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VOL. 25

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v. 25

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XXV

including

CM 238970 to CM 240216

(1943)

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

SPJGN
CM 238970

9 SEP 1943

UNITED STATES	)	SAN FRANCISCO PORT OF EMBARKATION
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Mason, California, 22
Second Lieutenant JENNINGS	)	July 1943. Dismissal.
D. HENDLEY (O-1315826), Company)	
B, 486th Port Battalion, Trans-)	
portation Corps.)	

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 93rd Article of War.

Specification: In that Second Lieutenant Jennings D. Hendley, Company B, 486th Port Battalion, did, at Camp John T. Knight, Oakland, California, on or about July 5, 1943, with intent to do him bodily harm, commit an assault upon Private Mose Robinson, by willfully and feloniously striking the said Private Mose Robinson in the face with his fist.

(2)

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

Specification: In that Second Lieutenant Jennings D. Hendley, Company B, 486th Port Battalion, did, at Camp John T. Knight, Oakland, California, on or about July 5, 1943, conduct himself in a manner unbecoming an officer and a gentleman by committing an assault upon Private Mose Robinson.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows by the testimony of four enlisted men, including one sergeant, that shortly before eight o'clock on the morning of 5 July 1943, the accused was in charge of a work detail of enlisted men, marching at attention in columns of twos, toward their duty assignment at the docks. As they approached a ramp leading down to a highway and railroad crossing, the accused told Private Mose Robinson to quit talking in the ranks and to get in step. A few minutes later, near the foot of the ramp, Private Robinson spoke to Sergeant Richard A. Merriman, whereupon the accused told Robinson to keep his mouth shut, that he ought to kick him, suiting the action to the word by applying the flat part of his shoe to the seat of Robinson's pants. Then, seizing Robinson by the collar, the accused jerked him out of the ranks, with the remark, "You black son of a bitch, you are not going to act right anyway". While the column marched on, the accused struck Robinson's face three times, with his bare fist; after which he put on his gloves and again struck the man's face, this time with his gloved fist, two or three times. Robinson, flinching, and trying to dodge the blows, inquired of the accused "why did he hit him, sir, he hadn't done anything". Two witnesses observed blood on Robinson's face; another, a knot on his cheek bone (R. 9-18, 20-26, 29-41).

Harry Comroe, a civilian patrolman, on duty below the ramp, heard some loud talking as the column came down. Then he saw the accused seize "the colored boy" by the collar, draw him up close, and strike "with his fist in towards his stomach". When the accused said "I have told you about that before", the colored boy answered, "yes, sir". Then they worked on across the road. In the meantime the accused again grabbed Robinson by the collar, and struck him somewhere about the face. Comroe testified further that:

"* * * there was quite a lot of hollering going on by a colored civilian that went by that I was neglecting my duty in not putting them under ar-

rest, so then I intercepted the officer and asked him to tell the colored boy to go to one side, I would like to speak to him, and I asked him in a kindly way not to do it, that he would very likely create racial trouble."

* * * * *

"* * * 'I have handled these niggers before,' he says, * * * 'I know what I am doing'".

* * * * *

"I thought there would be trouble and I called our company quarters and had them call for the Provist Marshall."

When he observed them, the accused and Robinson were "kind of" behind the detail. According to Comroe's testimony on cross-examination, he

"didn't know really at the time whether this colored soldier and the officer were attached to this unit that had crossed the street because they seemed to lagged behind during the argument that took place" (R. 45-49).

4. The defense did not introduce any witnesses except the accused, who after being fully advised of his rights, testified under oath. He stated he was twenty-three years of age, born in Marion, North Carolina, was married and had two children. He had been an enlisted man from 5 May 1939, until he was commissioned in the Infantry, 26 March 1943, upon graduation from Officers' Candidate School. He had been at Camp Stoneman about two weeks, doing various military duties. Private Mose Robinson was a member of his company, and he had had difficulty with him a few times before, for skipping detail, and for sleeping once when he had been put to cleaning about two hundred rifles, as company punishment. On 5 July, the accused's assignment as duty officer was to take his detail to the port. Private Robinson was hollering as they passed headquarters, when he was supposed to be at attention; so the accused reprimanded him. Robinson turned around in ranks and started talking, whereupon the accused ordered him out of the ranks. Robinson stepped out to the side, and the rest of the company moved forward. The accused told Robinson he "was about fed up with him, I couldn't take much more" and ordered him to report to the dock. Robinson said he was going back, that he had been treated like a dog, so the accused "lost all patience and judgment and grabbed

(4)

him around the collar and slapped him around the face", once with his bare hand. The accused took his glove out of his pocket, put it on, again grabbed Robinson by the neck, and "shook him like a dog"; but still Robinson refused to report back to the ship, so they went back to the company together, to interview the company commander. The accused asserted that he never hit Robinson, but slapped him with a bare hand after having him pulled out of ranks. He would not exactly say that he kicked Robinson; he hit him on the leg with the side of his shoe, when he told him to pick up his step (R. 50-63).

5. * The Specification, Charge I, alleges an assault with intent to do bodily harm, upon Private Robinson, by willfully and feloniously striking him in the face with his fist. "An assault with intent to do bodily harm is a felony only when committed with a dangerous weapon, instrument, or other thing, and a fist does not fall within this class within the meaning of the statute" (par. 451 (7), p. 312, Dig. Ops. JAG, 1912-1940). The Specification does not allege nor does the evidence establish any acts by the accused which would warrant the legal inference that, beyond a reasonable doubt, he intended to do bodily harm. Assault and battery are shown (CM 229366, Long). In the opinion of the Board, the evidence is legally insufficient to sustain the conviction of felonious assault in violation of Article of War 93, but legally sufficient to support a finding of guilty of the lesser included offense of assault and battery in violation of Article of War 96. ✓

6. The Specification, Charge II, alleges that the accused conducted himself in a manner unbecoming an officer and a gentleman by committing an assault upon Private Robinson.

"An officer has no right to punish, by assault, any offense or dereliction of duty on the part of an enlisted man. Such action constitutes an offense against military law, and charges may be preferred against the officer under either A.W. 95 or A.W. 96. 250.4 Sept. 3, 1918" (par. 453 (3), p. 341, Dig. Ops. JAG. 1912-1940).

The Board considers the evidence legally sufficient to sustain the findings of guilty of the Specification, Charge II, in violation of Article of War 95.

7. The defense moved to strike Charge I and its Specification on grounds of redundancy "as included in the more serious charge of violation

of the 95th Article of War", and double jeopardy, asserting that the accused could not "be tried for any other offense if either offense is necessarily included in the other". The purpose of the motion was announced as being "to avoid trial on two charges involving identically the same set of facts". The Judge Advocate General has held there is no inconsistency in the findings of guilty, upon identical Specifications, under both Article of War 95 and another appropriate Article, where the proof supports conviction under each (CM 230222 (1943)). The motion was properly overruled.

8. The accused is 23 years of age. War Department records show he enlisted 5 May 1939, for three years, and his period of service was extended to duration, plus six months. He graduated from Officers' Candidate School, Fort Benning, Georgia, on 26 March 1943, was honorably discharged and commissioned second lieutenant, A.U.S., on that date.

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 as to Charge I for a violation of Article of War 96 and of its Specification, except the words "and feloniously", and the findings of guilty of Charge II, and its Specification, legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon a conviction of Article of War 96 and is mandatory upon a conviction of Article of War 95.

Blaise Besson, Judge Advocate.

Abner E. Lifecomb, Judge Advocate.

Benjamin R. Slesper, Judge Advocate.

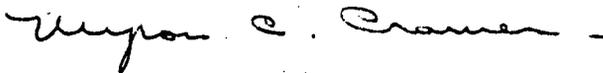
(6)

SPJGN
CM 238970

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 Second Lieutenant Jennings D. Hendley (O-1315826), Company B, 486th Port Battalion, Transportation 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 of Charge I and the Specification thereunder, excepting the words "and feloniously", in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and carried into execution.
3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should such action meet with your approval.



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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 309, 14 Oct 1943)

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

(7)

SPJGH
CM 238972

23 SEP 1943

UNITED STATES)

v.)

Private HAROLD B. LOWRY)
(39331436), Army Air)
Forces Unassigned,)
Attached 33rd Training)
Squadron, 509th Training)
Group.)

FOURTH DISTRICT, ARMY AIR FORCES
TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened at
Basic Training Center No. 5,
Kearns, Utah, 28 and 29 July
1943. Dishonorable dis-
charge and confinement for
twenty (20) years.
Penitentiary.

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 tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Harold B. Lowry, Army Air Forces Unassigned, Attached 33rd Training Squadron, 509th Training Group, did, at Salt Lake City, Utah, on or about 20 July 1943, with intent to commit murder, commit an assault upon Mrs. Elinore McLeod by willfully and feloniously striking her with his hands and fists, and by choking her with his hands.

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 twenty years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that at about 1:00 a.m. on 20 July 1943 Mrs. Elanor McLeod, who was visiting her mother, was in

the latter's one-room apartment on the second floor of an apartment building. Mrs. McLeod was alone in the room, was preparing to retire and was dressed in a housecoat. A studio couch had been pulled out ready to make up. It was very warm and the door was open. After looking at the name plate on an adjacent apartment, accused stuck his head in the door and asked Mrs. McLeod if she knew anyone by the name of Jackson. She replied that she had not heard of them and when she asked their apartment number he first said "20 something" and then 206 which was the number of the apartment of Mrs. McLeod's mother. Accused said he was sorry for bothering Mrs. McLeod, stepped just inside the door and when she asked him to leave replied that he would do so but made no move to go. When she turned to him and asked him to "please leave" he came at her and pushed or knocked her onto the couch. The thought came to her that she needed help and she screamed. He started choking and hitting her. She did not remember exactly what happened but knew he was hitting her as she looked at him once and saw his fist coming down. Both of her eyes were "black" after the beating. Accused hit her in the mouth so hard that if it had not been for a brace on her teeth she would have lost three or four of them. So far as she knew he made no threats as to what he intended to do. After he had hit her several times he looked at her and said "now, you are going to be quiet". She did not recall hearing him say "one more scream and it will be your last". She vaguely remembered seeing Mr. Stork in the door and knew that she went down the fire escape although she could not see very well. She was taken to the Emergency Hospital and from there to "St. Marks". When she first saw accused he did not seem to be drunk but after he came into the room she thought that he was or that he had had something to drink. She could not say that he was very drunk as she did not "know enough about it". At the time of the assault upon her, Mrs. McLeod was expecting a baby in four and one-half months (R. 7-14).

Mr. John Martin Stork lived in apartment number 204 which was separated by only one intervening apartment from the room occupied by Mrs. McLeod's mother. He was in bed when shortly after midnight on 20 July, he heard a scream. He got out of bed, put on his shirt and trousers and went out into the hallway. He heard someone gasp for air and heard accused say "and if I hear one more scream, that will be your last one". Upon looking into the room Mr. Stork saw accused on top of Mrs. McLeod choking her with one hand. He could not see the other hand of accused. Mrs. McLeod's face "was blood all over" - there was not a white spot on it and he did not even recognize her. Accused got up, came toward Stork, and upon meeting Stork in the center of the room tried to push him away and get to the door. Stork grappled with

accused, moved him out into the hallway and held him although accused made every effort to get away. Accused said "I am going to kill you too" and tried to drag Stork into the bathroom. Stork threw accused to the floor and although he kicked and struggled and "both hit each other", held him until the arrival of the "MP's". Accused struggled with the "MP's" and when Stork got up, kicked at him. There was no whiskey odor but a "smell of beer" on the breath of accused. Stork was certain that accused was not drunk (R. 15-20).

In response to a call which they received at about 12:50 a.m. Corporals A. L. Fortune and Daniel V. Husted, Corps of Military Police, went to the apartment house where the assault upon Mrs. McLeod occurred and found Mr. Stork holding accused on the floor of the hallway. They pulled Stork off and raised accused to his feet. Accused kicked at Stork, called him some "very vulgar names" and said that if he could get his hands on Stork he would kill him. It was necessary for the military policemen to throw accused to the floor again to keep him quiet. He quieted down "physically" but continued raving "with words". After accused had been placed in the "recon" car to be taken to the Police Station, Corporal Fortune heard him remark, "Go ahead and shoot me, any old bullets good enough for me. The sooner the better. I am coming back and get everyone of these". According to the testimony of Fortune accused also stated that he had served four years in San Quentin, the Army would not let him enlist, and "He was going to kill some of them". When Fortune asked accused if he thought he could "get away with beating up a pregnant woman", accused replied that when he beat his wife she lost her baby and he did not care about any other woman. Fortune saw Mrs. McLeod in the apartment of the landlord in the basement. Her lips looked as if they were cut, there were small scratches and finger nail marks on her throat, blood was coming from her mouth, her clothes were torn and bloody and she had "a nose bleed". When accused was on the floor and Fortune was "down over him" there was a faint odor of beer but "no alcohol smell". Fortune thought that although accused was not drunk on liquor he did not act normal "or human" but like a "wild or crazy man". Corporal Husted was of the opinion that accused was sober (R. 22-35).

4. For the defense First Lieutenant Owen Clark, Medical Corps, testified that he had examined accused shortly before the trial and from talking with him had received a "complete picture" of his past life. He classified accused as a constitutional psychopath. A paranoid personality

(10)

would come under that classification. When under the influence of liquor accused would have a morose, depressed feeling or a feeling that he had been treated badly and would not show the judgment or emotional stability of a normal person. Under such circumstances he would have a tendency to become violent without knowing "how far he was going with that violence" and might strike at anyone without any reason. That type of individual feels that he has been persecuted and has a desire to get even with someone. In the case of accused, alcoholic stimulation tends to bring out these tendencies which he keeps generally under control when not intoxicated (R. 36-39).

On cross-examination Lieutenant Clark stated that he was familiar with the test as to whether or not a person is legally sane - namely the ability to distinguish between right and wrong, and that, in his opinion, accused was legally sane (R. 41).

Accused testified that he was twenty-seven years old on 14 June 1943 and that he had married two months prior to his induction. His father died when he was five years old and accused received only a grammar school education. His last job had been in the shipyards in "Portland" where he worked as a chipper and corker. The first time he was in trouble was when he was nine years old. He was sent to a boarding school but did not like the food and ran away the next day. His mother was sick in bed at that time. From then on accused had a "pretty tough time". He "busted something", was locked up in a disciplinary school, "played hooky" and was sent to a detention home where he was confined four different times. He and another boy got into trouble and accused was sent to a training school. He "broke away" from there and later on, when he was fourteen, started drinking and was drunk most of the time. On one occasion when he was locked up in a police station "they" kicked him on the "tail bone" and he could not sit down for a week. He was kept in solitary confinement until he recovered, and was sent to a training school. Every time he walked down the street he would be arrested. When he was twenty years old he went to San Quentin where he was confined for almost four years. While there "they" would beat him until he could not walk up to bed. If he did anything wrong "they" would stand him up and if he "turned an eye" would beat him with the butt of a gun. He spent much of his time in San Quentin in solitary confinement on a fare of bread and water once a day, "sometimes not then". When he got out, as he wanted to make up to his mother and go straight, he tried to get a job but could not get one. He tried to join the Army but when it was discovered that he had been convicted of

a felony he was rejected. He was arrested just because he had been in trouble before. Every time anything went wrong in town accused would be picked up and held for investigation for three or four days. When he finally got a good job and was getting sixty to eighty dollars a week he got married. He told his wife about himself and she said that she understood "as long as I wouldn't do anything else". When he received his 1-A classification he tried to join the "CB's" but did not succeed because "they found out" about his conviction. At the Induction Center the inductees were permitted a choice of the Army, Navy or Marines but accused was not given a "choice of anything", and came into the Army. He did not think anyone liked "this Camp, very well". He became depressed, knew something was going to happen and went to see the Chaplain "so I could have my wife" and keep out of trouble. He was referred to "Major Runk" but after waiting three or four days without hearing anything, became more depressed, got drunk "and this is the result" (R. 42-45).

