9 December. Cross replied that he would do so. On the morning of the appointed day accused again called Cross by telephone and said that he had a teletype message from The Adjutant General recommending that Cross go to Los Angeles to see his "draft board" and apply for immediate induction instead of voluntary enlistment. Accused suggested that since he was going to Los Angeles on business that evening, Cross accompany him. After asking his father about it, Cross decided to go. He secured from the Port Ordnance Office where he was employed a release for submission to his selective service board, packed his personal effects and left them in readiness to be shipped to him, and went to the station to meet accused at about 8:30 p.m. Accused had told Cross that "he would put me on his reservation" and that Cross was to pay his own fare. Accused had a reservation for a single bedroom on the train. At that time sleeping accommodations on trains were difficult to obtain (R. 39-41, 65, 116-118).

Upon boarding the train accused and Cross left their coats and bags in the bedroom and went to the bar where they had two or three

drinks apiece and talked. They then returned to the bedroom. In the meantime the porter had made up the two "bunks"; an upper single bed and a lower three-quarter bed. In a short time both of them undressed, put on their pajamas and accused got into the lower bed. Cross sat on the foot of the bed but accused said to him, "Come on down and lie over here beside me. There is an ash tray over here" and Cross lay down on the bed on the left side of accused. Cross was on top of the bed clothing, accused was underneath, and each of them had his head on a separate pillow. When Cross expressed the hope that he was making the proper decision and would get along all right, accused put his left arm around the neck of the younger man and told him not to worry about it. He clenched his right hand "like a fist", patted Cross on the right cheek with it, "not hard", and said "You are a swell fellow, John; it will be all right". He started to pat Cross on the chest, repeated several times "You are a swell fellow", and asked "Are you happy?" Accused then slipped his hand under the elastic band at the top of the pajama trousers which Cross was wearing, grasped the penis of Cross between his fingers and thumb and "twitched" it. With his left hand Cross seized the right hand of accused, "for a moment there was a push and pull", and Cross sat up in bed. Accused, who was still lying down said "Oh, come on, sit back down". Cross put his pillow against the wall at the head of the bed and settled down in a reclining position with his head and shoulders somewhat elevated. After a short interval accused again asked "Are you happy?" and "started the same procedure" on Cross, patted him on the chest, reached down under the top of his pajama trousers and "momentarily" touched his penis. Cross then got out of bed with the remark, "Yes, I may be a swell fellow, but only in certain ways, and good night", climbed up to the upper bed and stayed there the rest of the night (R. 41-43, 53-56, 61, 117).

The next morning Cross waited until accused had dressed, then came down and dressed himself as rapidly as possible. Accused appeared to be nervous. Their conversation was general and the incidents of the preceding night were not mentioned. After breakfast, in the course of which accused met and conversed with "a general" who was on the train, they returned to their room and talked about what Cross was to do in Los Angeles. Accused instructed him to see his "draft board" immediately and let accused know what action had been taken as the plan was for Cross to go to Fort MacArthur in Los Angeles after his induction and accused would make arrangements for his transfer to Camp Stoneman. Upon arriving at their destination on the morning of 10 December, after exchanging information as to where each of them could be reached by telephone in Los Angeles, they shook hands and parted. At noon that day Cross telephoned to his father, who was in San Luis Obispo

and told him what had happened. After consultation with another relative and with a friend of the family Cross decided that he would take no further action with reference to his induction into the Army. On 11 or 12 December he informed accused by telephone that he had changed his mind and accused remarked "That's up to you". Cross arranged to resume his previous employment. Immediately after his return to San Francisco, on 15 December, he made a verbal complaint to his "superior officer" at the Port Ordnance Office about the incident on the train. Cross admitted on cross-examination that upon examination by defense counsel on 19 May 1943 he stated that accused had touched his penis only once, but explained that after such examination and prior to the trial, his memory had been refreshed by reading a "complete" statement which he had made immediately after the incident. Cross further testified that he had had an erection when accused touched his penis, that he had not told the trial judge advocate about it because "they didn't ask me" and that immediately "upon sitting up that was over". He also stated that his salary of $220 a month had not been a factor in his decision not to join the Army (R. 44-52, 56-61).

b. Specification 2, Charge I: Private Norman Wagner, 22 years of age, prior to his entry into the service in December 1942, was employed in the arsenal at Benicia, California. He first met accused early in September 1942, at a party, met him again at a social function about two weeks later and several days after that, at the invitation of accused, visited Camp Stoneman, where he discussed with accused his contemplated enlistment in the Army. Accused thought that it was a good idea and that, because of the experience which he had gained in two years of work at the arsenal, Wagner might qualify for Officer Candidate School. After they had met a number of times accused expressed a desire to go on a week-end trip with Wagner and asked the latter if he knew of any places to go. Wagner suggested Clear Lake. After meeting by appointment on the afternoon of 3 October 1942 they started out in the automobile of accused. They stopped for dinner en route, and arrived at Austin's Resort on Clear Lake at about 9:30 p.m. On the trip they discussed a number of topics, including the contemplated entry of Wagner into the service and accused remarked several times that Wagner reminded him of his son. At the resort Wagner stayed in the car while accused went into the manager's cabin, made arrangements for accommodations and signed the register. The cabin which they occupied had one bedroom with a double bed. There were eleven cabins with two or more beds at Austin's Resort, which were not rented that night. Accused did not use any "argument" to get Wagner to occupy the same cabin with him. Wagner did not "question it whatsoever" (R. 68-73, 92, 94-97, Ex. C).

Accused and Wagner undressed, put on their pajamas and went to bed. Accused several times asked Wagner if he was happy and said "Norman, you are a swell kid. I like you very much". After this had gone on for a short time accused put his left arm under Wagner's neck and shoulder, pulled the young man toward him and with his right hand patted Wagner on the chest. After several minutes Wagner remarked that he was tired, would like to go to sleep, and suggested that accused do the same thing. Wagner then turned over on his left side toward the edge of the bed and went to sleep. He was not disturbed until about 9:00 a.m. the next morning when he was awakened by accused who was already up. They both took shower baths, dressed and left the cabin. They drove around the lake, and after stopping for breakfast at a small resort, returned home. On the return trip accused, who was driving, several times told Wagner that he was very nice and reached over and put his hand flatly on Wagner's leg, just above the knee. Each time Wagner moved his knee and "kind of moved over a little further toward the door". The reason he moved his knee was that it was rather warm and he "just didn't care for it". After the Clear Lake trip Wagner went to Camp Stoneman several times and saw accused on three or four occasions, one of which was at a party given for Wagner by one of the young ladies at the arsenal (R. 73-77, 93).

In December 1942, after Wagner had entered the service, he had a conversation with accused at Berkeley, California, where Wagner was then stationed. Accused stated that a young man by the name of Cross had complained that accused was "fresh" with him and tried to attack him, during a trip to Los Angeles. Accused told Wagner that the accusation was false, but there might be some trouble about it and, if so, accused would like to call upon Wagner as a witness in his behalf. Accused wanted to know what Wagner would say and the latter replied that he would tell the truth and that was all he could do. On cross-examination, with reference to the same conversation, Wagner admitted that he had told accused that he (Wagner) would tell the truth "and say that nothing had happened on our trip". When asked by defense counsel if it was true that nothing happened on the trip, Wagner answered in the affirmative. On redirect examination the prosecution called Wagner's attention to a statement which he had made on 25 February 1943 to "Colonel Lloyd" of the Inspector General's Department, wherein Wagner had asserted that he informed accused he would tell the truth, that nothing out of the way had taken place and in any event Wagner had been so tired and had slept so soundly he would not have known about it if anything had happened. Colonel Lloyd had then asked Wagner, "Was this statement that you just made to Colonel Nelson the truth?", to which Wagner answered "No, sir, it wasn't the truth. I

said this in order to get out of a very embarrassing situation, and because I didn't care to discuss the matter any longer". In his redirect examination at the trial Wagner explained that when Colonel Lloyd had asked him the question quoted above his first answer had been "Yes" but that "Colonel Lloyd nearly jumped down my throat; screamed at me over the table, 'My God, a man almost attacks you, and still you say nothing happened?' What else could I say? I was so scared I didn't know what to say" (R. 81-91).

Shortly after his entry into the Army Wagner wrote a letter to accused and an exchange of correspondence between them followed in which accused wrote two letters to Wagner, one dated 1 February 1943 (Ex. B), and the other, not dated but postmarked on the envelope, 22 February 1943 (Ex. A). The letters, which are wholly in the handwriting of accused, open with the salutation "Dear Norman" and end with "Very Sincerely" or "Sincerely" and the signature "Greer B. Nelson". Both of the envelopes had stamps attached and did not bear any return address. On the whole, they seem to be ordinary, personal letters, which a normal man might be expected to write to another man with whom he was on very friendly terms. In both of them accused mentioned Wagner's prospects for gaining admission to Officer Candidate School, offered suggestions and advice on that subject, and stated that, in the event Wagner did attend such a school and complete the course accused would ask to have him assigned to the organization of accused, provided that Wagner then desired to serve with or under accused. In the earlier letter (Ex. B) accused mentioned the "hard blow" he had received and expressed the hope that "its all straightening out". He also wrote that he missed Wagner and "someday I hope to have a long visit with you". The second letter (Ex. A) contained the following suggestion: "I am sending this letter stamped with no return address. I think you had better stamp my letters and leave the return address off them. This is protection to both of us. Follow me". At the top of one page there was also this notation "Better destroy all our letters after answered". Otherwise the contents of the letters have no material bearing on any of the issues of the instant case (R. 84-86, 220-222).

c. Specification 1, Charge II: Master Sergeant Walter G. Atgalainis entered the service in April 1942 and in June of the same year, while on duty as a file clerk in the Adjutant General's Department at Camp Stoneman, met accused. One Saturday morning in October First Lieutenant Orville L. Bristol told Atgalainis that accused would like to see him. Accused asked Atgalainis to go on a trip with him, and the latter accepted. The invitation was unexpected as the previous acquaintance of accused and Atgalainis had been limited to an exchange of formal greetings when they met at headquarters. Accused on one

occasion had asked whether Atgalainis had applied for Officer Candidate School, and the latter answered that he had not because he "didn't intend to rush it". They set out on the trip in the evening and drove to Modesto, California, in the car of accused. As they approached the town they looked for a place to stay but the motels and auto courts had "No vacancy" signs outside. They stopped in Modesto and accused got out and tried to rent a room at a hotel but found that there was no vacancy. They drove on out to the edge of the town where accused procured, at a motel, a room with one double bed. After they entered the room accused "bought" Atgalainis a drink. They did not drink in the presence of each other but went into the bathroom one at a time and had a drink there. After having dinner in town they returned to the motel and accused retired. Atgalainis, who "wasn't feeling well" stayed up. At the suggestion of accused Atgalainis put his finger in his throat and vomited and then went to bed. Both of them occupied the double bed that night but nothing unusual happened. Accused did not in any way "get familiar" with Atgalainis. Accused had stated, after leaving Camp Stoneman that he was going to visit a Monastery. On the following day, which was Sunday, they had breakfast, and then drove to a Monastery. Accused went in and stayed for about 45 minutes while Atgalainis remained in the car. They then returned to Camp Stoneman and as Atgalainis left the car accused said to him "Don't go around bragging about the trip". Atgalainis did not know why accused made that remark. Accused paid all expenses and drove the car at all times except for a period of about ten or fifteen minutes Sunday morning when Atgalainis drove to the restaurant where they had breakfast (R. 98-109).

d. Specification 2, Charge II: About the middle of March 1942, Staff Sergeant Jack Putnam met accused at Fort Mason, California, and upon being transferred to Camp Stoneman served as chauffeur for accused for about six months. In October 1942, accused and Putnam went from Camp Stoneman to Guerneville, California together. Both of them made the trip under orders from competent authority, accused to inspect a Civilian Conservation Camp and Putnam to drive the car. They left in the afternoon and upon their arrival at Guerneville tried to obtain lodging at two hotels without success. Accused then rented a room with one double bed at a tourist camp. Putnam suggested that he spend the night in the car but accused said that it was absolutely unnecessary as long as they had accommodations, and, since that was all they could get they would share them. Putnam went to bed first. Accused took a shower and cleaned up and then retired. Putnam had on his underwear consisting of a shirt and shorts and accused wore pajamas. Nothing

unusual occurred during their stay in the room. When Putnam awoke the next morning accused was up and fully dressed. After accused had inspected the "CCC" camp they drove back to Camp Stoneman the same day. Upon taking leave of Putnam accused remarked that he should not "spread around" that they had stayed together as it would not look right to other men and it would be "bad for discipline" (R. 110-115).

4. a. For the defense accused testified that he was born in the State of Texas on 28 May 1903. He had three younger brothers and after the death of his father in 1919 assumed responsibility as head of the household. He finished high school in 1920 and graduated from Texas "A & M" College in 1924 with a Bachelor of Science degree in agriculture. He immediately secured employment with a dairy company, subsequently was promoted to the position of production manager of its plants in El Paso, Texas, and eventually became production manager for another dairy company which operated in New Mexico and Texas (R. 174-175).

Upon his graduation from college accused was commissioned second lieutenant, Cavalry Reserve, and after two short tours of active duty entered upon extended duty with the Civilian Conservation Corps in August 1935. He was assistant adjutant at District Headquarters in Phoenix, Arizona, for about two months and then served as commanding officer of a civilian conservation corps company for four and a half years, during which time he acted as sub-district commander on about six occasions. He then commanded, one after another for a period of two or three months each, some seven different companies "to straighten those companies out". He became District Quartermaster for the Arizona District in 1941 and after a tour of active duty in Texas was assigned to the San Francisco Port of Embarkation, Fort Mason, California. In 1939, accused formally adopted, by court decree, a young man who had previously been an enrollee in a "CCC" company which accused commanded. He sent the young man to "A & M" College from which he graduated with high honors. At the time of the trial this foster son, who had retained his own name, was serving in Africa as a first lieutenant (R. 176-178).

Accused had never been charged with a criminal offense or a military offense and had never received a written reprimand for his conduct while in the Army. In a letter to the Commanding Officer of Camp Stoneman, dated 24 September 1942, by the commanding officer of a certain shipment, accused was highly commended for his helpful and cooperative efforts well beyond what might be considered purely duty in the staging of the shipment. On 15 November 1942, at the suggestion of the Commanding General of the San Francisco Port of Embarkation, the Commanding Officer of Camp Stoneman recommended that the decoration "Officer of The Legion of Merit" be awarded to accused "for exceptionally meritorious service, in a position of great responsibility". The letter of recommendation stated that he had worked long hours, showing energy, mature judgment and efficiency. Accused testified that he had frequently, over a period of years, used the expression "Are you happy?" (R. 200-205; Exs. 5, 6).

With reference to the four incidents which were the basis of the accusations against him, accused testified as follows:

(1) Specification 1, Charge I: In November 1942, at the request of a civilian acquaintance accused interviewed John Cross and concluded that Cross, who had indicated that he was about to be inducted and wanted to come to Camp Stoneman, was a qualified stenographer and typist. Some time later accused had occasion to go to Los Angeles on Government business and made advance reservations on the train for a room as that was the only thing available. The request of Cross to be inducted into the Army, which accused had "relayed" to The Adjutant General, had been denied because of a change in the regulations. Accused and a number of other officers were discussing the matter at Camp Stoneman when "someone" suggested that accused take Cross to Los Angeles with him since that was where the boy was registered and "help him get in because we are exceptionally short of stenographers". By telephone accused invited Cross to make the trip, the latter accepted, they met at the railway station, and boarded the train on the evening of 9 December (R. 179-181).

After putting their baggage in the room, they went to the lounge car where they had three drinks, one of which was purchased by Cross. Upon their return to the bedroom accused undressed, put on his pajamas, and went to bed. Cross also donned his pajamas and "perched himself" at the foot of the bed. They discussed the procedure which Cross should follow the next day for a few minutes when Cross remarked "I am cold". Since it was chilly—cool, accused invited Cross to get into bed until they had concluded their discussion, and Cross got in beside him underneath the bed covers. Cross laid his head on the arm of accused, which had been resting on the bed in an extended position, but in less than half a minute accused pulled his arm free and put it under the covers. They smoked and completed their discussion in about ten minutes, accused suggested that they go to sleep, Cross climbed into the upper bunk and they exchanged good night greetings. Accused did not at any time pat the cheek or the chest of Cross or touch his penis or otherwise make any amorous advances toward him. The next morning they had breakfast together and accused introduced Cross to "General Easley" whom accused had met the preceding evening. After the train reached Los Angeles they parted at the depot after shaking hands. On the afternoon of 12 December, Cross called accused by telephone and stated that he had decided not to enlist in the Army. He gave no reason and accused remarked that it was something on which he had to make up his own mind. In the lounge car on the train, while they were having drinks, Cross had indicated that he was doubtful about

joining the Army as he remarked that there was "an awful big difference" between the salary he was then receiving and the $50 a month pay of a private. Accused had addressed Cross as "John" on the train because he was a younger man and accused had always called most people of his acquaintance by their given names. He had also several times asked Cross if he was happy. On this same trip accused eventually went to Phoenix, Arizona, where he met his fiancee (R. 181-189).

On cross-examination accused was asked whether in a statement under oath to "Colonel Lloyd", he had said that he requested Mr. Cross to lie down beside him because Cross had complained of being tired. Accused replied that he possibly may have told Colonel Lloyd that because earlier in the evening Cross and he both had commented on their being tired "but that still doesn't alter the fact that Mr. Cross did make the statement that he was cold" (R. 207-211).

(2) Specification 2, Charge I: Accused met Norman A. Wagner in July 1942 at a party, attended by a group of men and women of various ages up to 50 or 60 years and subsequently saw him at a number of other parties where substantially the same group was present. They discussed going to some lake for a week-end trip and eventually arranged to drive to Clear Lake together in the car of accused one Saturday afternoon. They stopped at Austin's resort, accused got out of the car and went into the office, signed the register, asked for accommodations for two without specifying any particular type and was assigned a cabin with one double bed. They disrobed, put on their pajamas, went to bed and, after talking for a few minutes, went to sleep. Nothing unusual happened. Accused did not fondle or caress Wagner. Accused asked Wagner if he was happy just as he had done with "lots of other people". He also had said two or three times he thought Wagner was a "nice kid". The next morning accused got up first, took a shower and then awakened Wagner. They drove around the lake, stopped for breakfast on the way, and returned home. Accused who was driving, struck Wagner on the knee with his hand when calling Wagner's attention to a snow-capped mountain and may have slapped him on the knee on one or two other occasions. After this trip accused saw Wagner many times (R. 189-193).

(3) Specification 1, Charge II: One Saturday in October 1942, after accused had been working for several weeks without a day off, he mentioned being "pretty tired" to his superior officer who told accused to get out and relax himself. Accused asked Lieutenant Orville L. Bishop to get some "youngster", who could drive, to accompany him as he did not want to be bothered with anyone who would talk shop. Accused and Sergeant Abgalainis left Camp Stoneman about 5:30 p.m. and drove to Modesto where

they arrived between 10:00 and 10:30 p.m. As they approached the town accused looked along the road for a place to stay but every tourist camp they passed had out a "no vacancy" sign. In Modesto they stopped at a hotel but could not get a room. As they were driving out of town they came to a tourist camp where they rented a room for the night. After they entered the room accused offered Atgalainis a drink of whiskey from a bottle which accused carried in his bag. Atgalainis took the bottle to the bathroom and, accused assumed took a drink. Accused then went to the bathroom, and after Atgalainis had left the room, had a drink also. They then went to town, ate supper and when they returned Atgalainis complained of being sick to his stomach. Accused advised him to put his finger down his throat and get rid of whatever was making him sick and Atgalainis went into the bathroom. The two of them slept in the one double bed in the room that night. Accused wore his pajamas and Atgalainis wore his undershirt and drawers. There was no "fondling" or anything else of an unusual character. In the morning Atgalainis said that he felt much better. They drove to a Monastery at Los Gatos where accused wanted to see a friend but could not do so because the friend was in retreat and could not have callers. They then returned to Camp Stoneman. Accused did not permit Atgalainis to drive the car except for a short time Sunday morning, for the reason that he did not feel secure with Atgalainis driving (R. 194-197).

(4) Specification 2, Charge II: On 7 September 1942, by verbal orders of the Commanding General of the San Francisco Port of Embarkation, accused was directed to proceed to Guerneville, California on official business and Corporal Jack Putnam was designated as the driver of the car in which he was to travel. They left Camp Stoneman about 4 or 5 p.m. and arrived at Guerneville about 9:30 or 10:00 p.m. Before reaching the town they had stopped at two or three tourist courts and inquired for accommodations but had been informed there were none. In Guerneville they again inquired at a tourist court and the owner told them that he had only one room available. Accused asked Putnam whether he wanted to "stay here" or find accommodations somewhere else. Putnam said "Colonel, I will sleep in the car" and accused replied "The Hell you will! It is no disgrace for you to come up here and sleep in this bed with me". After they had gone out to supper they went to bed. They did not have any drinks. Accused was dressed in pajamas and Putnam wore an undershirt and drawers. Nothing unusual or abnormal happened during the night. The next morning they drove out to the abandoned "CCC" camp which accused had been directed to inspect and then returned to Camp Stoneman (R. 197-199).

b. Seven witnesses, called by the defense testified to the effect that accused had an excellent or very good reputation for truth,

honesty and integrity and that they had never heard his reputation discussed or questioned in any way involving propensities or acts or conduct of an immoral, perverted, obscene or homosexual character. Two of the seven character witnesses were civilians who had been associated with accused for a number of years in Civilian Conservation Corps work, and four of them were officers who had known and associated with him in the service at Fort Bliss, Fort Mason, and Camp Stoneman, including Colonel Murray H. Ellis, the Commanding Officer of Camp Stoneman. The seventh character witness was Mrs. Margaret Null of Phoenix, Arizona, who stated that she had been engaged to marry accused since June 1941. Mrs. Null testified that the expression "Are you happy" was a "pet phrase" of accused and that he used it frequently (R. 120-131, 151-162).

Major Louis S. Lipschutz, chief of the Neuro-Psychiatric Section, Station Hospital, Camp Stoneman, at the request of defense counsel, made a psychiatric examination of accused on 27 May 1943. His examination revealed no evidence of homosexuality or perversion. Asked whether in his professional opinion accused was a normal man so far as he could determine, Major Lipschutz answered "From my examination of Colonel Nelson, he is a normal man" (R. 163-165).

c. In support of a motion to dismiss on the ground that there had not been an impartial investigation of the Charges in compliance with the 70th Article of War, the defense introduced in evidence a copy of a written statement (Def. Ex. 2) dated 2 March 1943, signed by Retha Morrow Kirkendall, the divorced wife of accused, and then called Mrs. Kirkendall as a witness to explain the circumstances under which the statement was made. In it she stated that she was the wife of accused from 10 October 1932 until their divorce became effective on 14 October 1936; that her "personal" reason for the divorce was she came to know him to a "homosexual"; that at the time of their separation in July 1936 he was a captain, commanding a "CCC" company; and that "Remarks made in my presence by the Enrollees substantiated what I already knew to be true. This was the real reason for my divorce" (R. 136-139).

At the trial Mrs. Kirkendall testified that she and accused had cohabited continuously as husband and wife from 10 October 1932 until June or July 1936, that her sex life with accused was at all times normal, his conduct toward her with reference to their sexual relations was not marked by any abnormality, and that their separation was not based upon sexual maladjustment. No children were born of their marriage. With reference to the statement she testified that she signed it after it had been prepared by Second Lieutenant Walter B. Wheeler and she did not know the meaning of the word "homosexual". After

questioning her for a time Lieutenant Wheeler had asked her whether her sexual relations with accused had always been to her satisfaction. She answered "Why, no" and he had stated "Then you say he is a homosexual". She had misinterpreted the meaning of the word. Its true meaning, which she had since learned was not what she had intended and had she known at the time what it meant she would not have given "that man" a statement but would have told him to leave. Mrs. Kirkendall was asked by defense counsel to explain the last two sentences of the statement, "Remarks made in my presence by the Enrollees substantiated what I already knew to be true. This was the real reason for my divorce". She stated that when Lieutenant Wheeler asked whether she had ever heard accused "proposition any of the boys" she at first had said "no" but when he asked if she did not "remember any time" she recalled to him this incident: One Sunday evening when accused was sick at a "CCC" camp three enrollees brought his food and drink to him in his room; as Mrs. Kirkendall entered by the back door the three boys were coming out and one of them said "What do you think of the CO's proposition?" That was what she "believed" the quoted language of the statement meant. On cross-examination she testified that she had graduated from high school, attended Indiana University for two years, had business training, spent about four months at Arizona State Teachers College, and studied Latin (R. 139-149; Def. Ex. 2).

5. On rebuttal Mr. Cross was recalled as a witness and testified that on the evening of 9 December the temperature in the room which he and accused jointly occupied was normal. He did not at any time tell accused that he was cold. It was a heated train and each room had an individual thermostat. However, he had no definite recollection as to whether the heat had been turned on or off. When he lay down on the bed pursuant to the suggestion of accused Cross had been on top of the bed covers and not under them (R. 231-232).

6. a. Specification 1, Charge I: The evidence shows that while accused was executive officer at Camp Stoneman, California, John Cross, a 22 year old civilian employee at the San Francisco Port of Embarkation, sought his advice with reference to entry into the military service. Accused encouraged the young man to enlist, promised to keep an eye on him, and if he proved worthy, to assist him to get into Officer Candidate School. After a change in regulations made it impossible for Cross to enlist voluntarily, accused called him by telephone and suggested that he (Cross) make arrangements with his selective service board in Los Angeles for immediate induction into the Army. Accused had planned to go to Los Angeles on official business on the night of 9 December 1942, and he invited Cross to accompany him and share

his reservation. Cross accepted the invitation, secured a release from his employer, packed up his personal belongings and met accused at the railroad station in San Francisco. After three drinks in the lounge car they went to the room which accused had reserved. It had a lower three-quarters bed and an upper single bed. They undressed, put on their pajamas, accused lay down in the lower bed under the covers, and Cross sat on the foot of the bed. According to the testimony of Cross, he lay down beside accused, at the latter's invitation, they talked a short time, accused put his left arm under the neck and shoulders of Cross, patted Cross on the left cheek with his right fist, told him he was a "swell fellow", and asked him if he was happy. Accused then patted Cross on the chest, passed his right hand down along the body of Cross under the elastic band at the top of his pajama trousers, grasped his penis and "twitched it". Cross seized the right hand of accused in his own left hand, pulled it away and sat up in bed. Accused said "Oh, come on, sit back down" but when Cross put a pillow against the wall at the head of the bed and leaned back against it in a recumbent position, accused started to make the same advances, patted Cross on the chest, asked him if he was happy, and "momentarily" touched his penis. Cross got up off the bed, remarked that he might be a "swell fellow" but only in certain ways, then climbed into the upper bed where he spent the night. Accused testified that he asked Cross to get into bed with him because Cross remarked that he was cold and that Cross did get in bed beside him under the covers. Accused emphatically denied that anything out of the way happened or that he made any amorous advances toward Cross.

The incidents related by Mr. Cross were of such a nature that he could not have been honestly mistaken as to whether or not they occurred. The record presents a direct conflict between the testimony of Cross and that of accused and the conclusion is inescapable that one or the other of them willfully testified falsely at the trial. The Board of Review is convinced, beyond any reasonable doubt, that the conduct of the accused was substantially as related by Cross. He had no motive, so far as the record discloses, for making false charges against accused. The detailed account of his experiences with accused as related by Cross appears to be straightforward and candid. His own conduct was natural and normal under the circumstances, and was consistent with the guilt of accused. He made immediate complaint to his father of the indecent assault upon him and, as soon as he had an opportunity, likewise complained to the officer under whom he worked at the San Francisco Port of Embarkation. After making definite plans for his immediate induction into the Army, packing his personal belongings,

giving notice to his employer, and traveling at his own expense from San Francisco to Los Angeles to see his Selective Service Board, Cross changed his mind and abandoned the whole project for no apparent reason other than his loss of confidence in accused. Entering the Army would have entailed a drastic reduction of income for Cross, it is true, but that was a factor which existed and apparently was within his knowledge before as well as after his night train ride with accused.

It is not disputed that Cross lay down on the lower bed at the request of accused. His making such a request when there were two beds in the small room or compartment, in itself was unusual. Accused testified that he asked Cross to get in bed with him because Cross had said that he was cold. Accused admitted, however, that some time previously when he had been questioned under oath by an officer of the Inspector General's Department he had stated that he suggested that Cross lie down because Cross had remarked that he was tired. On rebuttal Cross testified that he had not said that he was cold, and that the temperature on the train, which was heated, was normal.

Winthrop cites as an instance of offenses charged under the 61st (95th) Article of War, offending against good morals, in violation of the local law or of public decency and propriety (Winthrop's Military Law and Precedents, Reprint, p. 718). Clearly, the conduct of accused in taking indecent liberties with the person of his young, male traveling companion was so morally reprehensible and disgraceful as to constitute a violation of the 95th Article of War.

b. Specification 2, Charge I: One Saturday afternoon, in October 1942, accused took Norman Wagner, a 22 year old civilian whom he had met a number of times at different social affairs, on an automobile trip to Clear Lake. Accused rented a single room cabin with one double bed at a lakeside resort, although there were then eleven unoccupied cabins with two or more beds at the same resort. Wagner contemplated enlisting in the Army and accused had discussed the matter with him, and expressed the opinion that with his experience in arsenal work Wagner might qualify for Officer Candidate School. When they donned their pajamas and went to bed in the resort cabin accused several times asked Wagner if he was happy and said "Norman, you are a swell kid, I like you very much". He then put his left arm around the neck and shoulder of Wagner, pulled the latter toward him and patted Wagner on the chest with his right hand. Wagner remarked that he was tired, would like to go to sleep, suggested that accused do likewise, turned over on his left side and went to sleep. He was not disturbed during the night. The next day they drove home. On the way accused several times, as he was driving

along, placed his right hand flatly on Wagner's knee and each time Wagner moved his knee away. Accused paid all of the expenses of the trip.

Accused denied that he put his arm around Wagner and patted him on the chest, but, taking the testimony of Wagner as in all respects true, accused did not actually commit or attempt to commit any immoral act. Wagner was then a civilian and if accused, for the sake of economy or for some other proper reason, wished to occupy a double bed with him there was nothing to the prejudice of good order and military discipline in his so doing. The conduct of accused was such as to create suspicion but he did not make any improper proposal or indecent assault. He desisted without active resistance on the part of Wagner. No complaint was ever made by Wagner to anyone. Apparently Wagner did not interpret the acts of accused as an amorous or indecent advance as he remained on the best of terms with accused, continued to associate with him socially and exchanged friendly letters with him. The Court may have been influenced by the fact that accused employed practically the same methods of approach to Wagner as he did in the case of Cross but accused was entitled to have the Specifications considered separately. As to each of them he should be presumed innocent until his guilt has been established by competent evidence beyond any reasonable doubt. The following language from Buntain v. State (15 Tex. Appeals 490) quoted with approval in CM 212505, Tipton is equally applicable here:

> "We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen."

In the opinion of the Board of Review the evidence is not legally sufficient to support the finding of guilty of Specification 2, Charge I.

c. Specifications 1 and 2, Charge II: Accused took Master Sergeant Atgalainis on one overnight trip, and Staff Sergeant Jack Putnam on another. On each occasion accused engaged a room or cabin with a double bed and slept therein with the noncommissioned officer who accompanied him. The trip with Atgalainis (Spec. 1) was taken on leave

at the suggestion of the commanding officer of accused who recommended that accused take it because he had been working long hours and was tired. Atgalainis worked in an office adjoining that of accused at Camp Stoneman and accused openly, through a junior officer, invited Atgalainis to go along to keep him company and to help drive the car. Atgalainis actually drove the car only a short time but that was because his driving did not prove to be satisfactory to accused. Accused took the trip with Sergeant Putnam (Spec. 2) on official business under specific orders from his commanding general and Putnam was ordered to accompany accused as his driver. It affirmatively appears that on both trips accused repeatedly attempted to get other accommodations without success, and engaged one room with a double bed because nothing else was available. Both Atgalainis and Putnam testified that accused made no improper advances or proposal whatsoever at any time. It is the opinion of the Board of Review that the evidence is not legally sufficient to support the findings of guilty of either Specification 1 or 2, Charge II.

7. Upon arraignment the defense interposed a motion for dismissal upon the ground that there had not been an impartial investigation of the Charges as required by Article of War 70 prior to their reference for trial. The motion was renewed near the close of the trial. Specifically the defense complained that the investigating officer had not personally interviewed any of the witnesses but had adopted as the basis of his report, the statements taken from them by an officer of the Inspector General's Department. It appears from the admissions of defense counsel and from the report of Colonel Malcolm Douglas, the investigating officer, among the papers accompanying the record of trial, that accused was fully and properly advised of his rights by the investigating officer; that he was informed of the substance of the testimony expected of each witness by showing him a synopsis of such testimony; that accused stated that he did not desire to cross-examine any of the witnesses and they need not be called; and that accused further indicated that he did not desire to call any witnesses on his own account. The court properly denied the motion to dismiss. Under Article of War 70 the accused does not have the right to demand that he be confronted with the witnesses against him if he does not desire to cross-examine them (CM 185756, Paddock). The provisions of the Article requiring pre-trial investigation of charges are not jurisdictional and it is clear that in the instant case the substantial rights of accused were not injuriously affected by the manner in which the investigation was conducted (CM 229477, Floyd).