Accused further testified that he did not know and had never before seen Mrs. McLeod. He had no intention of doing anything to her. He did not remember being in "that house". On the night of the assault on her, he had gone to town on pass. He drank six or eight bottles of beer, then went to a liquor store where he purchased a pint of whiskey and drank all of it "except a couple of drinks". He left the liquor store just before it closed and went to the Overseas Club but did not remember where he went from there. He had no recollection of anything that happened thereafter that night (R. 45-46).

5. The evidence shows that shortly after midnight accused came to the open door of a second floor apartment and inquired of Mrs. McLeod, who was alone in the room, how he could find someone by the name of Jackson. After a short conversation she asked him to leave. He pushed or knocked her on to a studio couch and when she screamed, choked her and hit her in the face with his fists. According to her testimony, after hitting her several times he said "now, you are going to be quiet". Mr. Stork, who was in a nearby apartment, heard accused say, "if I hear one more scream, that will be your last one". When Stork came to the door of the room accused was on top of Mrs. McLeod and was choking her with one hand. Her face was covered with blood. Accused got up and came toward Stork who grappled with him and they struggled and wrestled out into the hallway. Accused after making every effort to get away without success, said to Stork, "I am going to kill you too". Stork threw accused to the floor and held him until the Military Police arrived and took him into custody. When Mr. Stork entered the room and accused released her, Mrs. McLeod got up from the couch and went down the fire escape. Both of her eyes were blackened, there were scratches on her throat, her lip was cut, and her nose and mouth were bleeding.

(12)

The Specification of the Charge alleges that accused assaulted Mrs. McLeod with intent to commit murder. The offense charged is, in effect, an attempt to murder. One of its essential elements is a specific intent to murder which must concur with the assault (MCM, 1928, par. 1491). Such an intent is to be inferred from the situation of the parties, their acts and declarations, the nature and extent of the violence and the object to be accomplished (4 Am. Jur. 142).

In the present case it is not the function of the Board of Review to weigh the evidence or determine controverted questions of fact (AW 50½) but since the findings of guilty, in so far as the element of intent to murder is concerned, rest upon an inference of fact it is the duty of the Board to determine whether there is in the evidence a reasonable basis for that inference (CM 212505, Tipton; CM 228831, Wiggins).

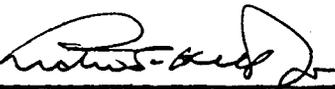
Considered as a whole the circumstances do not show that accused intended to kill Mrs. McLeod or attempted to murder her. She was a stranger to him and he could have had no motive to kill her when he came to the door of the room where she was preparing to retire. His first act of violence was to push her onto the couch, for what purpose is not clear, and he did not hit or choke her until after she screamed. She testified that he did not make any threats as to what he intended to do. The declaration, heard by Mr. Stork, to the effect that if he (accused) heard one more scream it would be her last one and his statement to Mr. Stork that "I am going to kill you, too", considered alone and aside from the attendant circumstances might be construed as indicative of an intention on the part of accused to kill Mrs. McLeod at the time he assaulted her. Such a construction, however, would not be consistent with the accompanying and prior acts and conduct of accused. He did not use a weapon of any kind. It does not appear that he attempted to choke Mrs. McLeod to death, as he choked her with only one hand and did not thereby render her unconscious or otherwise seriously injure her. While the blows to her face with his fist inflicted painful injury, they were not of such a character as ordinarily to cause death. When the assault terminated upon the entry of Mr. Stork, Mrs. McLeod was able to get up from the couch and go down the fire escape unassisted.

An inference as to the intent of accused should not be based solely upon his statements if his acts show a different intent. The question of intent is one of fact to be determined from all of the circumstances including such statements (Dig. Op. JAG, 1912-40, Sec. 451 (57); CM 155909). In the opinion of the Board of Review the evidence is legally insufficient to support the findings of guilty of assault with intent to murder but is legally sufficient to support findings of guilty of the lesser included offense of assault with intent to do bodily harm.

The maximum limit of punishment for assault with intent to do bodily harm is dishonorable discharge, total forfeitures and confinement at hard labor for one year (MCM, 1928, par. 104c). Under Article of War 42 that offense is not punishable by imprisonment in a penitentiary.

6. The accused is 27 years of age. The charge sheet shows that he was inducted on 3 May 1943.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involves findings of guilty of assault with intent to do bodily harm and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor in a place other than a penitentiary, Federal correctional institution or reformatory for one year.

, Judge Advocate.

Samuel M. Driver, Judge Advocate.

, Judge Advocate.

(14)

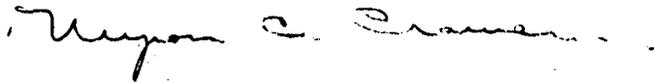
1st Ind.

War Department, J.A.G.O., 30 SEP 1943 - To the Commanding General,
Army Air Forces Western Technical Training Command, 1108 - 15th Street,
Denver 2, Colorado.

1. In the case of Private Harold B. Lowry (39331436), Army Air Forces Unassigned, Attached 33rd Training Squadron, 509th Training Group, 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 as involves findings of guilty of assault with intent to do bodily harm in violation of the 93rd Article of War be approved and that 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 in a place other than a penitentiary, Federal correctional institution or reformatory for one year be approved. Thereupon you will have authority to order the execution of the sentence.

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

(CM 238972).



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

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

(15)

SPJGH
CM 238987

3 SEP 1943

UNITED STATES)

v.)

First Lieutenant EDWARD W.)
FERGUSON (O-329681), Coast)
Artillery Corps.)

ANTILLES DEPARTMENT

Trial by G.C.M., convened
at APO 845, c/o Postmaster
New York, New York, 19
July 1943. Dismissal and
total forfeitures.

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

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

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

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

Specification: In that First Lieutenant Edward W. Ferguson, 51st Coast Artillery, did, at APO 845, on or about May 15, 1943, knowingly and wilfully misappropriate to his own use, one quarter ($\frac{1}{4}$) ton Willys truck, Number W-2041823, of the value of about \$752.50, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that First Lieutenant Edward W. Ferguson, 51st Coast Artillery, did, at APO 845, on or about May 15, 1943, with intent to deceive the dispatcher, Base Motor Pool, APO 845, officially state to the said dispatcher, in substance, that he was officer of the day and needed transportation to inspect a gun position off the Base, which statement was known by the said First Lieutenant Edward W. Ferguson to be untrue in that he was not officer of the day and did not need transportation to inspect a gun position

(16)

off the Base, which statement was made solely to induce and did induce said dispatcher to authorize transportation for him for an unauthorized purpose.

He pleaded not guilty to and was found guilty of all the 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 only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on 14 May 1943 accused was in command of Battery C, Provisional Coast Artillery Regiment, at Borinquen Field, which apparently was APO No. 845. At about 9:00 p.m. on that day, Private Victor Rivera, of Battery C, was instructed to drive a jeep which was assigned to the battery, to the Officers' Club. Torres, the usual driver of the car, was on pass and Rivera was the only one available to take his place. Rivera drove to the Officers' Club, picked up accused and five or six other officers about 10:00 p.m. and drove them to the quarters of an Air Corps officer and thence, about midnight, to the quarters of accused. They remained there until 2:00 a.m., at which time accused said that he would drive the jeep and told Rivera to wait for him at his quarters. Accused drove the car to the motor pool office and presented to Private First Class James W. Alexander, who was on duty as dispatcher on "off-base runs", a driver's trip ticket bearing the name of Lieutenant Pare. Accused stated to Alexander that he was "O.D., going to check a gun position at hill 128", and that he needed the vehicle for that purpose. The trip ticket was in order. Alexander dispatched the vehicle and made entries on the Daily Dispatching Record of Motor Vehicles showing the driver's name as "Torres", the destination as "Hill 128", the time out as 2:30 a.m. and, under the column headed "Report to", the name "Lt. Pare". About an hour or an hour and a half later, accused returned to the dispatcher's office and stated that the vehicle had not been dispatched. Alexander then showed him the record on the dispatch sheet. Accused did not have side-arms at the time. At about 4:15 a.m. on 15 May, a jeep, driven by accused and with two other officers in the rear seat, drew up at the window of the Aguadilla Gate at Borinquen Field, where Private Howard A. Guest was on military police duty. Accused handed Guest a trip ticket. Guest immediately entered it, and as he turned to get the officers' "sign-out" sheet, he heard the driver say that he was on a tactical mission.

The jeep then drove off at a high rate of speed. At about 5:00 a.m. the three officers returned in the jeep and signed the "sign-out" sheet. Accused, who was driving, remarked that they had been to Aguadilla light No. 4, and Guest wrote on the sheet "Light No. 4 Aguadilla", and 4:15, as the time the jeep had left the field. Guest explained to the accused that an officer should not drive a jeep. Accused replied that he knew that, but that the driver was tired and that he had sent him to bed and thought it would be "O.K." to go to Aguadilla. Private Joseph Comly, another guard on duty at the Gate at the time, identified accused as the officer who was driving the jeep at 5:00 a.m. (R. 9-19; Exs. 1, 2 and 3).

Captain Victor Cordona, the commanding officer of Battery G, "P.C.A.R.", was in charge of light No. 4 on or about 15 May 1943. He did not see accused on the night of 14-15 May and did not know whether accused was authorized to inspect the light on that night. There was a duty officer in Captain Cordona's battery and a duty officer at regimental headquarters, but neither Captain Cordona nor his officers had to act as officer of the day. Battery officers were required to make inspections (R. 19-20).

Second Lieutenant Eduardo Pare was motor transportation officer of the battalion in which accused was a battery commander. At about 7:30 a.m. on the 15th of May, Lieutenant Pare assigned jeep Number 2041823 and two cargo trucks to accused's battery. The same vehicles were assigned daily. There was no such duty as officer of the day, but there was a duty officer in his organization, and there was a staff duty officer and a regimental duty officer in the second battalion, one of whom checked the guard in the area, and the other checked the guard at the gun position on the beach (R. 20-22).

4. For the defense, First Lieutenant Pedro Vivas testified that on 15 May 1943 he was executive officer of the battery commanded by accused; that the battery commander ordinarily exercised control of the jeep and other vehicles assigned to the battery; that the Provisional Coast Artillery Regiment is no longer in existence, but that "our battery" does have an observation post at hill 128, in the general direction of the light position, and that its location is referred to as hill 128 (R. 22-24).

Accused did not testify or make a statement.

(18)

5. In rebuttal, the prosecution recalled Lieutenant Vivas. He was on leave during the period 14-17 May 1943. Hill 128 is in the same vicinity as light No. 4, but his battery did not have anything to do directly with light No. 4, and none of the battery officers were there (R. 24).

6. a. Charge II: The evidence shows without contradiction that on 15 May 1943, accused stated to the dispatcher at Base Motor Pool, APO 845, that he was "O.D.", going to check a gun position at hill 128 and that he required the jeep for that purpose; that the vehicle was dispatched; and that accused drove out the Aguadilla Gate in it at 4:15 a.m. and did not return until 5:00 a.m. There is no direct proof that the statements made by accused to the dispatcher were untrue.

Captain Cordona, who commanded Battery G, testified that there was no officer of the day in his battery or in the regiment, that the only thing he knew of was the duty officer at regimental headquarters, that neither he nor his officers had to act as officer of the day, but that for his own battery he had a duty officer. Lieutenant Pare was asked whether in his organization there was an officer of the day, and he answered that there was a duty officer, and that there was a staff duty officer and a regimental duty officer in the second battalion to check the guard in the area and at the gun position on the beach. It is evident from the testimony of these two officers that the regiment, the battalion, and each battery of the regiment had a duty officer who performed some of the normal functions of an officer of the day. If accused was duty officer his statement that he was "O.D." did not necessarily indicate an intent to deceive on his part as the term "O.D." would apply colloquially to the status of duty officer of the battery. Moreover, Bulletin No. 34, Airbase Headquarters, "A.P.O." No. 845, dated 9 February 1943, introduced in evidence by the prosecution (Ex. 3), shows that there was both an officer of the day and a headquarters duty officer of the Base and that an officer, who was not the duty officer was detailed as officer of the day on each of the following dates: 10 February, 11 February and 12 February 1943. Private Alexander testified that the trip ticket which accused exhibited to him was in order and bore the name of Lieutenant Pare, who was the battalion transportation officer. Lieutenant Pare was not questioned concerning the ticket. Accused stated to the dispatcher that he was going to check a gun position at hill 128, and there is no evidence that there was no gun position at hill 128, or that the jeep was not used for that purpose. It appears from the undisputed testimony of Lieutenant Vivas, that Battery G, of which accused was the commanding officer, had an observation post on hill 128 and that hill 128 was in the same vicinity as light No. 4,

but that his battery had nothing directly to do with light No. 4. When accused returned to the Gate at 5:00 a.m. he told the military police on duty that he had been to light No. 4 at Agudilla, but that is entirely consistent with his previous statement that he was going to check a gun position at hill 128.

It is not enough that the evidence cast suspicion on the innocence of accused. To warrant findings of guilty the evidence should establish his guilt as to every element of the offense charged beyond any reasonable doubt. The following language from Buntain v. State (15 Tex. Appeals 490) was quoted with approval by the Board of Review in CM 212505 Tipton and in CM 237032 Nelson:

"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, the evidence fails to show that the statement made by accused to the dispatcher as alleged in the Specification of Charge II with respect to the purpose of his trip was false in any respect.

b. Charge I: There is no substantial proof that the use of the jeep by accused on 15 May 1943 was unauthorized or improper. While it is shown that accused violated instructions of the commanding officer of the base that no officer would drive a Government vehicle and that a Government vehicle would not be left in front of Officer Quarters for any protracted period (Ex. 3), those offenses are not included within the allegation of misappropriation to his own use of the jeep.

In the opinion of the Board the record is legally insufficient to establish the offense alleged under Charge I.

c. The president of the court excused Major Charles Smith from serving as a member of the court on the ground that Major Smith had been relieved from duty at the Base. While the facts shown did not relieve him from his detail as a member of the court, the action

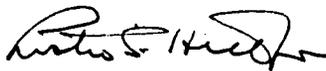
(20).

of the president did not prejudice any substantial rights of the accused (CM 193913, Dig. Op. JAG 1912-40, sec. 365 (9); CM 224424, Bull. JAG Vol. 1, p. 212).

d. Two members of the court recommended clemency by commutation to a "fine" of \$122 per month for six months because the sentence was excessive and accused was one of the best gunnery officers in his regiment. The individual defense counsel also submitted a clemency request to which are attached eight letters from other officers.

7. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, Coast Artillery-Reserve, from R.O.T.C., 10 June 1935; active duty (C.C.C.) from 1 July 1935 to 31 December 1935, from 15 April 1936 to 14 October 1936, and from 2 April 1937 to 30 September 1939; appointed first lieutenant, 13 July 1938; appointed first lieutenant, Inactive Reserve, 22 January 1940; active duty, 18 April 1942.

8. The court was legally constituted. 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., 6- SEP 1943 - To the Commanding Officer,
Antilles Department, APO 851, c/o Postmaster, New York City.

1. In the case of First Lieutenant Edward W. Ferguson (O-329681), Coast Artillery Corps, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and, for the reasons stated therein, recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and The Judge Advocate General is taken under the provisions of Article of War 50 $\frac{1}{2}$ and in accordance with note 4 following that Article (MCM, 1928, p. 216), and that under the further provisions of that article the record of trial is herewith returned to you for a rehearing or such other action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, they should be accompanied by the foregoing opinion and this indorsement, except that in the event a rehearing is directed the foregoing opinion and this indorsement should be returned alone and the disposition of the record of trial and the publication of the general court-martial order in the case shall follow the provisions of paragraph 89, Manual for Courts-Martial, 1928. 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 238987).



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

1 Incl.
Record of trial.

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

(23)

SPJGK
CM 238996

29 SEP 1943

UNITED STATES	)	DESERT TRAINING CENTER
)	
v.	)	Camp Young, California.
)	
Second Lieutenant IRVIN L.	)	Trial by G.C.M., convened at
RONDESTVEDT (O-561938),	)	Camp Young, California, 23
Air Corps.	)	July 1943. Dismissal, total
	)	forfeitures and confinement
	)	for two years.

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that 2nd Lieutenant Irvin L. Rondestvedt, AC, Fifth Liaison Squadron, did at Shreveport, Louisiana, on or about April 5, 1943, with intent to defraud, deceive and injure, wrongfully and unlawfully make and utter to Washington-Youree Hotel Company, Incorporated, a certain check, in words and figures as follows, to wit:

Colorado Springs, Colo., April 5, 1942 No. 56
THE COLORADO SAVINGS BANK 82-5
Of Colorado Springs
Pay to the order of Washington-Youree Hotel \$15.00
Fifteen and no/100 - - - - - Dollars
2nd Air Support Command Irvin L. Rondestvedt
2nd Lt., A.C. O-561938

and by means thereof, did fraudulently obtain from the Washington-Youree Hotel Company, Incorporated, \$15.00 cash, he, the said Irvin L. Rondestvedt, then well knowing that he did not have and not intending that he should have sufficient funds in the Colorado Savings Bank, Colorado Springs, Colorado, for the payment of said check.

Note: and 10 additional Specifications, identical in form with Specification 1, except as to the dates and the amounts, which are as follows, respectively:

- Specification 2: 16 April 1943 \$20.00. ✓
- Specification 3: 16 April 1943 \$20.00. ✓
- Specification 4: 17 April 1943 \$25.00. ✓
- Specification 5: 17 April 1943 \$20.00. ✓
- Specification 6: 21 April 1943 \$25.00. ✓
- Specification 7: 23 April 1943 \$20.00. ✓
- Specification 8: 25 April 1943 \$10.00. ✓
- Specification 9: 26 April 1943 \$25.00. ✓
- Specification 10: 26 April 1943 \$25.00. ✓
- Specification 11: 26 April 1943 \$25.00.

Specification 12: In that 2nd Lieutenant Irvin L. Rondestvedt, AC, Fifth Liaison Squadron, being indebted to the First National Bank of Colorado Springs, Colorado Springs, Colorado, in the sum of \$100.00 for a personal loan, which amount became due and payable in two payments; \$50.00 on December 7, 1942, and \$50.00 on January 6, 1943, did at Colorado Springs, Colorado, from December 7, 1942, to the present, dishonorably fail and neglect to pay said debt.

Specification 13: In that 2nd Lieutenant Irvin L. Rondestvedt, AC, Fifth Liaison Squadron, being indebted to Kapelke's, a jewelry concern, Colorado Springs, Colorado, in the sum of \$60.00 for jewelry, which amount became due and payable on November 7, 1942, in installments of \$20.00 on the fourth of each month, did at Colorado Springs, Colorado, from November 7, 1942, to the present, dishonorably fail and neglect to pay said debt.

Specification 14: In that 2nd Lieutenant Irvin L. Rondestvedt, AC, Fifth Liaison Squadron, did at Shreveport, Louisiana, on or about April 26, 1943, with intent to defraud, deceive and injure, wrongfully and unlawfully make and utter to the Continental-American Bank and Trust Company, Shreveport, Louisiana, a certain check, in words and figures as follows, to wit:

Colorado Springs, Colo., April 26 1943

COLORADO SAVINGS BANK

Pay to the order of Cash	\$25.00
Twenty-five and no/100 - - - - -	Dollars

2nd Air Support Command
Barksdale Field, Louisiana

Irvin L. Rondestvedt
2nd Lt., A.C. O-561938

and by means thereof, did fraudulently obtain from the Continental-American Bank and Trust Company, Shreveport, Louisiana, \$25.00 cash, he, the said Irvin L. Rondestvedt, then well knowing that he did not have and not intending that he should have sufficient funds in the Colorado Savings Bank, Colorado Springs, Colorado, for the payment of said check.

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

Specification: In that 2nd Lieutenant Irvin L. Rondestvedt, AC, Fifth Liaison Squadron, having been duly placed in arrest in quarters at Army Air Base, Desert Center, California, on or about 0830, June 7, 1943, did, at 0900, June 7, 1943, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that 2nd Lieutenant Irvin L. Rondestvedt, AC, Fifth Liaison Squadron, did, without proper leave absent himself from his station at Army Air Base, Desert Center, California, from about June 7, 1943 to about June 25, 1943.

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

Specification 1: In that 2nd Lieutenant Irvin L. Rondestvedt, AC, Fifth Liaison Squadron, did at Bossier City, Louisiana, on or about April 3, 1943, with intent to defraud, deceive and injure, wrongfully and unlawfully make and utter to the Bossier State Bank, Bossier City, Louisiana, a certain check, in words and figures as follows, to-wit:

Colorado Springs, Colo., April 3, 1942 No. 54

THE COLORADO SAVINGS BANK 82-5
of Colorado Springs

Pay to the order of Cash \$25.00
Twenty-five and no/100 - - - - - Dollars

II Air Support Command Irvin L. Rondestvedt
2nd Lt. AC O-561938

and by means thereof, did fraudulently obtain from the Bossier State Bank, Bossier City, Louisiana, \$25.00 cash, he, the said Irvin L. Rondestvedt then well knowing that he did not have and not intending that he should have sufficient funds in the Colorado Savings Bank, Colorado Springs, Colorado, for the payment of said check.

Note: and three additional Specifications, identical in form with Specification 1, except for the dates and the amounts, which are as follows, respectively:

Specification 2:	16 April 1943	\$25.00.
Specification 3:	24 April 1943	\$25.00.
Specification 4:	26 April 1943	\$50.00.

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

Specification 1: In that 2nd Lieutenant Irvin L. Rondestvedt, AC, Fifth Liaison Squadron, did at San Francisco, California, on or about June 12, 1943, with intent to defraud, deceive and injure, wrongfully and unlawfully make and utter to the Hotel St. Francis, San Francisco, California, a certain check, in words and figures as follows, to-wit:

San Francisco, Calif June 12, 1943

To the Bank of America (Jones-Geary) Bank
Branch
City San Francisco State California
Pay To St. Francis Hotel or order, \$25.00
Twenty-five and no/100 Dollars

Signature Irvin L. Rondestvedt, 2nd Lt.AC
Address Hamilton Field, Calif.
City

and by means thereof, did fraudulently obtain from the Hotel St. Francis, San Francisco, California, \$25.00 cash, he the said Irvin L. Rondestvedt then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of America, Jones-Geary Branch, San Francisco, California, for the payment of said check.

Note: and five additional Specifications, identical in form with Specification 1, except for the dates and the amounts, which are as follows, respectively:

Specification 2:	16 June 1943	\$15.00.
Specification 3:	20 June 1943	\$10.00.
Specification 4:	21 June 1943	\$10.00.
Specification 5:	22 June 1943	\$10.00.
Specification 6:	23 June 1943	\$15.00.

Accused pleaded guilty to Charge II and its Specification, guilty to Charge III and its Specification, not guilty to Charge I and its Specifications, not guilty to Additional Charge I and its Specifications, and not guilty

to Additional Charge II and its Specifications. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution showed that accused is a second lieutenant, Air Corps, Fifth Liaison Squadron, 74th Reconnaissance Group, stationed at Desert Center, California.

On stipulation duly made between the prosecution and accused, there was received in evidence the testimony of the following absentee witnesses: A. Roper, an employee of the Washington-Youree Hotel, Inc., Shreveport, Louisiana; of J. Hayes Davis, Vice-President of the First National Bank of Colorado Springs, Colorado; of Hugo C. Kapelke, a jeweler of Colorado Springs, Colorado; of James C. Atkins, cashier of Continental-American Bank & Trust Co., Shreveport, Louisiana; of O. J. Miller, Vice President of Colorado Savings Bank, Colorado Springs, Colorado; and of Colonel Clarence D. Wheeler, Air Corps, Commanding 74th Reconnaissance Group, Desert Center, California (R.16-25, Pros. Exs. 1,3,5,6,8,10).

The evidence so introduced showed that accused cashed 11 checks, all made and drawn by him on the Colorado Savings Bank of Colorado Springs, Colorado, payable to "Washington-Youree Hotel", at Shreveport, Louisiana, on the dates and for the amounts alleged in Specifications 1 to 11 inclusive, of Charge 1, respectively; and that accused was paid the face amount of each check. It was shown, further, that each of these checks was deposited by the payee with its local bank for collection and that each check was eventually returned to the payee unpaid; that accused was personally advised that these checks had been so returned, and had thereupon requested the payee to redeposit the checks; that all these checks were again presented for payment and again dishonored; but that on or about June 12 they were paid after having again been sent forward for collection (R.16-19; Pros. Exs. 1,2).

On 7 November 1942 accused borrowed the sum of \$100 from the First National Bank of Colorado Springs, Colorado, secured by his promissory note for that amount, dated the same date, and payable: \$50 on 7 December 1942 and \$50 on 6 January 1943. Accused failed to pay the note when it became due and it was not paid until 19 June 1943 (R.20,21; Pros. Exs. 3 and 4).

On or about 7 November 1942 accused bought a wedding ring from Hugo

C. Kapelke, a jeweler, at Colorado Springs, Colorado. On this purchase accused owed a balance of \$60, which he agreed to pay in monthly installments of \$20 each, beginning on the 4th of December 1942. Accused never paid this balance (R.22; Pros. Ex. 5).

On 26 April 1943, accused at Shreveport, Louisiana, made and cashed his check, payable to cash, dated 26 April 1943, drawn on Colorado Savings Bank, Colorado Springs, Colorado, at the Continental-American Bank & Trust Company of Shreveport, Louisiana, from which last named bank he received the sum of \$25.00. This check was presented for payment at the Colorado Savings Bank and was returned unpaid (R.23; Pros. Exs. 6 and 7).

It was stipulated in writing between the prosecution and the accused, for the purposes of the trial and for consideration by the court, that at Bossier City, Louisiana, accused cashed four checks made by him at the Bossier State Bank; that these checks were made payable to cash; that they were drawn by accused on the Colorado Savings Bank of Colorado Springs, on the dates and for the amounts, as follows:

3 April "1942" (1943)	\$25.00
16 April 1943	\$25.00
24 April 1943	\$25.00
26 April 1943	\$50.00

and that accused was paid in cash the face amount of each check by the Bossier State Bank (R.29,30; Pros. Ex. 12).

It was stipulated in writing by and between the prosecution and accused, for the purposes of the trial and for consideration by the court, that in San Francisco, California, accused made six checks payable to "The St. Francis Hotel" or "The Hotel St. Francis"; that said checks were drawn on the Bank of America on the dates and in the amounts as follows:

12 June 1943	\$25.00
16 June 1943	\$15.00
20 June 1943	\$10.00
21 June 1943	\$10.00
22 June 1943	\$10.00
23 June 1943	\$15.00

that accused cashed these checks on the dates described therein, respectively, at the Hotel St. Francis, San Francisco, California, and was paid by the hotel the face amount of each check; and that each of these checks was returned to the payee marked "unable to locate" (R.30; Pros. Ex. 13).

Accused's credit balance in the Colorado Savings Bank during the period in which these checks were issued was insufficient in amount to

enable the bank to pay any of the checks drawn by him on or after 5 April 1943. Prior to 18 May 1943 that bank received numerous checks signed by accused dating back to 5 April. Mr. Miller, who was in charge of all checking accounts for the bank, testified, "On all checks of accused dated on or after April 5, 1943, reaching this bank, the accused * * * had no funds in his account * * * from which payment for such checks could be had". No deposit was made in accused's account with that bank after 16 April 1943, except that arrangements were made on or about 12 June 1943 for payment of the checks given to Washington-Youree Hotel (R.25, Pros. Ex. 8).

By the testimony of Colonel Wheeler, and an authenticated extract copy of the morning report, it was shown that accused was placed in arrest in quarters at 8:30 a.m., 7 June 1943, and that he went absent without leave as of 9 o'clock a.m., the same day. Colonel Wheeler made a search for accused on 8 June 1943 and could not find him. Colonel Wheeler, his commanding officer, had not then relieved accused from arrest (R.26,27; Pros. Exs. 9 and 10).

Lieutenant Colonel Orville R. Emerson, Headquarters IV Air Support Command, Thermal, California, testified that he was the investigating officer in the case and that accused made and signed two written statements with respect to the "charges of giving bad checks, breaking arrest, and of being absent without leave". Before accused made the first statement he was told "that he would not be forced to make any statement", that "if he wanted to make a statement anything he said could be used against him in court". In these statements accused admitted his signature on, and that he cashed, the 11 checks mentioned and at the place and on the dates alleged in Specifications 1 to 11 inclusive of Charge I. He said that at the time he cashed the checks he did not know the exact amount of his balance in the drawee bank but that he did know that those checks along with others cashed during that period totaled more than he had on deposit in the bank. Accused admitted giving the note for \$100 to the First National Bank of Colorado Springs, and admitted receiving \$100 therefor and not having repaid the note. He admitted his indebtedness in the sum of \$60 to Kapelke, the jeweler, and that this indebtedness had not been paid. He also admitted that he made the check which is now the subject matter of Specification 14 of Charge I and that he received "the money on this check". Accused also admitted having made the checks mentioned in Specifications 1 to 4 inclusive of Additional Charge I and of cashing these checks at the Bossier State Bank, Bossier, Louisiana, on the dates indicated on each check. He was willing "to stipulate" that "these checks were returned unpaid by the Colorado Savings Bank" and "that there were not sufficient funds in" his "account to take care of these checks when they were presented". Accused further admitted that he signed and cashed the six checks mentioned in Specifications 1 to 6 inclusive of Additional Charge II on or about the dates appearing on each check. He states in his "supplementary statement" that he would

"stipulate" that he did not have any account with the Bank of America in San Francisco in the month of June 1943 or with any of its branches (R.31,32,33,34; Pros. Exs. 14 and 15).

4. The accused testified in his own behalf. He admitted making and cashing all of the checks mentioned in the Charges and Specifications and of receiving in exchange for each check the face amount thereof. He admitted borrowing \$100 from the First National Bank of Colorado Springs, Colorado, and failing to pay anything on account of the loan. He admitted owing a balance of \$60 on a wedding ring that he had purchased for the sum of \$92 from Kapelke, on which he paid \$32 on delivery. The purport of accused's testimony is the same as that contained in his written statements given to the investigating officer. He repeated that when he cashed the checks he intended to defraud no one, and that he expected to have money in the bank in time and in amount sufficient to meet each check as it was presented. He testified that he opened his account with the Colorado Savings Bank, in Colorado Springs, where he was then stationed, about 19 August 1942. Sometime later, he was transferred to San Antonio (Texas) for maneuvers. About 14 February, he was transferred to Shreveport (Louisiana). From there he went to Alexandria, Louisiana. Then, in succession, he was ordered first, in the early part of April, to San Antonio, then to Colorado Springs, back to San Antonio, to Paris, Texas, and again to San Antonio. During this period the Government was behind in their checks to him (R.36). The suggestion is that it was because of these moves that he lost track of his bank balance so that when he cashed the checks at the Washington-Youree Hotel he "didn't know at the time" that he "had the money in the bank". Accused said that he had been writing checks and didn't have a check book with him; that he "ran out of checks * * * and had written the bank for blank check book". He explained how he happened to cash the checks drawn on the Bank of America. He went to the bank to open an account and asked them to draw \$100 on his account in the Colorado Springs bank where he believed he had the money. That was 15 June. He signed a "note" for this purpose. He drew his first check on the Bank of America on 18 June. He testified to his financial condition just prior to his business with the Bank of America. He had been arrested for cashing "these checks that I had written". At that time, he said, he had only about \$40 and knew he "could not pay the checks that were outstanding". He broke arrest to go to San Francisco to borrow money from friends, ostensibly to pay these checks. He was unsuccessful. Accused had married 28 November 1942. In February 1943 his wife went to the hospital and he lost his child. This had been expensive. Then in April he became estranged from his wife. He had been sending her money. Accused attributed his troubles to his separation from his wife, to the loss of his child, and to the fact that he "was drinking heavily at that time" (R.34-40).