8. Careful consideration has been given to a brief prepared by defense counsel and submitted to The Judge Advocate General by the accused on 26 June 1943.

9. The accused is 40 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, Cavalry-ORC, 3 June 1924; reappointed 3 June 1929; appointed first lieutenant, Cavalry-Reserve, 14 October 1929; reappointed 14 October 1934; appointed first lieutenant, Cavalry-Reserve, Army of the United States, 29 June 1935; active duty CCC, 6 August 1935 to 5 October 1939; appointed captain, Cavalry-Reserve, 26 March 1936; reappointed on ineligible list, 26 March 1941; reappointed captain, Cavalry-Reserve on eligible list, 1 July 1941; extended active duty, 25 June 1941; appointed major, Cavalry-Reserve, 15 March 1942; appointed temporary lieutenant colonel, Army of the United States, 1 October 1942.

10. 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 insufficient to support the findings of guilty of Specification 2, Charge I, of Specifications 1 and 2, Charge II and of Charge II; legally sufficient to support the findings of guilty of Specification 1, Charge I, and of Charge I; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 12 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 Lieutenant Colonel Greer B. Nelson (0-195554), Cavalry-Reserve.

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 Specification 2, Charge I (embracing and fondling a male civilian), of Specifications 1 and 2, Charge II (unnecessarily jointly occupying with an enlisted man a tourist cabin equipped with only one bed) and of Charge II; legally sufficient to support the findings of guilty of Specification 1, Charge I (fondling and taking indecent liberties with the person of a male civilian) and of Charge I; and legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence to dismissal be confirmed and carried into execution.

In connection with possible consideration of clemency, there is also transmitted herewith, a report of investigation by Colonel P. J. Lloyd, Port Inspector General of the San Francisco Port of Embarkation, of the conduct of accused and Second Lieutenant John S. Stockenberg, a confessed homosexual. The investigation was conducted subsequent to the trial of accused in the present case. The report of the Inspector General shows that in November 1942, while accused was the executive officer at Camp Stoneman, accused received a report to the effect that the conduct of Lieutenant Stockenberg with respect to enlisted personnel had aroused suspicion that he was a homosexual; that accused took no action and suppressed the report; that he arranged a trip with Stockenberg on which they jointly occupied a double bed in a tourist cabin; and that accused made amorous advances toward Stockenberg and tried to induce him to commit sodomy per os on accused.

3. Inclosed are a draft of 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 carrying into effect the recommendation made above.

Myron C. Cramer.

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig.
Under Sec. of War.
Incl.3-Form of action.
Incl.4-Report of Investigation.

(Resigned)

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

SPJGK
CM 237063

21 AUG 1943

UNITED STATES	)	FORT KNOX, KENTUCKY
	)	
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 27 May and 17 June 1943. Dismissal.
	)	
Second Lieutenant RALPH A. CRAIG (O-1298645), Infantry.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: In that 2nd Lieutenant Ralph A. Craig, Infantry, Company C, 21st Armored Replacement Battalion, was, at or near Tip Top, Kentucky, on or about May 7, 1943, in a public place, to wit, highway number 31W, at or near Tip Top, Kentucky, drunk while in uniform.

Specification 3: In that 2nd Lieutenant Ralph A. Craig, Infantry, Company C, 21st Armored Replacement Battalion, did, at Hardin County, Kentucky, on or about May 7, 1943 operate a certain motor vehicle to wit: a (1) $\frac{1}{4}$ ton Command and Reconnaissance Car on a public highway to wit: U. S. highway 31W, in said county and state, while he, the said 2nd Lieutenant Ralph A. Craig, was under the influence of intoxicating liquors.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority directed that the court reconvene for the purpose of imposing a less severe sentence. Upon reconvening, the court adhered to its previous sentence. The reviewing authority

disapproved the finding of guilty of Specification 1 of the Charge, approved the sentence, and withheld the execution thereof pursuant to Article of War 48. The record has been treated as though forwarded for action under Article of War 48.

3. On the afternoon of 7 May 1943 accused was driving a Government ¼ ton reconnaissance car, known as a "jeep", on public Federal highway 31-W, in Hardin County, Kentucky, near Tip Top. He was in uniform. C. E. Sparrow, a Kentucky Highway Patrolman, noticed the jeep "zig-zagging" quite a bit. He drove up behind it and blew his siren, whereupon accused pulled over to the side of the road. Sparrow ordered accused to get out of the car, and he did so. In Sparrow's opinion, accused was drunk. He smelled of liquor, he staggered, he did not speak very coherently, and he acted as though he did not know "hardly what it was about". Sparrow found an unopened pint bottle of whiskey in the possession of accused. He turned accused over to Corporal Ivan F. Gillespie, 1550th Service Unit, Military Police Company. Accused caused no trouble (R. 6-9, 10, 12, 13, 14, 18).

Gillespie testified that when Sparrow brought accused to the Military Police station accused was "under the influence of liquor". He was sitting in the police car with his head down, not noticing anything in particular. Gillespie aroused him and took him into the station (R. 10).

Second Lieutenants Marrin J. O'Brien and Vail G. Barnes were sent to the police station to bring accused and the jeep back to camp. Each testified that accused was intoxicated. According to Lieutenant O'Brien he "seemed to be kinda' dizzy" and "didn't seem to be able to talk very coherently". Lieutenant Barnes testified that accused's gait was uncertain, that his breath was "rather heavy", that the odor of alcohol was about him, and that he did not appear able to answer questions intelligently. He added that accused's eyes were "heavy", that he seemed unable to focus them on witness for any appreciable length of time, and that he appeared to be "a little bit on the sluggish side" (R. 11-13).

First Lieutenant Judson W. Pierpont, commanding officer of accused's company, saw accused after his return to battalion headquarters and testified that he was drunk (R. 18).

Accused made an unsworn statement, which pertained exclusively to Specification 1 and therefore need not be considered.

4. The evidence proves conclusively that at the place and time alleged accused was drunk in uniform on a public highway, as alleged in Specification 2, and that he operated a Government car while under the influence of intoxicating liquor, as alleged in Specification 3. Obviously

his actions violated Article of War 96.

5. The defense moved to exclude all the evidence relating to drunkenness except that of Sparrow, the policeman. The motion was denied (R. 23, 24). The court's ruling was correct. Evidence of his condition shortly after his arrest, although he had been removed from the place alleged in the Specifications, was material in determining his condition at the time of his arrest.

6. Accused's "201" file is not available at this time. The charge sheet shows that accused is 35 years old and that he has served approximately eight and one-half years as an enlisted man. He was appointed a second lieutenant, Army of the United States, on 3 November 1942.

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

Percy E. Glen, Judge Advocate.

(On Leave), Judge Advocate.

Fletcher R. Anderson, Judge Advocate.

(Resigned)

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

(255)

30 JUL 1943

SPJGH
CM 237075

UNITED STATES MD v. Privates DARRELL E. AUVIL (6987360), Battery B, 253rd Field Artillery Battalion, and DONALD E. BEEMAN (3536295), Squadron C, 30th Training Group, Army Air Forces Technical Training Command.	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at O'Reilly General Hospital, Springfield, Missouri, 10 June 1943. As to each: Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.

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

1. The record of trial in the case of Private Darrell E. Auvil (6987360), Battery B, 253rd Field Artillery Battalion, has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Darrell E. Auvil, Battery B, 253d Field Artillery Battalion, attached to Detachment of Patients, O'Reilly General Hospital, and Private Donald E. Beeman, Squadron C, 30th Training Group, AAFTTC, attached to Detachment of Patients, O'Reilly General Hospital, and Private James E. Eggering, Headquarters Reception Center, Jefferson Barracks, Missouri, attached to Detachment of Patients, O'Reilly General Hospital, acting jointly and in pursuance of common intent, did, at O'Reilly General Hospital, on or about May 31, 1943, feloniously take, steal and carry away approximately One Hundred Nine Dollars ($109.00), lawful money of the United

States, the property of Private John E. Warren, Company B, 28th Signal Training Battalion, a patient at O'Reilly General Hospital, Springfield, Missouri.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be "dishonorably discharged", to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five years. The reviewing authority approved the sentence, ordered it executed, but suspended the dishonorable discharge, and designated the Rehabilitation Center, Seventh Service Command, Camp Phillips, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 776, Headquarters Seventh Service Command, 21 June 1943.

3. The competent evidence against the accused, Auvil, shows that about 9:00 p.m., 31 May 1943, Private John E. Warren, a patient in O'Reilly General Hospital, placed his pocketbook or wallet, containing $109, in his pillowcase, and just after the lights were turned out left the ward to take a shower. When he returned about fifteen minutes later the wallet and contents were missing. He reported the loss and had the lights turned on (R. 6, 7, 11, 14).

About six men in the ward, including accused, knew that Warren had the money. Before the lights went out, the accused and Privates Donald E. Beeman and James E. Eggering were sitting near Warren's bed, drinking lemonade. The beds of these men were near Warren's bed. Private John E. Cahill made a bed check of the ward at 9:00 o'clock and no one was missing. When the lights were turned on after he missed his wallet, Warren did not see accused (R. 8-9, 13-18).

Sergeant R. C. Phillips was called to the ward and made a search, but found nothing in the ward. On the outside, he found a billfold (Ex. 1), which was identified as Warren's wallet. Subsequently (1 and 3 June), Mr. Roy H. Stowe, a plumber, found parts of the same wallet containing pictures and cards (Ex. 2) in the drain pipe of a toilet at the Service Club. On the morning of 1 June, Master Sergeant William H. Pyke made an investigation at the ward and questioned Private Beeman in an office in the presence of Captain Morris Polsky and Sergeant Russell W. Duncan. Beeman surrendered his pocketbook to Sergeant Pyke, who gave Beeman twenty minutes to bring the money back. Beeman then left them. Second Lieutenant Bernadine Breon, a nurse, saw Beeman return to the ward, leave by the back door with accused, and saw them turn toward the road to the Service Club. Private Joseph T. Holehan, a military policeman, followed them, about six paces behind. The accused and Beeman

walked side by side and Holehan did not observe anything passed from one to the other. They went in front of another ward and out the fire door, and Beeman went under the cat-walk, reached under the steps, and brought out some money. When they entered the corridor, Beeman handed Holehan $35 in damp currency, and when they turned into the main corridor Beeman reached in his pocket, took out $31 in dry currency, and handed it to Holehan. The accused was with Beeman when he got the money. The $35 (Ex. 3) was delivered to Captain Polsky, as was the $31 (Ex. 4). Sergeant Duncan found $31 in currency and a silver dollar, in a brown envelope with some pictures, in a culvert back of the ward, and the money (Ex. 5) was delivered to Captain Polsky (R. 23-25, 28-34, 40, 43-44, 50-53, 56-60, 62-65).

4. The evidence for the defense and an unsworn statement by the accused, Auvil, did not relate to his guilt or innocence.

5. The competent evidence does not show either directly or circumstantially that the accused participated in the theft of Warren's money. The accused, as well as other persons, knew that Warren had the money, the accused was near Warren's bed shortly before the money was missed, and was not seen shortly afterward. The accused accompanied Beeman when the latter recovered a sum of money from a hiding place and delivered it and other money to a military policeman. Presumably this was part of the stolen money, although it was not positively identified as such. But there is no proof that the accused, either by word or act, exercised any control over any part of the money to indicate possession thereof. In the opinion of the Board no inference of larceny can be drawn from mere suspicion and opportunity to take the property, nor can possession of stolen property be inferred from mere presence at the time of its recovery. Neither can it be inferred that the accused passed any of the money to Beeman, although he had the opportunity to do so, in the absence of any proof indicating that he did. Where a finding of guilty rests on 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 (C.M. 212505, Tipton). Where circumstances are relied on entirely to justify a conviction, they must not only be consistent with guilt but inconsistent with innocence (Dig. Ops. JAG, 1912-40, sec. 395 (9) (CM 195705)).

6. The Board of Review is, therefore, of the opinion that the

record of trial in the case of Private Auvil is legally insufficient to support the findings of guilty and legally insufficient to support the sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 31 JUL 1943 - To the Acting Secretary of War.

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and Executive order 9363 dated July 23, 1943, is the record of trial in the case of Private Darrell E. Auvil (6987360), Battery B, 253rd Field Artillery Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence with respect to Private Auvil be vacated and that all rights, privileges and property of which Private Auvil has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action carrying into effect the recommendation made above.

T. H. Green,
Brigadier General, U. S. Army,
Assistant Judge Advocate General,
In Charge of Military Justice.

2 Incls.
Incl.1- Record of trial.
Incl.2- Form of action.

(Findings and sentence with respect to Private Auvil vacated, by order of the Acting Secretary of War. G.C.M.O. 196, 11 Aug 1943)

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

-8 JUL 1943

SPJGH
CM 237091

UNITED STATES v. Private HARRY T. WILLIAMS (35673702), Company A, 470th Quartermaster Truck Regiment.	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp McCain, Mississippi, 28 May 1943. Dishonorable discharge and confinement for five (5) years. Federal Reformatory, Chillicothe, Ohio.

HOLDING 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 found guilty of absence without leave for 16 days (Chg. I), of larceny of a 1938 Ford Coach, value about $600 (Spec. 1, Chg.II) and of larceny of a watch of a value, as approved, of less than $20 (Spec. 2, Chg. II).

3. With respect to the larceny of the automobile the only proof as to value is the statement of the owner that it is worth "about $650" (R. 6h). The only description of the car is the statement of the owner that it was a 1938 black Ford 2-door sedan (R. 6d), and that it had an extra aerial (R. 6g). There is no showing that the owner had expert knowledge of the value of automobiles, no testimony of any expert in values of second hand automobiles, no statement of the condition of the car or its tires such as to afford the court some basis for a conclusion as to the value, nor was the car presented for visual examination by the court to afford a basis for a like conclusion by the court.

4. Except as to distinctive articles of Government issue or other chattels, which do not have readily determinable market value, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 212983, Dilsworth; CM 213765, Krueger; CM 214367, Kasalajtis). The proof in this case fails to establish

that the market value of the automobile is of more than some value not in excess of $20.

The evidence is legally sufficient to support only so much of the finding as to value under Specification 1, Charge II, as involves a finding of some value not in excess of $20.

5. There is no maximum limit of punishment for absence without leave committed after 1 December 1942 (Ex. Order No. 9267). The maximum authorized punishment under Specifications 1 and 2, Charge II, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Confinement in a penitentiary is not authorized under the 42nd Article of War for absence without leave or for larceny of property of a value of less than $50.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Specification 1, Charge II as involves a finding of guilty of larceny by the accused at the time, place and of the ownership alleged, of the automobile described in the Specification, of some value not in excess of $20; legally sufficient to support the findings of guilty of Charge I and the Specification thereunder, and of Specification 2, Charge II and of Charge II; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary, Federal Correctional Institution, or Reformatory.

Carter T. Hill Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotthuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 9 JUL 1943 - To the Commanding General, Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Private Harry T. Williams (35673702), Company A, 470th Quartermaster Truck Regiment, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that only so much of the finding of guilty of Specification 1, Charge II be approved, as involves a finding of guilty of larceny by the accused at the time, place and of the ownership alleged of the automobile described in the Specification of some value not in excess of $20; and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for five years in a place other than a penitentiary, Federal correctional institution or reformatory. Thereupon you will have authority to order the execution of the sentence as thus modified.

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 237091)

Myron C. Cramer

RECEIVED JUL 12 1943 STAFF JUDGE ADVOCATE

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

JUL 10 43 SW

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

SPJGN
CM 237136

5 AUG 1943

UNITED STATES	)	75TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 24 and 25 June 1943. Total forfeitures and dismissal.
Captain PAUL ROBERT HARTMAN (0-193610), Anti-Tank Company, 291st Infantry.	)	

OPINION of 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 Charges and Specifications:

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

Specification: In that Captain Paul Robert Hartman, Anti Tank Company, 291st Infantry, did knowingly and wrongfully at or near Baltimore, Maryland, on or about the 12th day of June, 1942, contract and enter into an unlawful bigamous marriage with Thelma L. Roppelt of Baltimore, Maryland without first being divorced from his living lawful wife Catherine C. Hartman.

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

Specification: In that Captain Paul Robert Hartman, Anti Tank Company, 291st Infantry, did knowingly and wrongfully at or near Baltimore, Maryland, on or about the 12th day of June, 1942, contract and enter into an unlawful bigamous marriage with Thelma L. Roppelt of Baltimore, Maryland without first being divorced from his living lawful wife Catherine C. Hartman.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 29 June 1930, the accused was married to Catherine C. Hartman at Winchester, Virginia, and that thereafter on 12 June 1942, while Catherine C. Hartman was alive and undivorced from him, he married Thelma L. Roppelt at Baltimore, Maryland (R. 9-16, 17-19; Ex. 1-7).

The evidence for the prosecution shows further that the accused visited Catherine C. Hartman for ten days during June, 1942, and lived with her in their home. The evidence also shows that she in turn visited the accused at Columbus and Indianapolis and lived with the accused at a local hotel (R. 12).

4. Mrs. Thelma L. Roppelt Hartman, who had previously testified as a witness called by the prosecution, testified for the defense that she had married the accused on 12 June 1942, and that the Evening Sun, the Baltimore News Post, and a small weekly paper in the eastern section of Baltimore had published a notice of their marriage. She testified that prior to her marriage the accused had told her of his first marriage and that as far as she knew "* * * he was applying for a divorce" (R. 32-35).

The accused made an unsworn statement in which he asserted that he enlisted in the Reserve Corps in 1922, was commissioned a second lieutenant, Reserve, in 1924, and in the same year enlisted in the National Guard of Virginia. He was promoted to a first sergeant

and in 1927 he became the commanding officer of Company "P", 116th Infantry (R. 37).

The accused explained that in 1936 he first applied for a divorce and then dropped the matter. In 1941, he again applied for a divorce and in April 1942, he "tried to push it through because he wanted to remarry". He stated further that he was advised by counsel that it would be all right for him to remarry and that he was " * * * positive that the divorce was legal * * *". His first marriage, he explained was one in name only, and "There was no connection whatsoever as man and wife between her or myself". He contended that of the ten days that he was supposed to have spent in Winchester, he spent only two, and did not during that time, or when she visited him, live with Catherine C. Hartman (R. 38).

After his marriage to Thelma L. Roppelt he filled out papers with the "change of marriage and presented them". He stated that "On investigating the document which was supposed to be my divorce papers it did not look legal to me". He was advised to change his records at the Infantry School but was advised to "* * * hold off until I could get it straightened out". He concluded with the statement "* * * I would never have re-married if I had not thought I was doing the right thing and I was purely innocent of the fact that at the time of the marriage that it was illegal" (R. 39).

5. The identical specification alleges under the 95th and 96th Articles of War, that the accused did,

> "* * * knowingly and wrongfully at or near Baltimore, Maryland, on or about the 12th day of June, 1942, contract and enter into an unlawful bigamous marriage with Thelma L. Roppelt of Baltimore, Maryland without first being divorced from his living lawful wife Catherine C. Hartman."

The evidence clearly establishes every element of the offense alleged. Although the accused in his unsworn statement asserted that he innocently believed that he was lawfully divorced at the time of his second marriage, he offered no evidence, in support of his unsworn claim. His contentions appear to present another instance in

which "Inclination snatches argument to make indulgence seem judicious choice". Moreover, the evidence for the prosecution is altogether inconsistent with the claimed innocence of the accused, and justifies beyond a reasonable doubt, the findings and sentence.

6. The records of the Office of The Adjutant General shows the accused to be approximately 42 years of age, that he was federally recognized as a second lieutenant, Virginia National Guard on 18 December 1926, that he was appointed a reserve officer 15 February 1922, and that he was federally recognized as a captain, Infantry, Virginia National Guard.

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 thereof. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Chas. L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sluyter, Judge Advocate.

SPJGN
CM 237136

1st Ind.

War Department, J.A.G.O., 9 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 Paul Robert Hartman (0-193610), Anti-Tank Company, 291st 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 that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 334, 1 Nov 1943)

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

SPJGQ
CM 237138

16 AUG 1943

UNITED STATES	)	NEW ORLEANS PORT OF EMBARKATION.
v.	)	
Second Lieutenant WILLIAM S. KOHLHEPP (O-1044866), C.A.C.	)	Trial by G.C.M., convened at Headquarters, New Orleans Staging Area, New Orleans, Louisiana, 21 June 1943. Dismissal, confinement five years.

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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 Charges and Specifications:

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

Specification: In that 2nd Lieutenant William S. Kohlhepp, Casual Officers Detachment, New Orleans Staging Area, Louisiana, did, without proper leave, absent himself from his station at New Orleans Staging Area, Louisiana, from about June 4, 1943 to about June 7, 1943.

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

Specification: In that 2nd Lieutenant William S. Kohlhepp, Casual Officers Detachment, New Orleans Staging Area, Louisiana, having received a lawful command from Major F.H. Claridge, his superior officer, to report to him, the said Major F.H. Claridge, after he had received his pay check, did at New Orleans Staging Area, Louisiana, on or about June 4, 1943, willfully disobey the same.

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

Specification 1: In that 2nd Lieutenant William S. Kohlhepp, Casual Officers Detachment, New Orleans Staging Area, Louisiana, being indebted to New Orleans Staging Area Officers Mess in the sum of Twenty and 75/100 Dollars ($20.75) for meals furnished, which amount became due and payable on or about June 4, 1943, did, at New Orleans Staging Area, Louisiana, from on or about June 4, 1943 to on or about June 7, 1943, dishonorably fail and neglect to pay said debt.

Specification 2: In that 2nd Lieutenant William S. Kohlhepp, Casual Officers Detachment, New Orleans Staging Area, Louisiana, being indebted to the Jung Hotel in the sum of Twenty and 38/100 Dollars ($20.38) for hotel accomodations, which amount became due and payable on or about May 1, 1943, did, at New Orleans, Louisiana, from May 1, 1943 to June 7, 1943, dishonorably fail and neglect to pay said debt.

Specification 3: In that 2nd Lieutenant William S. Kohlhepp, Casual Officers Detachment, New Orleans Staging Area, Louisiana, on or about April 27, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Roosevelt, a certain check, in words and figures as follows, to wit,

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HOTEL ROOSEVELT
Pride of the South

New Orleans, Louisiana, April 27, 1943.

NAME OF BANK Simpson County Bank
CITY Franklin, Kentucky
PAY TO THE ORDER OF Cash $ 20.00
Twenty and- - -00/100- Dollars
SIGNATURE / William S. Kohlhepp Jr.
STREET 207 Water St. CITY Franklin, Ky.
FOR VALUE RECEIVED. I REPRESENT THAT THE ABOVE AMOUNT IS ON DEPOSIT IN SAID BANK IN MY NAME SUBJECT TO THIS CHECK AND IS HEREBY ASSIGNED TO PAYEE OR HOLDER HEREOF.
(On back: No acct.)

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and by means thereof, did fraudulently obtain from Hotel Roosevelt about $20.00 in lawful money of the United States, he the said 2nd Lieutenant William S. Kohlhepp, then well knowing that he did not have and not intending that he should have any account with the Simpson County Bank for the payment of said check.

Specification 4: In that 2nd Lieutenant William S. Kohlhepp, Casual Officers Detachment, New Orleans Staging Area, Louisiana, on or about April 28, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Roosevelt, a certain check in words and figures as follows, to wit,

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HOTEL ROOSEVELT
Pride of the South

New Orleans, Louisiana, April 28, 1943.

NAME OF BANK Simpson Scounty Bank
CITY Franklin, Kentucky
PAY TO THE ORDER OF Cash $ 5.00
Five——————00/100 Dollars

SIGNATURE William S. Kohlhepp Jr.
STREET 203 Water St. CITY Franklin, Ky.

FOR VALUE RECEIVED. I REPRESENT THAT THE ABOVE AMOUNT IS ON DEPOSIT IN SAID BANK IN MY NAME SUBJECT TO THIS CHECK AND IS HEREBY ASSIGNED TO PAYEE OR HOLDER HEREOF.
(On back: No acct.)

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and by means thereof, did, fraudulently obtain from Hotel Roosevelt, about $5.00 in lawful money of the United States, he the said 2nd Lieutenant William S. Kohlhepp, then well knowing that he did not have and not intending that he should have any account with the Simpson County Bank for the payment of said check.

He pleaded not guilty to Charge I and Charge II and the Specifications thereunder. He pleaded guilty to Charge III and the Specifications thereunder. He was found guilty of all the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for five years. The reviewing authority approved of the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution in support of Charge I and Charge II showed that the accused had been restricted to his quarters under arrest for a time not disclosed in the custody of Major Frederick H. Claridge, Director of Intelligence and International Security at New Orleans Staging Area. On 3 June 1943 Major Claridge handed him certain papers effecting his release from arrest, containing a reprimand and a forfeiture of part of his pay which required an indorsement thereon by the Adjutant. Major Claridge testified that on that date when he released the accused he ordered the accused to "go to the Adjutant and get the papers (release papers) straightened up, then to the finance officer to get what pay he had coming to him, and report back to me" (R. 9).

When asked to clarify the order that he gave to the accused Major Claridge stated "I told him to take this paper he had (he had to have an indorsement made on it), to go to the Adjutant and the finance officer and when he got straightened out to come back to see me to straighten out the mess bill" (R. 10). The accused said nothing when given these instructions. He just walked away with the paper (R. 12).

It appears that by reason of his arrest in quarters accused was not receiving his pay and Major Claridge had arranged with the Officers' Mess that credit should be extended to the accused during this period as there was no other way of feeding the accused. Major Claridge was anxious to see to it that the mess bill thus incurred would be paid promptly and for that reason desired the accused to procure his pay from the finance officer and return with it so that he could then order him to pay the mess bill (R. 12). The balance due by the accused to the Officers' Mess as of 5 June 1943 was $20.75 (R. 17). Not having heard from or seen the accused, on the evening of 4 June 1943 Major Claridge endeavored without success to find him in his barracks and later through the M.P.'s to find him in New Orleans. Major Claridge did not see the accused after the accused left him upon receiving the order until early morning 7 June 1943 at which time he placed the accused under arrest.

An extract copy of the morning report of the Casual Officers' Detachment was identified by the Commanding Officer of the detachment and admitted in evidence without objection and marked exhibit "C" (R. 17). The extract shows that the accused was marked as of 4 June 1943 from duty to AWOL. On 7 June 1943 from AWOL to confinement.

Lieutenant Richard J. Pettey, the investigation officer, testified that he started a search for the accused on the night of 4 June 1943; that the accused was not in his quarters; that he was unable to locate him in New Orleans or in his quarters on the 5th and 6th of June, but finally found the accused after he had been placed under arrest on 7 June 1943. In searching accused's quarters there was evidence that the accused's bed had been slept in on at least one occasion during that period of time (R. 13-17).

In support of Charge III and its Specifications (to which the accused pleaded guilty) the prosecution offered in evidence a written stipulation (Ex. D) entered into between the prosecution and the defense in which the accused acknowledged

(1) that he was at the time in the military service.

(2) that on 27 April 1943, he had no bank account with the Simpson County Bank of Franklin, Kentucky, but did on that date at New Orleans issue his check to the Roosevelt Hotel in the sum of $20 for cash or other consideration.

(3) that on 28 April 1943, he issued his check on the same bank to the same hotel for cash or other consideration in the sum of $5.

(4) that on 4 June 1943 he was indebted to the Officers' Mess in

the sum of $20.75, which amount had not been paid as of 7 June 1943.

(5) That on 7 June 1943, he was also indebted to the Hotel Jung, New Orleans, in the sum of $20.38 for hotel accomodations, which sum was due in May 1943.

(6) That on 4 June 1943, he received from the finance officer the sum of $32.10 as the balance due him as of 31 May 1943 as his pay as an officer.

(7) That the accused's father on 11 June 1943 paid the accused's indebtedness to the Roosevelt Hotel incurred by the two checks referred to in paragraphs 2 and 3 thereof in the amount of $25, and his indebtedness to the Jung Hotel in the amount of $20.38 referred to in paragraph 5 above.

Photostatic copies of the two checks issued by the accused to the Roosevelt Hotel were accepted in evidence without objection (Ex. E).

4. The accused having been advised of his rights elected to testify in his own behalf. He is 33 years of age, single, and his home is in Franklin, Kentucky. On 4 June 1941 he enlisted and on 9 October 1942 he graduated from the Coast Artillery (A.A.) Officer Candidate School at Camp Davis, North Carolina, and was, on that date, commissioned a Second Lieutenant and assigned to the 28th Battalion, Camp Wallace. He was transferred as a casual officer to New Orleans Staging Area on 18 March 1943. In civil life he had been for 12 years with the Equipment Engineering Department of Southern Bell Telephone Company. He had never before been in any trouble until this occasion and the preceding confinement. He formerly had an account with the Simpson County Bank in Franklin, Kentucky, which had been closed about eight months previously. He had an understanding, however, with that bank, that if his check were presented and there were no funds of his on hand the teller was to notify the accused's father and the father would cover the check. He had upon one previous occasion drawn a check on this bank without funds and his father had covered that check. When he had issued the two checks referred to in the charge, he had no funds in the bank but relied upon his father to cover the checks. He had written a letter to his father concerning these checks but the checks arrived at the bank before the letter reached his father and the bank failed to communicate with the accused's father (R. 31). His father had on 11 June 1943 reimbursed the Roosevelt Hotel for the $25. represented by the checks.

In view of this testimony the President of the court directed that the plea of guilty to Specifications 3 and 4 of the Charge III be changed to a plea of not guilty.

With reference to the charge of absence without leave the accused admitted that he was absent without leave on the days specified but that he reported back to camp every night and slept in his quarters (R. 27).

With reference to the charge of willfully disobeying the command of Major Claridge, he testified that the conversation he had with Major Claridge occurred over the telephone on Friday morning 4 June 1943. It was not the same conversation between the accused and Major Claridge on June 3, as testified to by Major Claridge. He admitted that he did not return to Major Claridge's office as ordered (R. 28). He explained that he had been reprimanded and fined by the Commanding General for having been AWOL upon a previous occasion. He blamed his derelictions of duty, namely, being absent without leave upon the two occasions, upon the fact that he was not given sufficient work to perform after his arrival on 18 March as a casual officer in the detachment (R. 28-29). He thereby became rather lax in his duties (R. 28). He stated that he did not intend to disobey Major Claridge's order but, having been restricted to camp for some time, he went "down town" and when he came back, it was too late at that time to see Major Claridge and he did not have enough money with which to pay the mess account (R. 31). He admitted that he had received from the finance officer $32.10 and had made no attempt to pay his mess bill.

5. Attached to the record, but not put in evidence, was a copy of a reprimand dated 1 June 1943 imposed by Brigadier General George G. Hunter upon the accused for being absent without leave from 26 April 1943 to 9 May 1943 and also imposing a forfeiture of one-half of the accused's pay for the month. There was also attached to the record evidence that the accused had been confined to his quarters as the result of being AWOL on the dates specified from 9 May 1943 until he was released by Major Claridge on 3 June 1943.

6. It appears from the record and its accompanying papers that the accused on 18 March 1943 was assigned as a casual officer to the New Orleans Staging Area in New Orleans. He absented himself without authority from 26 April to 9 May 1943 for which he was confined to his quarters from 9 May to 3 June 1943 and then released with a reprimand and a fine of one-half of his month's pay. The authority for the confinement during that period of time was not disclosed. During his absence on 27 and 28 April accused cashed two checks totalling $25 at the Roosevelt Hotel in New Orleans which checks were dishonored by the bank upon which they were drawn. He also incurred a hotel bill of $20.38 during this time.

While the accused was in confinement Major Claridge had arranged that the Officers' Mess feed the accused on credit, as the accused was without funds and would not receive his pay while under arrest.

Major Claridge was anxious to see to it that the indebtedness thus incurred to the Officers' Mess totalling $20.75, was paid when the accused was released and had obtained what was left of his pay. With that purpose in mind he alleges that he gave the accused the verbal order fully quoted in paragraph 3 above. In compliance with the order the accused apparently went to the Adjutant and completed his business with that officer. He then went to the Finance Officer and collected his pay which, after deductions, amounted only to $32.10. Instead of then returning to Major Claridge he, having been in confinement for almost a month, went "downtown" where no doubt

he spent part of his pay so that when he returned he didn't have sufficient money with which to pay the mess bill. It was late, so he did not go to see Major Claridge but instead, took an unauthorized "vacation" in New Orleans for the next two days.

With reference to Charge I and its Specification, it was shown by the morning report, the testimony of Lieutenant Pettey and the admissions of the accused that the accused was absent without leave from his duties from late afternoon of 4 June 1943 until early morning of 7 June 1943. The mere fact that he returned to his quarters and occupied them during the nights of this period of time is no defense of the charge. The finding of guilty of this charge is therefore amply sustained by the evidence.

Charge II and its Specification alleges that the accused willfully disobeyed the lawful command given by Major Claridge.

The requisite elements of proof required to sustain a finding of guilty of a violation of the 64th Article of War under such circumstances are "(a) that the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer, and (c) that the accused willfully disobeyed such command". (M.C.M. 1938, par. 134D. p. 149).