On cross-examination, accused said that while he started to keep a record of his bank account he got to drinking pretty heavily and forgot. On 16 April, as one instance, he was drunk and cashed three checks at two places. He knew "the last of the month" he didn't have much money in his account but figured his "check would be in before the checks" he "had written got there". So he "continued to write checks". He thought the bank would honor them as it had done once before in November (1942). However he called his bank up first on that occasion. He testified that he deposited his January check and that it went to pay for his wife's illness. His February check for \$223 was deposited in March. His March pay was deposited on 15 or 16 April. The check he received May first was for \$200, and was deposited about 26 May. He deposited \$150 1 June. His February check was deposited 15 or 16 March; but, he said he "had been to Louisiana and back by that time" and had "spent most of that money before he got back".

5. The evidence in addition to his pleas of guilty shows that accused broke arrest at the time and place as alleged in the Specification of Charge II, and was absent from his station without leave as alleged in the Specification of Charge III, and that he was properly found guilty of violation of Articles of War 69 and 61 as charged therein.

With respect to the debts mentioned in Specifications 12 and 13 of Charge I, they were contracted in November 1942. Accused promised to liquidate the two debts in two and three months respectively. The evidence shows that accused never made any payment on account of either debt, although he received his Army pay during the succeeding months. The trial was held 23 July 1943. Although there is no evidence that accused had any money other than that of his pay as a second lieutenant with less than three years' service, and although he was married in November 1942 and shortly thereafter his wife was taken ill and hospitalized, there is nothing to show that accused's legitimate expenses made it impossible for him to pay something during this long period on account of these debts. Accused failed to itemize his expenses. On the other hand the evidence clearly shows that accused spent money for liquor quite freely during a large part of the period in question, money which could have been used to make payments to his creditors. Upon the evidence, the court was fully justified in concluding that accused did in fact have financial resources with which to make payments on each of these debts. It was also justified in concluding that his failure and neglect to do so was the result of deliberate dishonesty or of culpable indifference or evasion and was, therefore, dishonorable within the meaning of Article of War 95 (CM 228894, Peterson). Furthermore, accused contracted these debts while an officer in the Army. It is not unreasonable to believe that credit was extended to him because of his military status. Under such circumstances, the failure of an officer to extend himself to pay such an obligation is dishonorable and unbecoming an officer and a gentleman.

With respect to the checks admittedly cashed by accused and unpaid for lack of funds, in order to constitute a violation of Article of War 95 it must be shown beyond a reasonable doubt that at the time the checks were drawn accused knew that his credit with the drawee bank was insufficient to meet them and that he did not intend to have money in his account to meet them.

The evidence shows that the accused executed and cashed the various checks, on the dates and at the places alleged, and received the value therefor, as specified in Specifications 1-11, inclusive, and Specification 14 of Charge I, and in the Specifications of Additional Charge I and the Specifications of Additional Charge II; and shows that there were insufficient funds in the bank to meet the various checks when they were drawn and that all the checks were returned unpaid. The evidence also shows that accused contracted and failed to pay when due the debts specified in Specifications 12 and 13 of Charge I.

Accused contended that while he did not know the status of his bank account he expected that a check he was about to deposit to his credit would be sufficient to meet the withdrawals. He testified to deposits he made in March, April, May and on 1 June. Between 3 April and 23 June, inclusive, accused drew checks, unpaid for lack of funds, in the sum of \$465. He testified that during this period he deposited about \$550. Had this testimony as to his deposits been true, his bank would not have dishonored every check of accused dated on and after 3 April. True, accused arranged with his bank in June to pay \$230 of these bad checks. But the moneys deposited or provided for this purpose could not have exceeded \$230 by much, certainly did not approximate \$550, for the six small checks drawn in June starting 12 June, for sums varying from \$10 to \$25, were all returned unpaid. The Board of Review finds itself on the evidence compelled to reject as false accused's testimony on the very material issue of the amount of his deposits during this critical period.

Accused was arrested 7 June charged with fraudulently issuing checks in the aggregate sum of \$230 to the Washington-Youree Hotel and a check for \$25 to the Continental-American Bank and Trust Company. This fact in itself certainly called his attention to the fact that his account was overdrawn. Moreover, he testified that he knew he was overdrawn on 7 June as the underlying reason why he broke arrest that day. He wanted to go to San Francisco to borrow money from friends, ostensibly to pay these checks. This is most significant, for although he was admittedly unable to borrow any money, he drew against his empty till in the Colorado Savings Bank on 15 June in favor of the Bank of America and proceeded to draw checks on that bank. On the admitted facts, he knew full well that he did not have and could not establish a credit there.

The Board of Review therefore finds direct proof of fraudulent intent

in the cashing of the four checks drawn in June on the Bank of America. This, in addition to accused's perjured testimony, affords sufficient ground from which to impute a similar intent, a fraudulent design, with respect to the other checks specified in the Charges.

6. War Department records show that accused is 25 years old. He enlisted 7 October 1940, attended Officer Candidate School and was commissioned a second lieutenant, Army of the United States, 5 August 1942. He is married. He did not attend college. Accused was shop foreman in charge of publications and job printing for two years in Bismarek, North Dakota, prior to 1940.

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all the Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95, and imprisonment is authorized upon conviction of violation of Articles of War 61, 69 and 96.

Lucy E. Gou, Judge Advocate.
John Hamilton, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

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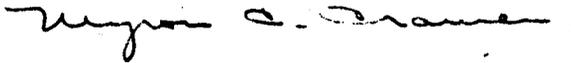
1st Ind.

War Department, J.A.G.O., 9 OCT 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 Irvin L. Rondestvedt (O-561938), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Since it appears from the record of trial that the offenses were committed while the accused was probably under mental strain incident to a separation from his wife and the loss of his baby, and in view of the fact that accused has been in confinement more than three months, I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

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



Myron C. Cramer,
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 Ex. action.

(Sentence confirmed but forfeitures and confinement remitted.
G.C.M.O. 413, 24 Dec 1943)

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

(35)

SPJGM
CM 239068

7 SEP 1943

U N I T E D S T A T E S)
)
) v.)
))
Major HENRY E. KNIERIM)
(O-140239), Air Corps,)
4th Academic Group.)

FIRST DISTRICT, ARMY AIR FORCES
TECHNICAL TRAINING COMMAND
Trial by G.C.M., convened at
Seymour Johnson Field, Greensboro,
North Carolina, 28 July 1943.
Dismissal.

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

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

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

CHARGE I: Violation of the 57th Article of War.

Specification: In that Major Henry E. Knierim, 4th Academic Group, Seymour Johnson Field, Goldsboro, North Carolina, being in command of Training Detachment, AAFTTC, University of Virginia, Charlottesville, Virginia, and it being his duty to render a Morning Report of the officers and enlisted men assigned or attached thereto for the period 8 May 1943 to 10 May 1943, did, at Charlottesville, Virginia, on or about 10 May 1943, knowingly make a false return for said period, which return was false in that it showed one officer as present for duty, to wit: Major Henry E. Knierim, Air Corps, when as he, the said Major Henry E. Knierim, then well knew the said officer was absent without leave.

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

Specification: In that Major Henry E. Knierim, 4th Academic Group, Seymour Johnson Field, Goldsboro, North Carolina, did, without proper leave, absent himself from his station at Training Detachment, AAFTTC, University of Virginia, Charlottesville, Virginia, from about 8 May 1943, to about 10 May 1943.

CHARGE III: Violation of the 96th Article of War (Finding of Not Guilty).

Specification: (Finding of Not Guilty).

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He pleaded not guilty to all Charges and Specifications and was found guilty of Charges I and II and the Specifications thereunder but not guilty of Charge III and its Specification. No evidence of prior 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 shows that from 20 February 1943 to 22 May 1943 the accused was the commanding officer of Training Detachment No. 25, 1st District AAFTC, Charlottesville, Virginia, where it was quartered at the Albermarle Hotel with its orderly room in the lobby. The accused lived on the second floor of the hotel. The only other officer with the detachment, during all material times involved, was First Lieutenant Harrison S. Hunt, whose primary duty was Detachment Adjutant.

About 1700 o'clock on Saturday, 8 May 1943, the Adjutant, who was then on duty, could not locate the accused, who was not seen at the hotel until about 1400 o'clock Monday, 10 May 1943, although the Adjutant ordinarily saw him many times daily. Between 800 and 900 o'clock, 10 May 1943, the accused telephoned the Adjutant by long distance and told him he was in Washington; that he had missed a train, and that he would not arrive in Charlottesville until noon. The Adjutant did not receive, in his official capacity, any orders from the District Headquarters authorizing the accused's absence, and did not see any orders granting him leave. The accused initialed the morning report for the period 8 May 1943 to 10 May 1943, inclusive, without showing his absence. The accused, in addition to his duties of Commanding Officer, had the duties of Intelligence Officer, Transportation Officer, and Special Service Officer for the detachment, which occasionally required him to go to Camp Lee, Richmond and Petersburg, all in Virginia and less than 100 miles distant, without orders of any kind from his superiors, but these trips did not keep him over night. The morning report was prepared daily by a sergeant, showing the duty status of the officers and enlisted men of the detachment from 0000 to 2400 o'clock. It was then given to the Commanding Officer for signature, and then to the Adjutant for like purpose. An officer absent by authority of a verbal order of his commanding officer would be carried as present, and no "in and out register" was kept. The accused had not told the Adjutant he was going to Washington (R. 8-22).

The sergeant made up the morning report for Saturday, 8 May, but it was not verified by the commanding officer on Sunday, 9 May, as was the usual practice. He also made it up for Sunday, 9 May, and Monday, 10 May, all showing accused on duty, placing it in the Commanding Officer's "In Basket" on the morning of 10 May, where it remained all day and was returned to him "as of the 10th". The sergeant was in the Adjutant's presence Monday morning when the long distance telephone call came from Washington. The sergeant did not see the accused around the hotel all day Sunday and Monday morning. The accused's wife, unaccompanied by him, was seen in the hotel lobby Sunday evening, 9 May (R. 23-31).

It was further in evidence that the Commanding Officer was the custodian of the morning report. A certified copy of the morning report for the period 7 May 1943 to 11 May 1943, inclusive, was admitted in evidence. It was initialed by both the accused and the adjutant without showing any change in accused's duty status on 8, 9 or 10 May (R. 16; Ex. 1).

4. Motion by the defense under paragraph 71d of the Manual for Courts-Martial for a finding of not guilty of all Specifications and Charges having been denied by the court, the defense announced that the accused had been advised of his rights and that he elected to remain silent. A stipulation was entered into, however, that if Major General Albert Wingate were present, he would testify in accordance with a letter, which was copied into the record, certifying to accused's fine character and excellent service under him as an officer in the first world war (R. 52).

5. The accused is charged with absenting himself from his station from about 8 May 1943 to about 10 May 1943, without proper leave; and with knowingly making a false return upon the morning report, in violation of his duty, showing himself as present for duty for said period of time when he was absent without leave. The elements of the offense, first stated above, and the proof required for conviction thereof, according to applicable authorities, are as follows:

"* * * (a) That the accused absented himself from his command, * * *, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (M.C.M., 1928, par. 132).

Army regulations, duly authorized and promulgated, within appropriate spheres have the force and effect of law and the court is bound thereby (United States v. Eliason, 16 Pet. 291 ● 302; Standard Oil Company v. Johnson, 316 U.S. 481). For the reasons hereinafter indicated subparagraph 19b of AR 605-115, 14 July 1942, is pertinent. Its provisions are:

"b. Oral permits. - An officer authorized to grant leaves of absence may grant oral permission for absence over Sundays, holidays, and other similar periods. Such officers may also grant oral permission

for absence during any period less than 24 hours at other times."

The gravamen of the offense, last stated above, is knowingly making a false return whereby the accused's own alleged absence without leave was concealed. Manifestly, conviction for this alleged offense is, therefore, dependent upon the accused's lawful conviction of the offense of absence without leave during the time reflected by the morning report involved because otherwise the offense alleged in the Specification would not be supported by the proof. The defense properly tested the legal sufficiency of the evidence by a motion for findings of not guilty. The denial of this motion was proper if there was any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tended to establish every essential element of the offenses charged or included in the specifications thereunder (M.C.M., 1928, par. 71d).

The direct evidence merely shows that the accused, between 800 and 900 o'clock on 10 May 1943 by long distance telephone, called the adjutant from Washington and said that he was in Washington, that he had missed his train, and that he would arrive in Charlottesville about noon. This statement of the accused unquestionably amounts to an admission that he was not then in Charlottesville, his assigned place of duty, but wholly fails to indicate whether his presence in Washington was with or without proper leave or when his absence from Charlottesville commenced. The evidence adduced by the prosecution upon these phases of the alleged offense is purely circumstantial. The adjutant and the sergeant merely testified that they saw no orders authorizing the accused to make a trip and that they did not see the accused from 1700 o'clock on 8 May 1943 until about noon on 10 May 1943, although they customarily saw him many times daily. Such testimony is inconclusive and insufficient as a basis from which inferences as to the time of the accused's departure, either with or without proper leave, must be definitely drawn beyond a reasonable doubt, if the findings of guilty are to be sustained. The evidence is undisputed that an officer absent by authority of a verbal order of his commanding officer would be carried as present on the morning report and that no "in and out register" was kept. Consequently, the morning report for the detachment during the period of time involved lends no probative aid to the circumstances shown relative to the time of the accused's departure or whether such departure was authorized or not. The evidence adduced wholly fails to take account of the fact that the accused's trip could have been authorized by the verbal order of his commanding officer pursuant to the regulation cited above. Such authorization could have

been given within 24 hours of the accused's return and could have been unknown to every one except the commanding officer and the accused and under the evidence, absence so authorized would not appear on the morning report. Since it is presumed that an officer does his duty unless the contrary is shown, this possibility assumes the proportions of a probability which the prosecution was under the burden to exclude before conviction was authorized upon the circumstances proved. "Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt" (CM 153330 (1922), Dig. Ops. JAG 1912-1940, par. 395(9)). The evidence, therefore, is insufficient to establish beyond a reasonable doubt that accused's absence was without proper authority and the findings of guilty of the Specification, Charge II, and of Charge II, are not sustained.

Since the findings of guilty of the Specification, Charge I, and of Charge I, can only be sustained, as hereinabove demonstrated, if the findings of guilty of the Specification, Charge II, and of Charge II, are sustained, such findings perforce were not supported by the evidence and likewise cannot be sustained.

6. War Department records show the accused is 49 years of age; enlisted service in Field Artillery, New York National Guard, 17 September 1912, as private until appointment as corporal, 26 July 1916, while on Mexican Border Service from 19 June 1916 to 14 January 1917; appointed sergeant 29 June 1917; honorably discharged from National Guard and drafted into United States service 5 August 1917 with enlisted service until commissioned Second Lieutenant of Field Artillery 5 December 1917 with service in France with 105th Field Artillery of 27th Division from 30 June 1918 to 13 March 1919; honorably discharged 3 April 1919; commissioned Second Lieutenant F.A.O.R.C. 6 May 1919; promoted to First Lieutenant F.A.O.R.C. 28 September 1923; promoted to Captain of Field Artillery 18 February 1928; reappointed Captain of Field Artillery 12 January 1933; promoted to Major, FA-Res. 1 March 1933; reappointed Major, inactive, 1 March 1938; reappointed Major (for limited service only) 22 July 1942 with active duty from 5 August 1942 to date.

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 of the Charges and the Specifications thereunder and the sentence.

Charles B. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sloop, Judge Advocate.

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SPJGN
CM 239068

61-201-Knierim, Henry E. (O)
1st Ind.

War Department, J.A.G.O. 23 SEP 1943 - To the Commanding General,
Army Air Forces Eastern Technical Training Command, Greensboro, North
Carolina.

1. In the case of Major Henry E. Knierim (O-140239), Air Corps, 4th Academic Group, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated therein. I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50 $\frac{1}{2}$, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 239068).

Myron C. Cramer

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

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

(41)

10 SEP 1943

SPJGH
CM 239085

UNITED STATES)

v.)

Second Lieutenant GEORGE
W. JONES (O-1307827),
Infantry.)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., con-
vened at Infantry Re-
placement Training
Center, Fort McClellan,
Alabama, 5 August 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 George W. Jones, Infantry, did, at Anniston, Alabama, on or about 6 February 1943, wrongfully and falsely with intent to deceive Mrs. Carrie E. Downing, a person then and there authorized to rent a certain room sought to be rented by the said Lieutenant Jones, falsely state in substance and represent to the said Mrs. Carrie E. Downing that one Mrs. Floradora Louisa Blasco was the wife of the said Lieutenant Jones, which statement was known by the said Lieutenant Jones to be untrue, in that the said woman was not the wife of the said Lieutenant Jones.

Specification 2: In that Second Lieutenant George W. Jones, Infantry, did, at Anniston, Alabama, on or about 6 February, 1943, wrongfully and falsely rent a room for the use of himself and one Mrs. Floradora Louisa Blasco, a woman not his wife, and with the said woman, under and by virtue of the said rental, did enter into occupancy of, and did

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occupy said room as husband and wife from on or about 6 February 1943 until on or about 23 July 1943.

← Specification 3: In that Second Lieutenant George W. Jones, Infantry, did, at Anniston, Alabama, on or about 6 February 1943, wrongfully and falsely introduce a woman, one Mrs. Floradora Louisa Blasco, as his wife to Mrs. Carrie E. Downing, when in fact the said woman was not the wife of the said Lieutenant Jones, as he then well knew.

Specification 4: (Finding of guilty disapproved).

Specification 5: (Finding of guilty disapproved).

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

Specification: In that Second Lieutenant George W. Jones, Infantry, being then and there a married man, having a lawful living wife, did, at Anniston, Alabama, from on or about 6 February 1943 until on or about 23 July 1943 wrongfully, dishonorably and unlawfully live and cohabit in a state of open adultery with one Mrs. Floradora Louisa Blasco, a woman not his wife.

He pleaded not guilty to and was found guilty of all the Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 4 and 5, Charge I, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence in pertinent part shows that on 6 February 1943, accused went to the residence of Mrs. Carrie E. Downing at 2101 Christine Avenue, Anniston, Alabama, and stated that he wanted a room for himself and his wife. Mrs. Downing showed him a room and he rented it. Later in the afternoon of the same day, he returned with a woman whom he introduced "as his wife, Mrs. Jones". They occupied the same room in Mrs. Downing's house from 6 February to 23 July 1943. During that period, accused referred to the woman as his wife and they occupied the room together. Mrs. Downing saw them go to their room at night and leave it in the morning. Lieutenant Colonel John E. Sentell, the officer who investigated the charges against accused, identified a sworn statement made in his presence by accused after he had warned accused that he was not required to make any statement and that any statement he made

might be used against him. In that statement accused admitted that he rented a room at 2101 Christine Avenue from Mrs. Downing about 6 February 1943; that later in the same day he brought "Mrs. Blasco" to the room and introduced her to Mrs. Downing as his wife; that he was not married to Mrs. Blasco and had not been married to her at any time; that he was married to another woman and had been married to her since October or November 1940; that his wife had left him in August 1941; and that they had two children. The statement was made by accused in the presence of Colonel Sentell, Captain Owen A. Johnston, Second Lieutenant Robert M. Fick, Jr., and a woman identified at the time by herself and by accused as Mrs. Floradora Louisa Blasco. Previously the same woman had been introduced to both Captain Johnston and Lieutenant Fick by accused as his wife (R. 8-18; Ex. 1).

4. The defense offered no evidence. Accused elected to remain silent (R. 19).

5. An accused cannot legally be convicted upon his unsupported confession. There must be, in the record, other direct or circumstantial evidence that the offense charged probably has been committed (MCM 1928, par. 114a). The general rule which has been stated and applied by the Board of Review in numerous cases is that while the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of the evidence or at all, nevertheless some evidence must be produced to corroborate the confession and such evidence must touch the corpus delicti (CM 202213 Mallon; CM 220604 Antrobus; CM 237225 Chesson; and CM 237450 Ivy). In CM 193828 Morandi and Mingo, the Board quoted with approval the following language from Daeche v. United States (CCA 2nd) 250 Federal 566: "The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel".

The several Specifications of the Charges now under consideration allege that accused falsely presented and introduced as his wife, Mrs. Blasco, who was not in fact his wife, lived with her in a rented room as husband and wife and cohabited with her in a state of open adultery. The gist of all of these offenses is that Mrs. Blasco was not the wife of accused. Without that element the other facts alleged in the Specifications constitute no offense at all. There is no competent evidence in the record other than the confession of accused, touching or tending to prove that essential element of the corpus delicti. There is testimony to the effect that the woman whom accused had been holding out

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as his wife "identified herself" in his presence as Mrs. Blasco, but any statement on her part as to her identity was hearsay and not competent independent evidence corroborative of the confession of accused. If her statement be treated as a tacit admission of her name and identity by accused, because made in his presence, it would nevertheless not constitute corroboration of the confession. In fact he expressly identified her, but his action in so doing was no more than a part of the confession itself. In the opinion of the Board of Review the evidence is, therefore, legally insufficient to support the approved findings of guilty.

6. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from June 1936 to July 1939 and from March 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 12 January 1943.

7. The court was legally constituted. 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.

Arthur S. Kelly Jr, Judge Advocate

Samuel M. Dixon, Judge Advocate

J. J. Lottich, Judge Advocate

1st Ind.

War Department, J.A.G.O., 6 NOV 1943 - To the Commanding General,
Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Second Lieutenant George W. Jones (O-1307827), Infantry, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and sentence, and, for the reasons therein stated, recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and The Judge Advocate General is taken under the provisions of Article of War 50 $\frac{1}{2}$ and in accordance with note 4 following that article (M.C.M., 1928, page 216), and that under the further provisions of that article the record of trial is herewith returned to you for a rehearing or such other action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, they should be accompanied by the foregoing opinion and this indorsement, except that in the event a rehearing is directed the foregoing opinion and this indorsement should be returned alone and the disposition of the record of trial and the publication of the general court-martial order in the case shall follow the provisions of paragraph 89, Manual for Courts-Martial, 1928. 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:

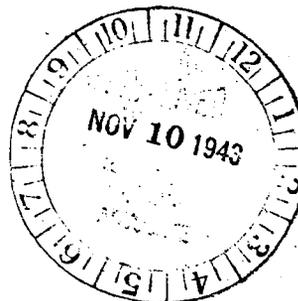
(CM 239085).



T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

1 Incl.
Record of trial.

927862



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

(47)

SPJGK
CM 239092

5 OCT 1943

UNITED STATES)

83D INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
A.P.O. 83, Nashville, Tennessee,
2 August 1943. Dismissal, total
forfeitures, and confinement for
two years.)

Second Lieutenant JAMES
S. HICKMAN (O-1285756),
Company G, 330th 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that 2d Lieutenant James S. Hickman, Company "G", 330th Infantry, did, without proper leave, absent himself from his organization and station at Camp Atterbury, Indiana, from about 21 June 1943, to about 12 July 1943.

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

Specification 1: In that 2d Lieutenant James S. Hickman, Company "G", 330th Infantry, having been restricted to the limits of the 2d Battalion Area, 330th Infantry, did, at Camp Atterbury, Indiana, on or about 19 June 1943, break said restriction by going to Indianapolis, Indiana.

Specification 2: In that 2d Lieutenant James S. Hickman, Company "G", 330th Infantry, did, at Cincinnati, Ohio, on or about 3 July 1943, with intent to defraud, wrongfully make and utter to The H. & S. Pogue Company, Cincinnati, Ohio, a certain check in words and figures as follows, to wit:

Cincinnati, Ohio, July 3, 1943
 First Nat'l Bank & Trust Co., Bank of Macon, Ga.
 The H. & S. Pogue Company
 Cincinnati, Ohio \$25.00
 Pay to the order of no/100 Dollars
 Twenty-five and
 101st Inf. Bn (Sep)
 Ft. Thomas, Ky. /s/ James S. Hickman
 O-1285756

and by means thereof did fraudulently obtain from the said H. & S. Pogue Company, the sum of twenty-five (\$25.00) Dollars, in cash, he, the said Lieutenant Hickman, then well knowing that he did not have, and not intending that he should have, sufficient funds in the said First National Bank & Trust Company, for the payment of said check.

Specification 3: Same form as Specification 2, but alleging check dated 3 July 1943, payable to the order of The McAlpin Company, made and uttered to the same company, at Cincinnati, Ohio, and fraudulently obtaining thereby \$25.00.

Specification 4: Same form as Specification 2, but alleging check dated 6 July 1943, payable to the order of The McAlpin Company, made and uttered to the same company, at Cincinnati, Ohio, and fraudulently obtaining thereby \$25.00.

Specification 5: In that 2nd Lt. James S. Hickman, Co. G, 330th Infantry, did, at Cincinnati, Ohio, on or about 9 July 1943, with intent to defraud, wrongfully make and attempt to utter to The John Shillito Co., Cincinnati, Ohio, a certain check in words and figures as follows, to wit:

Cincinnati, Ohio, July 9, 1943
 Bank Citizens & Southern Nat'l Bank, Macon, Ga.
 Pay to the
 Order of The John Shillito Co. \$20.00
 Twenty and no/100 dollars

/s/ James S. Hickman
 O-1285756
 101st Inf Bn. (Sep) Ft. Thomas,
 Kentucky

and by means thereof did attempt fraudulently to obtain from the said The John Shillito Co., the sum of twenty (\$20.00) dollars, in cash, he, the said Lt. Hickman, then well knowing that he did not have, and not intending that he should have, sufficient funds in the said Citizens & Southern National

Bank for the payment of said checks.

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

Specification: In that 2nd Lt. James S. Hickman, Co. G, 330th Infantry, did, at Cincinnati, Ohio, on or about 8 July 1943, with intent to defraud, wrongfully make and utter to The John Shillito Co., Cincinnati, Ohio, a certain check in words and figures, as follows, to wit:

Cincinnati, Ohio, July 8, 1943.

Bank: Citizens & Southern Nat'l Bank, Macon, Ga.

Pay to the

Order of Shillito's \$30.00

Thirty and no/100 dollars

/s/ James S. Hickman

O-1285756

101st Inf. Bn. (Sep)

Ft. Thomas, Ky.

and by means thereof did fraudulently obtain from the said The John Shillito Co., the sum of thirty (\$30.00) dollars, in cash, the said Lt. Hickman, then well knowing that he did not have, and not intending that he should have, sufficient funds in the said Citizens & Southern National Bank for the payment of said check.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction of absence without leave was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, remitted three years of the confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution shows that accused is a second lieutenant, Company G, 330th Infantry (R.7). On 19 and 21 June 1943, by General Court-Martial Order No. 9 of the 83rd Infantry Division, accused was restricted to the Second Battalion Area, 330th Infantry, at Camp Atterbury, Indiana (R.10-12, 14; Pros. Exs. 3,4).

On 19 June 1943, accused left his battalion area and went to Indianapolis, Indiana, where he was seen in the Harrison Hotel on that date at 9 p.m. by Second Lieutenant Raymond C. Rudd, Company G, 330th Infantry (R.7,10,16).

First Lieutenant Richard L. Cook, Company G, 330th Infantry, was company commander on 21 June 1943. On and after that date, according to

Lieutenant Cook, accused was not present for duty with his organization. Lieutenant Cook personally conducted a search for accused which included the officers' barracks and accused's room in the company area (R.9). Accused's absence was terminated by his arrest and delivery to the military authorities at Fort Thomas, Kentucky, on 12 July (R.8,14; Pros. Exs. 2,4). Accused's absence during this period was without leave (R.14; Pros. Ex. 4).

On the morning of 25 July 1943 accused identified his signature on and admitted having signed what purports to be a transcript of a statement made by accused before a board of officers at Camp Atterbury, Indiana, 17 July 1943. This statement recites as a fact that accused was informed of his constitutional rights in making any statement and further informed that any statement he might make could be "held against him" (R.14, Pros. Ex. 4). In this statement accused said, "I left this station Camp Atterbury, Indiana on 21 June 1943 AWOL". He also said, among other things, that during the period of his absence from his station he drew and, with one exception, cashed while in Cincinnati, checks payable to the persons and for the amounts as follows:

H. & S. Pogue, department store, amount not specified.
McAlpin, department store, amount not specified.
A department store, name and amount not specified.
Shillito and Co., \$20.00 (not cashed).
Shillito and Co., amount forgotten.

Accused said that he was in Cincinnati between 2 and 12 July and that these checks were drawn on the Citizens and Southern Bank, Macon, Georgia, in which bank he had had no money "for over six months". After itemizing these checks, accused admitted that he had not made any of them "good".

Evidence presented by the prosecution shows further that on the dates alleged in Specifications 2,3, and 4 of Charge II and the Specification of the Additional Charge, one representing himself as Second Lieutenant James S. Hickman, serial No. O-1285756, 101st Infantry Battalion, Fort Thomas, cashed checks signed by him "James S. Hickman", dated, for the amounts, to the payees, and drawn on the banks alleged respectively in those Specifications. The signature on each of these checks is that of accused.

In support of Specification 5 of Charge II, the prosecution showed that on 9 July 1943 James S. Hickman identified himself as a soldier, serial No. O-1285756, 101st Infantry, Fort Thomas, Kentucky, to Shillito Company and presented to that company a check drawn by James S. Hickman, dated 9 July 1943, in favor of The John Shillito Company, for \$20, drawn on the Citizens and Southern National Bank of Macon, Georgia. It bears

the signature of accused. This check was not cashed. As a result of accused having presented the check mentioned in the preceding paragraph the day before, the payee checked with Army Headquarters at Fort Thomas, Kentucky, to verify the identification given by accused. "During the conversation and investigation" accused departed from the store. He left the check behind, uncashed (R.15; Pros. Ex. 9).

Accused remained silent and called no witnesses.

4. It was proved that accused could not be located in the officers' barracks or his room in his company area on 21 June 1943 and that on and after that date he was not present for duty with his organization. His absence was terminated by his arrest on 12 July 1943. This evidence, coupled with the confession of accused that he went absent without leave from his station on 21 June 1943, supports the allegations of the Specification of Charge I. Accused was properly found guilty of a violation of Article of War 61.

On 19 June 1943 as appears by General Court-Martial Order No. 9 of the 83rd Infantry Division, accused was restricted to his battalion area. On that date accused broke his restriction and went to Indianapolis, where he was seen by Lieutenant Rudd who testified to that fact. Although the allegations of Specification 1 of Charge II were proved, the conduct therein alleged is not a violation of Article of War 95 but rather a violation of Article of War 96.

Specifications 2,3,4 and 5, Charge II, and the Specification of the Additional Charge, allege the fraudulent cashing by accused of four checks and his wrongful attempt to fraudulently cash a fifth check, drawn by him on two banks in which he knew that he had insufficient funds for their payment, and not intending that he should have sufficient funds in the banks for their payment. The evidence presented by the prosecution fails utterly, except for the confession of accused, to show that the four checks which were cashed by accused were ever presented for payment by the several payees, or that the checks, in fact, were unpaid. In the confession of accused there is a direct admission that he had not had any money in the Citizens and Southern Bank for six months. It was on this bank that two of these checks were drawn. Accused is silent as to any knowledge with respect to the substance or condition of a possible account with the First National Bank and Trust Company, the bank on which the other checks were drawn. However, it is a reasonable conclusion that accused had no account or funds in this latter bank, otherwise he would not have found it necessary to draw on the Citizens and Southern Bank, where he knew he had no funds. The cashing and attempted cashing of the five checks can properly be considered as one transaction. They were all presented between 3 July and 9 July, the period during which accused was absent without leave from his organization, and during which

he was separated from the pay roll, his quarters and mess, and obliged to "find" himself in the City of Cincinnati. Proof of the corpus delicti of the Specifications having to do with the bad checks is established independently of the confession of accused. Other evidence shows that on 8 July he cashed a check for \$30 at the Shillito Company. That check was drawn on Citizens and Southern National Bank. On the next day, 9 July, accused returned and attempted to cash a check for \$20 drawn on the same bank. The Shillito Company communicated at once with Army Headquarters at Fort Thomas, Kentucky, the address given by accused. It is clear that this inquiry was made by telephone and that in the midst of the conversation accused left. He not only left, but he left without the check or the cash. The attempt to cash this check is proved by direct evidence. The guilty knowledge and fraudulent intent involved in the attempt are proved circumstantially. The fraud and guilty knowledge involved in this one attempt are sufficient to stamp with fraud the entire transaction, involving all five checks. The corpus delicti is sufficiently established to open the door for the use of accused's confession. In the confession we find an admission, specifically that accused did not have money in the Citizens and Southern Bank and, inferentially, that he had no money in the First National Bank and Trust Company, at the time he drew the several checks. The further element of the offense that accused did not intend to have moneys on hand to meet the checks when they were presented is proved by the fact that accused was absent without leave from his organization, and that during such absence his pay voucher would be withheld. Accused knew that he would be unable to take care of these checks by the time they were presented for payment. The allegations of Specifications 2,3, 4 and 5 of Charge II and the Specification of the Additional Charge were satisfactorily proven. The conduct therein set forth constituted a violation of Article of War 95 as charged.