The evidence was clear that Major Claridge was the accused's superior officer and that on 3 June 1943 he gave the accused an order. The evidence, however, is not clear that accused willfully disobeyed.

M.C.M. 1938, par. 134B. p. 148 also provides:

> "The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under Article of War 96".

The order given by Major Claridge was not one to do a certain thing at once. It was to do a certain thing - namely; return - at a future time. He was to return only after he had performed other things included in the order. Accused at some time during 4 June 1943 complied with that part of the order to go to the Adjutant and to go to the Finance Officer and get his pay. He failed to return to Major Claridge.

This was clearly a failure or neglect to comply with the order, but was not a defiance of authority so as to bring the case under Article of War 64 as a willful disobedience.

The Board is therefore of the opinion that the evidence is not sufficient to sustain a finding of guilty of Charge II and its Specification but is sufficient to sustain a finding of guilty of the lesser included offense of failure to comply with a lawful order in violation of Article of War 96.

With reference to Specifications 1 and 2 of Charge III the accused is alleged to have dishonorably failed to pay his indebtedness to the Officers' Mess and to the Jung Hotel. In order to properly convict an officer of this offense there must be some evidence, in conjunction with the failure to pay the debt, showing dishonorable conduct such as fraud or deceit or specific promises of payment. The mere neglect on the part of the officer to pay his debt promptly is not of itself sufficient grounds for charges against him. C.M. 121207.

One of the debts involved in this case was not due until 4 June 1943. The credit was arranged for by a third party, namely, Major Claridge. The accused did nothing dishonorable in neglecting to pay the debt from that date until it was actually paid on 11 June. His failure to use the $32.10 that he received on 4 June 1943 to pay this obligation cannot be said to be a dishonorable failure. True he had sufficient funds with which to pay that obligation, but the record shows that he was also indebted to the Roosevelt Hotel and the Jung Hotel. His total indebtedness as shown by the record was more than twice the amount he had on hand. Suppose he had paid one creditor in full, could he then be convicted of dishonorably failing to pay the other? Such a conclusion would in effect make it a military offense to permit your liabilities to exceed your assets. Then again, if he used the money to pay this or his other debts how could he be reasonably expected to get along until the next pay day? The Officers' Mess was now on a cash basis. $32 is little enough to live on for one month. The commanding officer's imposition of the fine really put it beyond the power of the accused to take care of his obligations. To have rendered himself penniless by parting with the $32 under the circumstances would have been improvident and made the accused a burden on his fellow officers. Certainly his retention of this small fund which apparently had to last him for a month could not be considered dishonorable. The conviction on this Specification can not therefore be sustained.

In connection with the other obligation payable to the Jung Hotel the prosecution showed that the accused was never in any position to pay this obligation because he was in confinement from a short time after the obligation was incurred and had no funds with which to pay the debt until 3 June 1943 and then did not have sufficient funds with which to pay all of his debts. There was no evidence of any dishonorable conduct with respect to this obligation. The obligation was paid in full on 11 June 1943. Notwithstanding the plea of guilty to these Specifications the court, after having heard the evidence which clearly showed that the accused was not guilty, should have directed a plea of not guilty to be entered as it did with respect to the other two Specifications under this Charge (M.C.M. par. 70 page 54).

With reference to the remaining Specifications under Charge III the court properly directed a plea of not guilty. In doing so, it cast the full burden upon the prosecution to prove all of the elements of the charges beyond reasonable doubt. The only evidence in support of these Specifications was contained in the stipulation (Ex. D) and the testimony of the accused.

The stipulation showed that the accused did issue the two checks in question to the Roosevelt Hotel totalling $25 on the dates specified in the charge and received $25 in cash. It showed that he had no account at the bank upon which the checks were drawn. It also showed that the two checks were made good by the accused's father on 11 June 1943. According to the accused's testimony, there was no intent to defraud. He stated that he had an arrangement with the bank whereby under such circumstances his checks would be taken care of by his father at Franklin, Kentucky. He stated further that he had written a letter to his father regarding these checks but that the checks had been presented and dishonored before the letter reached his father and the bank officials neglected to notify the father. The fact that the father has made prompt payment of the checks direct to the hotel corroborates this statement. Having failed to prove the intent to defraud the findings of guilty of these Specifications can not be sustained.

7. The record shows the accused to be 32 years of age. He enlisted 4 June 1941 and served as an enlisted man until 9 October 1942 when he was commissioned from an officer candidate school as second lieutenant, Coast Artillery and assigned to the 28th Battalion.

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 not legally sufficient to sustain the findings of guilty of Charge II and the Specification thereunder (willful disobedience of a lawful command), of Specifications 1 and 2 of Charge III (dishonorable failure to pay debts), and Specifications 3 and 4 of Charge III (issuing worthless checks with intent to defraud) and of Charge III. In the opinion of the Board of Review the record of trial is legally sufficient to support findings of guilty of Charge I and its Specification (absent without leave 4 June to 7 June 1943), a finding of guilty of the lesser included offense of a failure to comply with a lawful command in violation of the 96th Article of War under Charge II and its Specification, and to support the sentence, and to warrant confirmation thereof. A sentence of dismissal and confinement at hard labor for five years is authorized upon conviction of violation of Article of War 61 and Article of War 96.

William A. Pounds, Judge Advocate

Earle Hedlund, Judge Advocate

Herbert A. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O. 30 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 Second Lieutenant William S. Kohlhepp (0-1044866), C.A.C.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge III and its Specifications (dishonorable failure to pay debts and issuing worthless checks with intent to defraud), legally sufficient to support only so much of the findings of guilty of Charge II and its Specification (willful disobedience of a lawful command of his superior officer) as involve a finding of guilty of the lesser included offense of failure to obey a lawful command of his superior officer, in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge I and its Specification (AWOL 4 June 1943 to 7 June 1943), and the sentence and to warrant confirmation thereof. I recommend that the findings of guilty of Charge III and its Specifications be disapproved and that only so much of the findings of guilty of Charge II and its Specification as involve a finding of guilty of the lesser included offense of failure to obey a lawful command of his superior officer in violation of Article of War 96 be approved. I further recommend that the sentence to dismissal be confirmed, but in view of the disapproval of the findings set forth above, that the confinement be remitted and 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 recommendations hereinabove made, should such action meet with approval.

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement remitted. G.C.M.O. 294, 2 Oct 1943)

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

SPJGK
CM 237145

31 AUG 1943

UNITED STATES	SECOND SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Fort Jay, New York, 4, 5, 7 June 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private First Class JOHN C. PHILLIPS (31047382), Company A, 372nd Infantry	

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 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 Private First Class John C. Phillips, Company A, 372nd Infantry, did at 55th Street between 10th Avenue and 11th Avenue, New York, New York, on or about May 3, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Clisby Blackshear, Company A, 372nd Infantry, a human being, by shooting him with a U.S. rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions, each for violation of the 61st Article of War, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 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 prosecution offered evidence to show that accused and Private Clisby Blackshear, the deceased, were both members of Company A, 372nd Infantry, stationed at 550 West 56th Street, New York City, on and prior to

3 May 1943 (R. 19, 20, 21, 22, 39). In July, 1942, accused married Mrs. Emily Bryant Phillips, 325 Lenox Avenue, New York City (R. 89, 92). Mrs. Phillips, prior to her marriage to accused, had lived in New York City for three years. Before that she resided in Savannah, Georgia, where she had known Blackshear, the deceased. After Mrs. Phillips came to New York, she saw Blackshear "on and off" in the early part of 1942. In April, 1942, Blackshear introduced her to accused at the organization's dayroom on Powell Street, Brooklyn, where it was then quartered. The marriage occurred as stated (R. 90-92). After the marriage, according to Mrs. Phillips, accused visited her from time to time at her mother's, where she lived. Blackshear also came to visit her family (R. 92, 96). About three months prior to 3 May 1943, accused visited his wife. He had a swollen jaw. Asked by her as to what was wrong, he replied that Clisby Blackshear had hit him. He told his wife, "I am going to kill him if that is the last thing I do". At that time he questioned his wife as to why Blackshear visited the house. Accused said, "Don't let him come here anymore". Mrs. Phillips told her husband that Blackshear came there to see her family and not to see her (R. 96). A few weeks prior to 3 May 1943, accused came to see his wife, in a drunken condition. "He came in fighting and arguing". He punched Mrs. Phillips in the face and stomach. At that time she decided to leave him. On 30 April 1943, accused told his wife that he had married when he was 17 years of age. She upbraided him for having concealed the fact and asked him to take his clothes and leave. Divorce was mentioned at that time. Accused said that his wife "had waited four months and * * * could wait another four months until he got a divorce" (R. 96-98). On 2 May 1943 (Sunday), Mrs. Phillips went to the company's quarters on West 56th Street and had an argument with accused. Accused struck his wife. Blackshear came down and said, "You can't hit her. * * * I will knock your damn head off if you hit her." Accused wanted to know what Blackshear "had to do with it anyway". Accused "said for Blackshear to keep out of it. * * * I will get you yet." Accused went upstairs and came down with a rifle. Blackshear ran up with a "long" knife and swung at accused. Corporal A. J. Cooper, Company A, 372nd Infantry, and some other men took the rifle away from accused before he got to Blackshear or Mrs. Phillips (R. 100, 125, 131, 264, 268, 270). There was no ammunition in the rifle (R. 266). During that incident, Captain William M. Bridgeford, commanding officer of the company of which accused and Blackshear were members, told Corporal Cooper to bring accused, his wife and Blackshear to him (R. 257, 263). Accused and his wife had a talk with the captain (R. 102). Then they went downstairs and talked. Accused wanted to divorce his first wife and remarry Mrs. Emily B. Phillips. She (Mrs. Phillips) said "No" to this. Accused said, "As soon as you leave, I am going upstairs and kill Blackshear if it is the last thing I do. * * * I know that you are still loving him. I am going to kill him if it the last thing I ever do" (R. 102).

Mrs. Phillips testified that on 3 May 1943 (Monday) she talked to accused on the phone. He asked her to bring his shoes and identification

tags to him (R. 103). She stated that she then telephoned Blackshear and said, "I am coming over to bring Phillips' shoes and would he please be around because I was afraid that he might harm me for what happened that Sunday" (R. 103). The quarters of Company A occupy the building which extends between 56th and 55th Streets, with an entrance on each street (R. 8, 22, 23, 53; Ex. 5). Mrs. Phillips went to the 55th Street entrance of the building located on the north side of the street, arriving there about 9:00 p.m. She met Blackshear there (R. 103, 104, 346). After some conversation, Blackshear asked her to go over to a truck on the south side of the street. Both got in the cab of the truck (R. 105) and remained there until accused appeared (R. 106, 115).

At about 10:00 p.m., the same night, Private H. A. Conover, at that time a sergeant, Company A, 372nd Infantry, discovered that Private Marion, a sentry on guard duty at post No. 7 was drunk. Private Conover advised the sergeant of the guard of this fact. Accused was present and said that he would take the post for Private Marion (R. 53-56). After stating that he would take post No. 7 for Private Marion, accused asked Private Conover for Marion's rifle. Instead, Conover gave accused his own rifle, No. 79642 (R. 57, 58; Ex. 6). That was about ten minutes before Conover "heard the shot" (R. 181). Accused then asked for ammunition for the rifle. Conover said he had none (R. 58). Accused then went to Private C. R. Johnson, Company A, 372nd Infantry, on the second floor and told him that "Sergeant Smith" had told him (accused) to get ammunition from Johnson because he (accused) was going to take Marion's place. Private Johnson thereupon gave accused one clip, containing cartridges (R. 67-69).

Sergeant Milton Smith, Company A, 372nd Infantry, was sergeant of the guard on the evening of 3 May 1943 (R. 240, 251). On examination by the court, he stated that he had authorized accused to replace Marion (R. 243). This was about a half hour or forty-five minutes before the "accident occurred". Sergeant Smith did not give accused any ammunition that night or tell him to get ammunition from Johnson (R. 244).

After securing the ammunition from Johnson and on leaving the building to take Marion's place on post No. 7, accused departed from the 55th Street entrance to the building at post No. 4 and instead of turning right, the direction toward post No. 7, he turned left toward the truck in which Blackshear and Mrs. Phillips were seated (R. 136-137, 159). Blackshear and Mrs. Phillips had been in the truck about an hour, or "until the accident" occurred (R. 115), when Mrs. Phillips saw accused on the sidewalk with a rifle in his hands. She said to Blackshear, "Oh, Bubber, there is Phillips". Blackshear turned around and said, "Wait a minute, Phil; wait a minute, Phil". Accused said, "No, come out. Don't run. I will blow your brains out". She got out of the truck, ran across the street "by the post" (sentry post No. 4)

and heard two shots. Accused was following her with the rifle. She saw some soldiers and said, "Please don't let him shoot". Mrs. Phillips testified further that a soldier came up and took Phillips inside. She then went back to the truck alone. No one was there so she went back to the post where she saw two soldiers whom she took with her back to the truck. She opened the door. Blackshear was sitting with his head on the steering wheel. The soldiers took him outside and laid him on the sidewalk (R. 106, 109, 132). The shooting occurred about 10:30 o'clock.

First Lieutenant R. S. Randall, Medical Corps, medical officer assigned to the station at 550 West 56th Street, New York City, was called to the scene of the shooting and arrived there shortly after 10:30 p.m. A group of men were standing around and Blackshear was lying on his back in a litter on the south side of 55th Street. He stated that he pronounced Blackshear dead at 10:48 o'clock as the result of "a gunshot wound of the upper thorax on the right side" (R. 18-20). An autopsy performed 4 May 1943 showed death to have been caused by a gun shot (R. 233-234).

It was developed by the prosecution that Private Simon Dickerson, Company A, 372nd Infantry, was on duty at post No. 4 (55th Street entrance to the building) between 8:30 and 10:30 p.m. on 3 May 1943. Private Gilmore Tallie of the same company was there with him. At about 10:15 p.m. accused about to leave the building came to the post, with a rifle. Accused was not in a hurry and was not excited. He said he was going to relieve Marion. A short time after that Private Dickerson heard a couple of shots. He ran to the street. Mrs. Phillips was running across the street and accused was behind her with a rifle in his hand. Dickerson grabbed the rifle and Tallie grabbed accused. The rifle was warm (R. 155, 158, 160).

Private Tallie testified that when he saw accused running behind the woman he asked, "What's wrong?" Accused said, "The man went with my wife." Tallie asked him whether he had shot anybody. Accused said, "No, I shot up in the air" (R. 162, 164).

Sergeant August Thomas, Company A, 372nd Infantry, saw accused at about 10:50 p.m. that evening. The accused was placed in his custody. Sergeant Thomas asked the accused what was the matter but received no reply. According to Sergeant Thomas accused was sober and did not act as if he were excited (R. 172-174).

Technician Fifth Grade James A. Carter of the same organization, saw accused at about 10:45 p.m. on the night of 3 May 1943. He noticed a commotion in the orderly room and happened to see accused sitting in a chair. He asked accused what happened and accused replied, "I shot Clisby about my wife" (R. 175, 176).

Sergeant Isaac W. Carr, Company A, 372nd Infantry, went over to the truck where Blackshear was shot at about 10:30 o'clock that evening. "Right down by the truck, against the curb", he found an empty cartridge (R. 186, 188). Sergeant Carr took this cartridge over to First Lieutenant Reginald Watkins, 372nd Infantry (R. 195, 199). Lieutenant Watkins was on the street standing near the truck immediately after the shooting and another empty shell was handed to him (R. 198). Subsequently, Henry F. Butts, Sergeant, city police department of the city of New York, examined the rifle used by accused that evening and the empty shells found on the scene of the shooting, as stated, for the purpose of determining whether those shells had been fired from that rifle. Sergeant Butts established, and had been in charge of, the Ballistic Bureau, in the city of New York, since 1930. He had testified as an expert in such matters for 25 years. As a result of his examination he formed the opinion that the empty shells had been fired in that rifle (R. 57, 58, 200, 204, 206, 208, 212, 213, 214-220; Ex. 6).

4. For the defense Sergeant Milton Smith, Company A, 372nd Infantry (R. 241), testified that he was sergeant of the guard on the evening of 3 May 1943 and that he gave accused permission to replace Private Marion on guard duty (R. 243). He stated that accused volunteered to take the post and that this occurred about one-half hour or forty-five minutes before the "accident" (R. 243, 245, 247).

Captain Bridgeford was recalled as a witness for the defense and stated that between 4:30 and 5:30 p.m., 2 May 1943, he sent for accused and his wife. Blackshear was also present. Witness stated that he told Blackshear not to interfere in arguments between accused and Mrs. Phillips; that they did not concern him and that "he had a wife of his own" (R. 258). Accused at this interview asked what business Blackshear had interfering with him (R. 260). Blackshear appeared to be angry (R. 261). The captain told accused that if his wife wanted to go around with someone else, accused could not stop it, that he should attempt to straighten it out with her (R. 262). Accused told the captain that Blackshear would not behave himself (R. 262).

Corporal Cooper was recalled as a witness. He testified that on Sunday, 2 May 1943, Captain Bridgeford told him to bring accused, his wife and Blackshear to the captain (R. 263). This took place about 5:30 o'clock in the afternoon (R. 270). Corporal Cooper went upstairs and met accused coming out of the doorway on the fifth floor. Accused passed him. He followed accused downstairs and then he and some other men took a rifle away from accused. Blackshear ran upstairs with a long knife and leaped at accused and swung at him. The blade of the knife was open (R. 264-270). There was no ammunition in the rifle taken from accused (R. 266). This witness knew about the argument between Blackshear, accused and the latter's wife. Blackshear said to accused, "I will knock your damn head off if you hit her" (R. 268).

Sergeant John Siville, 372nd Infantry, corroborated Corporal Cooper in his testimony as to Blackshear's attack on accused and also testified that he did not see accused make any threatening motions toward Blackshear (R.272-275).

After having been advised of his rights, accused made an unsworn statement through defense counsel. He said that after his marriage to Emily Phillips in July 1942, everything was going all right until 5 or 6 months before when Blackshear came to his home one night while he was in bed and he heard him talking with his wife in the kitchen. Soon afterwards "the boys" began to talk about Blackshear going with his wife. Again, at home one night, he woke up and found Blackshear there. He remonstrated with his wife and she said it would not happen again. His wife would come to see him at the station and would leave with Blackshear. On the afternoon of 2 May 1943 his wife came down to see him. They had an argument and Blackshear interfered. On Monday afternoon, his wife called up and said that she was coming down to see him. He told her to bring down his shoes and identification tags. She said she would arrive about 8 o'clock. At 9 o'clock she had not arrived. He heard some discussion about Private Marion being intoxicated on post and he said he would take Marion's post because he knew Marion's sister very well. Accused's own rifle had been sent to ordnance inspection so he borrowed a rifle from Sergeant Conover. At that time he did not know anything about his wife and Blackshear being there. He thought he would circle around the building and go out to Marion's post. He heard a noise and stopped. He went across the street to see what it was. He saw Blackshear and his wife and asked her to come out to talk to him. Blackshear said: "Hell, you don't have to come out", and accused fired a shot in the air. He remembered nothing else (R.278-282).

5. It is unnecessary to summarize the evidence. The story of the crime as related by the witnesses for the prosecution stands uncontradicted by the defense in any material detail.

The fact of deceased's death and the fact that his death was caused by a gunshot wound was shown by expert testimony. There can be no doubt that it was accused that fired the shot which killed Blackshear. The wife testified to this. In addition Corporal Cooper testified that he saw accused standing by the truck, on the spot in which the gun was fired. Others saw accused run from that direction. Accused was shown to have been armed before the shooting and the rifle taken from him immediately thereafter was still warm. Empty shells found at the scene were proven to have been fired by the gun which accused carried. The accused admitted firing the rifle.

Deliberation and premeditation, as essential elements of the charge of murder, could have been found by the court from the threats of accused and the hatred borne by him for his victim. Accused and Blackshear had been

unfriendly for some months. Within a recent period this feeling had grown to intense bitterness. Its quality is best revealed by the incident of the night prior to the fatal shooting when the two rushed at each other, the accused armed with a rifle and Blackshear holding a knife. The fact of this enmity does not depend solely on the testimony of accused's wife, who admittedly was alienated from her husband and undoubtedly in love with the deceased and he with her. Convincing proof of this damaging fact which had a part on the question of premeditation is found in the testimony of others and in the statement of accused himself. The open violence between accused and Blackshear which occurred the preceding day was testified to by Corporal Cooper and Captain Bridgeford. The testimony of others as to the feud between the two gives credibility to that important part of Mrs. Phillips' testimony wherein she related that on two occasions accused threatened Blackshear's life.

The threats of accused to take "Blackshear's" life support the element of intent. The conduct of accused on the evening in question showed premeditation and unlawful intent. Accused volunteered to act as a substitute sentry. This was significant. As a sentry, accused would be armed with a rifle and ammunition. He would be on the street prepared and ready to "hunt down" Blackshear whom he expected to find with his wife at that time. His wife had told him that she would be there between 8 or 9 o'clock but at that time, nearly 10 p.m., she had not called for him. In the mind of accused she had already arrived and was "trysting" with Blackshear in the vicinity, probably in a truck. That accused so armed himself with a murderous intent is shown by the fact that when he left the building, instead of turning right and going to his post, he turned left and hastened to the truck where he found and shot Blackshear. All of this showed purpose and unlawful intent to take the life.

The killing was unlawful. Accused's suspicion of Blackshear's relations with his wife, even though true, did not justify the killing or reduce the degree of the offense. The record shows no sudden provocation which could have reduced the crime to voluntary manslaughter.

The court by its searching questioning attempted to determine whether accused had in fact been advised by one of the soldiers that his wife was with Blackshear immediately prior to accused's going on post. Had such been the fact, that in itself would not necessarily have disproved the element of premeditation. It could well have constituted a recently discovered opportunity to carry into execution a premeditated killing. Furthermore, "deliberation and premeditation being established, the length of time it existed is immaterial; the homicide will be murder" (Wharton's Criminal Law, Vol. 1, Sec. 420).

The evidence, then, was amply sufficient to warrant the court in its

finding that accused killed Blackshear with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation by shooting him with a rifle, and in finding accused guilty as charged.

6. Prior to introducing Mrs. Emily Phillips, wife of accused, as a witness to testify against him, the prosecution offered, and there was received in evidence, a certified copy of a marriage certificate which purported to show the marriage of accused on 16 September 1938 to one Lillian Marshall. The purpose of this offering, and also of additional evidence which was ruled out by the court, was to show that Mrs. Phillips was not the lawful wife of accused in order to qualify her as a competent witness. The law member instructed the court that no inference of bigamy or of any other offense was to be drawn from the marriage certificate; and that accused was entitled to the presumption that when he was married in 1942 to Mrs. Phillips, he was legally competent to marry her (R.74,75,93,95,236,237; Ex. 7). It may be assumed that these instructions cured any harmful effect which may have occurred as a result of the receipt of evidence of accused's prior marriage.

Individual defense counsel's statement that accused consented to have Mrs. Phillips testify against accused and her consent so to testify, made her a competent witness (par. 102d, M.C.M. 1928).

The court sustained the objection by the prosecution to a question asked of Captain Bridgeford as to the character of Blackshear, the deceased (R.255,256). Evidence of the deceased's character is admissible in a homicide case involving a claim of self-defense. It is inadmissible when the evidence shows no basis for a claim of self-defense (Andersen v. United States, 170 U.S. 481, 504-509; I Wigmore on Evidence, 3rd Ed., Sec. 63; Ibid., Vol. 2, sec. 246). In this case, all the evidence, including the unsworn statement of accused made through defense counsel, negatived the idea of self-defense. Therefore, the exclusion of evidence as to deceased's character was proper.

7. Accused was 27 years of age at the time of the trial. He enlisted 15 April 1941. There was no prior service.

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 of trial is legally sufficient to support the findings and the sentence. A sentence either of death or of imprisonment for life is mandatory upon 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).

James G. Eaton, Judge Advocate.

John Humbert, Judge Advocate.

(On leave), Judge Advocate.

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

SPJGH
CM 237173

9 AUG 1943

UNITED STATES	)	92ND INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 9 June 1943. Dismissal, total forfeitures, and confinement for one (1) year.
	)	
Second Lieutenant ARCHIE H. HARRIS (O-1301137), Infantry.	)	

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 63rd Article of War.

Specification 1. In that Second Lieutenant Archie H. Harris, 371st Infantry, did, at Fort Huachuca, Arizona, on or about May 17, 1943, behave himself with disrespect towards First Lieutenant Willard B. Brooks, 365th Infantry, his superior officer, by stating in his presence, while said First Lieutenant Willard B. Brooks was taking notes, 'Is that son of a bitch taking notes again?', or words to that effect.

Specification 2. In that Second Lieutenant Archie H. Harris, 371st Infantry, did, at Fort Huachuca, Arizona, on or about May 18, 1943, behave himself with disrespect towards First Lieutenant James J. Shea, 598th Field Artillery Battalion, his superior officer, by saying to him, 'You are a cock-sucker, and still another, a mother fucker and a chicken shit First Lieutenant,' or words to that effect.

Specification 3. (Finding of Not Guilty).

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Second Lieutenant Archie H. Harris, 371st Infantry, having been duly placed in arrest at Fort Huachuca, Arizona, did, at Fort Huachuca, Arizona, on or about May 24, 1943, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that 2nd Lt Archie H. Harris, 371st Infantry did, at Fort Huachuca, Arizona, on or about 26 May 43, at 0654 o'clock, behave with disrespect towards Major W. R. Gunby, his superior officer, who was then in the execution of his office, in that he, the said 2nd Lt Archie H. Harris, did say, when ordered to return to arrest in his room, 'All right, bastard,' followed by the statement, 'I wish you would hit me,' in a provocative and contemptuous tone and manner.

Specification 2: In that 2nd Lt Archie H. Harris, 371st Infantry, did, at Fort Huachuca, Arizona, on or about 25 May 43, behave with disrespect towards 1st Lt James J. Shea, his superior officer, who was then in the execution of his office, in that he, the said 2nd Lt Archie H. Harris, did say, 'Stay out of here or I will kick your ass,' or words to that effect, as the said 1st Lt James J. Shea left the said 2nd Lt Archie H. Harris's quarters, where he had gone to make an inspection, about 2055 o'clock.

ADDITIONAL CHARGE II: (Finding of Not Guilty).

He pleaded not guilty to all Charges and Specifications, and was found not guilty of Specification 3, Charge I, Specification 1, Charge II, and Additional Charge II and the Specification thereunder, and guilty of all other Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. 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 upon the Specifications of which the accused was found guilty:

a. Specification 1, Charge I: On 17 May 1943, the 92nd Division Officers' School of Application and Proficiency began at Fort Huachuca, Arizona, in order that officers through application might demonstrate their proficiency. Accused was a student officer in the school. On that night First Lieutenant Willard B. Brooks was in charge of a march which started about 5 p.m. and lasted two and a half days and nights. The march continued up a canyon after dark and at about 10:30 p.m. the students were fired on by an assimilated enemy. The accused was in an advance party of four or five men, and made little if any response to the firing. Lieutenant Brooks had been instructed by Major William R. Gunby, executive officer of the school, to check the names of students who did not show any action when fired upon, and in performing this duty he came upon the accused, who looked up, saw Lieutenant Brooks with a pencil and paper, and remarked "Is that son of a bitch taking names again". At the time Lieutenant Brooks was within five or six feet of accused, it was light enough to see, and he knew the voice of accused. Another officer was taking names at the end of the column, but Lieutenant Brooks knew the accused was referring to him (Lieutenant Brooks), because he was the only man taking notes within 100 yards. There was excellent light from the moon that night (R. 6-7, 9, 12, 15, 21-24, 32-33, 44-45, 48, 50).

b. Specification 2, Charge I: On the next night, 18 May, at about 6:30, after marching all day, the column split up and the rear end of the column fell out under orders of the platoon leader. First Lieutenant James J. Shea, one of the tactical officers, after conferring with the platoon leader, tried to get the rear part back on the road to bring the column together so the men could eat and spend the night together. The men did not respond quickly and Lieutenant Shea went around taking names. As he passed accused, whose name he took, the accused said "is that cock-sucker taking names again" or words to that effect. Lieutenant Shea asked him what he said and accused replied "you are a cock-sucker, and another and another, and a mother fucker and a chicken shit First Lieutenant" (R. 48-51, 54).

c. Specification 2, Charge II: On 22 May 1943, Lieutenant Colonel Duncan Hallock, commandant of the school, ordered the accused into arrest and personally informed the accused of that fact. Under instructions of Colonel Hallock, Major Gunby confirmed the arrest and its terms by letter to accused (Ex. A). The terms of arrest were that accused should not leave his room except for meals at the prescribed time and

place, medical attention, or to visit the latrine, and that on leaving his room he should leave a note on his pillow stating time of departure, where he had gone, and time he would be back. On 24 May Lieutenant Brooks, whose duty it was to check on men in arrest in quarters, heard loud voices "down the hall" during drill hours, identified one of the voices as that of accused, went to the room of accused, saw no one there, started back up the hall of the barracks, and encountered accused coming out of the room of "Lieutenant Hawkins". He asked accused what was going on, and accused started to his room and remarked "You aren't going to catch me breaking restrictions". Lieutenant Brooks did not search for a note because accused only had authority to be absent from his room "for two purposes, one of which was not to visit anybody else", and he did not search the latrine (R. 7-9, 13-15, 22, 24-26, 30, 33-36).

d. Specification 1, Additional Charge I: On 25 May the limits of arrest of accused were amended to include all duty normally required and he was directed to attend all classes and formations, by letter signed by Major Gunby (Ex. B). On 26 May about 6:50 a.m. Major Gunby, who was in his office at the time, heard voices in the hall "where they were living", including that of accused. Major Gunby approached the accused and another officer and directed them to go to their rooms. Accused replied "Are we on duty or aren't we? The schedule started at six o'clock, why don't you make up your mind?" When Major Gunby again ordered him to go to his room, accused said "Sure", "All right" or "O.K.", and as he turned around to go to his room, added "Bastard". As accused went down the hall he turned suddenly and said "I wish you would hit me". At the time of the incident the accused was standing near the bulletin board, but not reading it. Major Gunby considered the tone of voice of accused very abusive. Reveille was at 6 a.m., classes began at 7:30 a.m., and the schedule was posted on the bulletin board (R. 36-37, 41-43, 56-59).

e. Specification 2, Additional Charge I: On 25 May Lieutenant Shea, as Duty Officer, checked on men in arrest, went to accused's room and found him there. As Lieutenant Shea left the room, accused came out and said "Stay out of my room or I will kick your ass" (R. 50, 52-53).

4. The defense presented no testimony. The accused elected to remain silent.

5. The evidence shows beyond any reasonable doubt that the accused behaved himself with disrespect toward superior officers by using

language with reference to them and in their presence as alleged (Specs. 1 and 2, Chg. I, and Specs. 1 and 2, Add. Chg. I).

With respect to Specification 2, Charge II, it is shown without contradiction that the accused was legally placed in arrest on 22 May 1943, that by the terms of the arrest he was required to remain in his room except for meals, medical attention and visits to the latrine, and that on 24 May he was found out of his own room and leaving the room of another officer.

6. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service since 10 March 1941; appointed temporary second lieutenant, Army of the United States, and active duty, 26 November 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 63rd or 69th Article of War.

_____, Judge Advocate

Samuel M. Driver, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 12 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 Second Lieutenant Archie H. Harris (0-1301137), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Accused on four occasions behaved with disrespect toward his superior officer by using indecent and disrespectful language, and left his room on one occasion in breach of arrest.

3. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for one year be confirmed and carried into execution.

4. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

5. Inclosed herewith are the 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 carrying into effect the recommendation made above.

Myron C. Cramer

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

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

(Sentence confirmed but confinement remitted. G.C.M.O. 219, 4 Sep 1943)

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

SPJGK
CM 237192

2 SEP 1943

UNITED STATES	)	35TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Rucker, Alabama, 28 June 1943. Dismissal and total forfeitures.
Second Lieutenant RICHARD L. HART (0-1300964), Infantry.	)	

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 93d Article of War.

Specification 1: In that Second Lieutenant Richard L. Hart, Anti-Tank Company, 134th Infantry, did, at Camp Rucker, Alabama on or about 1 May 1943 feloniously embezzle by fraudulently converting to his own use money in the sum of $1.00, the property of Corporal Raymond Johnson, Anti-Tank Company, 134th Infantry, entrusted to him by the said Corporal Raymond Johnson for the purchase of War Savings Stamps.