5. It was error to receive evidence of one previous conviction at the conclusion of the trial before voting on the findings. However, the evidence so received and considered pertained to the previous conviction brought to the attention of the court earlier during the trial when there was received in evidence a copy of General Court-Martial Order No. 9 (Ex. 3). This evidence was necessarily and properly received in support of the allegations of Specification 1, Charge II, which alleged breach of restriction. Since the court already knew of this previous conviction, it can not be said that its introduction, out of order, prior to the arrival by the court at its findings, was materially prejudicial to the substantial rights of accused.

6. Accused is 30 years old and had a high school education. He was commissioned second lieutenant, Army of the United States, 20 June 1942, after attending Infantry Officers' Candidate School, Fort Benning, Georgia. There was prior enlisted service between 20 December 1940 and 19 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 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 finding of guilty of Specification 1, Charge II, as involves a finding of guilty of that Specification in violation of Article of War 96; legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95, and authorized under Article of War 61.

Wm. A. Goss, Judge Advocate.
Alm. Tommitt, Judge Advocate.
Peter B. Andrews, Judge Advocate.

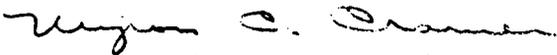
1st Ind.

War Department, J.A.G.O., 11 OCT 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 S. Hickman (O-1285756), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1, Charge II, as involves a finding of guilty of that Specification in violation of Article of War 96; legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. In this case it is believed that dismissal is sufficient punishment. I therefore recommend that the sentence be confirmed but that the forfeitures and confinement 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,
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 Ex. action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 367, 13 Nov 1943)

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

(55)

SPJGH
CM 239133

15 SEP 1943

UNITED STATES)

FOURTH AIR FORCE)

v.)

Private ARTHUR V. McMAHAN,
JR. (15085360), 9th Trans-
port Transition Training
Detachment.)

Trial by G.C.M., convened
at Army Air Base, Hamilton
Field, California, 12 and 30
July and 2 August 1943. Dis-
honorable discharge and con-
finement for five (5) years.
Federal Correctional Instit²⁰
tution, Englewood, Colorado.)

5 - OCT 1943

NO. 4th AIR FORCE

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 tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Arthur V. McMahan, Jr., 9th Transport Transition Training Detachment, did, at 156 San Marco Avenue, Lomita Park, California, on or about 20 June 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Shirley Proctor, age 6 years.

Specification 2: In that Private Arthur V. McMahan, Jr., 9th Transport Transition Training Detachment, did, at 156 San Marco Avenue, Lomita Park, California, on or about 21 June 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Shirley Proctor, age 6 years.

He pleaded not guilty to and was found guilty of the Charge and Specifications. He was sentenced to be dishonorably discharged the service, to

McMAHAN, ARTHUR V. (ENL)

forfeit all pay and allowances due or to become due, and to be confined at hard labor for five (5) years. The reviewing authority approved the sentence, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only direct evidence offered by the prosecution in support of the Specifications of the Charge consisted of the testimony of Shirley Proctor, named as the other party to the acts of sodomy of accused. The record shows that she entered the courtroom, "assumed the stand" and was questioned by the trial judge advocate who first directed her to "walk around there in front of the chair, and stand right here". She stated that she was six years old - would be seven on 5 September 1943, that she did not know what an oath was, that she went to Sunday School every Sunday, knew "who God is", and that He is in Heaven. She also stated that she would go to Heaven when she died unless she were a bad girl, in which event she did not know where she would go. It was wrong to tell a lie, she did not ever tell one and God would punish her if she did (R. 14-15).

The trial judge advocate then remarked, "I ask the defense counsel, or -- are you satisfied with the swearing of the witness, or is the court satisfied?" and defense counsel indicated that he would like to ask a few questions. Upon interrogation by him, Shirley testified that she had just been promoted to the second grade, she did not know how many days there are in a week or a month or how many hours there are in a day and she could not count to a hundred or to twenty by ones. She did not know how God punishes people. She knew what a lie is - "It's when you don't tell the truth" (R. 15-16).

After defense counsel had stated "I think that's all", the following immediately transpired:

"TJA: Is the court satisfied with the swearing of the witness?

PRESIDENT: I think we are satisfied as far as the witness goes, considering the age and so forth.

TJA: That's what I mean. I mean her competence to testify.

PRESIDENT: Surely.

TJA: Shirley, you want to sit up in that chair right there.

LAW MEMBER: You haven't sworn her yet.

TJA: What's that?

LAW MEMBER: You haven't sworn her yet.

TJA: She does not know what an oath is.

LAW MEMBER: I think you ought to explain to her what an oath is before she starts to testify. Tell her she must tell the truth while on the stand.

TJA: All right. Now, Shirley, anything you tell, anything you say when you are sitting in that chair there --

A Yes.

TJA: You want to make sure it is the truth, understand?

(Witness nods head)

TJA: And you don't want to hold back anything, you want to tell everything.

A Yes.

TJA: Make sure everything is the truth. If you don't God will punish you. Now, he's watching over you.

(Witness nods head)

TJA: Is that sufficient?"

There was no answer from any source to the foregoing question by the trial judge advocate, who then proceeded with the direct examination (R. 16-17).

4. Article of War 19 provides that all persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God".

With reference to the foregoing requirement Winthrop states that in view of the mandatory injunction of the Article "the form of the oath may not be departed from; but the witness may accompany the form by such additional ceremony as is habitual with persons of his religious sect" (Winthrop's Military Law and Precedents, p. 285). As to the procedure that should be followed in the case of a very young witness who does not understand the meaning of an oath, the same authority (p. 333) states:

"* * * Where indeed a young child, who is to be a material witness, is quite ignorant of the obligations of an oath, it should be instructed beforehand, by some competent person--as a clergyman, as to the nature of the oath and the moral consequences of false swearing. A momentary instruction at the time of the trial is not sufficient. The court, in a case of doubt, will, by questioning the child,

satisfy itself whether he or she has the requisite appreciation of the significance of an oath to make proper its administration. Where there is an apparent lack of knowledge, and no opportunity for instruction has been had, the court may grant a continuance to enable such instruction to be given. These considerations are especially important on a trial for the rape of a young female child." (Underscoring supplied.)

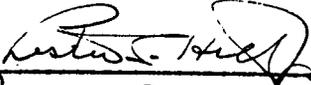
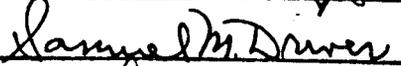
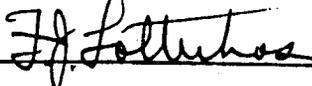
In the instant case, after Shirley Proctor had been examined to determine her competency as a witness, the Trial Judge Advocate expressly conceded that she did not understand the meaning of an oath. The law member stated that it should be explained to her and directed that she be instructed to tell the truth.

The Trial Judge Advocate then gave Shirley the brief explanation and instruction quoted above. No oath was administered to her either in the exact or substantial form prescribed by Article of War 19. She was not asked to swear and did not swear to tell the truth. As she affirmatively expressed a belief in God and it did not appear that she had any conscientious or religious scruples against taking an oath there was no reason to have her testify upon affirmation rather than upon oath.

While the unsworn statement of a child of tender years may be admitted in evidence where defense counsel expressly waives objection thereto, a mere failure to object does not constitute a waiver. The Board of Review has held that the admission of such a statement without express waiver of objection injuriously affects the substantial rights of accused, in the absence of competent evidence of a compelling character (Dig. Op. JAG, 1912-40, sec. 395 (58); CM 185972; CM 186545). While the defense counsel in the present case did not make any objection to the unsworn testimony of Shirley Proctor he did not expressly waive objection or affirmatively consent that it be received in evidence.

Since there is no other evidence in the record to support the findings of guilty, the receipt in evidence of the unsworn testimony of Shirley Proctor, in the opinion of the Board of Review, injuriously affected the substantial rights of accused.

5. For the reasons stated, the Board of Review holds the record of trial 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., 29 SEP 1943 - To the Commanding General,
Fourth Air Force, San Francisco, California.

1. In the case of Private Arthur V. McMahan, Jr. (15085360), 9th Transport Transition Training Detachment, I concur in the foregoing holding of the Board of Review, and, for the reasons therein stated, recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the Assistant Judge Advocate General is taken under the provisions of Article of War 50½, and Executive Order 9363 dated July 23, 1943, and in accordance with note 4 following that article (MCM, 1928, p. 216), and that under the further provisions of that article the record of trial is herewith returned to you for a rehearing or such other action as you may deem proper.

2. Should you decide to order a rehearing in this case attention is invited to paragraph 4 of the holding of the Board of Review in which is quoted an extract from Winthrop's Military Law and Precedents outlining an approved method of instructing a young child as to the meaning of an oath preparatory to the administration of the oath.

3. When copies of the published order in this case are forwarded to this office together with the record of trial, they should be accompanied by the foregoing holding and this indorsement, except that in the event a rehearing is directed the foregoing holding and this indorsement should be returned alone and the disposition of the record of trial and the publication of the general court-martial order in the case shall follow the provisions of paragraph 89, Manual for Courts-Martial, 1928. 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 239133).



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

3 AM

1 Incl.-
Record of trial.



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

SPJGN
CM 239137

9 SEP 1943

UNITED STATES

HAWAIIAN DEPARTMENT

v.

First Lieutenant DOMINIC
A. SCAVARDA (O-1533909),
Medical Administrative
Corps.

Trial by G. C. M., convened at
Army Task Force, APO #914, 23
July 1943. Dismissal and con-
finement for one (1) year and
nine (9) months.

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 Charge and Specification:
CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Dominic A. Scavarda, Medical Administrative Corps, 26th Station Hospital, APO Number 914, did at APO number 914, on or about 15 July 1943, with felonious intent and against the order of nature, attempt to commit the crime of sodomy per os with Staff Sergeant Normand G. Gaudreau, Medical Detachment, 26th Station Hospital, APO Number 914.

He pleaded guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed from the military service, to forfeit all pay and allowances due and to become due and to be confined at hard labor for a period of one year and nine months. 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, supporting and confirming the plea of guilty, in brief is as follows:

In the early part of the evening of 15 July 1943, Staff Sergeant Normand G. Gaudreau, on his way to the showers after a game of baseball, met the accused, who having learned where he was going, urged him to "hurry back". Fifteen minutes later, returning to his tent to change his clothes, Sergeant Gaudreau found the accused sitting on his absent roommate's bed. After they had discussed different things for about fifteen minutes, the accused got up and said he was going; then slapping his hand on Gaudreau's knee, he sat down on the bed beside him, started making advances, and finally inquired, "Would you like to 'fudge' around?". Sergeant Gaudreau suspected what he was up to, having "heard remarks about it". He replied that this was neither the time nor the place for such a thing. Then the accused suggested "How about coming back at about 9:00 o'clock or so?" "All right", the sergeant told him; then set out to report the matter to Major Tinker. Unable to locate the major, he decided to tell Chaplain Valenta and ask his advice. The chaplain excused himself after hearing the story, returning in about ten minutes, at which time he told Gaudreau to go back to his tent, act as if nothing had happened and "just go on as agreed". The sergeant waited until about 9:30, when the accused came to his tent and suggested that they go down to the officers' showers. Gaudreau told the accused to go first, that he would follow in a few minutes; then ran to Chaplain Valenta's quarters to tell him that he was going to meet the accused in the officers' showers. The chaplain said, "Go ahead and stall him off for five or ten minutes and I'll take care of it." After about five minutes Gaudreau met the accused in the officers' showers. After a brief, suggestive conversation, the accused asked Gaudreau to sit down on the bench and unbutton his pants. Gaudreau's back was towards the door, which he wanted to watch, so he told the accused he would rather sit the other way; as he unbuttoned his pants, he was watching outside. In about thirty seconds, a flashlight beam reflected on a timber. Just as the accused put his mouth down to Gaudreau's penis, and took Gaudreau's penis into his mouth, two officers walked in and asked "what's the meaning of this?" After they got outside, one of them told Gaudreau to report to his quarters under arrest. He did not recognize the two officers then, but knows now that they were Lieutenant Colonel Julian B. Francis and Lieutenant Colonel Donald M. McClain. The accused was not in the least drunk nor under the influence of drugs. Gaudreau never suggested to accused that they two commit the crime of sodomy together; the first suggestion came from the accused that same night (R. 4-6).

It was agreed by all parties that if Chaplain Marcus A. Valenta were present he would testify that on 15 July 1943, Sergeant Gaudreau, a non-

commissioned officer of excellent character, had reported to him - Chaplain Valenta - that there was an officer in the Medical Corps who wanted to commit an immoral act with him - Sergeant Gaudreau; that on that same evening this officer had come to his - Gaudreau's - tent, slapped him on the leg, and stated that he would return about nine o'clock. The chaplain reported these facts to Colonel Francis, who instructed the chaplain to tell the sergeant to go to his tent and wait. At about nine-fifteen, the sergeant came to the chaplain's office and stated that he was going to meet the officer at the showers; whereupon the chaplain informed Colonel Francis, who accompanied by Colonel McClain, went to the showers and there found both parties (R. 6-7, Ex. "A").

According to Lieutenant Colonel Julian B. Francis, having been informed, that evening, of the accused's designs, he got Colonel McClain to go with him to the sergeant's tent about 9:25. Learning that the sergeant had gone to meet the officer at the showers, they walked into the door there, and flashed their light. Sergeant Gaudreau's pants were unbuttoned and the accused was leaning over him, holding Gaudreau's penis in his hand. The accused jumped up and started for the door, but the colonel stopped him, asking what was going on. The accused did not say anything; Gaudreau said "it was just like he reported to the chaplain". Colonel Francis had been informed that the accused was the officer involved, prior to entering the shower; and, when he entered, he recognized the accused. At that time, only the accused and the sergeant were in the building, and the accused was not drunk nor under the influence of drugs (R. 7-8).

When Colonel Francis flashed his light, at the entrance to the showers, Colonel McClain heard a scrambling noise, and saw an officer and a sergeant standing there, the sergeant on the right of the entrance tucking his privates back into his pants and buttoning them, the officer on the left, with his erect penis in his hand. Colonel Francis asked what was going on and, as soon as the two men got their clothes fixed, all went outside. Colonel McClain recognized the accused and the sergeant as being from the medical corps. Both were placed under arrest, and the accused, after being warned, stated he had nothing to say (R. 8-9).

4. The defense declined to cross-examine the witnesses for the prosecution, and introduced only one, Captain Frank B. Boyle, Medical Corps, who testified that the method of sexual expression alleged in the Specification was not normal. However, he did not consider it a manifestation of insanity; it signified an individual, abnormal in that respect, who could be perfectly normal otherwise. In the witness' opinion, the accused could not control this action, which was as normal to him "as other ways are to other people". The homosexual urge is a strong one; but, in this instance, what the accused had

in mind did not constitute a willful attempt to harm another person. Homosexuals are medical problems, their manifestation of aberrant human behavior cannot be considered as normal, and they need re-education or readjustment to take their minds from their abnormal cravings. Being "sick" with reference to their sexual cravings, they cannot control this abnormal act quite so well as a normal person can control a normal act. They should have educational treatment designed to effect a readjustment; but should not be at large, while such treatment is being administered (R. 9-11).