And 36 additional Specifications, identical in form with Specification 1, alleging in substance that accused at the same time and place embezzled moneys entrusted to him in the amounts, from the principals, and for the purposes as follows:

Specification 2:	$37.50	Private James Blane	War Savings Bonds
Specification 3:	.25	Pfc Jack Fitzgerald	War Savings Stamps
Specification 4:	18.75	Corporal Rafael Guerra	War Savings Bonds
Specification 5:	1.00	Private Edward Nuzgoski	War Savings Stamps
Specification 6:	.50	Private Howard Swain	War Savings Stamps
Specification 7:	1.00	Sergeant Harvey Lentz	War Savings Stamps

Specification 8:	$80.00	Corporal Louis Kurent	War Savings Bonds and Stamps
Specification 9:	18.75	Pfc Louis Talken	War Savings Bonds
Specification 10:	.25	T/V Victor Westermann	War Savings Stamps
Specification 11:	2.50	Sergeant Paul Hoesing	War Savings Stamps
Specification 12:	6.75	Pfc Maurice Bonderer	War Savings Stamps
Specification 13:	1.00	Private Charles Murz	War Savings Stamps
Specification 14:	1.00	Private Samuel Griffith	War Savings Stamps
Specification 15:	18.75	Stf. Sgt Raymond Bettenhausen	War Savings Bonds
Specification 16:	9.00	Private Floyd Cotton	War Savings Stamps
Specification 17:	1.00	Pfc Harry Minshall	War Savings Stamps
Specification 18:	5.25	Private George Lovell	War Savings Stamps
Specification 19:	18.75	Private Leo Meehan	War Savings Bonds
Specification 20:	18.75	Private John Sultas	War Savings Bonds
Specification 21:	7.00	Pfc Melbern Davis	War Savings Stamps
Specification 22:	2.00	Corporal Corvin Knutson	War Savings Stamps
Specification 23:	37.50	Private Joseph Flynn	War Savings Bonds
Specification 24:	6.25	Private Oscar Anderson	War Savings Stamps
Specification 25:	4.00	Private Richard Langford	War Savings Stamps
Specification 26:	4.00	Private Robert Meisner	War Savings Stamps
Specification 27:	18.75	Private Bert Keylon	War Savings Bonds
Specification 28:	18.75	Private Arthur Hawks	War Savings Bonds
Specification 29:	.50	Private Erwin Dlugolinski	War Savings Bonds
Specification 30:	18.75	Private Eldred Kahler	War Savings Bonds
Specification 31:	.25	Private Cooper Ledbetter	War Savings Stamps
Specification 32:	4.00	Pfc Donald Parnell	War Savings Stamps
Specification 33:	75.00	Private Glenn Nelson	War Savings Bonds
Specification 34:	1.50	Private Ernest Green	War Savings Stamps
Specification 35:	.50	Private Clifton Gossett	War Savings Stamps
Specification 36:	5.00	Private Robert Scofield	War Savings Stamps
Specification 37:	1.00	Pfc James Long	War Savings Stamps

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

Specification 1: In that Second Lieutenant Richard L. Hart, Anti-tank Company, 134th Infantry, did, on or about the 15th day of April 1943, wrongfully borrow money from First Sergeant Joseph Pietz, Anti-tank Company, 134th Infantry, in the sum of $35.00 and did further dishonorably fail and neglect to pay said indebtedness, until about 23 June 1943.

Specification 2: In that Second Lieutenant Richard L. Hart, Anti-tank Company, 134th Infantry, did, on or about the 8th day of May, 1943,

wrongfully borrow money from Sergeant Ellard Born, Anti-tank Company, 134th Infantry, in the sum of $40.00 and did further dishonorably fail and neglect to pay said indebtedness, until about 23 June 1943.

Specification 3: In that Second Lieutenant Richard L. Hart, Anti-tank Company, 134th Infantry, did, on or about the 29th day of January 1943, wrongfully borrow money from First Sergeant Benjamin Miller, Company "L", 134th Infantry, in the sum of $10.00 and did further dishonorably fail and neglect to pay said indebtedness, until about 23 June 1943.

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

Specification: In that Second Lieutenant Richard L. Hart, Anti-tank Company, 134th Infantry, did, without proper leave, absent himself from his station at Camp Rucker, Alabama from about 16 June 1943 to about 19 June 1943.

Accused pleaded not guilty to Charges I and II and their respective Specifications and guilty to Charge III and its Specification. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal and forfeiture of all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is as follows:

It was stipulated between the prosecution, the defense, and the accused that (a) accused was on and prior to 1 May 1943, Bond Officer of Antitank Company, 134th Infantry; that on or about 1 May 1943, and in his official capacity as bond officer, accused received for conversion into War Savings Bonds or Stamps the specific sums of money as alleged in the 37 Specifications under Charge I, (b) that the principals referred to in the Specifications did not receive their bonds and/or stamps until on or about 25 June 1943, and (c) that it was possible to purchase such bonds and stamps at the Post Office, Camp Rucker, Alabama, during the "usual business hours of the usual business days", from 1 May 1943 to on or about 20 June 1943 (R.10,11).

First Lieutenant Russell S. Harper, Antitank Company, 134th Infantry, the officer who signed the Charges and Specifications, stated that he asked the accused about a week before accused went on leave "* * * if he was delivering the War Bonds and Stamps he had orders to deliver to the men in the company. * * * He [accused] said he was and was handing them out as fast as he could get to them" (R.11). The date of this interview

was 19 or 20 May 1943 (R.14). Witness stated that on the day accused returned from leave (R.12) about the middle of June (R.14) he again discussed the matter with accused. Accused "was quite worked up and he made the statement that he had gotten into a crap game and lost some money that didn't belong to him. *** bond and stamp money he had collected in the Company" (R.12). Lieutenant Harper stated that on or about 24 June 1943 he received from accused checks of the Western Union Telegraph Company, payable to and endorsed by accused in the total amount of $565, and that the proceeds of the check were applied by him to the purchase of bonds and stamps for the principals as set forth in the Specifications, Charge I (R.13,14,16). Witness was asked upon cross-examination why he discussed the matter with accused on 20 May, to which he replied,

> "There were reports coming to me as acting executive officer that some of the men in the company had not received their bonds according to schedule" (R.12).

Corporal Rafael Guerra, Private First Class Howard Swain, Sergeant Harvey Lentz, Corporal Louis Kurent, Private First Class Eldred Kahler, and Private Glenn Nelson, all of Antitank Company, 134th Infantry, Camp Rucker, Alabama, each testified. Corporal Guerra (Specification 4) stated that on or about 1 May 1943 he gave accused $18.75 which was to be used by accused for the purchase of a War Savings Bond. Witness "figured" he would get the bond the next day. About three weeks thereafter he asked accused about the bond and accused stated that he had lost the money "some way or other, I don't know how". This incident occurred in the day room of Antitank Company (R.14,15). Witness did not get his bond until it was given to him by Lieutenant Harper on 24 June 1943.

Private First Class Swain (Specification 6) stated that on or about 1 May 1943 he gave accused 50 cents for the purchase of a War Savings Stamp. He did not get his stamp until 24 June when it was given to him by Lieutenant Harper (R.16).

Sergeant Lentz (Specification 7) stated that on or about 1 May 1943 he gave accused $1.00 for the purchase of War Savings Stamps and expected his stamps within a week but did not receive them until they were given to him by Lieutenant Harper, 24 June 1943 (R.17).

Corporal Kurent (Specification 8) stated that on or about 1 May 1943 he gave accused $98.75 for the purchase of War Savings Stamps and/or Bonds. About two weeks later accused gave the corporal a $25 bond and explained

that his reason for not giving him "the rest" ($80) was that "he just said he didn't have the money and he would give me the bond later" (R.18). Witness stated that at the time of the original transaction - 1 May 1943, he expected to get the bonds as soon as accused could get them (R.19). Corporal Kurent received the rest of his bonds from Lieutenant Harper, 24 June 1943 (R.19).

Private First Class Kahler (Specification 30) gave accused $18.75 on or about 1 May 1943 for the purchase of a $25 bond. He heard nothing further from accused but received his bond from Lieutenant Harper on 25 June 1943 (R.20-21).

Private Nelson (Specification 33) gave accused $75 on or about 1 May 1943 for the purchase of a bond. Nelson stated that he expected to get his bond in three or four days. He spoke to accused about the bond in the latter part of May, at which time accused stated "he was out the other night and had a little tough luck and he would see that I got it" (R.22). Nelson received his bond from Lieutenant Harper 25 June 1943 (R.22).

Charge II, borrowing money from enlisted men (3 Specifications), in violation of Article of War 96. Specification 1: On 5 March 1943, accused borrowed from First Sergeant Joseph F. Pietz, Antitank Company, 134th Infantry, five dollars, and on 15 April borrowed from the sergeant the further sum of $30. With reference to the loan of $5 which was made at Camp San Luis Obispo, accused stated that he wanted to go to town that evening and that he was short of money. Nothing was said about the time of repayment. The $30 transaction was at Camp Rucker. Accused requested the additional loan stating that he was expecting a visit from a friend and needed the money to pay rent on some quarters. It was understood that the $30 loan would be paid on or about 1 June 1943. However, witness stated that he was on furlough 1 June and did not return until 16 June and that both loans were discharged through Lieutenant Harper on 24 June 1943 (R.23-25).

Specification 2: Sergeant Ellard F. Born, Antitank Company, 134th Infantry, loaned accused $30 during the first week of May and $10 during the second week of May. In requesting the loans accused merely stated that he had had a little "hard luck" and that the loans would be returned around 30 May or 1 June. Sergeant Born stated that the loans were discharged through Lieutenant Harper, 24 June 1943 (R.26-27).

Specification 3: First Sergeant Benjamin Miller, Company L, 134th

Infantry, made a loan of $10 to accused the latter part of January 1943, while travelling by train from Ojai to San Louis Obispo, California. Accused promised to return the money "as soon as we got to San Luis Obispo". Although witness asked accused for the money on their arrival in San Luis Obispo he did not receive a return of the money until payment thereof was made by Lieutenant Harper, 24 June 1943 (R.27-28).

Charge II (1 Specification), Absence without leave, in violation of Article of War 61. The accused pleaded guilty to this Charge and Specification (R.9) and no evidence thereon was introduced.

4. For the defense the accused testified that he enlisted in the Regular Army on 9 September 1935 and that he had had continuous service since that time. He participated in the defense of the Japanese attack at Pearl Harbor, 7 December 1941. He returned to the continental United States, 1 August 1942, for the purpose of attending Officer Candidate School, Infantry School, Fort Benning, Georgia, from which he was commissioned a temporary second lieutenant, Army of the United States, 23 November 1942. He was assigned to Antitank Company, 134th Infantry, 8 December 1942. He was acting bond officer of that organization at Camp Rucker, Alabama, on 30 April 1943, which was pay day. He stated that in accordance with a memorandum order he sat at the pay table and as the principals named in the Specifications, Charge I, were paid, he received from them for conversion into War Savings Bonds or Stamps, the sums of money as alleged in the Specifications. He received about $700 (some of it was received from soldiers not referred to in the Specifications). He placed about $300 in small bills in a money belt and put the balance in a billfold with about $125 of his own money. After making tabulations of his collections it was too late in the evening to purchase any bonds or stamps. He had no opportunity of making such purchase on the succeeding day (1 May) because "The company moved out" and he was in charge of training that day - and did not return to the camp area until around 5 o'clock. He stated that on that evening he "started drinking and changed clothes and took a run into town". He returned to camp about 10 or 11 o'clock and had been "drinking pretty heavily" (R.32-36). After returning to camp he went to his quarters and engaged in a "crap game" with other officers, in the course of which he lost the $525 in the billfold, but did not touch the $300 which had been placed in the money belt. Accused stated that due to his condition he didn't have sense "about me at the time" to keep track of the money that he was losing. He stated that after the game he lay down and a few hours later awakened to the realization of what he had done (R.36,38,39). He said that he had no intention of defrauding anyone. The $300 which was in the money belt was converted into stamps and bonds and given to other principals in the company who had advanced

money to him for this purpose. He then borrowed $125 which was likewise used. The proceeds of his May pay check ($176.33), less a part thereof used in the payment of some bills and a further sum retained for living expenses, were applied to the purchase of the stamps and bonds in behalf of his principals. He did not have sufficient funds to take care of the men named in the Specifications, Charge I. He stated that he had made an allotment for the purchase of "a bond a month" and that it was his intention to convert his bonds into cash for the protection of "those men". He went on leave 1 June 1943 and when he arrived he found that only two of his bonds were at his home. The others were in the Finance Office in Washington, D.C. He stated that while at home he made financial arrangements for sufficient funds to settle his outstanding obligations, and that after his return from leave he received a "telegraphic money" order which he endorsed over to Lieutenant Harper for use by him in making settlement of all accounts covered by the Specifications, Charges I and II (R.36-38). Reverting to his condition during the "crap game" accused was asked if he was "very drunk" or "slightly drunk". His answer was, "I would say I was pretty drunk". When asked if during the "crap game" he stopped to consider that he was gambling with money which he had collected and held for a special purpose - he replied, "No sir; I just won and lost" (R.39). On cross-examination witness stated that he was not drunk when he went to town but that he did some drinking there. He stayed in town four or five hours and returned by bus. He was alone. He recalled the hour of his return. He remembered going to his room. He had a bottle of whiskey in his room and was in the act of taking a drink when he heard the noise of the "crap game". It was then that he took his bottle and joined the game. He remembered some of the officers in the game (whose names were not given) (R.34). He remembered withdrawing money from the billfold for use in the game and was conscious of not using the money in the belt. He remembered that the game was played on a table. He stated that during "most of the evening" he was able to tell whether he was winning or losing. He recalled that the game was going "both ways".

> "When I won I put the money in my pocket and when I lost I took it out. * * * I kept playing until I didn't find any more money in my billfold. Then I went to bed." (R.45-46).

With respect to the Specifications, Charge II, the accused admitted borrowing from the enlisted men the specific amounts designated in the three Specifications, but stated that he honestly intended the repayment of the loans and that the loans were paid from the proceeds of the check which he had turned over to Lieutenant Harper. He stated that the loans referred to in Specifications 1 and 2 were paid within a reasonable time but that the $10 loan from Sergeant Miller (Specification 3), contracted in January, 1943, had completely "slipped" his mind (R.40-41).

5. As to Charge I and its Specifications, a recapitulation of the evidence is considered unnecessary. It is clearly shown that the accused in his capacity as bond officer received money from certain enlisted men of his organization in trust, for the purchase and delivery to his principals, of War Savings Bonds and/or Stamps. The money was received by accused on 30 April 1943. It was contemplated that the trust would be executed as speedily as possible. It was stipulated that the bonds and stamps were available for purchase at the Post Office, Camp Rucker, Alabama, during the usual business hours of the usual business days from 1 May 1943 to on or about 20 June 1943, and that the principals did not receive their bonds and/or stamps until on or about 25 June 1943, when they were delivered to them by Lieutenant Harper. The accused admitted receiving the money in his fiduciary capacity and stated that before he had had an opportunity of buying the bonds and stamps, to wit, on the night of 1 May 1943, he lost in a game of dice the funds which were so entrusted to him. The Manual for Courts-Martial defines embezzlement as -

> "* * * the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. (Moore v. U. S., 160 U.S. 268.)".

Continuing, the Manual states:

> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. * * *" (MCM, 1928, par. 149h, p. 173-174).

It will be noted that the accused had admitted every element of the offense of embezzlement except that he fraudulently converted or appropriated the trust funds. As to this he attempted to exculpate himself by asserting that when he gambled away the money he was so drunk that he was incapable of entertaining a fraudulent intent. In the first place it may be stated that the testimony of the accused is wholly unsupported both as to the gambling and as to his intoxication.

> "It is so well established as to require no citation of authority that a jury is not obliged to accept the testimony of a witness simply because such testimony is not contradicted, if in the judgment of the jury, in view of all the circumstances in the case, such testimony is not worthy of belief. This rule is as applicable to courts-martial as to juries in the civil courts." (CM 152797)

But assuming that the court accepted as true accused's statement that he

lost the money in a crap game, certainly this use of the funds involved malfeasance and constituted such a reckless disregard of his trust as would warrant an inference of fraud. Under all the evidence the court may well have considered that the "crap game" was an afterthought. The money was received by accused 30 April. When Lieutenant Harper asked accused 19 or 20 May about the bonds, accused did not then say that he had (three weeks prior thereto) lost the money in a crap game. On the contrary he falsely stated that he was delivering the bonds "as fast as he could get to them". Moreover it will be recalled that accused at no time voluntarily and frankly explained to his principals the reason for the delay in the delivery of their bonds. After waiting three weeks Corporal Kahler spoke to accused about his bond. Accused told Kahler that he had lost the money. Corporal Kurent gave accused $98.75 for the purchase of bonds. About two weeks later accused delivered a $25 bond and told Kurent that his reason for not giving him "the rest" was that he didn't have the money. When Private Nelson spoke to accused about his bond ($75) around the last part of May "he [accused] said he was out the other night and had a little tough luck and he would see that I got it back". The very fact that accused waited for the men to come to him and his evasive and conflicting statements show a course of conduct wholly inconsistent with innocence. Even if the court accepted the statement of the accused that he lost the money gambling, the court was justified in rejecting the unsupported testimony of accused that he was too drunk to entertain an intent to defraud. From his detailed account of the game accused appears to have been possessed of all his faculties, except perhaps the faculty to win. Of course repayment or restitution, after the completion of the crime, is no defense. The Board of Review is of the opinion that the evidence and the inference arising therefrom show the accused guilty beyond a reasonable doubt of every element of the offense of embezzlement as alleged in Charge I and the 37 Specifications thereunder.

Concerning Charge II and its Specifications. The evidence shows, and the accused admitted, that he borrowed from the enlisted men the amounts alleged in the Specifications. As to Specifications 1 and 2 (loans from First Sergeant Pietz and Sergeant Born), since the record shows no false representations by the accused nor a failure to pay, characterized by deceit, evasion, or dishonorable conduct, the court in its findings upon these Specifications should have excepted the words "and did further dishonorably fail and neglect to pay said indebtedness". However, this omission on the part of the court is harmless because by the exclusion of the excepted words each Specification charges a wrongful borrowing in violation of Article of War 96, of which accused is clearly guilty. As to the loan from Sergeant Miller (Specification 3), the evidence shows that accused procured the loan 29 January 1943, under

a definite promise of repayment upon arrival at San Luis Obispo. When accused failed to make payment in accordance with his promise Sergeant Miller asked him for payment. Payment was not made until 24 June 1943, five months later. The evidence thus warrants the finding of guilty of Specification 3, Charge II.

The accused pleaded guilty to Charge III and its Specification, absence without leave.

6. The accused is 25 years of age. The records in the Office of The Adjutant General show that he enlisted in the Regular Army 10 September 1935 and that he has had continuous service as an enlisted man (attaining the grade of platoon sergeant) until his graduation from the Infantry School, Fort Benning, Georgia, 23 November 1942, at which time he was commissioned a temporary second lieutenant, Infantry, Army of the United States. In recommending accused for Officer Candidate School his commanding officer stated that his character was excellent and that accused "possesses educational qualifications or practical experience which will enable him to complete satisfactorily the course of instruction". His company commander, Company G, 21st Infantry, APO 957, said of accused,

> "Sgt. Hart is a level-headed, conscientious non-commissioned. He is serious about his duties, and on many occasions has applied himself studiously in preparation for new assignments. He is quiet in manner, yet forceful."

This officer gave accused an efficiency rating as "Superior".

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 93, 96 or 61.

Irving E. Gray, Judge Advocate.

John Bonnybill, Judge Advocate.

(On leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 SEP 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 Richard L. Hart (0-1300964), 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 that the forfeitures adjudged be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 291, 2 Oct 1943)

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

SPJGK
CM 237212

6 SEP 1943

UNITED STATES v. Second Lieutenant WILLIAM NEAL BROWN (0-567488), Air Corps.	2ND DISTRICT, ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at 2nd District, AAFTTC, 455 Lake Avenue, St. Louis, Missouri, 21 June 1943. Dismissal and total forfeitures.

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 95th Article of War.

Specification 1: In that Second Lieutenant William Neal Brown, Air Corps, did, at the School for Special Service, Lexington, Virginia, on or about March 13, 1943, with intent to deceive Colonel Leon T. David, Field Artillery, upon being asked the following question by the aforesaid Colonel Leon T. David, Field Artillery: "Have you ever seen that envelope", or words to that effect, officially state to the aforesaid Colonel Leon T. David, Field Artillery: "No, sir", or words to that effect, which statement was known by the aforesaid Second Lieutenant William Neal Brown, Air Corps, to be untrue, in that the aforesaid Second Lieutenant William Neal Brown, Air Corps, full well knew that previously he had seen the envelope aforementioned.

Specification 2: In that Second Lieutenant William Neal Brown, Air Corps, did, at the School for Special Service, Lexington, Virginia, on or about March 13, 1943, with

intent to deceive Colonel Leon T. David, Field Artillery, upon being asked the following question by the aforesaid Colonel Leon T. David, Field Artillery: "Whose handwriting is that", or words to that effect, officially state to the aforesaid Colonel Leon T. David, Field Artillery: "I don't know, sir", or words to that effect, which statement was known by the aforesaid Second Lieutenant William Neal Brown, Air Corps, to be untrue, in that the aforesaid Second Lieutenant William Neal Brown, Air Corps, full well knew the handwriting aforementioned to be his own.

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

Specification: In that Second Lieutenant William Neal Brown, Air Corps, did at the School for Special Service, Lexington, Virginia, on or about March 5, 1943, with intent to deceive the Editor of the Pittsburg, Pennsylvania, "Courier", and the Editor of the Norfolk, Virginia, "Journal and Guide", transmit to the editorial offices of each of the newspapers aforementioned an alleged news release falsely purporting to emanate from Captain George Donald Born, Army of the United States, Public Relations Officer, School for Special Service, Lexington, Virginia, and bearing the caption:

"Public Relations Office
School for Special Service
Washington and Lee University
Lexington, Virginia"

which alleged news release full well was known by the aforesaid Second Lieutenant William Neal Brown, Air Corps, to be false in that it did not, in fact, originate in the Public Relations Office, School for Special Service, Lexington, Virginia.

He pleaded guilty to Charge II and its Specification, and not guilty to Charge I and its Specifications. He was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal and forfeiture of all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Accused was a second lieutenant in the Air Corps assigned to Headquarters and Headquarters Squadron, BTC #1, Jefferson Barracks, Missouri, and was a person subject to military law. He was on temporary duty at

the school of Special Service, Washington and Lee University, Lexington, Virginia, from 29 January 1943 to 17 March 1943. During this period Colonel Leon T. David, Field Artillery was commandant of the school (R.9, Ex. 1). On 5 March 1943 accused prepared and sent through the United States mail to the Pittsburgh Courier and the Norfolk Journal and Guide a news release publicizing the graduation of himself and three other negro officers from the School of Special Service. The return address on the envelopes transmitting the release was in the handwriting of accused. Accused was not connected with the Public Relations Office of the school and had no authority to release this or any other news article. On a "Sunday night early in March", Captain George Born, Public Relations Officer and head of the grading committee of the school, received a telegram stating, "Your story received" and requesting pictures of the negro officers concerned (R.13). Since no such item of news had been authorized, an investigation was instituted, as a result of which Captain Born obtained the original release together with the envelopes in which they had been transmitted. The return address on the envelopes was handprinted as follows:

"Public Relations Office
School for Special Service
Washington & Lee Univ.
Lexington, Virginia."

(R.12,13,20,21,50; Pros. Exs.3,5,7,9). Captain Born went to his office where the files of "problem solutions" were kept and took therefrom a solution which had been submitted by the accused (R.13,14). He then took the telegram, the envelopes, and the problem solution to Colonel Leon T. David, the commandant of the school (R.13,20). Colonel David called a meeting of the faculty board for 8 o'clock on the morning of 13 March. The accused was present at this meeting. Colonel David showed accused the envelope in which the release was sent to the Norfolk Journal and Guide and asked him if he had ever seen it before, and accused replied, "No, sir" (R.18,26). Colonel David then asked accused if he wrote what appeared on the envelope (referring to the return address), and accused said, "No, sir" (R.18,19). Colonel David then showed accused the problem solution which accused had submitted in the course of his studies as a student and accused acknowledged authorship thereof (R.15), and admitted that he had written the news releases (R.23). About 5 o'clock on the evening of 13 March 1943 Colonel David, accused, and "Mr. Smith" of the Military Intelligence Service, went to the office of Colonel David for further discussion of the incident. Mrs. Nell L. Starling, confidential clerk to the commandant, testified that she was present to take shorthand notes of this meeting. She stated that the original shorthand notes had been lost, but testified from her independent recollection and from

her transcript of her notes that Colonel David said to accused, "'You have yourself in a spot, as I guess you know'", and that accused answered "'Yes'". Colonel David continued:

> "'I want to have a chance to chat with you about it as you are in some difficulty. This morning you lied about your connection with the news release to the Norfolk and Pittsburg papers, which may involve charges before a Court Martial. I will tell you now that you are free to answer these questions or not, as you wish. You need not say anything, if you do not want to. You are entitled to be represented by counsel as if there was a court. You are permitted to stand on your rights and to handle this as you would a legal matter. If you care to answer these questions, I will have a better picture of it all.'" (R.34,35,37)

Mrs. Starling stated that accused then said "that he knew he was in trouble - that he had been thinking about it - that he knew he was wrong and that he had lied to Colonel David" (R.36).

Sergeant Edmund I. Hockaday stated that he was in command of the general headquarters of the Missouri State Police stationed at Jefferson City, Missouri. He stated that he had studied the characteristics of handwriting for identification and comparison, and that he had had two years' experience in comparing and analyzing handwritings for the purpose of identifications. During the six years that he had been with the State Highway Patrol he had analyzed and compared about "fifty" specimens (R.43). Witness described in great detail the method employed in comparing handwritings. He examined the problem solution (admittedly written by accused) and the envelope in which the news item was shown to have been transmitted to the Norfolk Journal and Guide, and stated that in his opinion the handwriting on the problem solution and on the envelope were by one and the same person (R.42,43,50).

James M. Reid, News Editor of the Pittsburgh Courier, testified by deposition (Pros. Ex. 2). Deponent stated that he had charge of all news matters published in this paper. He identified the news release, a photostat of which is attached to his deposition. The release was received by the witness in the office of the Pittsburgh Courier on 6 March in the regular course of the mail (R.9; Pros. Ex. 2).

Plummer Bernard Young, President and Editor of the Norfolk Journal and Guide, stated that he first saw the envelope in which the news release came to his office (Pros. Ex. 5) after the matter had been called to his attention by a representative of the Special Service School in Lexington, Virginia (R.10,11; Pros. Exs. 4,6).

Captain Harry C. Blank, Headquarters II Armored Corps, San Jose, California, testified by deposition. He stated that he had known accused just a few weeks while accused was attending the School for Special Service. On 15 March Captain Blank was adjutant of the shool and late in the afternoon of that day he went to the office of Major G. W. Kaull, Executive Officer of the School, at which place and time accused in the presence of Captain Blank signed and swore to a statement, attached to the record as "Prosecution's Exhibit 9". Witness stated that no force, duress, compulsion, or threat was used by any person in his presence in order to obtain accused's signature, and that accused signed the statement voluntarily without any promise of immunity or leniency (R.53; Pros. Ex. 8). Over the objection of the defense, the prosecution introduced in evidence the statement referred to, identified by Captain Blank and attached to the record of trial as "Prosecution's Exhibit 9" (R.56). The statement is as follows:

"I hereby certify that I have read the above and foregoing transcript of an official investigation conducted by the Commandant, School for Special Service on March 13, 1943, and that it fairly and truly reports my statements given to the Commandant and others at that time.

"I have been warned by the Commandant in person that it may be necessary to conduct Court Martial proceedings, based upon the fact that I prepared and sent from the School for Special Service to the newspapers referred to herein, certain press releases without any authority at all; that I enclosed these in an official envelope addressed to the Norfolk and Pittsburg papers concerned; that I wrote upon the envelope return cards, indicating that the material had been sent from the Public Relations office, School for Special Service, Lexington, Virginia, and likewise so indicated on the face of the release itself, referring further to Captain Born as Public Relations officer and purporting to quote Colonel L.T. David, Commandant; whereas, in fact, neither Captain Born nor Colonel David knew of these news releases, and Colonel David had made no such announcement. Furthermore it is true that at the meeting of the Faculty Board, presided over by the Commandant, on March 13, 1943, I was shown the envelope enclosing the news release sent to the Norfolk paper and that in response to questions by Colonel David, I denied that I had any knowledge concerning it at all. Later Colonel David showed me a written exercise which I had submitted to the School in the same handwriting, or rather handprinting, which appeared upon the envelope, and that I then acknowledged that I had prepared and sent the news release.

"Colonel David has informed me that these circumstances will

be investigated and charges may be filed. I hope I will not lose my commission and that I won't be imprisoned. I realize now that I was definitely wrong in what I did.

"Colonel David has stated to me that I need not sign this statement, and that if I do, he still will not promise me anything in relation to the action which now will be taken. I have made this statement as an officer and in the hope that a previous good record will be considered, and that I may be permitted to continue in the Army."

4. For the defense, Captain Born was recalled and stated that the accused had a good record at the Service School, that his grades were satisfactory, and that he was an excellent student (R.57,58).

Mrs. Starling was recalled and stated that she typed the statement of accused (Pros. Ex. 9) from her stenographic notes, as dictated by Colonel David. She did not believe that accused was present when the statement was dictated, and she was not present when accused signed the statement. As witness remembered it, she wrote the statement on Monday morning following Saturday's investigation. Mrs. Starling stated that Colonel David at the time of the trial was overseas (R.34,58,59).

Captain William C. Lane, Air Corps, Jefferson Barracks, Missouri, stated that he had known accused at Jefferson Barracks for about 8 months, during which time accused assisted him as Special Service Officer. Witness stated that accused was "very trustworthy" and his work was "very satisfactory" (R.60,61).

The accused did not testify or make an unsworn statement.

5. The evidence shows that accused was a student officer at the School for Special Service, Washington and Lee University, Lexington, Virginia, and a member of the class which graduated on 13 March 1943. In order to obtain publicity for himself and three fellow colored officers, accused on or about 5 March 1943 prepared a news article publicizing the graduation of himself and the other negro officers. He mailed a copy of the release to the Courier, a newspaper published in Pittsburgh, Pennsylvania, and a copy thereof to the Norfolk Journal and Guide, Norfolk, Virginia. The return address on the envelopes in which the news releases were transmitted indicated that the release emanated from the Public Relations Office, School for Special Service, Washington and Lee University, Lexington, Virginia. The release was duly published in the papers to which it had been forwarded. An investigation disclosed that accused was probably the author of and had transmitted the unauthorized release. Accused was called before the faculty board and in the course of an official investigation disclaimed any connection with the matter. He was shown one of the envelopes in which the

release was transmitted and was asked by Colonel David "Have you seen this envelope before?". Accused answered, "No, sir". Accused was then asked by Colonel David, referring to the handwriting on the envelope, "Did you write that?". Accused answered, "No, sir". Colonel David then showed accused the problem solution which accused had previously submitted in his class work and asked accused if he could identify it. When accused was shown the problem solution and the envelopes, both in the same handwriting, he then admitted authorship of the news item. Late in the afternoon of the same day Colonel David called accused to his office to continue the investigation and had his secretary remain and take notes of the meeting. At this time the accused, who had been fully warned of his rights, talked freely and admitted that he had falsely answered Colonel David's questions at the morning meeting and assumed full responsibility for the authorship and transmission of the news item. On the following morning the accused voluntarily signed a full and complete confession of guilt.

The court allowed the introduction in evidence by the prosecution of a part of the statement made by accused to Colonel David on the evening of 13 March, but upon objection by the prosecution excluded the remainder of the statement. Under the circumstances, the defense had the right to the introduction in evidence of the entire statement for the purpose of cross-examination or otherwise (Puckett v. State, 213 Ala. 383, McKee 73 Conn. 18; 49 A.L.R. 572, 2 Whartons' Criminal Evidence, sec. 606; M.C.M. 1928, par. 114a; Winthrop's Military Law, 1920 Reprint, p. 328). However, a reference to the excluded matter discloses that it was of no evidentiary value to the accused. For that reason, and in view of all the evidence, including accused's confession, the error was not prejudicial to the substantial rights of the accused within the meaning of Article of War 37.

The defense objected to the introduction in evidence of the confession of accused and of certain admissions made by him, on the ground that no proper foundation had been laid for the introduction thereof. The objection was properly overruled. The accused in this case, according to all the evidence, was an officer of a high degree of intelligence. He was carefully and fully warned and advised of his rights on 13 March 1943. He had from that time until the afternoon of 15 March 1943 in which to consider and deliberate upon his final action in the premises. With all that time for meditation and thought, accused on the afternoon of 15 March voluntarily signed and swore to a confession under circumstances which meet every requirement of Article of War 24, and the requirements of paragraph 114a, Manual for Courts-Martial, 1928, and Winthrop's Military Law, 1920, page 328).

6. The Board of Review is of the opinion that the evidence shows

beyond a reasonable doubt the guilt of accused of all Charges and Specifications upon which he was arraigned and tried.

7. Accused is 24 years of age. The records in the Office of The Adjutant General show that accused is a graduate of Hampton Institute, Hampton, Virginia, 1941. He enlisted at Langley Field, Virginia, 31 March 1942 in the grade of private. Having graduated from Air Forces Officer Candidate School, Miami Beach, Florida, he was honorably discharged as a staff sergeant to accept the commission of temporary second lieutenant, Army of the United States, on 9 December 1942. In recommending accused for appointment to the officer candidate school, his commanding officer stated that he was of excellent character and that he had demonstrated outstanding qualities of leadership.

8. There is attached to the record of trial a letter to the reviewing authority, signed by all members of the court, the trial judge advocate, the assistant trial judge advocate, the defense counsel, and the assistant defense counsel, as follows:

> "1. It is the recommendation of the court, the trial judge advocate, assistant trial judge advocate, and defense counsel that the sentence of this court be set aside and that the accused be given a forfeiture of Three Hundred ($300.00) Dollars payable over a period of six months at Fifty ($50.00) Dollars per month.
>
> "2. The reason for this recommendation is the good record of the accused to date. It was shown by the evidence that he enlisted as a soldier and maintained a good record through Officers' Candidate School, as well as the school for Special Services at Washington & Lee University, Virginia. He has no previous convictions and there was nothing before the court to indicate that he has not maintained a proper attitude and has an enviable record of accomplishment in the Army. The accused is 24-6/12 years of age, and it is not believed by the court that he was fully aware of the seriousness of the offenses here committed."

9. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96 and mandatory upon a conviction of violation of Article of War 95.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 9 SEP 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 Neal Brown (O-567488), 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 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,
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-Ex. action.

(Sentence confirmed but execution suspended. G.C.M.O. 300, 6 Oct 1943)

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

SPJGK
CM 237225

6 AUG 1943

UNITED STATES	)	2ND INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp McCoy, Wisconsin, 28 June 1943. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private EUGENE J. CHESSON (18010535), Antitank Company, 38th 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 in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Private Eugene J. Chesson, Antitank Company, 38th Infantry, did, at Camp McCoy, Wisconsin, on or about June 1, 1943, wrongfully and without proper authority, apply to his own use, one Willys ¼ Ton 4 x 4 Truck, No. 203512, of the value of about $750.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Private Eugene J. Chesson, Antitank Company, 38th Infantry, did, at La Crosse, Wisconsin, on or about June 1, 1943, with intent to defraud, willfully, unlawfully, and wrongfully pass as true and genuine a certain instrument in writing, in words and figures, substantially as follows: "Post gasoline filling station LaCrosse, Wis. Date 6-2-43, Deliver to U.S.A. Reg. No. W-203512. Gasoline 5 gal. Albert Ender (Signature of

storekeeper) Pvt. Henry Johnson, A.T. Co., 38th Inf. (Signature of Dispatcher)" a writing which he, the said Private Eugene J. Chesson then well knew was falsely made and forged, to the prejudice of good order and military discipline.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of three previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, reduced the period of confinement to five years, ordered the execution of the sentence as thus modified, but suspended the execution of the dishonorable discharge. He designated the Sixth Service Command Rehabilitation Center, Fort Custer, Michigan, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 36, Headquarters 2nd Infantry Division, Camp McCoy, Wisconsin, 2 July 1943.

3. Having been warned "as to his rights under the 24th Article of War", accused made a statement to Second Lieutenant Irving Ratner, Antitank Company, 38th Infantry. The statement was reduced to writing, and signed and sworn to by accused. It was admitted in evidence without objection (R.8-9; Ex. B). In the statement, accused confessed that at 5:35 p.m., 1 June 1943, he and another enlisted man took a jeep from the 9th Infantry Motor Pool and drove to LaCrosse, where accused obtained five gallons of gasoline for the jeep from the Sixth Service Command Motor Repair Shop. After riding around LaCrosse until midnight, he left the jeep behind a shed (Ex. B). In addition to the matter contained in the written statement, accused told Lieutenant Ratner that the vehicle which he removed was a quarter-ton, 4 x 4 truck, commonly referred to as a jeep, and that if he and his companion had not been arrested, they would have driven further. Lieutenant Ratner testified that accused did not mention any official business in connection with his use of the truck (R.16,17). Accused also told Lieutenant Ratner that he obtained the gasoline from a civilian employee named Meredith and that he used the name "Private Henry Johnson" in obtaining it (R.9, 10).

It was stipulated that the employee, Harold Meredith, would testify that he approved the request of a Private Henry Johnson, Antitank Company, 38th Infantry, for five gallons of gasoline, and gave him the gasoline because he was driving a Government vehicle, Meredith believing that he needed the gasoline in order to return to his station. Meredith "met Pvt. Johnson" again on 3 June 1943, and recognized him as the soldier for whom he had approved the sale of the five gallons of gasoline (R.7; Ex. A).

Without objection there was admitted in evidence a document dated 2 June 1943, showing delivery by the Post gasoline filling station, LaCrosse, Wisconsin, to "U.S.A. Reg. No. W-203512", of five gallons of gasoline. On the document appear the name and designation "Pvt. Henry Johnson, A.T. 38th Inf.", as "Signature of dispatcher" (R.10; Ex. C). Lieutenant Ratner testified that he had obtained the document from the motor shop at LaCrosse, and he identified it as "a receipt for five gallons of gasoline issued to Private Chesson (accused) under the name of Henry Johnson" (R.10). (It is obvious that Lieutenant Ratner's identification was based on hearsay.)

There was evidence that at about 5:30 p.m., 1 June 1943, accused was not at his place of duty, whereupon a search was made of the company and regimental areas and of all the post exchanges on the post, resulting in his not being found. He was brought back by the Military Police on 2 June 1943 (R.12-13). Lieutenant Ratner testified that according to the "Ordnance book" the jeep was valued at either $740 or $750 (R.16).

4. With reference to the Specification, Charge I, there are only two items of evidence remotely supporting the confession: (a) that accused was away from the post at the time in question; and (b) that on some date prior to 3 June 1943 Meredith sold 5 gallons of gasoline to a soldier driving a Government jeep, who gave his name as Private Henry Johnson. In view of the admission by accused that he used that name in purchasing the gas, the evidence probably suffices to identify him as the soldier to whom Meredith sold the gas. But there is no evidence whatsoever of the misapplication of the vehicle. The Manual for Courts-Martial requires, in addition to the confession, evidence that "the offense charged has probably been committed" (MCM, 1928, par. 114a, p. 115). This requirement was not complied with. There was hearsay testimony that accused did not have permission to use the vehicle (R.11), but of course that testimony was incompetent. A search of the authorities reveals no case precisely in point on the facts, but in the opinion of the Board of Review, the Manual leads to the conclusion reached.

5. With reference to the Specification, Charge II, an oral confession by accused was admitted in evidence without objection (R.14-16). The confession was made to Captain John W. Fritts, the investigating officer, and there was no proof regarding the circumstances surrounding it, and nothing to show that accused was advised of his rights. By reason of this omission, the confession was incompetent (MCM, 1928, par. 114a, p. 116). The mere failure to object to its introduction does not amount to a waiver (MCM, 1928, par. 126c).

Disregarding the incompetent confession, the evidence consists of the following: (a) the confession made by accused to Lieutenant Ratner

that he used the name "Private Henry Johnson" in obtaining the gasoline; (b) the stipulated testimony of Meredith, already mentioned, to the effect that Meredith sold 5 gallons of gasoline to a Private Henry Johnson; (c) the receipt for the gasoline, containing the signature "Private Henry Johnson". There is no proof that accused signed the receipt. His confession that he used Johnson's name may be enough to justify an inference that he admitted signing it, but, as already noted, there must be evidence outside the confession "that the offense charged has probably been committed" (MCM, 1928, par. 114a, p. 115). To constitute the offense of passing or uttering a forged instrument, there must be proof that the instrument was a forgery (MCM 1928, par. 152c, p. 189). That element is a vital part of the corpus delicti. There is no extraneous proof that the instrument was forged. There is proof merely that Meredith sold the gasoline and that he was given a receipt containing the signature, "Private Henry Johnson". He did not even identify accused as the person to whom he made the sale. It is obvious that the proof completely fails to indicate "that the offense charged has probably been committed" (MCM, 1928, par. 114a, p. 115).

The case of Blacker v. State (74 Neb. 671, 105 N.W. 302) is directly in point. In that case the accused was convicted of uttering a forged deed. He confessed, and his confession included a recital of the methods used by him in forging the deed. Because there was no evidence aliunde that the deed was in fact a forged instrument, the court reversed the conviction. The case is especially striking in view of the fact that under the Nebraska rule of corpus delicti, slight corroborative circumstances are sufficient, - a more liberal rule than that announced by the Manual for Courts-Martial.

In a case analogous on principle, it was held that a conviction for embezzlement could not be upheld because there was no evidence, other than the confession, that accused ever came into possession of the money allegedly embezzled (Dig. Op. JAG, 1912-40, sec. 395 (11)).

Since the prosecution has failed to make out a case, it is unnecessary to consider the effect of the erroneous admission of the confession.

6. In view of our decision, we refrain from commenting upon other questions of law contained in the record.

7. 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.

1st Ind.

War Department, J.A.G.O. 9 - AUG 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½ and Executive Order No. 9363, dated July 23, 1943, is the record of trial in the case of Private Eugene J. Chesson (18010535), Antitank Company, 38th Infantry.

2. I concur in the opinion of the Board of Review, and for the reasons stated therein recommend that the sentence be vacated and that all rights, privileges, and property of which accused has been deprived by virtue of the sentence so vacated be restored.

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

T. H. Green,
Brigadier General, U. S. Army,
Assistant Judge Advocate General,
In Charge of Military Justice.

2 Incls.
Incl.1-Record of trial.
Incl.2-Form of action.

(Sentence vacated, by order of the Under Secretary of War. G.C.M.O. 204, 19 Aug 1943)

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

SPJGN
CM 237228

17 AUG 1943

UNITED STATES	)	SEVENTH SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Camp Crowder, Missouri, 18 June 1943. Dismissal.
	)	
Captain David A. Wolters, S. C. (0451510) 262nd Signal Construction Company.	)	

OPINION of 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 Charges and Specifications:

CHARGE I: (Disapproved by reviewing authority).

Specification 1: (Disapproved by reviewing authority).

Specification 2: (Finding of not guilty).

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

Specification 1: In that Captain David A. Wolters, 262nd Signal Construction Company, did, at Camp Crowder, Missouri, on or about December 15, 1942, with intent to deceive the SECRETARY OF WAR, and the COMMANDING OFFICER, Second Headquarters, Special Troops, Second Army, officially report by indorsement and orally to the said COMMANDING OFFICER, Second Headquarters, Special Troops, Second Army, that the amount of one thousand ninety-two dollars and sixteen cents ($1092.16) due Allen-Bennett Company Incorporated, Wholesale Grocers, Wadesboro, North Carolina, from canteen funds of the 262nd Signal Construction Company had been paid as of December 10, 1942, which report was known to be untrue, in that same was not paid until March 6, 1943.

Specification 2: In that Captain David A. Wolters, 262nd Signal Construction Company, being the Commanding Officer of the 262nd Signal Construction Company and Custodian of the Canteen Funds of said Company, did, while on maneuvers in North Carolina and Tennessee and while at Camp Crowder, Missouri, during the period of about June 30, 1942, to about November 11, 1942, negligently fail to keep proper accounts and records of said Canteen Funds, in that receipts and expenditures were not properly recorded and a council book was not kept and audited by a properly appointed council.

Specification 3: In that Captain David A. Wolters, 262nd Signal Construction Company, did, at Camp Crowder, Missouri, on or about December 15, 1942, with intent to deceive the COMMANDING OFFICER, Second Headquarters, Special Troops, Second Army, officially report to the said COMMANDING OFFICER, Second Headquarters, Special Troops, Second Army, that all obligations incurred by the canteen were paid which report was known to be untrue in that no payment had been made to Carolina Sandwich Company, Charlotte, North Carolina; James A. Leak Company, Inc., Wadesboro, North Carolina; Rockingham Bakery, Rockingham, North Carolina; the indebtedness to whom remained unpaid at that time.

Specification 4: In that Captain David A. Wolters, 262nd Signal Construction Company, did, at Camp Crowder, Missouri, on or about December 15, 1942, with intent to deceive the COMMANDING OFFICER, Second Headquarters, Special Troops, Second Army, officially report to the said COMMANDING OFFICER, Second Headquarters, Special Troops, Second Army, that all monies accruing to the canteen fund of the 262nd Signal Construction Company had been transferred to the company fund 262nd Signal Construction Company which report was known to be untrue in that a canteen fund account was held in the Commerce Union Bank, Lebanon, Tennessee and First National Bank, Neosho, Missouri.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 2, Charge I, guilty of the remaining Specifications, except the words "and a council book was not kept," in Specification 2, Charge II, and of both Charges. He was sentenced to be dismissed the service and forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specification 1, Charge I, and of Charge I, 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, recommending, however, that the execution of the sentence be suspended during the pleasure of the President.

3. The evidence for the prosecution shows that about 20 June 1942, the 262nd Signal Construction Company, the accused commanding, proceeded from Camp Crowder, Missouri, to Morven, North Carolina, to take part in Sixth Army Corps maneuvers. In the absence of post exchange facilities for his company, the accused verbally arranged with the Sixth Army Corps to purchase supplies for a company canteen, which he established, and "which was", one of his subordinate company officers testified, "we understood at the time, to be operated more or less off the record". The accused discussed with his two subordinate company officers "means of setting up some sort of a system to account for the exchange", but all three were "under the impression that a canteen did not need an accounting system that a regular army post exchange would need; that whatever profit was made would be turned over to the company, declare a dividend" (sic) "and that would be the end" (R. 13-14).

The canteen was operated for about two and a half months in that area, supervised by the company officers, the first sergeant and a sergeant detailed as clerk in the orderly room. Invoices for merchandise were filed in an envelope and the total of each purchase recorded in a note book. Proceeds from cash sales were deposited in an improvised change box, counted and recorded at the end of each day by the man behind the counter and the orderly room clerk, and delivered to the accused, who locked them in the company safe. Credit sales, recorded on separate index cards for each man to whom credit was extended, were settled each pay day. Proceeds of all sales were deposited to the credit of the canteen fund. No official council book was kept, but an inadequate one was, consisting of a record of receipts and expenditures. No official inspection of these accounts was made while the company was on maneuvers. An officer from the Sixth Army Corps Inspector General's Office once visited the canteen and made inquiries as to its system of operation, but did not ask to see the books (R. 14-18).

The canteen was operated in North Carolina for about two and a half months. It was closed about three days before the company moved to Tennessee, to take part in Second Army maneuvers in that area, where a similar canteen was operated for about two months in approximately the same manner. However, there the accused, pursuant to his written request, received permission from the commandant of special troops in that area, to operate a

company canteen in accordance with par. 2c, AR 210-65. The Tennessee canteen was closed about the middle of November 1942, shortly before the company returned to Camp Crowder (R. 14, 18-19, 35).

On 30 November 1942, Allen-Bennett Company, Wholesale Grocers, Wadesboro, North Carolina, wrote the War Department requesting co-operation in the collection of an indebtedness of $1,092.16, incurred by the accused's company in the operation of the North Carolina canteen. Through channels, on or about 8 December 1943, this letter reached Colonel Rinaldo L. Coe, Commanding Officer of special troops stationed at Camp Crowder, including the accused's company. Colonel Coe endorsed this communication to the accused for report of action taken. On 15 December 1942 the accused brought it back to Colonel Coe without having endorsed it, and, telling him the bill had been paid as of 10 December 1942, asked if the Colonel desired anything further. Colonel Coe replied he desired a written endorsement signed by the accused covering the action which he had taken. The accused thereupon wrote and signed an endorsement reciting "Basic communication complied with as of December 10, 1942" (R. 23-32).

At the same time, the accused assured Colonel Coe that there were no other bills outstanding to the best of his knowledge and belief; that his reason for not previously paying the Allen-Bennett account was his inability to obtain an itemized statement from Allen-Bennett; but that the accounts of the canteen had been closed out and all bills paid, and that all of the funds and profits had been turned over by him to the company fund (R. 28).

In the early part of March 1943, Colonel Coe again received, through channels, the same bill from the Allen-Bennett Company, who were then asserting it was still unpaid. Colonel Coe summoned the accused, who, in response to questions, again assured his commanding officer that he had paid the bill, giving various false excuses for his inability to produce a receipt, cancelled check or other evidence of payment (R. 29, 32).

Colonel Coe thereupon ordered the accused to pay the bill immediately if, as a matter of fact, it had not been paid, and, in any event, within 24 hours to give him - Colonel Coe - telegraphic assurance from the Allen-Bennett Company that the bill had been paid. Within the time stipulated the accused exhibited to Colonel Coe a telegram from Allen-Bennett dated 12 March 1943 acknowledging receipt of check covering the account in full. The bill was not in fact paid until 12 March 1943, on which date Allen-Bennett received the accused's check drawn on the company fund (R. 29, 30, 32).

In the meantime, some time prior to 27 February 1943, Major Fred D. Ordway was ordered to audit the company funds of which the accused was the custodian. According to Major Ordway's testimony, these funds "were in such terrible shape it was impossible to audit them. There were no records

for anything." The Major advised the accused "to establish a council book; get the thing in order; get his certificates of deposit and books from the bank." In compliance with Colonel Coe's instructions, Major Ordway then went over the accused's company funds and assisted him in getting them straightened out and in such shape that they could be efficiently audited (R. 5-9).

In April 1943 the assistant post inspector inspected the accused's records pertaining to his company fund and the canteen operations during maneuver period in the summer and early fall of 1942. He testified,

> "Generally speaking, the records were incomplete and not in good order. * * * I observed that the situation had been somewhat complicated by the concurrent maintaining of three bank accounts. * * * I cannot state the authority for maintaining more than one bank account. * * * I observed, as I continued through these records, that there was no evidence that an inventory had ever been made of the goods on hand in the company canteen in compliance with Par. 24 AR 210-65. I observed that there had been a certain confusion with respect to payment of obligations. I will explain what I mean. Certain obligations became due as a result of purely company obligations. Other obligations became due as a result of the operation of the company canteen. I found from my investigation of the records that some of these purely company obligations had been paid out of canteen funds when those canteen funds had not been regularly declared as a dividend to the company. * * * Finally, as far as the records themselves were concerned, AR 210-65 specifies that the operations of an army exchange, be it a post exchange, or be it an exchange operated by an organization shall be kept, as far as practical, in conformity with the Manual of Uniform System of Accounts. * * * In general, this Manual calls for a complete set-up of books such as would be found in a retail house in the commercial world. I found, however, no cash disbursements books; I found no cash receipt book; I found no cost of sales books or record of sales accountability."

His investigation disclosed no regular method of record maintenance, but an irregular one, which made certain assumptions necessary, for auditing purposes. "There was no manner in which the figures could be cross-checked and verified." (R. 36, 37, 43)

The following accounts, incurred in the operation of the accused's company canteen on maneuvers in North Carolina and Tennessee in the summer and early fall of 1942, were still unpaid when the charges were filed:

Carolina Sandwich Co., Charlotte, N. C.	$57.15
James A. Leak Co., Inc., Wadesboro, N. C.	15.57
Rockingham Baking Co., Rockingham, N. C.	23.04 (R. 33-34)

On or about 15 March 1943, when the accused transferred to his successor the funds, belonging to the 262nd Signal Construction Company, of which he was the custodian, these funds were deposited on three separate bank accounts, and had been so deposited on 15 December 1942, when the accused reported to Colonel Coe that all of the canteen funds and profits had been closed out and turned over by him to the company fund. These three separate bank accounts were designated as follows: (1) Canteen Fund 262nd Signal Construction Company, First National Bank, Neosho, Missouri. (2) Company fund, 262nd Signal Construction Company, First National Bank, Neosho, Missouri. (3) Canteen Fund 262nd Signal Construction Company, Commerce Union Bank, Lebanon, Tennessee (R. 16-17, 21, 34).

4. The evidence for the defense shows that the accused's physical condition was noticeably impaired while on maneuvers, despite which all the numerous wire-construction work-orders which were assigned to him were handled rapidly and efficiently, and various extensive and essential missions performed by his company in an excellent manner. As a result of his splendid showing on these maneuvers, he was promoted to the grade of captain (R. 31, 32, 46, 47, 51, 52).

He was hospitalized from 28 January to 26 February 1943, and again from 10 March to 7 June 1943, for cystitis, a very painful infection involving the bladder. His was a "full blown case" upon his first admission to the station hospital, where his history indicated that prior to his present assignment he had been hospitalized at Ft. Meade for the same condition, and had never been free of it since. Patients suffering from his complaint frequently have pain and marked discomfort during periods when their cases are not actually acute. Diagnosis of the accused's condition revealed chronic protastitis, cystitis and periostitis, all non-venereal, and other diseases of the osseous system, manifested by marked clubbing of the fingers and toes. A medical board, in connection with his last discharge from the hospital in June 1943, found him temporarily incapacitated for full military duty because of painful feet, and recommended "Limited Service of a type which will preclude prolonged marching or standing, with re-examination in six months for possibility of assignment to full duty" (R. 52-56).

5. The accused, after his rights as a witness had been properly explained to him, testified under oath that, shortly after his arrival at Camp Crowder he took his newly activated company to North Carolina for maneuvers, where,

> "We * * * just decided, since we were stuck out there in the sticks, that we would make some provision for the men to have at least a little comfort. All they had to sleep on were blankets and that was about all they had. We opened the canteen on the 10th and two days after that Lt. Alexander and I went to the Sixth Army Corps

Headquarters and inquired around and finally found that no formal. authority was necessary to open that canteen; that we were all right after all; that we were being placed on the list of authorized canteens by the Sixth Army Corps. The canteen continued operating and we were inspected by the Inspecting General of the Sixth Army Corps and he did not see anything wrong with the canteen and we compared things with other canteens already in the vicinity and found that our own canteen was being operated much the same way that their canteens were and on August 21st we departed the maneuver area but closed out the canteen a few days before then."

Army Regulations were not available, and he did not know that he was required to keep a council book (R. 60).

"We arrived in Lebanon, Tennessee", he continued, "on August 25, 1942, and a few days after that we decided to open a canteen but we learned that some formal authority was required to open a canteen and one day somebody in the Orderly Room asked me to sign a letter requesting that a canteen be opened. I don't know who wrote the letter but my name was tagged on to it. It was addressed to the Commandant Special Troops, Second Army, Lebanon, Tenn."

He knew nothing about the Army Regulations referred to in the letter, nor the source of the information on which the reference was based. He had repeatedly tried in vain to secure a set of Army Regulations for his company (R. 60, 61, 68, 69, 72).

In connection with the Tennessee canteen he opened a canteen fund account in the Commerce Union Bank of Lebanon. When he returned to Camp Crowder at the end of maneuvers, he deposited approximately $2,000 in a canteen fund in the Neosho Bank, representing cash taken in during the last few days' operation of the canteen in Tennessee, and subsequent collections from credit customers. He already had a company fund account in the Neosho Bank, but established the canteen fund separately, because all canteen accounts had not yet been settled. He had made arrangements with the wholesale merchandisers who had supplied the canteen, to pay their accounts in lump sums at the end of maneuvers.

"Nobody in that company that I know of was under any impression that an accurate account had to be kept of the operations. We thought that being on maneuvers, what was left or if any profit was made we thought that at the end of the maneuvers we would declare a dividend to the company and the company fund would absorb that profit."

He declared a dividend at the end of July, depositing something over $1,100 in the Company Fund account in the First National Bank of Neosho (R. 61-64).

He admitted the falsity of his statements to Colonel Coe on 15 December 1942, and the endorsement to the effect that the Allen-Bennett bill had been paid. The check for it was not made out until 6 March 1943. However, he had sufficient money in the total of all accounts to take care of it and all other outstanding canteen obligations. He was confused about the others and was then under the erroneous impression that they had been paid. He had never kept, or applied to the payment of personal obligations, any of the monies belonging to the company or canteen funds of which he was custodian. His misrepresentations to Colonel Coe were made "in order to get Colonel Coe off my neck", he testified. "It is not exactly any fun to walk around or sit around when you have bladder trouble and with that pain in my feet - it was about all I was interested in * * * for quite a while and I was about ready to say anything to get a little peace and quiet." (R. 64-68).

6. Specification 1, Charge II alleges a false official report that the indebtedness of $1,092.16 owed by the accused's company canteen fund to the Allen-Bennett Company had been paid as of December 10, 1943, made both verbally and by written indorsement with intent to deceive the Secretary of War and the accused's commanding officer. Every element of the offense alleged was not only shown by clear and uncontradicted testimony, but freely admitted by the accused, who testified however, to a painful and long continued illness - the existence and character of which were established by competent medical testimony - to which he attributed the mental attitude which impelled him to say "anything", just to get Colonel Coe "off his neck". This latter is a matter eligible for consideration in extenuation only, and constitutes no defense to the charge.

7. Specifications 3 and 4, Charge II, allege false official reports made with intent to deceive the accused's commanding officer, that all outstanding canteen accounts had been paid, and that all monies accruing to his canteen fund had been transferred to his company fund. The statements and their falsity are shown by the evidence. The accused testified he was under the impression the outstanding accounts had been paid at the time he falsely stated to his commanding officer that such was the case. The statement that he had closed out the canteen account and deposited the proceeds in the company fund was as purposeless as it was false, but it was made officially with intent to deceive. The evidence is sufficient to support the findings of guilty of both these specifications. The action by the reviewing authority indicates that the accused's illness was taken into consideration as an extenuating factor.

8. Specification 2, Charge II, alleges negligent failure to keep proper account of canteen funds while on maneuvers, in that receipts and expenditures were not properly recorded and a council book was not kept and audited by a properly appointed council. The evidence shows, in

connection with the establishment of the North Carolina canteen, that the accused had made an unsuccessful effort to procure pertinent Army Regulations, and that he labored under the impression that informal methods were authorized. An immediate need existed for a company canteen, and he simply made arrangements to procure a stock of merchandise, and started one, consulting informally with his company officers from time to time concerning operational details, and maintaining a crude system of records that required various "assumptions" when an audit was finally made. He signed a letter requesting authority to operate a company canteen in Tennessee "in accordance with par. 2c, A.R. 210-65." However, he operated it in the same manner that he had operated the North Carolina canteen. These canteens were profitably operated, and there is no convincing suggestion of misappropriation of funds. The accused was properly acquitted on the second Specification under Charge I, alleging embezzlement of $60.00; and the finding of guilty of the first, for embezzling the same amount on another occasion, was properly disapproved. His failure to keep proper records as shown was a breach of Army Regulations, to the prejudice of good order and military discipline, and properly charged as a violation of Article of War 96.

9. The action of the reviewing authority, approving so much of the sentence as provides for dismissal from the service, terminates with the following sentence: "It is recommended, however, that the execution of the sentence be suspended during the pleasure of the President."

10. The accused is 26 years of age. War Department records show enlisted service from 2 May 1939, until commissioned second lieutenant, A.U.S., 30 September 1941; temporary promotion to first lieutenant, A.U.S., 28 May 1942; temporary promotion to captain, A.U.S., 14 December 1942.

11. The court was legally constituted. No errors affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specifications; 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.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(332)
SPJGN
CM 237228

1st Ind.

War Department, J.A.G.O., 3 SEP 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 David A. Wolters, S.C. (0-451510), 262nd Signal Construction Company.

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 as approved by the reviewing authority, and legally sufficient 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 - Dft. ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed but execution suspended. G.C.M.O. 295, 4 Oct 1943)

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

SPJGQ
CM 237229

6 AUG 1943

UNITED STATES	FORT LEWIS, WASHINGTON
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 19 June 1943. Dismissal
First Lieutenant THEODORE C. BALDWIN (O-385528), Infantry.	

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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 Charges and Specifications:

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

Specification: In that 1st Lieutenant Theodore C. Baldwin, Infantry, (O.R.C.), Service Command Unit No. 1907, did, at his quarters, at Fort Lewis, Washington, on or about May 22, 1943, with intent to commit rape, commit an assault upon Ruth Marion Rankin, a female person, by striking her with his fist and knocking her down, forcibly removing her clothing, pushing her onto the bed and starting to get on top of her.

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

Specification 1: In that 1st Lieutenant Theodore C. Baldwin, Infantry, (O.R.C.), Service Command Unit No. 1907, did, at and near Mess Hall No. 4, Staging Area, Fort Lewis, Washington, on or about May 22, 1943, in the presence of enlisted men, wrongfully strike Ruth Marion Rankin in the face and body with his open hand, drag her by the hair, and forcibly thrust her into a Government truck.

Specification 2: In that 1st Lieutenant Theodore C. Baldwin, Infantry, (O.R.C.), Service Command Unit No. 1907, was, at South Tacoma,

Washington, on or about May 18, 1943, in a public place, to wit: The Monarch Fuel Company fuel yard at No. 3302 So. Center Street, drunk while in uniform.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and the Specification thereunder except the words "with his fists and knocking her down", also of Charge II and the Specifications thereunder except, as to Specification 1, the words "and body" and "drag" substituting for the latter word "grasping". No evidence of any previous conviction was submitted. 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 20 years. The reviewing authority approved only so much of the findings of guilty of Charge I and the Specification thereunder as involves a finding of guilty of assault and battery, in violation of the 96th Article of War, only so much of the findings of guilty of Specification 2 of Charge II as involves a finding of guilty of being drunk in uniform in a public place, in violation of Article of War 96, and only so much of the sentence as provides for dismissal from the service. The record of trial was forwarded for action under the 48th Article of War.

3. The evidence for the prosecution pertinent to Charge I and its Specification shows that a Miss Ruth Marian Rankin , who had been recently, but was not then, an employee in the Western Union Office at Fort Lewis, Washington, received a telephone call shortly after 9 p.m., Friday 21 May 1943 from the manager of that office, a Mr. Hiatt. During the phone conversation Mr. Hiatt introduced her to the accused. Accused then asked her if he might take her home that night when she was ready to leave her place of employment. Her hours of employment were from 4 p.m. to midnight. She told him that she usually went home by bus. At midnight when she left her place of employment accused was outside waiting for her and again asked her if he might take her home. Mr. Hiatt and some others arrived and after a general discussion Miss Rankin got into a truck driven by accused. Instead of driving her home accused took her to his quarters at Fort Lewis, where they were joined by Mr. Hiatt (R. 12, 13, 28, 30, 32, 34, 42). Shortly thereafter, Mr. Hiatt went out and brought back "quite a few" bottles of beer (R. 13, 41), and the accused and Mr. Hiatt partook of the beer (R. 13). After a time accused and Mr. Hiatt left the quarters. Later accused returned alone (R. 14, 33). Miss Rankin then stated that she had better go home, and accused said that he would go just as soon as he had finished his beer and had played a phonograph record (R. 14). The accused then "started getting funny", and Miss Rankin asked him "not to do that", and told him that she would like to "get home because it was getting late". The accused "insisted on getting fresh", and Miss Rankin told him if he did not stop she would hit him (R. 14). The accused held her hand so she couldn't strike him, and then she bit him, and he hit her then "the first time on the cheek" with his open hand (R. 14, 15, 37). After that the accused pushed Miss Rankin down on the cot and started to take off her blouse (R. 15). When

accused went over to the sink Miss Rankin buttoned up her blouse again (R. 15, 19). Accused came back from the sink and held her hands, unbuttoned her blouse and forcibly removed her underskirt, brassiere, skirt and girdle, but not her panties (R. 15, 16, 19, 48, 55). She never was completely undressed (R. 39). He made no attempt to remove her panties (R. 50). Miss Rankin resisted and tried to stop accused from removing her clothes, but he was sitting on her legs and holding her hands together with one hand (R. 15, 46, 47, 50). Miss Rankin made no outcry, explaining that she was too frightened (R. 15, 16), and she feared that he would hit her again (R. 53). The accused, before removing Miss Rankin's clothing, had pushed her so that she was lying down toward the back of the cot (R. 18, 47). When she was struck, everything went black and she saw stars and was so shocked that it sort of gave her "a funny feeling in the stomach" (R. 16, 18). After her girdle had been removed Miss Rankin picked up a pair of pajama trousers and of her own accord put them on for protection (R. 20, 21). The accused made one attempt to get on top of Miss Rankin, but she made an excuse to "go out to the back" because she "felt sick", and she then "went to the sink and threw up", and he never did actually get on top of her (R. 50, 51). After the accused struck Miss Rankin, he "pulled his shirt off" and sometime later he took off his trousers. He took off no additional clothing (R. 54). The accused got up a number of times to go to the sink, and every time he got up, Miss Rankin would get up too (R. 51). She was not in fear of rape, but was just "in fear in general" (R. 49). She testified she had nothing to drink (R. 40), but Private McMahon who talked to her at about 6 o'clock the next morning (R. 86) testified that he smelled liquor on her breath (R. 88). Finally Miss Rankin asked the accused if she "could go out to the back" and he said, "Yes". She left the barracks, and seeing that he was not going to come after her, and observing lights in a mess hall across the field, she ran there for help (R. 20). When she went out she "grabbed the sweater from the back of the chair that was sitting close to the shower room door" (R. 24).

In support of Specification 1 of Charge II the evidence for the prosecution shows that upon leaving the quarters of the accused, Miss Rankin ran across the field to a mess hall, the lights of which she could see, for help and asked the men there who were cooking breakfast if they would get her clothes from the accused (R. 20), but they stated that they "didn't dare to go up there because he was a lieutenant" (R. 20, 21). One of the men finally went up after the accused, and the accused came in a truck to take her back, but she "was scared to go back" and asked the men not to let the accused take her (R. 21). The accused then took her by the arms and shoulders, "in a strong grip", and, against her protests, pushed her toward the truck and pushed her in (R. 21, 22, 86). Miss Rankin jumped out of the truck, and the accused chased and caught her (R. 21, 22). This time he grasped her hair and used her hair to help put her back into the truck (R. 23, 48, 52). After he put her into the truck the second time the accused struck her on the chin (R. 21, 23, 24). This took place in front of the mess hall across the field from accused's quarters in the Staging Area, Fort Lewis (R. 23). Miss Rankin had no idea as to the time of day, but it was "in between daylight and night" and it "was not really light out" (R. 23, 24). Then a guard came up who reported the matter to Lieutenant Dunthorn, who came down (R. 24, 87). After Lieutenant Dunthorn's arrival Miss Rankin's clothes were brought to her at the mess hall (R. 24, 87). After she had dressed the guard escorted Miss Rankin to the

highway so that she could catch a bus (R. 24, 87).