5. The accused, after his rights had been explained to him, desired to remain silent.

6. The plea of guilty by the accused is fully substantiated and corroborated by the uncontradicted testimony of four unimpeached witnesses. The only witness for the defense stated positively that the accused was not insane, merely abnormal in respect to the act alleged in the Specification, normal in other respects.

7. The accused is 37 years of age. War Department records show that he was commissioned in active service as a temporary second lieutenant, A.U.S., at Carlisle Barracks, Pennsylvania, 25 August 1942; promoted to first lieutenant, 13 January 1943.

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

Charles B. Besson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

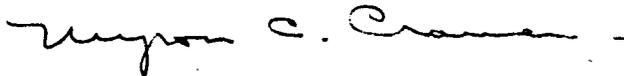
Benjamin R. Slaper, Judge Advocate.

SPJGN
CM 239137

1st Ind.

War Department, J.A.G.O., 13 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 Dominic A. Scavarda (O-1533909), Medical Administrative Corps.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. 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 your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with your approval.



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

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

(Resigned)



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

(67)

SPJGK
CM 239164

12 OCT 1943

UNITED STATES

v.

Private JAMES R. KYLES
(38099067), 64th Base Head-
quarters and Air Base Squadron,
Army Air Forces Basic Flying
School, Minter Field, California.

ARMY AIR FORCES
WEST COAST TRAINING CENTER

Trial by G.C.M. convened at
Minter Field, California,
24-26 June 1943. Dishonorable
discharge and confinement for
life. Penitentiary.

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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James R. Kyles, 64th Base Headquarters and Air Base Squadron, Army Air Forces Basic Flying School, Minter Field, Bakersfield, California, did at or near Bakersfield, California, on or about May 31, 1943, forcibly and feloniously, against her will, have carnal knowledge of Kathlene Witwicke, 1312 $\frac{1}{2}$ M Street, Bakersfield, California.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Charge and guilty of the Specification, substituting 30 May 1943 for 31 May 1943. 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 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 under Article of War 50 $\frac{1}{2}$.

3. Summary of evidence.

The prosecuting witness was Mrs. Kathlene Witwicke of Bakersfield, California (R.72). According to her testimony, she worked as a waitress at Gill's Cafe, was 5 feet 4 inches tall, 24 years of age, divorced, and

the mother of a four-year-old daughter (R.72,74,100,107). On 30 May 1943, she attended a picnic for the employees of the cafe and their friends (R.74). She was dressed in a slack suit and blouse (R.74,107, 124). The party left Gill's Cafe around noon (R.74,100). Before leaving, Mrs. Witwicke had a couple of "nips" of whiskey out of a bottle. She had two more on the way to the picnic grounds and one more after her arrival there. During the day she also drank four or five glasses of beer (R.75,101-103).

The picnickers engaged in various sports, including swimming; and a person named "Freddy" pushed Mrs. Witwicke, who was attired in her bathing suit, into the swimming pool (R.75,76,105,106,146). She was sitting on the edge of the pool at the time. The edge of the pool was composed of rather rough concrete, and when "Freddy" pushed her the back portion of her legs, between the buttocks and the knees, was burned. However, her legs were not scratched (R.104,105).

Returning home about 7 p.m., Mrs. Witwicke decided to go to Los Angeles (R.75-77). She did not change her clothes, as they were clean enough to wear. There were no stickers in her hair or blouse and no marks on her collar. Her blouse was not ruffled, and neither strap was off her slacks (R.142).

The Los Angeles bus being filled, Mrs. Witwicke did not board it. Instead she went alone to Hanning's, a cocktail lounge (R.78,110). She had a whiskey and seltzer drink at the bar and was introduced to accused by one Walter Cortez, an acquaintance (R.79,110-112,143). Accused sat beside her and they had a drink (R.79,80,112). They left Hanning's about 9:45 p.m. and went to Goodfriends' in accused's car. At Goodfriends' they drank and danced, witness having three drinks of whiskey and seltzer, and accused some beer (R.80-82, 113-115).

Leaving Goodfriends' they headed for El Adobe, another bar, but accused drove past. El Adobe without stopping, and did not reply when Mrs. Witwicke said that she thought they were going to stop there (R.82,83, 116,117). He drove up "South Chester" and turned onto a side road. At this point Mrs. Witwicke begged him to take her home, but he drove about 300 yards down the side road, stopped the car, and turned the lights off (R.83,84,118). He got out of the car, came around to the side of the car where she was sitting, opened the door, pushed her down on the seat, and "started in on" her (R.84,85,118-120). Holding her for the moment with one hand, he pulled out his penis and got on top of her (R.88,119, 121). He said he was going to "make her", and she said that it would be over her dead body and that she would turn him in (R.85,119). She cried, hollered, and kept begging him to leave her alone. She slapped and pounded him in the face, and bit, kicked and otherwise fought against

him. She tried to raise herself to get out of the car, but he shoved or knocked her back each time. When she kicked at him, he grabbed her legs and pressed them against the seat. He unbuttoned and jerked off her slacks, pulled her "panties" off, and threw them out. During the struggle, she hit her head on the steering wheel. After struggling for five or six minutes, she became pretty exhausted. Accused said he was tired of fooling with her. He took her by the legs and dragged her out of the car onto the ground. Her back hit the running board and her head hit the ground (R.84,85,87,119-122,124,126,128,129,139,140). He dragged her for a distance of about five or six feet (R.129). She was on her back (R.135). She continued to struggle against him, hitting and kicking him and attempting to bite and scratch him (R.85,128,135,138-140). She screamed loudly (R.140). She reached for his penis in order to "break it off" (R.85,86,140). Thereupon he put his left hand over her nose and mouth, smothering her, which prevented further screaming and kept her from breathing (R.86,88,136,140). He held her left arm down with his right hand, and his knees were on hers. She was unable to move (R.86, 88,136,137). Then he "forced himself" into her, "slammed it in", penetrated her, and engaged in sexual intercourse with her (R.86,137). She at no time consented (R.86). She felt pain in her private parts (R.137). The penetration lasted about half a minute, and accused "finished" (R.89,138).

Accused arose and so did Mrs. Witwicke. A sticky substance ran out of her private parts. There were some thistles in her ear, which had become embedded there during the struggle. She thought they were "foxtails" (R.87,89,138). She told accused that she would "turn him in" (R.89,130,145). She found her "panties", which were full of stickers, and put them in her pocket. She put on her slacks. There were burrs in her shoes and stockings (R.127,130,131,145).

Accused entered the car, drove forward, and started to turn around (R.89). Fearful that he would come back and kill her, she ran and hid in the bushes. She did not lie down, but merely stooped. As she recalled it, these bushes also were full of thistles (R.89,131,132). He stopped the car, looked around, then drove away (R.90,131).

Mrs. Witwicke ran to Chester Avenue, hailed a car, and was taken to the home of Mr. Gill, her employer (R.90,91). Her testimony and that of Mr. and Mrs. Gill and members of the police, who saw her at the Gill home, adduced the following facts: She was crying and in a hysterical condition. Her hair and clothes were mussed. There were "foxtails" in her hair, blouse, and "panties". One strap was missing from her slacks. There were bloodstains on the collar of her blouse, small bumps on her head, bruises on her face, and a red mark on her forehead. She told them what had happened to her (R.10-13,18,19,20-23,27-29,31-43,91,92,94-97,133).

She was taken to the hospital, where a Dr. Gardner examined her. He testified that there were four or five scratches, eight or ten inches long, on the posterior portion of her thighs, and some scratches on the inside of her thighs. Mrs. Witwicke testified that these portions of her body were covered by her bathing suit during the picnic. There was partly dried blood in the scratches, and they were not more than a few hours old. Although she complained of bruises in her head, Dr. Gardner found no cuts, abrasions, or swelling present. There was a small "possible superficial abraded area" on the right side of the vagina, but no direct evidence of trauma or blood in the vaginal tract, and no tenderness present. Witness took a vaginal smear and sent it to the laboratory (R.98,143,147-156).

Dr. Brown, pathologist and director of the clinical laboratory at the hospital, testified that the vaginal smear revealed the presence of spermatozoa, which meant that Mrs. Witwicke had had intercourse within a reasonable time before her entrance into the hospital. No examination was made to determine whether the spermatozoa were dead or alive. In a normal adult vagina, they live from two to four hours and thereafter remain in the vagina for about four days (R.157,161,162).

Witness also examined the stains on Mrs. Witwicke's blouse and determined that they were blood stains and that the blood belonged to the "Type A" blood group. The substance which determines the blood type is often present in secretions such as saliva, sweat and semen. Substances in addition to the blood stains were taken from the blouse and also belonged to "Type A" (R.158,159,160,163,164).

Miss Roseannau, laboratory technician at the Station Hospital, Minter Field, took specimens of the blood of Mrs. Witwicke and accused. Accused's blood was "Type A" and Mrs. Witwicke's "Type O" (R.166-167).

Police and others who saw the place of the alleged crime testified to the presence there of foxtails and other grasses and weeds from one and a half to four feet in height. About four feet from the road the grass and weeds had been trampled down in an area variously estimated as between four feet by two and nine by six. There were no houses within a quarter of a mile. One of the officers found a strap from Mrs. Witwicke's slacks and her door key on the ground (R.14-16,20,24-26,44-49,52,59,60,61, 95,99,133,144). Buttons from Mrs. Witwicke's slacks were discovered in the front seat of accused's car (R.63,64).

Two enlisted men whom accused picked up and drove back to Minter Field after he had left Mrs. Witwicke, testified that they noticed nothing out of the ordinary about accused's appearance, and did not observe any scratches on his face, foxtails in his clothing, or stains on his shirt. However, neither of them observed him other than casually (R.53-58,328-333).

The investigating officer, who saw accused about 3 p.m. on 31 May, testified that accused's eyes were bloodshot and that he had several apparently fresh scratches on the left side of his neck. The scratches were not the same type as those on accused's face at the time of the trial (R.64-70).

Private McCrae, a member of accused's organization and a fellow-prisoner in the guardhouse, testified that a few days after 31 May, accused told him to instruct accused's friend "Matthews" to have someone get in touch with Mrs. Witwicke and "offer her a sum of money to settle the case". Witness conveyed the message to Matthews (R.300).

For the defense there was evidence that the edge of the swimming pool at the picnic grounds was composed of rough concrete, and that after Mrs. Witwicke had been pushed into the pool, she complained that the back of her legs above her knees had been skinned. Two of the witnesses did not notice whether there were any scratches, whereas the third testified that there was an area of red marks on the back of the legs (R.169-171, 173-176, 179-181, 218-220).

Hanning, proprietor of Hanning's Cafe, testified that he had known accused for about three months and that on or about the night in question, accused, after having been with some people at a table, came over to the bar and sat down next to a girl who was dressed in slacks. They talked to each other, and witness noticed that after accused had gone, the girl was no longer there either. During her stay at the bar, the woman had four drinks of straight whiskey. However, she was not drunk. Witness admitted that Cortez had been there during the evening and that accused and the girl might have been introduced. He also admitted that he could not remember precisely what any of the other patrons had drunk (R.202-206, 208, 210-212, 214-216).

One of the officers present at the Gill residence testified that in his opinion Mrs. Witwicke was "highly intoxicated". However, he admitted that she gave a comprehensible and intelligible account of her misfortunes (R.181-183).

Two enlisted men on guard duty at Minter Field at the time of accused's return observed no scratches on him and nothing unusual about his appearance except bloodshot eyes (R.187-190, 220-226).

Accused testified that he is six feet tall, weighs between 190 and 200 pounds, and engaged in athletics in school (R.249). He admitted that on the night in question he desired sexual intercourse (R.287). After his party at Hanning's broke up, he sat down next to Mrs. Witwicke at the bar and asked her whether she would like a drink, to which she

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answered in the affirmative. He did not know her and no one introduced them. He thought there was a possibility of having intercourse with her by consent (R.232,233,255,256,287). She was not drunk (R.259,260).

After a drink together at Hanning's, they went to Goodfriends' where they danced and had six drinks each. Accused drank nothing but beer, whereas Mrs. Witwicke drank straight whiskey (R.233-235,251,261, 262,282).

According to accused, he and Mrs. Witwicke parked in the rear of El Adobe and he engaged in some "heavy courting", during the course of which they kissed a number of times, and accused "fooled around with her all over her body". His "courting" included putting his hands inside her slacks and playing with her private parts. She made no objection; in fact, she was very cooperative and passionate (R.235-238,242, 264-267,286).

Accused "propositioned" her by saying, "Why don't we get something out of this business?", to which she replied, "'Not here'" (R.238,243, 265,268,292,293). Accused interpreted this as evidencing a willingness on the woman's part to engage in sexual intercourse somewhere else (R. 242). At this stage of the proceedings, accused left the car and went into the El Adobe to find his friend Matthews. He talked to "Mike", and from him learned that Matthews was not there (R.236,267).

Accused then drove Mrs. Witwicke to the place previously referred to, selecting it because it was "a likely spot for an intercourse". She did not protest going there. After stopping the car, accused started kissing Mrs. Witwicke and "fooling around" with her breasts, when suddenly she began hitting him in the face with her open hand. Accused slapped her with the back of his hand. After a brief fight, Mrs. Witwicke left the car. Accused turned the car around and did not see her. The weeds in that locality were possibly two feet high. Accused drove back to the field, picking up Corporal Bottoms and another enlisted man on the way (R.238-244,268-274,281,290-292).

Accused specifically denied having sexual intercourse with Mrs. Witwicke, and denied the various forcible actions attributed to him by her testimony, such as pulling off her slacks and "panties", struggling with her, and the like (R.240,241,244,285). He testified that he had no scratches on his face, neck, or elsewhere, but had a neck irritation from "wild hairs", which sometimes caused bleeding. He identified the shirt which he had worn that night and which showed foxtails in the sleeves and stains on the left side of the collar and near the fourth button. He borrowed the shirt from "Bob Matthews" at about 6 p.m.,

29 May, and wore it from then until the afternoon of 31 May. When he first put on the shirt, he noticed blood on it (R.246,274-279,283,293). He denied asking "Private McCrae" to arrange with Matthews to "get to" Mrs. Witwicke and offer her some money (R.276).

Laray, bartender at the El Adobe, and evidently the "Mike" referred to in the testimony of accused, testified that he had known accused for several months and that accused came into the bar between 10:45 and 11:15 p.m., 30 May, looking for a friend (R.197-201).

Matthews, called by the court, testified that he loaned a shirt to accused on 30 May and that it had some blood on it as a result of a nose-bleed incurred by witness the previous night while running home from the post theater. Witness did not notice any bloodstains until during the afternoon of 30 May (R.306,308-313,315-317,319,322,323,325). Sergeant Hugo Pasquinni of accused's organization testified that on the afternoon of 30 May he noticed some red spots on the front of accused's shirt (R.296,297). It was stipulated that Miss Rosenau would testify that Matthews' blood was "Type A" (R.326).

The prosecution brought out that in his statement to the investigating officer accused said nothing about any "heavy courting" at the El Adobe (Def. Ex. A). Accused explained this omission by declaring that at the time he considered it unimportant (R.265,266).

4. In this case it is not the function of the Board of Review to weigh the evidence, adjudge the credibility of the witnesses, or determine controverted questions of fact. Rather, we are to decide whether the record contains sufficient evidence to support the findings of guilty (M.C.M.,1928, p. 216, note 3). Without doubt there is sufficient evidence in the record to prove that accused had carnal knowledge of Mrs. Witwicke by force and without her consent. Testimony to the contrary was rejected by the court in the exercise of its authority to determine conflicts in the evidence. It is worthy of note that the corroborative and circumstantial evidence fully justify the court's determination of the issues of fact.