Private Fred McMahon, 613th Ordnance Company, saw Miss Rankin in the mess hall shortly before 6 a.m., 22 May 1943 dressed in pajamas and an Army overcoat. Accused came in shortly thereafter. She cried, "Oh, don't let him take me". Accused picked her up and carried her out and put her in a truck and then got in himself. He did not see him strike the girl (R. 86, 88). McMahon smelled liquor on her breath and was under the impression that she had been drinking (R. 88).

At seven P.M. on 22 May 1943, Miss Rankin was examined by Major Leon B. Thomas, MC, at the Fort Lewis Station Hospital, and he found that she had a slight bruise on the point of the chin which might have resulted from a blow of the hand (R. 57, 58). In his opinion Miss Rankin was a virgin (R. 60).

The evidence of the prosecution pertinent to Specification 2 of Charge II shows that about 7:30 a.m. 18 May 1943 the attention of George A. Smith, an employee of Monarch Fuel Co. 3302 Center Street, Tacoma, Washington, was directed by his employer to a government truck parked under the open shed in the rear yard of the Fuel Company. Mr. Smith investigated and found the accused asleep on the seat of the truck. He was not visible until Mr. Smith looked into the truck. Accused was in uniform. Mr. Smith opened the door of the truck and smelled something like whiskey or beer but could not tell the source of the odor. He did not smell liquor on the breath of the accused (R. 62-64, 71). Mr. Smith awakened the accused. Accused grumbled something. He appeared the same "as any average person would be when they waked up out of a sleep" (R. 64).

The company yard is private property but customers have access to it. The truck was hidden from view as to persons on Center Street because of two buildings. There was a bluff over 20 feet in height to the rear. Persons using the highway on the bluff could, if they looked down in the yard, have seen part of the truck extending out from under the shed (R. 68, 70). The truck had a canopy over it (R. 71).

Although awakened by Mr. Smith accused fell asleep again until two Corporals, Kenneth D. Morris and David L. McTeer, arrived shortly thereafter and aroused him. They could not tell whether anyone was in the truck until the door was opened and they looked in (R. 75, 80). Corporal Morris described accused as under the influence of liquor but not drunk (R. 74, 78). His eyes were "blood stained". He was groggy and dazed. There was an odor of liquor on his breath. He talked "thick-tongued" (R. 74). He was not disorderly in any way (R. 78). Corporal McTeer also testified as to his condition. He did not smell the odor of liquor at all. At first, after awakening, accused did not answer the questions put to him but was soon in possession of his faculties. He could not say whether accused was drunk or sober, but accused acted "very much like a man who had been drinking" (R. 80, 81). In further amplification McTeer stated that accused was not drunk but was "partially under the influence of liquor". He would not classify a man as drunk until he is "just about out" (R. 82). Accused was a "little bit unsteady" on his feet when he got out of the truck (R. 83).

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

5. With reference to Charge I and its Specification the reviewing authority has approved only a finding of guilty of simple assault and battery under the 96th Article of War. An assault and battery is the application of force by material agencies to the person of another without his or her consent. For a man to fondle a woman not his wife, against her will, is an assault and battery (M.C.M. par. 149b. page 178). To strike or slap her, or to forcibly remove her clothes is also an assault and battery. It was established by the complaining witness, and not denied by the accused, that he slapped Miss Rankin and forcibly removed most of her clothing against her will. The intent to rape was not proven. The finding of guilty as to the Charge and its Specification, as approved by the reviewing authority is clearly supported by competent evidence.

In support of the finding of guilty of Specification 1 of Charge II the record discloses that Miss Rankin ran away from accused's quarters dressed only in his pajama pants and her own sweater across a field to a mess hall where enlisted men were cooking breakfast. She described how accused took her by the arms and shoulders and pushed her over towards and into a truck. At the first opportunity she jumped out and ran. Accused caught her and dragged her back. In pushing her back again into the truck he took hold of her hair. After he got her into the truck the second time he struck her on the chin. There was a bruise on her chin when she was examined later that day. She held on to the door of the truck trying to prevent being put back on it and asked "the men" if they wouldn't go along. The testimony of only one enlisted man was produced - it was that of Private McMahon, introduced by stipulation. He described how Miss Rankin appeared in the mess hall shortly before six o'clock in the morning and how the accused came in after her and picked her up bodily, carried her out, and put her into the truck. He saw no blows struck. He was under the impression that the girl had been drinking. He smelled liquor on her breath.

The acts performed by the accused were against the will of and without the consent of Miss Rankin. The acts of striking her on the chin, forcibly thrusting her into a truck, and grasping her by the hair, constitute an assault and battery in violation of the 96th Article of War. The evidence as related was sufficient to support a finding that the accused committed the acts alleged by the Specification. Similar conduct of the accused in assaulting Miss Rankin in his quarters by striking her and forcibly removing her clothes was considered by the reviewing authority a violation of the 96th Article of War and thus sustained. The record does not clearly show whether any of the enlisted men witnessed the accused's conduct during the second episode other than McMahon. McMahon saw no striking of blows but witnessed only the seizing, carrying and placing Miss Rankin in the truck. The assault and battery should therefore be treated in the same manner as in the first episode and sustained only as a violation of the 96th Article of War. It is the opinion of the Board that the evidence is not sufficient to sustain a finding that the accused's conduct during the second episode showed beyond a reasonable doubt that he was morally unfit to be an officer or to be considered a gentleman as contemplated by the 95th Article of War.

Specification 2 of Charge II alleges the accused was drunk in uniform in a public place. It was shown that the accused was asleep in a truck not visible to anyone unless they peered into the truck parked on private property under a shed. The accused was in uniform. Whether the place could be considered a public place or not is debatable. It is not necessary to answer that question because, in the opinion of the Board, the prosecution failed to prove beyond any reasonable doubt that the accused was drunk.

The usual method of proving drunkenness is by the opinion of witnesses who observe the person charged, together with a description of his conduct and demeanor. If a blood alcohol test is given, the resulting report, if properly identified, is also admitted in evidence.

In the case under discussion the blood alcohol report was not offered in evidence although it appears attached to the record, and shows that at 1:15 p.m., 18 May 1943, the accused was not drunk but was classified as intoxicated. The report showed the blood content to be 0.14 Gms. per 100 cc. There were three witnesses who observed the accused at the time he was awakened on the morning of 18 May 1943. The first witness, Mr. George A. Smith, stated that the accused acted like any other average person would act when awakened from a sleep. He detected an odor of alcohol when he opened the door of the truck, but could not tell the source of that odor. The other two witnesses testified that the accused was not drunk. They both stated there was evidence that he had been drinking. One detected the odor of liquor on his breath. The other did not. One stated that the accused was groggy and dazed and was unsteady on his feet when he got out of the truck. This condition could also be true of anyone who had been sleeping for some length of time on the seat of a truck and is awakened. However, it is difficult to sustain a finding that the accused was drunk in the face of the direct evidence given by the only two witnesses that the accused was not drunk. The Board is, therefore, of the opinion that the conclusions of these witnesses to the effect that the accused was not drunk should outweigh the descriptions that they gave of his demeanor and conduct, particularly when the accused's demeanor and conduct may be explained by the fact that he had just been awakened from heavy slumber. A doubt thus raised should be resolved in favor of the accused. The evidence therefore does not support the finding of guilty of Specification 2 of Charge II.

6. The record shows that accused is 26 years of age. He graduated from high school in 1936 and attended an agricultural college for one and one half years. He was commissioned Second Lieutenant, Infantry-Reserve 11 December 1939. He attended two tours of active duty of two weeks each. He was ordered to active duty 1 February 1941. On 21 December 1941 he was assigned to the Hawaiian Department. On 20 November 1942 following two months confinement in hospitals suffering from chronic duodenal ulcers he was assigned to Fort Lewis for duty in limited-service capacity with the Service Command Unit 1907. On 1 April 1942 he was promoted to 1st Lieutenant, Infantry-Reserve.

7. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the finding of guilty of Charge II, and Specification 1 thereunder as in-

volves findings of guilty of that Specification in violation of Article of War 96, legally insufficient to support the finding of guilty of Specification 2, Charge II, legally sufficient to support the finding of guilty of Charge I and its Specification and the sentence as approved by the reviewing authority and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of Article of War 96.

William A. Pounds, Judge Advocate

Earle S. Cohen, Judge Advocate

Herbert B. Fredman, 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 First Lieutenant Theodore C. Baldwin (O-385528), Infantry.

2. I concur with the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specification 2 of Charge II (drunk while in uniform in a public place), is legally sufficient to support the findings of guilty of Charge I and its Specification, as approved by the reviewing authority (assault and battery in violation of Article of War 96), and of Specification 1 of Charge II (assault and battery as a violation of Article of War 96, and not of Article of War 95). I concur with the Board of Review that the record of trial is legally sufficient to support the sentence as approved by the reviewing authority (dismissal) and to warrant confirmation thereof. I recommend that the findings of guilty of Specification 2 of Charge II be disapproved and that the sentence be confirmed and carried into execution.

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

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence to dismissal confirmed. G.C.M.O. 289, 2 Oct 1943)

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

SPJGH
CM 237265

11 AUG 1943

UNITED STATES	)	NINTH UNITED STATES AIR FORCE
v.	)	Trial by G.C.M., convened at Hergla North, Tunisia, 16 June 1943. Dismissal, total forfeitures and confinement for three (3) years.
Captain JAMES F. FOWLER (0-561032), Air Corps.	)	

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 Captain James F. Fowler, A. C., Headquarters, 340th Bomb Group, then Lieutenant, 340th Bomb Group, did, on the U. S. SS West Point, while in route from the United States to an undisclosed destination overseas, covering a period from February 14, 1943, to April 10, 1943, feloniously embezzle by fraudulently converting to his own use the sum of Five Hundred Dollars ($500.00), lawful currency of the United States, entrusted to him by Private Chester E. Tobias, 486th Bomb Squadron, on or about February 15, 1943, this sum being the property of the said Pvt. Chester E. Tobias.

Specification 2: In that Captain James F. Fowler, A.C., Headquarters 340th Bomb Group, then Lieutenant, 340th Bomb Group, did, on the U.S. SS West Point, while in route from the United States to an undisclosed destination overseas, covering a period from February 14, 1943, to April 10, 1943, feloniously embezzle by fraudulently converting to his own use the sum of One Hundred Thirty Dollars ($130.00), lawful currency of the United States,

entrusted to him by Sergeant Joseph F. Skipper, 486th Bomb Squadron, on or about February 15, 1943, this sum being the property of the said Sgt. Joseph F. Skipper.

Specification 3: (Finding of Not Guilty).

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

Specification 1: In that Captain James F. Fowler, A.C., Headquarters 340th Bomb Group, then Lieutenant, 340th Bomb Group, did, at San Francisco, California, on or about February 13, 1943, as the commanding officer having cashed a check in the sum of Two Hundred Eighty Four Dollars ($284.00), more or less, representing ration allowance to enlisted personnel of the 340th Bomb Group, willfully and wrongfully appropriate and convert same to his own use without consent of those entitled thereto.

He pleaded not guilty to all Charges and Specifications, and was found not guilty of Specification 3, Charge I, and guilty of all other Specifications and the Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that the accused was Adjutant of the 340th Bomb Group, that the organization was in Walterboro, South Carolina in December 1942 and until about 30 January 1943, moved by rail to Camp Stoneman, California, sailed from San Francisco, 14 or 15 February 1943 on Steamship West Point, and arrived at Kabrit, Egypt about 29 March 1943. During the voyage there was a great deal of heavy gambling among the officers, and accused participated in some of the games. At first he won, but later lost, and on one or two occasions stated that he was "broke or busted" (R. 5, 7, 16, 23-25, 33-34, 41, 45-49).

a. Specification 1, Charge I: At the beginning of the voyage, Private Chester E. Tobias spoke to Captain (then Lieutenant) William M. Pearlstein with reference to finding a place for $500 that he had won in a dice game. Accused was present at the time, stated that he had a safe, and invited Tobias to come to his compartment later. Tobias and Corporal Sidney C. Pearl went to the room of accused, and Tobias asked, "Will you put my money away now, sir". Accused replied, "Yes, there is a safe here and you can put it in here". Tobias counted the $500, mostly in five and ten dollar bills, and gave it to accused, who also counted it. Captain Pearlstein was in the compartment at the time. Tobias did not ask for his money during the voyage, but about 2 or 3 April, after landing at Kabrit, Egypt, he went to headquarters with Corporal James F. Garrity and Private Peter J. Lannon, and asked accused for his money. Accused stated

that he had forgotten the key and instructed Tobias to wait outside. He waited two or three hours, during which he twice made inquiry for accused and was told that accused was not in. When accused returned he stated again that he had forgotten the key, and advised Tobias to return the next morning. Garrity and Lannon did not go inside with Tobias and did not hear the conversation. When Tobias returned the next morning accused stated that the money had been stolen and also his gun, and that accused was responsible for it, would pay it back, and somehow would get it. Tobias did not at any time receive the $500 nor any part of it from the accused (R. 5-9, 14-15, 18-19, 21-24).

Before they left the boat at the port of Tewfik, on the last day of the journey, accused stated to Captain Pearlstein that the safe had been rifled and that the money he was keeping in trust for Tobias, along with a gun, cartridge belt and cartridges, had been stolen. Accused stated that any key would open the safe, that it had been rifled between the last time he looked at it and "the present time", and that he would make up the money "in allotments or pay it off some way". From the port at Tewfik they proceeded by train (one day's journey) to Geneifa and then the same day to Kabrit (R. 28, 30-32).

b. Specification 2, Charge I: During the voyage from San Francisco to Egypt, Sergeant Joseph F. Skipper delivered to the accused for safekeeping $130 (thirteen $10 bills), which he had won in a crap game. Sergeant Skipper understood that one of the other men had placed some money with accused, and for that reason asked him to keep it and wanted it kept in a safe. Accused stated that he would be glad to keep it for Sergeant Skipper. This occurred on the promenade deck, several men were "around there" but Sergeant Skipper did not know their names, and he did not ask for nor receive a receipt. Four or five days after they arrived at Kabrit, Sergeant Skipper went to headquarters and asked accused for the $130. Accused advised him that the safe had been rifled and that all the money and a gun were gone, but that he could expect restitution or reimbursement, and did not deny that Sergeant Skipper gave him the money. Sergeant Skipper did not receive the $130 nor any part of it (R. 16-17).

c. Specification 1, Charge II: During December 1942, while at Walterboro, South Carolina, a number of men in the organization were authorized to live off the post and ration separately. Their names were shown in the morning reports (Exs. 2 and 3). Before the organization left Walterboro, a letter containing a check for approximately $280, came to the office. Accused advised Technical Sergeant George R. Vohries that the check was for rations, requested him to make up a list of the men rationing off the post, and remarked that he had this money and could not do anything with it. On the train between Walterboro and Camp Stoneman, accused mentioned the check to Sergeant Vohries and Master Sergeant Paul J. McElroy, and asked if the former still had a list of the

men who had ration money coming to them. Sergeant Vohries handed the list to accused. Later, at Camp Stoneman when the men asked Sergeant Vohries about their ration money Sergeant Vohries was informed by accused that the check was made out to the Commanding Officer and could not be cashed. About 1 May at Sfax, Sergeant Vohries again spoke to accused about the money and accused stated that he did not know where the check was. After an investigation started, accused asked Sergeant Vohries to make out another list. Sergeant Vohries then, in the latter part of May, prepared a list of the men due rations (Ex. 4), and delivered it to accused. This list contains names of 20 men, and shows total rations due them of $276.71. It was stipulated that 17 named men of the organization, 14 of whom (subject to some discrepancies in spelling) appeared among those on the list (Ex. 4), would testify that they lived off the post at Walterboro, South Carolina during certain dates in December 1942 and were entitled to ration funds, and that they had never received any part of these ration funds from accused or anyone else (R. 33-43).

After he had been advised that he need not make a statement and that if he did it would be used against him, accused made a written statement (Ex. 5) to Major Hugh E. McConville, in substance as follows: The check was "addressed" to the Commanding Officer and had the word "Rations" on it. Accused delivered the check to "Colonel Mills", later it was "turned over" to accused, who held it until he found out what it was for, and then Colonel Mills had gone. Accused asked the Judge Advocate at San Francisco "how it could be cashed so I could pay the boys off". He was referred to the Finance Officer, who instructed him to sign his name "as commanding". Most of the money was for men who had preceded them and the remainder was for men who were to be with the organization and "some who weren't". "So" he held the money several weeks on the boat, and "to make it brief" loaned the money out as he "figured" it would be impossible to pay all the men until they arrived and the unit got together, and "this individual" would reimburse him and everything would be "square". "So far the individual hasn't kicked through and that is where the matter stands now". The amount involved was about $284, the accused had not reimbursed any of the personnel, and he did not care to name the individual to whom he loaned the money (R. 43-45).

4. For the defense it is shown by testimony of Major Carl Kisselman, defense counsel, Lieutenant Colonel Adolph E. Tokaz, First Lieutenant Anthony J. King, Captain Charles J. Cover, and Major Malcolm A. Bailey, that accused was a man of ideals, patriotism and principles, had a good reputation for integrity and honesty, by diligence and enthusiasm did much to build up the 340th Bomb Group, and was "one of the most respected and admired men" in the group (R. 50-51, 54-55, 57-60, 62-63).

On cross-examination and questions by the court it is shown that Major Kisselman learned two or three days after they arrived at

Kabrit that some money was missing, accused spoke of the $500 only and said that he held himself responsible for repayment of the money, and Major Kisselman assumed that satisfactory arrangements had been made. During the voyage the safe was kept in a hold in the forward part of the ship, the door to the hold was kept locked, and it was necessary to make arrangements with the officer in charge of the hold in order to enter it. The hold was filled with impedimenta and baggage of several organizations. The safe of accused was a standard field safe and had a common type lock with a flat key, but the wrong key would not turn in the lock. When accused told Major Kisselman that the $500 had been stolen from the safe and that a gun had disappeared, he stated that the safe had not been blown open or the lock smashed, but that whoever had done it had found some means of opening it and relocking it. Captain Cover had to have someone go with him and open the door when he went to the hold where equipment was stored (R. 51-54, 60-61).

Accused testified that he entered the service 16 October 1941, attended Officer Candidate School, was commissioned a second lieutenant, was awarded a "soldier's medal", was assigned to Columbia Army Air Base, had a large part in the activation of the 340th Bomb Group, and served as Group Adjutant. Before going overseas he gambled very little and only for small stakes. The ground echelon of the group, of which he more or less assumed command, moved to Camp Stoneman, California, and then embarked on the West Point on 15 February. There was general gambling, both among officers and enlisted men, on board ship, and accused participated spasmodically. The first day he won $375 in a crap game. After the first 10 days he lost steadily. During the voyage accused lost about $900 taking into consideration his winnings. He meant that he lost $525 plus the $375, and he borrowed about $75. He borrowed $200 from his "defense counsel" and repaid $100, borrowed $120 from Lieutenant Pearlstein and repaid $20, borrowed $25, $25, $20, $30, and $80 from five other officers, all of which was repaid except the $80. The amounts repaid were from his first pay received at Kabrit. After leaving Australia he had a bad streak of luck, began borrowing, in less than a week gave up gambling, and thereafter devoted his time to reading and writing (R. 64-67, 71-72).

At the suggestion of Captain Pearlstein, Private Tobias gave the accused $500 to be placed in the safe for safekeeping. The safe was in the hold and the entrance was through a small door. In order to enter the hold accused had to obtain permission from the officer in charge who accompanied him into the hold. After placing the money in the safe, accused did not "go into" the safe again prior to arriving at Kabrit. When Private Tobias came to see accused about the money at Kabrit, the safe had just arrived. Accused suddenly realized that he did not have the key, so stated that he would have to go to the barracks and get the key. He started to the barracks, but there were "a million and one things to do right then", and after two hours he returned to

headquarters without having gone to the barracks, Tobias was still there, and accused told him he was sorry and to return the next morning. When accused opened the safe in the presence of several men, it opened normally and he made the comment that he had $500 in there that "belonged to another fellow". At first he did not discover that the $500 was missing, but finally said, "By God, the money and the gun is gone". He was referring to a gun which Captain Varnol G. Farmer had placed in the safe. Accused later learned that the gun had not been stolen, as Captain Farmer had obtained the key from accused and gone to the safe during the voyage to get his cleaning materials which were with the gun. When Tobias returned, the morning the safe was opened, accused told him the safe had been opened and the gun and money were gone, and that accused would see that he received his money back. The accused made plans for repayment and intended to repay the money regardless of the outcome of the trial. He had received no pay since the one time shortly after landing (R. 67-71).

Accused had no recollection that Sergeant Skipper gave him $130 for safekeeping, but would not deny that it was given to him, and expected to pay that amount to Sergeant Skipper (R. 68-71).

On cross-examination and questions by the court, accused testified that he had about $25 when he went on the boat and two or three dollars when he left, that he won and lost at gambling and finally had a losing streak. He sealed the $500 of Tobias in an envelope, put Tobias' name and the amount on it, and placed it in the safe. The safe was "pretty full", no other money was placed in it, and it was not opened again until the day the money was missed. He reported the loss to his commanding officer, but did not request an investigation. The safe was not damaged and there was no noticeable disorder in it. The gun in the safe belonged to Captain Farmer. The accused did not, before leaving the boat, tell Captain Pearlstein that the money had been stolen. He did not remember that Sergeant Skipper gave him any money, but if it was given to him, he "used it in gambling and * * * wasn't supposed to use it". Accused did little drinking on board ship (R. 72-77).

Captain Varnol G. Farmer placed a pistol, cleaning kit and full equipment in the safe of accused. During the voyage when he asked accused to get the pistol for him, accused gave him the key to the safe, and Captain Farmer removed the pistol and cleaning materials and returned the key. It was his recollection that he told accused he had removed the pistol. This was about a week or a week and a half after leaving San Francisco. In order to get to the safe it was necessary for him to go to the officer in charge of the hold to unlock the hold. The safe was in the bottom of the hold with several heavy boxes on top, which they had to remove in order to get to the safe. Captain Farmer did not see any money nor an envelope which might have contained money, in the safe,

and did not remove any money. He locked the safe and put the boxes back on top as they were. Staff Sergeant Frank Tureck and the officer in charge of the hold were present, and the former assisted Captain Farmer. Accused told him the pistol was missing from the safe (R. 77-81).

Captain Robert F. Sommers and Chaplain James A. Cooper were present on the occasion when accused opened the safe at headquarters at Kabrit, and he "mentioned that he had lost a gun and a sum of money" (R. 80-81).

5. In rebuttal it is shown that Tobias delivered the $500 to accused in "Five and tens", about 1:00 p.m., and it was last seen in accused's hand. After accused told Tobias the money was gone, he said he would pay it back somehow and that his gun was missing also. Sergeant Skipper delivered the $130 to accused about three or four o'clock in the afternoon, a day or two after Tobias turned in his money and two or three days after the beginning of the voyage. At the time accused was standing on the deck, enjoying the scenery, and was in complete control of his mind although he may have had a drink or so. Sergeant Skipper identified himself, asked accused to take the money, and accused took it and put it in his wallet. The conversation lasted not more than five minutes. When he asked for his money at Kabrit, accused did not express surprise, and told him the money had been stolen. Sergeant Skipper reminded him of the incident on the boat, and accused seemed clearly to remember the occasion of Sergeant Skipper giving him $130 (R. 81-85).

Staff Sergeant Frank Tureck, called as a witness by the court, assisted Captain Farmer in removing a pistol from the safe in the hold of the ship. He saw no money nor envelope in the safe, and no one removed any money (R. 86-87).

6. Accused, recalled as a witness, testified that at Kabrit he showed no surprise when Sergeant Skipper said he had $130 in the safe, because he knew Tobias and Skipper were friends and assumed that the $130 was part of the $500 that Tobias gave him. Accused was not intoxicated at any time on the boat. There were originally two keys to the safe, but he did not know who had the other, nor whether it still existed. It was more or less used as his own personal safe (R. 87-88).

7. a. As to Specification 1, Charge I, it is shown without contradiction that shortly after the 340th Bomb Group left San Francisco by boat, Private Chester E. Tobias delivered to accused for safekeeping $500 in currency, which Tobias had won in a dice game, that it was intended that the money be kept in a safe of accused which was in the hold of the ship, and that after they arrived in Egypt about six weeks later, Tobias asked for his money, but accused did not then nor later deliver it to him. These facts unexplained constitute a clear case of embezzlement.

As a defense accused claimed that he placed the money in a

sealed envelope bearing the name of Tobias and the amount, placed the envelope in his safe in the hold of the ship, locked the safe, did not open it again until after he arrived in Kabrit, Egypt, and then found that the money had been stolen from the safe. Considered in the light of the attendant circumstances, this uncorroborated explanation offered by accused is not convincing.

The safe was stored in the bottom of a hold of the ship, under several heavy boxes which had to be removed in order to reach the safe. The door to the hold was kept locked and no one could enter the hold except by permission of an officer in charge who would unlock the door. Accused claimed that the safe had not been broken open, and that someone had apparently unlocked it with a key and then relocked it, as it opened normally at Kabrit, according to accused. Accused possessed the only known key to the safe although there had at one time been another key. When Captain Farmer and Sergeant Tureck opened the safe about a week and a half out of San Francisco, they did not observe any money nor an envelope that might contain money, and they did not remove any money. Captain Pearlstein was positive that accused stated to him on the boat at Tewfik at least one day before they arrived at Kabrit, that the money had been stolen from the safe; but accused answered Tobias' request for the money at Kabrit, several days after they left the boat at Tewfik, by stating that he did not have the key to the safe. The next day he advised Tobias that the money had been stolen, and also that a gun had been stolen from the safe, but claimed that he later learned that Captain Farmer had removed the gun. It was the recollection of Captain Farmer that, at the time, he advised accused that he had removed the pistol. Accused gambled heavily on the voyage and lost.

> "Any adult man who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, cannot complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence." (Dig. Op. JAG, 1912-40, sec. 451 (20); CM 123488; CM 203869).

> "An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting. The return of the amount of the fund post litem motam is of no probative value, except as an admission that he was responsible for it. It does not tend either to negative or to excuse the offense charged." (Dig. Op. JAG, 1912-40, sec. 451 (20); CM 123492).

b. As to Specification 2, Charge I, it was admitted by accused that if Sergeant Skipper gave him money to keep for him, accused used it in gambling, but he claimed that he did not remember that Sergeant Skipper gave him the money, though he would not deny it. The evidence shows beyond any reasonable doubt that Sergeant Skipper did deliver $130 to accused. The testimony of Sergeant Skipper was clear and positive that he delivered 13 ten dollar bills, on the promenade deck, at a time when accused was viewing the scenery, and that accused placed the money in his wallet. At Kabrit when Sergeant Skipper asked for the money and referred to his having delivered it to accused, no denial was made, but accused stated that the money had been stolen. It is most improbable that an officer receiving $130 from an enlisted man, in trust for safekeeping, would forget about it, or be in doubt as to whether it had been delivered to him. Accused did not deny receiving the money from Sergeant Skipper.

c. As to Specification 1, Charge II, it is shown that accused received a check for about $280, representing ration money to be paid to some of the men. He admitted to Major McConville that he obtained advice as to how to indorse and cash the check, which was payable to the Commanding Officer, held the money for several weeks on the boat, and then loaned the money to an unnamed person. It was stipulated that 14 of the men shown to be entitled to the money would testify that they had never received any part of these ration funds.

To constitute a conversion of money or property so as to make out a case of embezzlement, accused need not appropriate the property to his own use, but is guilty if he fraudulently appropriates it to the use of another (20 C.J. 427-429). Whether accused uses the money converted himself, or loans it to others, is immaterial (Russell v. State, (Ark.) 166 S.W. 540).

8. Careful consideration has been given to petition for clemency by defense counsel and assistant defense counsel dated 19 June 1943, application for clemency by accused dated 23 June 1943, and request for clemency by 10 officers of 340th Bomb Group dated 6 July 1943.

9. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 16 October 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty 5 August 1942; appointed temporary first lieutenant, 1 December 1942; appointed temporary captain, 15 May 1943.

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 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 93rd or 96th Article of War.

Lester S. Hill Jr., Judge Advocate.

Samuel M. Driver, Judge Advocate.

F. J. Letterhos, 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 Captain James F. Fowler (0-561032), 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 embezzled from one enlisted man $500 which had been entrusted to him for safekeeping, $130 from another, and converted to his own use approximately $284 of ration funds due men of his organization. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for three years be confirmed and carried into execution.

Consideration has been given to a clemency request from ten officers of the organization of accused, that the confinement imposed be suspended or remitted. The reviewing authority considered and denied the request for clemency. In view of the nature of his offenses I believe that the confinement should be executed.

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 the signature of the Secretary of War, transmitting the record to the President for his action and a form of Executive action carrying into effect the recommendation made above.

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

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

(Sentence confirmed but that part providing for confinement at hard labor remitted. G.C.M.O. 227, 11 Sep 1943)

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

SPJGK
CM 237279

9 SEP 1943

UNITED STATES	)	SIXTH AIR FORCE
v.	)	Trial by G.C.M., convened at U. S. Army Air Base, Talara, Peru, 7 June 1943. Dismissal.
Major HERBERT M. JONES (O-336875), Quartermaster Corps.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: In that Major Herbert M. Jones, Quartermaster Corps, was, at U.S. Army Air Base, Talara, Peru, on or about January 10, 1943, drunk and disorderly in the Officers Club.

Specification 3: In that Major Herbert M. Jones, Quartermaster Corps, did, at Talara, Peru, on or about March 14, 1943, unlawfully enter the dwelling of Joseph Guthrie without authority.

Specification 4: In that Major Herbert M. Jones, Quartermaster Corps, was, at Talara, Peru, on or about March 14, 1943, drunk while in uniform in the company of enlisted men in the home of Joseph Guthrie.

The accused pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority disapproved the finding of guilty of Specification 1 (drunk and disorderly in quarters), 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:

On the night of 10 January 1943, a dice game was in progress in the Officers' Club at the United States Army Air Base, Talara, Peru. Major Samuel L. Stevens, Air Corps, United States Army Air Base, Talara, Peru, stated that the game was going on when he entered the Club. He estimated that 10 or 15 officers were playing - "Just as many as could stand around the table". The accused was in the game. Playing dice at the Club was a common occurrence, especially around pay day. A special table had been arranged for that purpose. Major Stevens stated that during the progress of the game Captain Sol Heinemann, Medical Corps, wanted to shoot the dice and accused objected, saying that it was not his shot. Accused "struck at" or struck Captain Heinemann. There was some further argument, following which accused was "pushed" out of the door. Major Stevens stated without objection, "I think the major (accused) was drinking rather heavily" (R.22). Profanity was being used by the accused and by others who were participating in the game, and others in the game, besides the accused, were drinking and using profanity "such as you usually hear around a crap game" (R.23).

Major Henry S. Howard, Air Corps, Headquarters and Headquarters Squadron, 336th Service Group, United States Army Air Base, Talara, Peru, was not in the crap game but was standing near Major Stevens, just a few feet from the game table. According to Major Howard's version:

> "* * * A commotion started, and there were some wild swings exchanged by various people, of whom Major Jones was one. Then there seemed to be a lull in the situation, and the next thing I knew, Major Jones [accused] was more or less bodily carried out * * *." (R.25).

About 15 minutes later Major Howard found accused lying on the ground outside the Club. He shook accused a little bit, after which accused recognized him and got up. Major Howard stated that he "more or less" assisted accused to his quarters. Accused had the smell of liquor on his breath and in the opinion of witness he was intoxicated (R.26).

First Lieutenant Robert E. Boak, Air Corps, 397th Bombardment Squadron, 10th Statistical Control, APO 832, testified through a deposition that he was a participant in the crap game. His version of the episode was that accused entered the game about 9 o'clock. Accused's face was flushed and he seemed confused in his actions. He dropped money and had difficulty in recovering it. His voice was loud. He made an error regarding the

game and refused to permit the game to continue until he had his way. Deponent stated that accused attempted to provoke a fight. He attempted to strike "Captain Dowtin" and Captain Heinemann, who "threw the officer" (accused) out of the Club. On direct examination deponent stated that only accused used profane language, but on cross-examination he contradicted himself by stating that others, including himself, were using profanity (R.21; Govt. Ex. C).

Captain Heinemann's account of the incident was that some question arose as to whose turn it was to "shoot the dice". He stated that accused insisted that it was his (accused's) turn and refused to let the game proceed unless he was allowed to have his way. The general opinion was that accused was in the wrong. Captain Heinemann stated that accused finally "took a swing" at him but missed and that after that was settled accused argued with other officers in the game. Witness described the swing as a "sort of a round-house". He stated that there were about 15 officers in the game; that some of them were drinking; and that in his opinion accused was drunk. On cross-examination Captain Heinemann stated that there were other arguments during the game in which accused was not involved; that there was nothing extraordinary about this particular incident except perhaps "It was a little bit more violent and went a little further than the usual incident * * *." (Govt. Ex. D).

With reference to Specifications 3 and 4, Mrs. Charlotte Guthrie, an employee of the Post Engineer, Talara, Peru, stated that she had known the accused since about 20 November 1942. Accused had been a friend of the family since that time. She and her husband had accepted his hospitality at the Officers' Club and other places on more than one occasion and accused had been an invited guest in their home 12 or 15 times. On some occasions he would stop by their home without invitation. On the night of 14 March 1943, after Mr. and Mrs. Guthrie had retired and after all the lights were out, Mrs. Guthrie heard a commotion outside. The front door was locked. The next thing she knew:

> "* * * the crowd came around from the front door to the back door and through the back door, and they were lighting their way with a cigarette lighter from the kitchen to the dining room and through to the living room, opposite the bed room. Mr. Guthrie, my husband, got up and went into the living room. I had to go through to another bed room to get a robe, and I went into the kitchen, and there I found one enlisted man standing at the door. I got him and took him into the middle bed room and sat him down and started to call Colonel McElvain but I decided I wouldn't bother him since it was Sunday night and he would probably be home. I didn't see Major Jones, but

> I heard my husband calling the name and asking him what the hell he was doing there, and to get out and stay out. * * *" (R.14).

Mrs. Guthrie stated that "they" rang the bell and "banged" on the front door several times before entering the house through the rear door. She did not know the soldier but recognized him as an enlisted man by his uniform (R.15).

Joseph A. Guthrie, of the Accounting Department of the International Petroleum Company, a resident of Talara, Peru, and husband of the witness Mrs. Charlotte Guthrie, corroborated the testimony of his wife and described the entry into the house substantially the same as did Mrs. Guthrie except he explained that the back door through which accused entered was unlocked (R.18). Mr. Guthrie stated that in his search for the intruders he found the accused "and some other fellow" at the front door and ordered them out. Witness then went to the kitchen where he found two enlisted men. One left immediately. Mrs. Guthrie "grabbed" the other one by the arm and took him into the bedroom by the telephone to call the "colonel" but decided not to do so at that hour (10:30 p.m.) (R.12). Referring to the accused, Mr. Guthrie stated that when he first saw him he was at the front door on his knees trying to unlock the latch. Mr. Guthrie was of the opinion that accused was drinking (R.17,18). He stated that he did not turn the lights on until after accused had left. He corroborated the statement of Mrs. Guthrie with respect to the friendly relations which had existed between his family and accused. He stated that accused had been assured of his welcome at their home which, of course, did not contemplate such an unauthorized intrusion. He stated that the accused later called by telephone and apologized for the incident and explained that he was "tight" at the time (R.20).

For the defense First Lieutenant John B. Hayley, Quartermaster Corps, United States Army Air Base, Talara, Peru, testified that as he entered the Club on the night of 10 January 1943 he:

> "* * * looked toward the crap table, and there was the usual amount of loud talking, swearing, and talking to the dice, so I went over and looked at the table -- I couldn't get around it, because there were so many officers around the table. * * * I turned around and started to go toward one of the other tables and have a drink. As I turned around, I heard Captain Heinemann swear very loudly and say something about Major Jones [accused] -- I didn't hear distinctly what it was, and I didn't pay much attention to it * * *. A few minutes later, I heard a rush toward the door. I just looked back, and didn't see anything -- I just saw a whole bunch of officers rush out, and I didn't even know what happened and someone said

some other officers were rushing Major Jones out of the club. * * *" (R.27).

Corporal John F. McDonough, 208th Quartermaster Detachment, United States Army Air Base, Talara, Peru, was on duty as temporary bartender at the Officers' Club on the night of the incident referred to. He stated that everything was "going along quite well". He served a drink to the accused and then accused went back to the crap game. According to the corporal's version a lieutenant picked up the dice out of turn and there was an argument over the "roll". In the course of the argument accused stated that he would sell the roll to the lieutenant for 100 soles. The lieutenant refused the offer and accused placed the dice on the table and remarked that there would be no more crap shooting that night, whereupon Captain Heinemann picked up the dice. Accused said something to Captain Heinemann to the effect that if he rolled he would be sorry, "and Captain Heinemann just took the dice and rolled them". Accused made a move toward Captain Heinemann but witness did not know whether he struck the captain or "just swung at him and missed". Witness stated that most of the officers were drinking and that accused's condition was "about the same as the rest of the officers" (R.28,29,30).

Accused did not testify but made an unsworn statement through defense counsel as follows:

"* * * On behalf of the accused, I would like to tell the court that Major Jones is a professional soldier. He has spent the best years of his life in the Army. Before coming into the Army, he served in the Pennsylvania National Guard -- his home state. He enlisted in the Regular Army on September 23, 1931, and after serving one enlistment, he was honorably discharged as a sergeant, and reenlisted on September 23, 1934. He was discharged as a sergeant on August 4, 1936, and reenlisted. He was discharged as a staff sergeant on August 4, 1939, and reenlisted. He was discharged as a technical sergeant on August 25, 1940, to accept a commission as a second lieutenant in the Quartermaster Corps. On June 17, 1941, he was promoted to first lieutenant. On June 17, 1942, he was promoted to captain, and on January 30, 1943, he was promoted to major."

4. The evidence as it relates to Specification 2 of the Charge shows that accused at the place and time alleged was intoxicated and that while engaged in a crap game with 10 or 15 officers, many of whom had been drinking, accused became involved in an argument and scuffle with Captain Heinemann, which resulted in accused being ejected from the club. Such

conduct on the part of the accused was, of course, prejudicial to good order and military discipline but the evidence does not show that accused was grossly drunk or that he was conspicuously disorderly within the meaning of Article of War 95. The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of Specification 2 as involves a finding of guilty of that Specification in violation of Article of War 96.

As to Specification 3 it clearly appears that accused wrongfully entered the home of Mr. Joseph Guthrie. However, in view of the peculiar circumstances and the friendly relations theretofore existing between the accused and the Guthries, the Board of Review is of the opinion that the conduct of accused was not such as to transcend the line of demarcation between the service-discrediting conduct in violation of Article of War 96 and the more reprehensible conduct violative of Article of War 95. For that reason the record is held sufficient to support a finding of guilty of Specification 3 in violation of Article of War 96 only. (Dig. Op. JAG, 1912-40, Sec. 453(9); CM 195373 (1931).) As to Specification 4 the accused was charged with being drunk while in uniform in the company of enlisted men in the home of Mr. Joseph Guthrie, in violation of Article of War 95. He is not charged with drinking with or becoming drunk with enlisted men. This is the occasion referred to in Specification 3. There is no direct evidence that accused was in uniform. However, the fact that he was an officer on duty - with American troops in Peru in time of war - affords a basis for a legitimate inference that he was in the uniform of an officer of his rank. There is evidence warranting an inference that the accused was drunk, but as was said in connection with Specification 3, supra, his conduct was not such as to transcend the line of demarcation between conduct prejudicial to good order and military discipline, in violation of Article of War 96 and the more reprehensible conduct violative of Article of War 95.

5. The accused is 37 years of age. The records of the Office of The Adjutant General show that he served as an enlisted man in the Pennsylvania National Guard for three years; enlisted in the Regular Army on 23 September 1931 and served therein in the grades of private, corporal and sergeant for nine years. While serving in the Regular Army he was appointed second lieutenant, Infantry Reserve, 7 October 1935, and was reappointed in the same grade on 11 September 1940. He was discharged from the Regular Army as staff sergeant on 25 October 1940 to enter on active duty; entered on active duty 26 October 1940; promoted to first lieutenant 18 June 1941; promoted to captain 26 May 1942; and promoted to major 30 January 1943.

6. There is attached to the record of trial a recommendation for clemency in behalf of the entire membership of the court which states in part as follows:

"c. With the exception of the circumstances that led to Major Jones' recent trial, this officer was known to have executed his official duties as an Officer in the Quartermaster Corps in a manner that showed marked aptitude and ability. During the entire twelve years of honorable service performed by the accused, the recent charges placed against him appear to be the only evidence of infractions of the standard of conduct prescribed for military personnel.

"3. It is believed that if clemency is granted and this officer is reinstated to duty in the permanent grade of Technical Sergeant held by him prior to being commissioned, he will prove his value to the armed forces in every respect and abide by and deserve the faith placed in him.

"4. For reasons set forth above, it is earnestly recommended that clemency in this case be granted."

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 2, 3 and 4 of the Charge as involves findings of guilty of those Specifications in violation of Article of War 96 and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of Article of War 96.

Thomas C. Gray, Judge Advocate.

William Hancock Hall, Judge Advocate.

Fletcher H. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 11 SEP 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 Herbert M. Jones (0-336875), 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 findings of guilty of Specifications 2,3 and 4 of the Charge as involves findings of guilty of those Specifications in violation of Article of War 96 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. 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. 329, 28 Oct 1943)

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

SPJGN
CM 237281

3 NOV 1943

UNITED STATES	)	ARMY AIR FORCES
	)	GULF COAST TRAINING CENTER
v.	)	Trial by G.C.M., convened at
	)	Lubbock Army Flying School,
Second Lieutenant JAMES	)	Lubbock, Texas, 16 June 1943.
R. EVANS (O-437402),	)	Dismissal and confinement for
Air Corps.	)	two (2) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, GOLDEN 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 Charges and Specifications:

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

Specification: In that Second Lieutenant James R. Evans, Air Corps, did, at Pampa Army Air Field, Pampa, Texas, on or about May 21, 1943, knowingly and wilfully apply to his own use a BC-1 airplane, Field No. 2, Air Corps Serial Number 37-451, of the value of about $23,184.83, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Second Lieutenant James R. Evans, Air Corps, having received a lawful order from Colonel D. S. Campbell, Commanding Officer of the Pampa Army Air Field, Pampa, Texas, that he was grounded, that is, was off flying status, or words to that effect, the said Colonel D. S. Campbell being in the execution of his office, did, at Pampa Army Air Field, Pampa, Texas, on or about May 21, 1943, fail to obey same.

Specification 3: In that Second Lieutenant James R. Evans, Air Corps, did, at Pampa Army Air Field, Pampa, Texas, on or about May 21, 1943, disobey Post Flying Regulations issued by the Commanding Officer of the Pampa Army Air Field, Pampa, Texas, in the execution of his office, to wit:

> "Pilots and or student pilots will not fly at an altitude of less than 1000 feet above the terrain, except when necessary to complete a mission or to comply with civilian air regulations"

by flying a military airplane at an altitude of approximately fifteen feet over a part of the ramp of the Pampa Army Air Field, Pampa, Texas.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Charge II, guilty of both Charges and all remaining Specifications, and 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 might direct, for the period of 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 on 21 May 1943, Colonel D. S. Campbell, Commanding Officer, Pampa Air Field, informed the accused that he intended to prefer charges against him for offenses he was alleged to have committed; also that he - the accused - was grounded. Later in the afternoon the accused, explaining that he was going to taxi to Post Operations to pick up Colonel Campbell, got into a BC-1 airplane at Field 2. Because another plane was preparing to land, the officer in the control tower instructed the accused to stand by; despite this order he proceeded forthwith to take off, reporting to the tower, "BC-1 taking off, taking off on last hop" (R. 9, 44-46, 50-51, 53, 56).

From an altitude of between 1500 and 2000 feet, he dived toward the ramp, levelling his plane at an altitude of about 15 feet, so that its wheels, which were down, almost touched the airplanes parked on the ramp. He repeated this performance for a total of three dives, calling in to the operations tower, as he came out of one of them, "BC-1 just buzzed ramp. How am I doing?" The officer directing operations from the tower radioed the students who were in the air to leave the pattern and stay away from the accused's plane. He also tried to bring some of the students back separately to get them on the ground, but as one would come in, the accused would return, and the student would have to be sent away. The students were finally ordered to land at the Pampa Municipal Airport (R. 24-25, 54-55).

Lieutenant Colonel Robert C. McBride, Director of Flying at the Pampa Army Air Field, anticipating fire or accident as a result of the accused's operation of the plane, ordered the theatre vacated, the fire department alerted, the gasoline trucks dispersed, extra guards around the field, and a medical officer to hold himself in readiness. He also directed the operations officer in the control tower not to annoy the accused with radio conversation. The accused's flying, on this occasion, was, according to Colonel McBride, clear violation of Post Flying Regulations, of which a true extract copy was introduced, prohibiting flying at an altitude of less than 1000 feet, except when necessary to complete a mission or comply with Civil Air Rules (R. 23-28; Ex. 1).

Colonel Campbell took off in another BC-1 airplane, following the accused, when the latter desisted from buzzing the ramp and proceeded in the direction of Miami, Texas, operating his plane in an aimless manner at altitudes varying from very low to approximately 1000 feet. After two apparent attempts at pasture landings, the accused made a low, slow turn, his left wingtip struck the ground - or a fence - and his plane came to a stop, its landing gear retracted, straddling the remains of a fence, demolished by the landing. The right wing was badly broken, the left wing had a hole in it and a damaged tip, the propeller was bent, and there was a small hole in the fuselage. The list or invoice price of this plane, equipped with its engine, was $23,184.83 (R. 10-12, 42, 73-75; Ex. 2).

4. The evidence for the defense shows that Sergeant Elo C. Findeisen, 1094th Guard Squadron, Pampa Army Air Field, was placed in charge of the accused when he was picked up after the crash, riding in the ambulance with him to the hospital, where, shortly after midnight, the sergeant testified,

> "The nurse came in and gave him a pill of some kind. After the nurse left he closed the door to approximately twelve to fifteen inches of being closed. He asked me if it was all right. I said it was all right. He slammed the door. I went to the door and saw that it was locked on the inside. I went to the adjoining room to the window. Lt. Evans was on the outside. I yelled, 'Halt'. I fired above his head. He stopped and came back in the window and we decided to put him in another place for safe keeping."

The sergeant heard the accused make the statement, with reference to his actions that afternoon, "that he wanted to show the officers on the field that he could fly a plane" (R. 98-99).

First Lieutenant Delbert P. Johnson, Medical Corps, a qualified psychiatrist, had conducted a cursory professional examination of the accused, a month or more before the date of the alleged offenses. He did not consider the 30 to 45 minute talk which he had with him on that

occasion an adequate basis for a complete diagnosis. He testified, however, in answer to a hypothetical question, which included all of the alleged misconduct of the accused, that it was his opinion that a person with a psychopathic personality would do all of this. It was his further opinion that although the accused was able to tell the difference between right and wrong, the urge within the accused to do these things was so strong as to overcome his idea of the consequences (R. 100-105).

Following Lieutenant Johnson's testimony, Colonel Campbell was recalled by the court and asked why the flight surgeon had recommended that the accused be grounded, to which he replied,

> "As a result of his observation and what he had been told, he stated that it was his opinion that Lt. Evans was what would be classed as an inadequate personality, an unstable inadequate personality as well as I recall" (R. 109).

5. The accused at his own request was sworn and testified that he had gone through two years of public school, transferred to military school, and attended college two and one-half years. He left college to get into the Air Corps and was accepted in March, 1941. While taking primary training at Cuero, Texas, he was soloing a BT-14 airplane when a storm struck the field. The field called no more landings, and the accused tried to get to the auxiliary field, but, upon landing, he jumped the fence at the end of the field. Thereafter, while taking advance training at Kelly Field, Texas, he had a mid-air crash in December, 1941. However, he finished his advanced training at Kelly and went on foreign service to Peru. He left the latter part of March, 1942, returned to this country around the last of May or the first of June, 1942, and was assigned as an instructor at Kelly Field. There he again had an accident while on a night bombing mission and bailed out of his plane about 300 feet above the ground. His back was injured as a result of the jump and he became extremely nervous after that time. He was taken off of flying status by the Flight Surgeon and given a furlough. In November, 1942, he took a Form 64 physical examination, but did not pass the 64 examination on account of his pulse and blood pressure. He was then sent to the Pampa Army Air Field, but was returned to Kelly Field again to take another Form 64 examination. While returning to Pampa, he felt pretty badly and was apparently late in getting back to the field. He was not then placed on flying status at Pampa but in charge of certain work in connection with the construction of athletic equipment. Following this, he was sent to Wichita to study the construction of Beechcraft airplanes, and, after a two weeks' course there, received an AT-10 rating. After returning to Pampa, he was sent to Cadet Detachment, but had worked there only a short while when he was reinstated for flying on 27 March 1943 (R. 79-84).

Sometime around the 19th of May 1943, the accused was again removed from flying. According to the accused, this action was taken apparently as the result of an informal conference attended by a number of officers, including Colonel McBride, Director of Flying, and Major Adler, Post Surgeon. During this conference, the prior conduct of the accused was discussed in his presence, and the possibility of resigning from the service was suggested to him. In answering inquiries of Colonel McBride and Major Adler as to the supposed misconduct of the accused on prior occasions, the accused testified that he had not insulted the wife of a fellow officer at Amarillo, Texas, and that he was not drunk at that time. He also stated that as to the South American trip made by him, at which time he was given $2,000 for expenses, he returned to this country sooner than he expected, and that he still owed $600. He admitted that he had hit a South American officer while on this trip, but stated that he did so because this officer was bragging on Germany. Several other matters were brought up at this conference as to irregularities in the conduct of the accused (R. 87-88, 90, 91).

After the conference, the accused saw Colonel Campbell, and was informed that charges were being preferred against him by reason of his conduct, and that he was being removed from flying upon the advice of Major Adler, Post Surgeon. All of this put the accused in a bad mood, and he went to town that afternoon, drank a couple bottles of beer and came back to the post. After sitting in his quarters awhile, he did not care much what he did, and it was at this time that he went out to the airplane. The accused remembered putting a bottle of brandy in the plane, but does not remember whether he drank anything from it prior to getting into the plane. After landing he felt a little "woozy" but did not know whether that was the result of the accident he had in landing. Upon examination by the court, the accused again stated that he did not know why he was flying, and that when he took off, he didn't give it a thought. He did not feel drunk at that time, but as though he were in a "dim dream" (R. 92-97).

6. The Specifications of which the accused was found guilty allege misapplication to his own use of a Government airplane; failure to obey the lawful order of his post commander, grounding him; and failure to obey Post Flying Regulations, by flying a military airplane at an altitude of fifteen feet. Every element of each of these alleged offenses was clearly shown by uncontradicted evidence; the misapplication in violation of Article of War 94, the failures to obey in violation of Article of War 96.

7. Defense counsel entered a plea of "temporary insanity at the time and period of the offense in question", which plea the court overruled after all the evidence was in, including testimony adduced by the defense in support of the plea. The question thus clearly raised by the

record concerning the sanity of the accused has been, at the direction of The Judge Advocate General, resolved subsequent to the trial in accordance with the provisions of the Manual, by a board of officers convened on 20 September 1943 at the Borden General Hospital, Chickasha, Oklahoma, where the accused had been under observation since 15 August 1943. The board's report, while diagnosing the accused's condition as "a constitutional psychopathic state", expressly recites that "the patient could distinguish right from wrong and could adhere to the right at the time of the alleged offenses."

8. The accused is 26 years of age. War Department records show service as an aviation cadet from 31 May 1941, until appointed second lieutenant, Air Corps, A.U.S., and ordered to active duty, 13 February 1942.

9. The court was properly 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 a violation of Article of War 94 or 96.

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 237281

1st Ind.

War Department, J.A.G.O., 12 NOV 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James R. Evans (0-437402), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed.

3. Consideration has been given to a letter from the accused addressed to the Honorable Walter F. George, United States Senate, and forwarded by Senator George to this office.

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.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. fr. accused to Hon. Walter F. George.

(Sentence confirmed but confinement reduced to one year. G.C.M.O. 403, 22 Dec 1943)

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

SPJGQ
CM 237306

21 JUL 1943

UNITED STATES	)	79TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Rutherford County Court House, Murfreesboro, Tennessee, 7 May 1943, Dismissal, total forfeitures, confinement for one (1) year. Disciplinary Barracks.
Second Lieutenant ROBERT H. RAY (0-1283135), 313th Infantry.	)	

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 Charge and Specification:

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

Specification: In that 2nd Lieutenant Robert H. Ray, Company "F", 313th Infantry, did, without proper leave, absent himself from his organization at Maneuver Area, Camp Forrest, Tenn., from about April 11, 1943, to about April 15, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification thereunder. Evidence of two previous convictions by general courts-martial, one for absence without leave and the other for breach of arrest, was submitted. 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 one year. The reviewing authority approved the sentence and 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. While accused's regiment was in the Camp Forrest maneuver area in a bivouac located four miles from Noah, Tennessee on Highway 41, about 25 miles from Camp Forrest, Tennessee (R. 6b-6e), he was granted a pass by his company commander authorizing him to leave on Saturday 10 April 1943

to go to Nashville, which leave expired at noon on Sunday 11 April 1943 (R. 6b). He did not return and after a search of the area he was entered on the morning report of his company, Company F, 313th Infantry, as AWOL (6c; Pros. Ex. 1). At the time accused was a platoon leader (R. 6c) and the battalion was running a firing test (R. 6d). At 6:30 a.m., Monday 12 April, the battalion moved to Spencer Range (R. 6b). About 2100 (9 p.m.) on the evening of 15 April 1943 Major Augustus H. Bode, Jr., accused's battalion commander, saw him walking down the street in the town of Murfreesboro, apprehended him and turned him over to the military police at the police station in that town. Major Bode had issued orders that all officers and men should be back from pass on Sunday 11 April by noon (R. 6d-6e).

4. No evidence was adduced by the defense and accused, his rights as a witness having been explained to him by the defense counsel, elected to remain silent (R. 6f).

5. The record is legally sufficient to support the findings and sentence.

6. The record discloses that this officer is 23 years of age; enlisted 3 October 1939, graduated from Infantry Officer Candidate School, Fort Benning, Georgia, and was commissioned Second Lieutenant, Infantry, AUS, on 1 May 1942. Since that time, he has been convicted of absence without leave from 0715, 5 September 1942, to 0650, 7 September 1942 (Ex. 2); and of breaking arrest on 31 December 1942 (Ex. 3). Although not disclosed by this record, accused, while serving a sentence to, inter alia, restriction to camp, promulgated by General Court-Martial Orders No. 3 Headquarters 79th Infantry Division, dated 17 October 1942 (Ex. 2), breached these restrictions and was absent without leave from 2 November 1942 to 5 November 1942. He was convicted of these offenses and sentenced to be dismissed, but execution of the sentence suspended during the pleasure of the President (CM 229461). Action was taken by the President on 23 March 1943, and the results of that trial are published in War Department General Court-Martial Orders 76, dated 2 April 1943.

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 the sentence and to warrant confirmation of the sentence. The sentence is legal, dismissal and the confinement imposed by the sentence are authorized upon conviction of violation of Article of War 61.

William A. Lounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

6 - AUG 1943

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert H. Ray (0-1283135), 313th 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. Accused absented himself without leave in war time for four days and remained in that status until apprehended. The instant case is the fourth time this officer has been convicted by general court-martial since he was commissioned a second lieutenant on 1 May 1942. In addition to breach of restriction (A.W. 96) and breach of arrest (A.W. 69), this officer has also been convicted of absence without leave (A.W. 61) on two occasions since September 1942. One of these prior convictions resulted in a sentence of dismissal which was suspended by the President. Accused's repeated offenses and unauthorized absences demonstrate an attitude of indifference and irresponsibility incompatible with efficient service as an officer. I do not believe that future useful service as an officer can be expected of him. Accordingly, I recommend that the sentence be confirmed and carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

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

3 Incls.
1 - Record of trial.
2 - Dft. of ltr. for sig. USW
3 - Form of action.

(Sentence confirmed but that part thereof providing for confinement at hard labor remitted. G.C.M.O. 292, 2 Oct 1943)

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

7 - AUG 1943

SPJGH
CM 237326

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Pocatello Army Air Base, Pocatello, Idaho, 23 June 1943. Dismissal.
	)	
Second Lieutenant CECIL C. THOMPSON (0-573572), Air Corps.	)	

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 94th Article of War.

Specification: In that, 2nd Lt. Cecil C. Thompson, 539th Bombardment Squadron, 382nd Bombardment Group (H), did, at Pocatello, Idaho, on or about May 6, 1943, knowingly and willfully apply to his own use a government vehicle, service number 20166381, command reconnaissance car, of the value of about $1360.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that 2nd Lt. Cecil C. Thompson, 539th Bombardment Squadron, 382nd Bombardment Group (H), did, at Idaho Falls, Idaho, on or about May 6, 1943, with intent to deceive O. A. Toome, Manager and Owner, Yellow Cab Company, Idaho Falls, Idaho, officially state to the said O. A. Toome, that, "I certify that this trip is a military necessity for the war effort," in order to secure taxi cab transportation in excess of

twenty-five miles, which statement was known by the said 2nd Lt. Cecil C. Thompson to be untrue, in that the said 2nd Lt. Cecil C. Thompson intended and proceeded to use the taxi cab for his own personal use.

He pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be "dismissed from the service of the United States Army". The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution offered no evidence.

4. The accused did not testify or make a statement. No witnesses were called by the defense. After the findings, defense counsel "offered a plea in mitigation" substantially as follows:

At the time that accused signed the certificate that the trip by taxicab was a military necessity for the war effort (Charge II), he was very drunk. The offense of applying to his own use a Government vehicle (Charge I), was committed as the result of circumstances which arose in connection with the taxicab trip. On the afternoon of 6 May 1943, accused had been drinking in company with Private Nunn and a woman. When accused had arranged for the taxicab trip to Pocatello, the others decided to accompany him. En route to Pocatello accused fell asleep. When he awoke, in front of the Hotel Bannock, he found that some $200.00 in money and his "AGO" pass were missing. He asked the cab driver to wait, and entered the hotel to call the Military Police. During his absence, Nunn directed the cab driver to drive away. Accused followed the advice of the Military Police and swore out a warrant for the arrest of Nunn and the woman. At that time, accused was very angry and not entirely sober, and having been duped and robbed, he wanted to do something himself. As he was the Transportation Officer, he quite naturally called the Air Base and arranged for a "Reconn. Car" to pick him up. He took this vehicle and went to Idaho Falls, where he contacted the local police, the taxicab company manager and the cab driver. He then drove back to Pocatello in the car, and the car was returned to the Base (R. 8).

5. The pleas of guilty support the findings of guilty. The statement of defense counsel in mitigation contains nothing inconsistent with the pleas of guilty. The Specification, Charge I, clearly sets forth an offense in violation of the 94th Article of War. In the opinion of the Board of Review the Specification, Charge II,

alleges conduct of a nature to bring discredit upon the military service and cognizable under the 96th Article of War (see CM 150526, Thompson).

6. Following the record among the accompanying papers is a file of papers marked Exhibits A to M inclusive. None of those papers however were offered or received in evidence as exhibits. It appears probable that they are the Exhibits A to M referred to in the report of investigation as statements of witnesses and stated to be attached thereto.

7. The accused is 34 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 20 July 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 20 January 1943.

8. The court was legally constituted. No substantial 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 94th or 96th Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 12 AUG 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 Second Lieutenant Cecil C. Thompson (0-573572), Air Corps.

2. I concur in the opinion of the Board of Review that the record is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence.

The accused pleaded guilty to and was found guilty of willfully applying to his own use an Army command car, in violation of the 94th Article of War, and of making a false official statement to the owner of a taxicab company that his trip was a military necessity for the war effort, in order to secure transportation in excess of a prescribed limit, in violation of the 96th Article of War. I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Inclosed herewith are the 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 carrying into effect the recommendation made above.

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

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

(Sentence confirmed. G.C.M.O. 287, 2 Oct 1943)

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

SPJGN
CM 237347

5 AUG 1943

UNITED STATES	)	FORT BRAGG, NORTH CAROLINA
	)	
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 23 June 1943. Dismissal and confinement for six (6) months.
	)	
Second Lieutenant JESSE F. GAMBLE (0-1169970), Field Artillery, First Field Artillery Training Regiment.	)	

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 95th Article of War.

Specification 1: In that Second Lieutenant Jesse F. Gamble, Field Artillery, First Field Artillery Training Regiment, Field Artillery Replacement Training Center, Fort Bragg, North Carolina did, at Raleigh, North Carolina, on or about March 29, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Hillsboro Hotel, Raleigh,

North Carolina, a certain check, in words and figures substantially as follows, to wit:

RICHMOND, VIRGINIA, March 29, 1943 NO_____
STATE PLANTERS BANK & TRUST CO.

Pay to the
order of Hillsboro Hotel $10 /00
Ten Dollars & no/100 - - - - - - - - Dollars
For_____

s/ Jesse F. Gamble
2nd Lt. F.A.
0-1169970

and by means thereof, did fraudulently obtain from Hillsboro Hotel, Raleigh, North Carolina $10.00, he the said Second Lieutenant Jesse F. Gamble Field Artillery, then well knowing that he did not have and not intending that he should have sufficient funds in the State Planters Bank & Trust Company, Richmond, Virginia for the payment of said check.

Specification 2: Making and uttering false check at Raleigh, North Carolina, in amount of $10.00 drawn on State Planters Bank & Trust Co., Richmond, Va.

Specification 3: Making and uttering false check at Raleigh, North Carolina, in amount of $10.00 drawn on State Planters Bank & Trust Co., Richmond, Va.

Specification 4: Making and uttering false check at Raleigh, North Carolina, in amount of $5.00 drawn on First Citizens Bank & Trust Co., Raleigh, N. C.

Specification 5: Making and uttering false check at Raleigh, North Carolina, in amount of $5.00 drawn on First Citizens Bank & Trust Co., Raleigh, N. C.

Specification 6: Making and uttering false check at Raleigh, North Carolina, in amount of $5.00 drawn on First Citizens Bank & Trust Co., Fort Bragg, N. C.

Specification 7: Making and uttering false check at Raleigh, North Carolina, in amount of $5.00 drawn on First Citizens Bank & Trust Co., Raleigh, N. C.

Specification 8: Making and uttering false check at Raleigh, North Carolina, in amount of $5.00 drawn on First Citizens Bank & Trust Co., Raleigh, N. C.

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

Specification: In that Second Lieutenant Jesse F. Gamble, Field Artillery, First Field Artillery Training Regiment, Field Artillery Replacement Training Center, Fort Bragg, North Carolina, did, without proper leave, while en-route from Camp Pickett, Virginia to Fort Bragg, North Carolina, his proper station, absent himself from his organization and station at Fort Bragg, North Carolina from about March 15, 1943 to about April 28, 1943.

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 two years. The reviewing authority approved only so much of the sentence as involves dismissal from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months, 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 concerning Charge II and the Specification thereunder alleging absence without leave from 15 March to 28 April 1943, consists of exhibits and stipulations, of which the first is a duly certified copy of Special Orders Number 65, W.D., 6 March 1943, showing that the accused was relieved from Camp Pickett, Virginia, and assigned to Fort Bragg, North Carolina, on that date; it was stipulated that he had received a copy of this order. Prosecution's Exhibit 2, extract copy of morning report of the accused's organization, shows he was relieved and departed from Camp Pickett for Fort Bragg on 13 March 1943. The court took judicial notice of the fact that Camp Pickett is about 150 miles from Fort Bragg, and of Army

Regulations 605-180 relative to commissioned officers travelling on duty. It was stipulated that the accused was returned to military control at Fort Bragg, 28 April 1943. The prosecution introduced, without objection, as Exhibit 3, an extract copy of the morning report of the Field Artillery Officer Replacement Pool, for 28 April 1943, the pertinent parts showing that the accused on 13 March 1943 was en route to join the organization, and on 28 April 1943, was confined in the stockade at Fort Bragg. As Exhibit 4, there was introduced, without any objection, a copy of Special Orders 103, Field Artillery Replacement Center, Fort Bragg, dated 29 April 1943, assigning the accused to the First Field Artillery Training Regiment (R. 10-13).

4. Relative to Charge I and the eight Specifications thereunder, the prosecution introduced as Exhibits 5, 6, 7, 8, 9, 10, 11 and 12, photostatic copies of the checks described in the eight Specifications. It was stipulated that as to the checks described in Specifications 1, 2 and 3, each for ten dollars, drawn on the State Planters Bank & Trust Co., and those described in Specifications 4, 5, 6, 7 and 8, each for five dollars, drawn on the First Citizens Bank & Trust Co., each and all were signed by the accused, who passed the checks, received value for them, did not have sufficient funds to cover them, nor any account at the time in the banks on which they were drawn, and that when the checks were presented for payment to the respective drawee banks, they were dishonored (R. 13-22).

On 7 May 1943, the accused, after being properly warned, made a statement to Major Leo J. Kraus, investigating officer, which was signed by the accused, identified by Major Kraus, and introduced without any objection as Prosecution's Exhibit 13. In substance it sets out that the accused signed out at Camp Pickett on 13 March 1943, arrived at Raleigh, March 14, intending to report at Fort Bragg the following morning, Sunday, but having lost his orders and other papers, waited there until the following Thursday for an answer concerning his lost orders. During that time he wrote a check on his account with the State Planters Bank & Trust Company of Richmond, which was cashed by the Sir Walter Hotel, but was returned for being on the wrong form. He then knew he was absent without leave, and facing a lot of trouble; so remained absent without leave, being too ashamed to report at Fort Bragg. He did not drink liquor and not enough beer to become intoxicated. After his Richmond bank account was depleted, he wrote several

checks that were not covered by funds, but had no intention of defrauding anyone, and gave his right name, address and serial number. He only wrote checks when he needed money for his hotel room and lunches, despite which he left three hotel bills unpaid; these, however, are going to be paid (R. 22-24).

5. It was stipulated that the mother of the accused, Vada Ruth Gamble, if present, would testify that she maintains a checking account in the Mesilla Valley Bank of Las Cruces, and that the accused had her permission to draw checks on it by his usual signature; he has availed himself of this permission and checks so drawn have been honored. Before he went into the army, he gave her over $200; and has sent her money subsequently from time to time (R. 24).

6. The accused, after being duly informed of his rights, elected to make a sworn statement. He testified that he asked Mr. Little, a director of the First Citizens Bank & Trust Company, about transferring his account from the Richmond bank to the Raleigh one but that the account was never transferred. He identified two checks for $10 each and one for $30, which he had drawn on the Mesilla Valley Bank, photostatic copies of which were introduced in evidence as Defense Exhibits A, B and C. These were drawn pursuant to an agreement he had with his mother. When he withdrew his account from the Richmond bank, he did not make an attempt to open one in the First Citizens Bank of Raleigh, or of Fayettville, or in "any of those banks", and, knowing he had no longer any account in the Richmond bank still he continued to write checks on it. He never had a bank account in his own name, except in Richmond, and the one in his mother's name at Las Cruces. He intended, if and when possible, to redeem his worthless checks (R. 25-29).

7. Specifications 1 through 8, Charge I, allege that the accused fraudulently obtained from designated persons various sums of money, by wrongfully making and uttering checks on designated banks in which he neither had nor intended to have sufficient funds to pay the checks so uttered. The uncontradicted evidence establishes every element of the offense, and is fully corroborated by the accused's own testimony. Neither his expressed intention to repay his victims, at some future time, the sums so obtained, nor the fact that his mother had permitted him to draw checks on her account in an entirely different bank, constitutes a valid defense to the Charge or any Specification thereunder.

The Specification, Charge II, alleges absence without leave

for the period specified, and this offense, too, is unequivocally established by the uncontradicted evidence.

8. Records of the War Department show the accused to be 26 years of age. He enlisted February 7, 1942, attended the Officers Candidate School at Fort Sill, Oklahoma commencing 1 May 1942, and was commissioned second lieutenant, Army of the United States on 17 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 findings of guilty and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of Article of War 61 and is mandatory upon conviction of Article of War 95.

Chas. L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Cleeper, Judge Advocate.

SPJGN
CM 237347

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jesse F. Gamble (0-1169970), Field Artillery, First Field Artillery 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. This officer was absent without leave once before for a period of 45 days for which he received punishment under Article of War 104. I recommend that the sentence be confirmed and carried into execution.

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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence, as approved by reviewing authority, confirmed. G.C.M.O. 248, 18 Sep 1943)

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

SPJGQ
CM 237354

21 JUL 1943

UNITED STATES	92D INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, 12 June 1943. Dismissal, total forfeitures and confinement for nine (9) months.
Second Lieutenant DEAN F. MILLER (0-1301187), Company B, 371st Infantry.	

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 Charges and Specifications:

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

Specification: In that Lieutenant Dean F. Miller, Company B, 371st Infantry, did at, Camp Joseph T. Robinson, Arkansas, on or about, 0730 April 18, 1943, fail to repair at the fixed time to the properly appointed place of assembly for participation in a formal guard of honor.

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

Specification 1: In that Lieutenant Dean F. Miller, Company B, 371st Infantry, did at Camp Joseph T. Robinson, Arkansas, on or about 1600 April 10, 1943, behave himself with disrespect toward Lieutenant Benjamin Singer, Company B, 371st Infantry, his superior officer, by saying to him, or words to that effect, "I don't care what orders you give me or what you do about it, I'm going to go to town, anyway".

Specification 2: In that Lieutenant Dean F. Miller, Company B, 371st Infantry, did at Camp Joseph T. Robinson, Arkansas, on or about 1200 April 18, 1943, behave himself with disrespect toward Lieutenant Benjamin Singer, Company B, 371st Infantry, his superior

officer, by saying to him, or words to that effect, "It seems as though this is a personal matter between us. We'll settle it right now. There is nothing you can do about it, because there are no witnesses." "I don't hear your order. There are no witnesses. You can't prove a thing".

He pleaded not guilty to and was found guilty of both Charges and all of the Specifications thereunder. No evidence of prior convictions was submitted. 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 nine months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of record discloses that accused, as second lieutenant of Infantry, was in command of a platoon of Company B, 371st Infantry (R. 7). Another second lieutenant, Benjamin Singer, was Company Commander of this company (R. 7) and therefore (M.C.M. 1928, p. 147, par. 133) his superior officer. On 10 April 1943 accused put a request for leave on Lieutenant Singer's desk. Lieutenant Singer told accused his request for leave was refused and that he was restricted to his hutment for the week end on account of some earlier infraction, the nature of which was not indicated (R. 10). Accused said "that he didn't care what orders were given him, he was going anyway" (R. 10, 17). He started out the door and Lieutenant Singer called him back and said "I am going to give you an order that you are restricted to your hutment for the week end," to which the accused replied "I don't care what orders you give me, I am going to town anyway" (R. 10, 17) and left, slamming the door as he went (R. 18, 20).

On Saturday, 17 April 1943, the regiment was advised that a Special Escort of Honor was to be furnished on Sunday morning, 18 April 1943, for a distinguished guest, whose identity was to remain secret until the time of his arrival (R. 10, 15, 18). That same day, Saturday, the ceremony was rehearsed and the accused was in command of a platoon during rehearsal (R. 11, 18). That evening a written memorandum, setting out the prescribed uniform and time of assembly (0705) was issued and circulated and this memorandum was receipted for by the accused (Ex. A; R. 7). On Sunday morning, 18 April 1943, at 0725, accused not being at the orderly room, Lieutenant Singer sent word to him to come down to the company and take his place with the platoon (R. 7). The ceremony was held, the President of the United States being the distinguished guest, but accused failed to put in his appearance (R. 7, 16, 17, 18).

After the ceremony, Lieutenant Singer met accused on his way to the noon mess and asked him why he had not attended the Escort of Honor (R. 8). The accused said that he had gone on sick call an

hour earlier (R. 8), which statement was false as his name did not appear on the sick book for that day (R. 9; Ex. B). Lieutenant Singer told accused that he should have made an effort to get in touch with him so that another officer could have been substituted in his place (R. 8). Accused replied that he was too sick to get up, and Lieutenant Singer then inquired how he was able to get to the infirmary for sick call (R. 8). Accused then became very indignant and said to Lieutenant Singer "This seems to be a personal matter between the two of us, let's settle it between us now. You can't prove a thing. You have no witnesses" (R. 8). Lieutenant Singer then said "Lieutenant Miller, I am giving you a direct order to be in the orderly room at one o'clock, to reply by indorsement for your failure to appear in the Escort of Honor this morning" (R. 8). To this the accused replied "I don't hear your orders, you can't prove a thing", turned and walked down the street (R. 8, 9).

4. Accused introduced no testimony in his defense and, his rights as a witness having been explained to him by the president of the court, he elected to remain silent (R. 19).

5. Although ordinarily failure to repair is a minor offense in the case of an enlisted man, it takes on a more serious aspect in the case of an officer, particularly as in the instant case where the formation which accused deliberately avoided was of exceptional importance, a guard of honor for the Commander-in-Chief of the Army. Absence from such ceremony without a very cogent excuse verges on disrespect to the office as well as the officer to be honored. The evidence is clear and conclusive that the officer toward whom the disrespectful words and behavior were directed, although of equal rank, was nevertheless his company commander and as such his superior officer. Accused's words were insolent and showed contempt for his company commander's authority on both occasions. His action in slamming the orderly room door "pretty nearly hard enough to break the windows" (R. 18) emphasized and added an act of marked disdain and rudeness to his impertinent language and insubordinate attitude. The evidence as to both Charges of disrespect is clear and conclusive and sustains the findings of guilt.

6. War Department records show accused to be 29 years of age and single. He graduated from high school in 1928 and went to college nine months in 1929. He enlisted 2 June 1941 and served as a corporal in the Cavalry School Detachment, Fort Riley, Kansas, until March 1942. He was appointed a second lieutenant, Army of the United States, from Officer Candidate School at Fort Benning, Georgia, on 26 November 1942. In civil life he was a shoemaker for six years, did odd jobs and owned a repair shop.

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 and the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 and punishment for violation of Article of War 63 in the case of an officer is discretionary with the court.

William A. Rounds, Judge Advocate.

Dale S. Sellers, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 - 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 Second Lieutenant Dean F. Miller (O-1301187), Company B, 371st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for 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.

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

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 226, 10 Sep 1943)

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

SPJGK
CM 237359

3 SEP 1943

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Gowen Field, Boise, Idaho, 5-11 June 1943. Dismissal.
Captain CHARLES E. RICHARDS (0-381737), 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: (Finding of not guilty granted on motion of defense).

Specification 2: In that Captain Charles E. Richards, 52nd Bombardment Squadron, 29th Bombardment Group, did, at Boise, Idaho, on or about April 22, 1943, contribute to the delinquency of a minor, to-wit, Rudolph H. Beck, Jr., by causing him to become drunk from intoxicating liquors, furnished by said Captain Charles E. Richards.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

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

Specification: In that Captain Charles E. Richards, 52nd Bombardment Squadron, 29th Bombardment Group, did, at Boise, Idaho, on or about April 22, 1943, furnish intoxicating liquor to Ralph R. Gregerson, a minor, and Rudolph H. Beck, Jr., a minor, and did entice said Ralph R. Gregerson and Rudolph H. Beck, Jr. to a hotel room for the purpose of having carnal connection with them against the order of nature.

Accused pleaded not guilty to the Charges and Specifications. The court sustained a motion for a finding of not guilty of Specification 1, Charge I, at the conclusion of the prosecution's case. He was found not guilty of Specifications 3 and 4, Charge I, guilty of Specification 2, Charge I, and guilty of Charge I. He was found guilty of the Specification of Charge II, except the words "and did entice said Ralph R. Gregerson and Rudolph H. Beck, Jr., to a hotel room for the purpose of having carnal connection with them against the order of nature," and of the excepted words not guilty, and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence introduced by the prosecution shows that accused was a captain, Medical Corps, 52nd Bombardment Squadron, and at all times mentioned in the Charges stationed at Gowen Field, Idaho (R.5,36). On the evening of 22 April 1943 Rudolph Harold Beck, Jr., a 17 year old boy and Ralph Rudolph Gregerson, 15 years of age, both of Boise, Idaho, were at the Hotel Boise, in Boise, Idaho, attending a dance of young people in the "Crystal Ballroom". The boys had both been working after school hours and met about 9 o'clock. They "puttered around the streets", had something to eat and then decided to go to the dance. After they had been there about forty-five minutes and while standing "on the mezzanine" at the head of the stairway, they met accused (R.8,9,15,16). Accused came up to them and asked "what was going on there", referring to the dance (R.9,16). According to Gregerson: "We told him it was an Antlers' dance; and then he offered us a cigarette and we accepted. Then he and Rudy got talking about army courses; Army and Navy V-5 and V-7." Both boys said that the accused asked them if they wanted a drink. At first they both said "no". After more talk, during the next 10 or 15 minutes the offer of accused to the boys to have a drink was twice repeated. The third time the invitation was accepted. Accused told them to wait and he would produce a bottle of rum (R.10,16,17). Accused asked "where can we drink this stuff", and was told "over in the kitchen". They went in there, Gregerson "guessed", because it was not "correct to drink out". According to Gregerson, Beck had two or three drinks while he had one or two. The bottle had "rum" on the label (R.10,16,17). They sat there and talked a bit and then accused asked "shall we go some place and finish this off" (R.11), "Let's get a room and finish off the bottle" (R.17). Thereupon they left the Boise Hotel. Beck testified that he did not know where they went that he "faded out" when they left the hotel (R.11). According to Gregerson, Beck was "getting a little dreamy when they left the Boise Hotel" (R.17). Gregerson testified that they went over to the Owyhee Hotel, where accused applied for a room. There was no room available and so they went to the Grand Hotel, the Milner Hotel, and the Overland Hotel without success. They finally were able to obtain a room at the Pacific

Hotel. When they got up to the room accused said, according to Gregerson, "finish up the bottle". They finished it up. Gregerson continued, "Rudy drank quite a bit then, again. * * * the stuff was getting me; it kind of dazed me; and I didn't feel any too good, but I wasn't sick". With respect to Beck at that time, "He wasn't out, but I mean he was -- just did not know what he was doing". Shortly after, as related by Gregerson, Beck became very ill on the bed where he was lying. Accordingly Gregerson grabbed him by the arm, slapped his face fairly hard and started home. Beck could walk after a fashion and Gregerson would slap him and keep him going, holding on to him. While passing around the corner of the high school, a "constable jumped out and grabbed" them (R.17,18,21). About the same time a patrol car drew up with some policemen and the two boys were taken to the police station. Beck woke up at about 6:20 in the morning, found himself lying on a blanket on the floor at the police station (R.11,21,22).

Sergeant Lewis Whillig of the Boise Police Department, who was one of the officers who picked up Beck and Gregerson, described them, "Ralph Gregerson, the more sober of the two. The Beck boy was completely passed out; we couldn't rouse him at all; and Ralph Gregerson was visibly under the influence of liquor, although I would not say the boy was terribly drunk" (R.32). Whillig is corroborated in his testimony with respect to the condition of the Beck boy by officer Clarence Edward Helm of the Boise Police Department (R.33-34). Robert Orville Flood, detective on the Boise Police Department, testified that Rudolph Beck "was very intoxicated; in fact, he was passed out, unconscious". Flood testified that he went to the Boise Hotel and went to the room which was shown him by Gregerson. There, he found a bed sheet which showed vomit (R.34-35).

Doctor Thomas N. Braxton examined Rudolph Harold Beck, Jr., in the early morning of April 23. He found the boy in a comatose condition, "either from drugs or liquor" (R.35, Pros. Ex. C).

Major John W. Morris, 40th Base Headquarters and Air Base Squadron, Gowen Field, was the investigating officer in this case. He testified that he had a conversation with accused as such investigating officer on 27 April. Prior to the conversation he told accused "what I was there for" and "read him the regulation as to his rights; also read the charges to him". In the course of the "conversation" accused told Major Morris a story which was substantially that related by accused on the witness stand. A written statement was obtained by Major Morris from accused, which statement was signed by accused. This statement was identified by Major Morris and introduced in evidence as "Ex Def #1". In that statement accused said that when he was at the Pacific Hotel with the boys, he for the first time realized how young they were and asked them their ages. "One stated that he was 19 and the other 18" (R.5-8,42; Ex. Def. 1).

4. Accused testified on his own behalf. He told of spending the earlier part of the evening with a brother officer and the latter's wife. They attended an early movie that let out by 9:30. From there they went to the Aero Club, where they sat around talking and drinking. Accused testified that he had four or five drinks during the evening. Sometime after 11:30 he anticipated the 12 o'clock closing of the Aero Club by having a bottle of rum, originally "a fifth" of which there was one-third left, wrapped up, to take with him, preparatory to leaving for the field. About midnight he left the Aero Club, evidently located in the Boise Hotel. As he was going out he noticed a dance going on in an adjacent room. He walked over casually to the door and looked in. After standing for five or six minutes he noticed several civilians also standing by the door, including Beck and Gregerson. Accused asked who was having the dance. Upon being told that it was the "Antlers' Hop" he inquired as to "what the Antlers were". He was told and "that led to a general conversation". Accused took out a cigarette, lit it and offered one to Beck and Gregerson. He noticed at that time that Beck was "obviously under the influence of liquor". Gregerson did not appear to accused to be under the influence of liquor. He said the boys told him that during the evening they had had a bottle of apricot or peach brandy. They talked about the Army and Navy. Accused said that he had "this bottle of rum" under his arm and asked them if they wanted a drink. Accused stated that the boys accepted his invitation and that he went with them into the service kitchen where they had one drink. After sitting 15 or 20 minutes accused noticed that the lights were being turned off in the ballroom and that the people were leaving. Accused and the two boys went down stairs across the lobby and out into the street. They stood there for a couple of minutes. Accused asked them if they would like to go some place and finish the bottle. Beck suggested two or three night clubs but accused had never heard of any of them. Furthermore he recalled that there was a Base regulation that officers could not drink after midnight except in a private residence or hotel room. "So," accused testified, "we decided we would find a hotel room and go to that". Accused related that they went to the Owyhee, the Milner Hotel, and another hotel and finally to the Pacific Hotel, where he registered and obtained a room. Here they had another drink which finished the bottle. Accused thought, at one stage, that Gregerson was sick. He testified very definitely that Beck was ill and had to be slapped several times to "rouse" him and get him on his feet so that the boys could go home (R.37-40).

Captain Robert W. Dickson, Group Headquarters, 29th Group, Captain Harold M. Hanson, Pocatello Air Base, Captain Thomas D. O'Brien, 537th Bombardment Squadron, Pocatello Air Base, Captain Robert T. Marland, 43rd Bombardment Squadron, Gowen Field, and First Lieutenant Cleo E. Morrison, 52nd Bombardment Squadron, Gowen Field, each testified as to the good

reputation of accused (R.47,48,49,50,51). Depositions of Dr. Torald Sollmann, Dean of the School of Medicine, Western Reserve University, Dr. Charles E. Martin, Medical Director of the Bell Telephone Laboratories, New York City, and Corporal Robert M. Prentice, Cavalry Replacement Training Center, Fort Riley, Kansas, were read into the evidence. Each deponent testified to the good character of accused (R.52,53,54).

First Lieutenant Theodore R. Florenz, Medical Corps, Gowen Field, also testified for the accused. Lieutenant Florenz had undergone certain tests of alcoholic ingestion. He was asked by the defense if in his opinion "two mouthfuls" of alcohol absorbed by a boy 17 years of age "would produce under any conditions a state of amnesia within 20 minutes". The witness testified that he did not believe that four or five ounces of rum (the equivalent of two mouthfuls) would produce a comatose condition in an hour and a quarter. On cross-examination he testified that the answers he gave were with respect to the normal, average person without regard to age. He qualified his answer by saying that boys 15 and 16 would be to a certain extent more susceptible to the effects of alcohol than an adult (R.59-62).

5. In summarizing the evidence presented for the prosecution and the defense there has been omitted any reference to testimony offered with respect to those specifications upon which there were findings of not guilty. The testimony of the two boys with respect to those Specifications was rejected by the court. This action by the court and certain testimony introduced by the defense might well be considered in judging the credibility of the testimony of the two boys with respect to the remaining Specifications upon which there were findings of guilty. However, the admissions of accused substantially corroborated that part of the testimony of Beck and Gregerson which had to do with the Specifications of which accused was found guilty.

It remains uncontradicted, therefore, that accused on the night of 22 April 1943 offered liquor to two boys, Gregerson and Beck, 15 and 17, respectively, in the Boise Hotel, Boise, Idaho. These boys drank the liquor. Beck became drunk. These facts constitute proof of Specification 2 of Charge I which alleges that accused contributed to the delinquency of a minor, Rudolph Harold Beck, Jr., by causing him to become drunk from liquor furnished by accused on the date specified, in violation of Article of War 96. These facts also constituted proof of the Specification of Charge II to the extent, and as found by the court, that accused furnished liquor to Ralph R. Gregerson, and Rudolph H. Beck, Jr., minors, at the time specified, in violation of Article of War 95. Title 11, chapter 9, of the District of Columbia Code established the juvenile court

for the District of Columbia and provides for the "disposition" in such court of any child, a person under the age of 18 years, "who habitually so deports himself as to injure or endanger himself or the morals or safety of himself or others" (Title 11, sec. 901-915, D.C. Code). The conduct so described is commonly known as juvenile delinquency. Title 11, section 919, of the District of Columbia Code provides:

> "* * * Any person who by act or omission willfully causes, encourages, or contributes to any condition which would bring a child within the provisions of this chapter, or who by such act or omission tends to cause such a condition, shall be guilty of a misdemeanor and punished by a fine not exceeding $200 or imprisoned not exceeding 12 months, or by both fine and imprisonment. * * *"

In other words, any person who by act or omission causes or tends to cause, encourages, or contributes to juvenile delinquency is guilty of a misdemeanor.

It requires no argument that one who furnishes liquor to a minor under 18 tends by that act to cause a condition of juvenile delinquency.

In furnishing intoxicating liquor to Beck and causing him to become drunk, accused violated the plain provisions of Title 11, section 919, of the District of Columbia Code and is therefore guilty of a violation of Article of War 96 as charged. The conduct of accused in furnishing intoxicating liquor to Beck and Gregerson was also a violation of Article of War 95 as charged. In the latter Charge there were legal and moral issues involved which touched on accused's two-fold responsibility, as an officer not to violate the law, and as a gentleman to protect, not corrupt, the morals of children.

The wrongful conduct of accused alleged in Specification 2, Charge I, involves a portion of his misconduct alleged in the Specification of Charge II. The first mentioned specification alleges that accused caused Beck to become drunk from intoxicating liquor, while the latter alleges that he furnished intoxicating liquor to Beck and Gregerson. A conviction under both Article of War 95 and Article of War 96 is not illegal as placing accused twice in jeopardy for the same offense (McRae v. Henkes, 273 Fed. 108, cert. den., 258 U.S. 624). The offense should, however, be considered as but a single offense in fixing the appropriate punishment (C.M. 230222 (1943)). Section 80, Manual for Courts-Martial, 1928, provides:

> "If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court

should impose punishment only with reference to the act or omission in its most important aspect."

Here the punishment imposed was dismissal, mandatory for violation of Article of War 95.

It made no difference what accused believed with respect to the ages of the two youths. The statute makes no exception in case of mistaken belief as to age. The actual age is the determining factor. The rule with respect to the offense of contributing to juvenile delinquency is the same in that respect as is the offense of rape of a person below the age of consent.

6. Accused was 28 years of age. He graduated from Dartmouth College in 1936, after which he attended Dartmouth Medical School for two years. He then transferred to Western Reserve University and was graduated with an M.D. degree in 1939. He served an internship in Albany Hospital, Albany, New York, for nearly two years. He entered on extended active duty, Headquarters Ohio Military Area, April 1, 1941; Battalion Surgeon, 58th Signal Battalion, Camp Forrest, from May, 1941, to September, 1941; Detachment Surgeon, 558th Signal AW Battalion, from January, 1942, to November, 1942; Squadron Surgeon, 74th Bombardment Squadron, from November, 1942; Medical Officer, 52nd Bombardment Squadron, as of March 31, 1943.

7. Attached to the record is a written recommendation for clemency, dated 16 June 1943, addressed to the trial judge advocate, Gowen Field, Idaho, to be forwarded to the reviewing and confirming authorities, signed by six of the seven members of the court which tried accused.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory for a violation of Article of War 95 and authorized for violation of Article of War 96.

Jerry G. Fox, Judge Advocate.

John Bonnicwell, Judge Advocate.

(On leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 SEP 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 Charles E. Richards (O-381737), 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 and 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. 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. 306, 9 Oct 1943)

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

SPJGQ
CM 237425

28 JUL 1943

UNITED STATES v. Second Lieutenant EVERETTE E. MATTSON (01017269), Headquarters Company, Division Trains, 8th Armored Division.	EIGHTH ARMORED DIVISION Trial by G.C.M., convened at North Camp Polk, Louisiana, 28 June 1943. Dismissal, total forfeitures and confinement for five (5) years.

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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that 2nd. Lt. Everette E. Mattson, Train Hq. Co., Division Trains, 8th Armored Division, did, at Bon Wier, Texas, on or about 25 June 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Pvt. William G. Kitchell, Battery C., 405th Armored Field Artillery Battalion, a soldier of the male sex.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was submitted. 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 and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of record discloses the following facts:

It was stipulated that accused has been a commissioned officer in the Army of the United States from 27 March 1943 to the date of trial, 28 June 1943 (R. 6), and that the bivouac area of Company I, 41st Armored Regiment, 11th Armored Division, was at Don Wier, Texas, on 25 June 1943 (R. 6). Private William G. Kitchell, Battery C, 405th Armored Field Artillery Battalion, North Camp Polk, Louisiana, on 25 June 1943, was attached to Company I, 41st Armored Regiment, 11th Armored Division. The 11th Armored Division was on maneuvers on that date and witness was driving for the umpires, one of whom was the accused (R. 6). About 7:30 p.m. that date Kitchell parked his "peep", in which accused was the only passenger, in the bivouac area at Don Wier, Texas, and the two of them sat there and engaged in a general conversation. During the discussion accused began "feeling around" witness' penis.

> "Directly he suggested that we go to his tent. I didn't know what to think so I got out of the Peep and started toward the tent. I went back and got the flashlight. He had stopped and turned around and it kind of got me thinking so I went back and got the flashlight and went over to the tent. When we got in the tent he went to feeling around again. And directly he went to feeling around his equipment. I didn't know what he was after. He got a mosquito bar. He put that over the front of the tent, as I guessed, to keep anybody from seeing in, looking in the tent. So then he went over and put my penus in his mouth. He told me to forget he was a Lieutenant for the time being. He went ahead and sucked me off. He then told me to tell him when I was coming. Which I did. He said something about wishing I was of the opposite sex. I told him when I was coming. Instead of pushing away he just hung on. He got up and walked outside and spit it out. He came back and sat down and said "you meet some strange people sometimes", I said, "yes, sir." I was trying to figure out a way to get away from him. I finally told him I was going to bed. I went over and put up my mosquito bar. I started getting my bedding out and when I thought he was lying down I slipped out of the tent. I went over to Captain Baker and reported it."

During the commission of the act accused mentioned several times to witness "something about milking him down" and witness "played with" his (accused's) private parts (R. 7).

The prosecution introduced and the court received in evidence accused's confession which was written out in longhand, signed and sworn to by accused on the date of the offense. It was also stipulated in writing, signed by accused and his counsel, that "the document hereto attached and signed by accused was in fact voluntarily made by the accused after he had been fully advised of his rights" (R. 7; Pros Ex. A).

"Affidavit 25 June 43

"I hereby solemnly swear that:

"1. I took my driver into my tent and after laying there a while I sucked him off. By 'sucking off' I mean that I put his penis into my mouth for a period of 2 or 3 minutes.

"2. I certify that the foregoing statement was made voluntarily, after being warned of my rights, and said statement may be used against me in any proceedings, Board of Officers or court of competent jurisdiction.

Everette E. Mattson
2nd Lt. Inf. 0-1017269

Witnessed By
Richard R. Seibel
Major - 41st AR.

Robert L. Baker
Capt. - 41st AR

"Sworn to and subscribed before me this 25th day of June, 1943.

Wray F. Sagaser
Major, 41st A.R.
Summary Court"

The defense called only one witness, Major Walter A. Thompson, Medical Corps, Station Hospital, Camp Polk, Louisiana, who, being duly qualified as a psychiatrist, testified that on the morning of the day of the trial, Monday, 28 June 1943, accused had requested witness "to make a special examination of him" (R. 8). Accused "readily admitted that he had practiced sodomy, which in this case was sexual intercourse by mouth". After talking to him and going into his life history Major Thompson determined that "this was a symptom of a mental abberation or disorder and was a symptom of an underlying neurotic condition" (R. 9). This officer has a feeling of guilty following this practice which indicates that consciously he does not like it and regrets it and wishes he did not have this unusual practice. This is an act that is actually beyond the control of the individual. Usually there occurs a pent-up or nervious reaction in the individual until that feeling is gratified. In this case the gratification is through the practice of sexual intercourse by mouth. In the opinion of the witness accused's condition is a medical one--it is not "a willful or criminal tendency" (R. 9).

The defense offered and the court received into the evidence the written report rendered by this witness after consultation with accused (R. 9; Def. Ex. 1). His conclusion is expressed as follows:

> "IMPRESSION: From a study of this officer, it is apparent that the act of sodomy here is a neurotic symptom or manifestation. It is due to a subconscious mechanism which is a result of fixation at an early stage in his development and probably goes back to the age of at least 2 or 3 years. It is not due to willfulness or criminalistic tendencies but is something over which he has no control. This is proven by two facts, (1), the shame and remorse following the act, and (2), the inability to have satisfaction from normal heterosexual relationships.
>
> "It is the writer's opinion that this is a medical condition and not a criminal one, and that the officer should be considered to be suffering from a neurosis."

On cross-examination witness admitted his diagnosis was based solely and entirely on a "history" given him by accused plus his (the doctor's) experienced deductions (R. 10) and that accused "does understand right from wrong in particular cases" (R. 9) and, in a particular case, accused "could, for a certain period of time" abstain for one reason or another, even though he had nervous energy built up (R. 10).

On examination by the court witness was asked,

> "Q - In your estimation do you think he is sane in all other matters and just insane in regard to this offense?
> "A - I didn't go in to all sides of his nature. On the surface this is really the only so called insane symptom, actually, of course, it is not a symptom of insanity, at least not from a medical standpoint, but is a symptom of neurosis which is considered a mild mental condition as compared with psychosis or insanity which is a severe mental illness in which the individual does not have control of himself and usually has delusions and other manifestations."

The gist of the witness' diagnosis is that accused understands sodomy is wrong and that he is committing a criminal act when he does it but if the circumstances are favorable and he has built up a certain amount of nervous energy he can no longer resist the impulse or control himself (R. 11). Witness believes accused is sane in every other respect besides this (R. 11) and that he knows the difference between right and wrong even with respect to sodomy and if discovered

either in the preliminary stage or the actual act of sexual relationship he would stop, "because there is that much control over the condition" (R. 12).

At the conclusion of the psychiatrist's testimony the president of the court read in open court paragraph 63, page 49, Manual for Courts-Martial, 1928, which relates to inquiry into sanity of accused at the time of trial and asked whether any member of the court or the prosecution or the defense wished to make a motion for such an inquiry. None was desired and the defense counsel stated,"The defense feels that such investigation as has been made is adequate" (R. 13).

The accused,having been advised of his rights as a witness by the defense counsel, stated in open court he understood such explanation and desired to remain silent (R. 13).

4. That accused committed sodomy per os as alleged is clearly established by the competent evidence of record plus the voluntary confession of accused. The theory of the defense is one of confession and avoidance--admitting commission of the felony at the time, place and in the manner alleged, but contending, in effect, that the criminal act was the result of an irresistible and uncontrollable impulse which was caused by an early fixation, the development of which accused was unaware since it had developed long before he could resist it.

The "irresistible impulse" theory put forth by the defense through the testimony of a psychiatrist is evidently intended to embrace that exculpating form of insanity in which the accused is driven to the commission of a crime by an internal force, the source of whose impetus is an actual existing disease of the mind by reason of which he is incapable of offering such internal resistance or will power as would prevent commission of the crime. In other words, accused, while able to understand the nature and consequences of the act charged against him and to perceive that it is wrong, is unable, because of a mental disease affecting his volition, as distinguished from his perceptive powers, to resist the impulse to commit the act of sodomy.

The doctrine that irresistible impulse will relieve from responsibility for crime an accused who, as here, is able to distinguish right from wrong in regard to the special offense committed, is rejected by a large number of judicial authorities, United States v. Holmes (1858) 1 Cliff. 98, Fed. Cas. No. 15,382; Guiteau's Case (1882) 10 Fed. 161; United States v. Young (1885) 25 Fed. 710; United States v. Faulkner (1888) 35 Fed. 730.

The general doctrine is clearly stated in Flanagan vs. People (1873) 52 N.Y. 467, 11 Am. Rep. 731, where the New York Court of Appeals said:

> "We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them, and that the absence of the former is consistent with the presence of the latter. The argument proceeds upon the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates, but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law. The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitations claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it. Indulgence in evil passions weakens the restraining power of the will and conscience, and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law." See also State v. Knight (1901) 95 Me. 467, 55 L.R.A. 373, 50 Atl. 276.

The Board adopts this logically sound and morally correct view of the law with respect to the defense of irresistible impulse in sodomy cases, and repudiates any amoral doctrine which holds otherwise, psychiatry to the contrary notwithstanding. Aside from the cold legal aspect of this issue, the Board cannot ignore the moral and military phases involved. The seduction of a soldier into becoming a particeps criminis in this most disgusting and revolting form of moral degeneracy by an officer who was, at least for the time being, his superior and immediate commander is abhorrent not only to any decent standards of morality but destructive of those military standards required by the Army of its officers. The evidence is legally sufficient to support the findings of guilty of Charge I and its Specification.

5. This officer is 23 years of age and single. He graduated from high school in 1938 and attended a business college for five months in 1941. He was inducted 27 May 1942, served as a private in

the 7th Armored Replacement Batallion at Fort Knox, Kentucky. He was commissioned a second lieutenant, Army of the United States, 27 March 1943 after completion of an Officer Candidate School course at Fort Knox, Kentucky. In civil life he has worked as a laborer, a clerk, a contractor for sugar beet work and, from time to time, owned and operated a trapping business between 1935 and 1942.

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 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 93.

William A. Pounds, Judge Advocate.

Charles Stephen, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 7 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 Second Lieutenant Everette E. Mattson (01017269), Headquarters Company, Division Trains, 8th Armored Division.

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 and that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement.

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

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

3 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. USW
3 - Form of action

(Sentence confirmed but confinement remitted. G.C.M.O. 240, 17 Sep 1943)

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