5. The Charge Sheet shows that accused is 24 years of age and was inducted into the service on 13 March 1942.

6. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion

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of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. Penitentiary confinement is authorized under Article of War 42 and section 22-2801, District of Columbia Code.

Lang E. Goss , Judge Advocate.
Wm. H. Hamerick , Judge Advocate.
Stetson R. Andrews Judge Advocate.

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

(75)

SPJGK
CM 239172

7 OCT 1943

UNITED STATES)
))
 v.)
))
Second Lieutenant JOSEPH M.)
STRAUSS (O-1080154), Coast)
Artillery Corps.)

NORTHWESTERN SECTOR,
WESTERN DEFENSE COMMAND
Trial by G.C.M., convened at
Fort Worden, Washington, 25
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. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lt. Joseph M. Strauss, 14th Coast Artillery, was, at Port Townsend, Washington, on or about June 3, 1943, in a public place, to wit, The Italian Cafe, drunk and disorderly while in uniform.

Specification 2: In that 2nd Lt. Joseph M. Strauss, 14th Coast Artillery, did, at Port Townsend, Washington, on or about June 3, 1943, while in uniform in a public place, to wit: at or near the Palms Cafe, drink intoxicating liquor with a certain enlisted man, to wit: Pvt. James E. Eglaston, Headquarters Battery, 14th Coast Artillery.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be 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 presented by the prosecution shows that accused is a second lieutenant, 14th Coast Artillery, Fort Flagler, Washington (R. 63). Mrs. Dorothy Rooney of Port Townsend, Washington, barmaid at the Palms Cafe in Port Townsend (R. 22,23), Technician 4th Grade Harry

J. Rooney, 248th Coast Artillery, Fort Worden (R. 31), Staff Sergeant Clarence J. Ring, Corps of Military Police, Fort Worden (R. 36), Corporal Emory G. Dudleston, Military Police Detachment, Fort Worden (R. 50) all were in the Tap Room of the Palms Cafe, at various times, from about 3 p.m. until between 5 and 6 p.m. on 3 June 1943, and saw accused there. He was sitting in a booth drinking Schlitz Beer from a bottle, (the label of which claimed for it an alcoholic content of 4% by weight) (R. 24, 25, 27). With accused, in the booth, were a Private John Eglaston, a young lady, and a sailor. Accused and the enlisted man were in uniform (R. 23, 24, 33, 36, 38). Accused and Private Eglaston were drinking together (R. 23-25, 33, 34, 39). During the latter part of the afternoon, accused became "boisterous". Shortly after 5 o'clock he went up to the bar and spoke to a civilian, Harley R. Knott, of Port Townsend, Washington, who was sitting there with his wife, and in a voice "quite loud, so everyone heard it through the tap room", said to Knott; "Any man in civilian clothes nowadays is a son-of-a-bitch". (R. 25, 26, 34, 143, 144). Knott became quite angry. He invited accused to go outside, but accused refused (R. 26). Mr. Knott said that accused's remark was unprovoked (R. 144).

Between 6 and 6:30 p.m. accused was observed by Staff Sergeant Ring and Corporal Dudleston having dinner with Private Eglaston and the same young lady in the Italian Cafe also located in Port Townsend, Washington. Accused called the corporal over to the booth and, in the hearing of other occupants of the Cafe, employees and guests, called the Corporal, "a red-haired son-of-a-bitch". Corporal Dudleston went out and returned with Staff Sergeant Ring. Accused motioned to Staff Sergeant Ring to come over. He said; "MP, come over here to me" and "God damn you, stand at attention when you talk to me." Accused also called him a "son-of-a-bitch". The sergeant then sent for the provost marshal of Fort Worden, Washington, who persuaded accused to leave the cafe and accompany him to the post (R. 39-41, 42, 53, 63, 66-68, 148-151).

Mrs. Rooney testified that at the Palms Tap Room accused was all right "until he went to the bar". She said "he was loud and boisterous, but did not seem to be drunk in the sense that we could not serve him" liquor (R. 29). Mr. Rooney who saw accused at the Palms Tap Room described him as "more or less uncertain" (R. 32). At the Italian Cafe, according to Staff Sergeant Ring, accused was "standing * * * with his hands in his pockets, weaving first one way and then the other" (R. 43); while Corporal Dudleston testified that "in his weaving around he sort of fell down on the wood pile" (R. 56). Edna Widger, waitress at the Italian Garden, "thought he was drunk". She heard him use "foul language" (R. 149, 154). First Lieu-

tenant Lloyd J. Jorgensen, Corps of Engineers, Fort Worden, was the provost marshal who came responsive to the report of Staff Sergeant Ring. He asked accused to go outside, in back of the cafe to talk. Accused was abusive of the military police and was "rather unsteady on his feet and his body would move around a bit and once in awhile he would take a step to catch himself so he would not fall". In the opinion of Lieutenant Jorgensen accused was drunk because of his "unsteadiness in gait, the language he used, and the odor of liquor on his breath". After some discussion accused consented to enter the military police truck. He was assisted in and taken to the office of Colonel Frank H. Holden, Commanding 14th Coast Artillery, Fort Worden (R. 43, 56, 63-69, 108, 129, 147, 149, 151). Colonel Holden testified that accused was not "in full possession of all of his faculties," and that he was "confused mentally" (P. 131).

4. Accused testified in his own behalf. He stated that during the latter part of May he had been "restless, nervous" and not sleeping well. As a result, he consulted "Captain Franke" at the station hospital. Captain Franke prescribed nembatal, a sedative, to be taken at intervals of four hours. He was first told "of any pathological effects that might result" if he drank liquor after taking nembatal. On the evening of 2 June 1943, accused testified, he left for Port Townsend on a verbal pass which terminated at 6 p.m., 3 June 1943. Arriving at Port Townsend, accused purchased "one fifth of whiskey", engaged a room at the hotel and retired shortly thereafter. He awoke at 7:30 a.m. on 3 June with a slight headache. He took one of the nembatal capsules and went back to sleep. He awoke about noon, and "took several drinks of whiskey". He finished his toilet about 1:30 and still "had a feeling of a slight headache". He took another capsule and in 15 or 20 minutes "took another drink of whiskey". Accused was at this time asked the question; "Is that the only drink of whiskey you took that day?" The answer was: "Yes sir." He then proceeded to the Palms Cafe where he ordered a meal, his first food since 9:30 the night before (R. 85). At this time, the first sergeant of Battery C, 14th Coast Artillery came over with Private Eglaston who was in "protective custody". The three drank a glass of beer and the first sergeant departed leaving Private Eglaston in the custody of accused. A young lady friend of Private Eglaston joined the group and the three sat in a booth. Accused ordered some beer. Accused stated that he then began to feel very hazy and could not remember very clearly what occurred after that time. However, accused recalled his trip to Fort Worden, although he stated the details were very hazy. He remembered that about 5 o'clock he phoned his commanding officer and was granted an extension on his pass. Accused testified that "he had no recollection of using foul and obscene language" to "Mr. Knott". He remembered that he left the Palms Cafe about 5:30 and went to the Italian Cafe with Private Eglaston "and this girl" to get

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spaghetti and that he ordered spaghetti. He remembered that he had four "glasses of beer or bottles of beer" in the Palms Cafe. He also remembered having seen Corporal Dudleston in the Palms Cafe and later in the Italian Cafe. He stated that he called Corporal Dudleston over and "asked him if he was trailing me around". He recalled Dudleston's reply; "I am on the MP detail and have to keep things straight around here". Accused recounted his version of what followed. He said that he asked Dudleston "What isn't straight" and that Dudleston said something to the effect that he, accused, was not conducting himself as he should. Accused remembered that Dudleston "then went over and sat on the stool by the counter. He sat down and kept turning around glaring at me, so I called him back" and told Dudleston that "if he had anything further to say", he should say it. Accused added that Dudleston was very insolent, and looked rough and tough as though he would want to cause some trouble and that accused "of course" lost his temper. He stated that he started to get up and Corporal Dudleston struck him on the side of the head. Accused said that he did not remember using any foul words to Staff Sergeant Ring or Corporal Dudleston, although he may have called Corporal Dudleston a "son-of-a-bitch". Accused denied that he was drunk on the afternoon of 3 June or that he had ever been drunk in all his life. He said that if he was disorderly it was provoked by the "wrong attitude of these MP's". On examination by the court accused stated that he drank the whiskey from a glass, straight, and that he considered "about half an inch" to be a normal drink of whiskey (R. 76-107).

A number of medical witnesses testified as experts that the effect of intoxicating liquor or of an effervescent liquid taken within a short time after a tablet of nembutal would produce the effects of intoxication and that it would be difficult to distinguish the difference between the condition so caused and that caused solely by the use of intoxicants. One of these medical officers was Captain Frederick A. Franke, Medical Corps, Fort Worden who testified that about the middle of May he had prescribed nembutal to be taken by accused, one tablet every 4 hours. Captain Franke testified that a combination of nembutal and liquor creates an anesthesia and has a definite effect on the brain, "an excitory effect on the forepart of the brain which releases the normal inhibitory processes and causes him to do things which liquor alone would not make him do" (R. 109-115). Major Richard B. Link, Medical Corps, Fort Worden, Regimental Surgeon, 14th Coast Artillery, gave his medical experience in the use of nembutal and the effect on the human system of its combination with an effervescent liquid of any kind. He testified that the combination would be likely to injuriously affect the mental processes, that it caused individual idiosyncrasies. He stated that a man's ordinary capacity for liquor would be lowered by the introduction of nembutal (R. 115-119). Captain Albert L. Borska, Medical Corps, testified that the effect of a "hypnotic", such as nembutal, with alcohol causes a "loss of complete control of the mental capacities". On examination by the court Captain Borska stated with respect to this condition that "There is no way you could discriminate what was due to the drug and what was due to alcohol" (R. 119-124).

These medical officers also testified in high terms to the good character of accused, to their regard and respect for him and to that of the officers and enlisted men with whom he served (R. 109-124). Colonel Frank H. Holden, Commanding Officer, 14th Coast Artillery, stated that accused's "general reputation throughout the harbor defenses has been exceptionally high" (R. 108-109). The defense claimed to have in attendance ten witnesses, officers and enlisted men, prepared to testify that the bearing, demeanor, qualities of leadership and efficiency as an officer of accused was of the highest order and that his reputation among the officers and enlisted men with whom he served was that of superior intelligence and of an officer and a gentleman. It was stipulated that these witnesses if called would so testify in open court (R. 128).

5. Colonel Holden, Commanding Officer, was permitted to testify, over objection, that when accused was brought to his office on the evening of 3 June he questioned him and asked accused; "Are you drunk?" Colonel Holden testified that, as he remembered, he told accused that he did not have to say anything but did not remember telling accused that "what he said might be used against him in a court-martial". Colonel Holden then testified, without objection, that in answer to this question accused said, "Well, all right, I am drunk" (R. 129-130). On cross-examination Colonel Holden testified that at the time he interviewed him, accused appeared to be "confused mentally", not in possession of all his faculties, whereupon the defense moved to strike out all the testimony of this witness, on the general ground that accused, because of his "proven mental condition", was unable to weigh the effect or possible results of his making this statement. The motion was denied (R. 131-136). If the admission of accused's statement was erroneous the error was not prejudicial to any substantial rights of accused. There was ample evidence, aside from this admission, which was conclusive on the issue of drunkenness.

The objection of the defense to the validity of Specification 2 of the Charge, on the ground that it was changed and was not thereafter reinvestigated, was without merit. A reinvestigation is not required when the specification as modified, does not allege a new or different offense (Dig. Op. JAG 1912-1940, sec. 428 (1)). Accused's motion to clarify Specification 2 of the Charge was properly denied. The allegation stating the offense to have occurred "at or near Palms Cafe" was sufficiently definite (Dig. Op., JAG, 1912-1940, sec. 428 (12)).

6. The evidence is conclusive that in the evening of 3 June 1943, in Port Townsend, Washington, in the Italian Cafe, accused was drunk and conspicuously disorderly. Accused's own testimony as to the quantity of liquor consumed by him, the testimony of the waitress at the Italian Cafe and that of Lieutenant Jorgenson, Staff Sergeant Ring and Corporal Dudleston indicated that accused was drunk as alleged in Specification 1 of the Charge. The testimony does not show that he was grossly drunk. His conduct

in the Italian Cafe, however, was conspicuously disorderly. He indulged in profanity and foul language directed toward and heard by members of the military police, and within the hearing of a female employee and probably of others. It is true that the Military Police were undoubtedly "keeping an eye" on him but this surveillance was not provocative in view of the fact that it arose as a result of accused's proven disorderly conduct at the Palms Cafe earlier in the day when he insulted a civilian. Accused's conduct was unbecoming an officer and a gentleman. He was properly found guilty of Specification 1 of the Charge and guilty of the Charge.

The evidence is conclusive that in the latter part of the afternoon of 3 June 1943 accused was in the Tap Room of the Palms Cafe, a public place in Port Townsend, while in uniform, drinking intoxicating liquor with Private James Eglaston, an enlisted man, as alleged in Specification 2 of the Charge. During this time, accused without provocation publicly and grossly insulted a civilian. In the latter part of the afternoon, while still with the enlisted man, he became boisterous and drunk. Numerous persons, including the waitress who served them, testified as to all of these facts. Accused admitted drinking with the enlisted man at the time and place alleged. Specification 2 of the Charge is laid under Article of War 95. It is true that drinking with an enlisted man is not per se a violation of Article of War 95 (Dig. Op. JAG, 1912-1940, 453 (9)). However, circumstances, including ungentlemanly behavior by the officer, may bring the service discrediting conduct across the line and within the purview of Article of War 95. It is believed that the conduct of accused in the present instance was not only service discrediting but most unbecoming a gentleman. He was disorderly, drunk and insulting. Where drinking of this character occurs in public and is attended by ungentlemanly conduct, as here, calculated to attract public notice and to reflect discredit on the service generally, then indeed may accused be said to have committed not only a military offense under Article of War 96, but to have violated well known standards of gentlemanly conduct, and to be guilty of violation of Article of War 95. The situation is akin to mere drunkenness which is not per se a violation of Article of War 95. But drunkenness does violate this Article when coupled with conduct which is conspicuously disorderly.

Accused admitted a mental condition similar to that found in drunkenness. His defense was that he was the guiltless victim of a combination of drugs involuntarily taken and of alcohol. The medical experts testified to the harmful result which follows the combined use of nembutal and alcohol, dependent on individual idiosyncrasies. There is no testimony that a baneful result is certain to follow in the case of everyone. Had the evidence been that accused took nembutal and one drink of liquor and had then become intoxicated, the medical testimony would have offered a reasonable explanation of this unusual result. However, accused's own testimony was

that, without any breakfast or luncheon, he, after awaking around noon, took several drinks of whiskey, straight, completed his toilet and took another drink of whiskey; that he took food for the first time that day around 3 o'clock p.m.; and from then until about 6 o'clock he had four glasses or bottles of beer. In view of this testimony little time need be wasted determining whether accused's drunkenness was due to drugs or liquor. It may be true, and undoubtedly is, that nembutal decreases one's tolerance for alcohol. The same may be said of an empty stomach. Under the law one indulges in liquor at his own risk. Accused's ignorance of the possible effect of this combination was no defense. The fact that it may have created an extenuating circumstance was clearly and carefully called to the attention of the court and was disregarded by the court.

7. Accused is 31 years of age. He was commissioned second lieutenant, Army of the United States, 7 August 1942. He was inducted 9 January 1941 and discharged 6 August 1942. He is single. He attended Holy Cross, Villanova and St. Mary's University from which he graduated in 1934.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95.

Wm. C. Lyon, Judge Advocate

John Hammett, Judge Advocate

Fletcher R. Andrews, Judge Advocate

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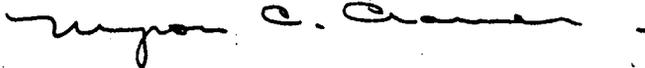
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War Department, J.A.G.O., 16 OCT 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Joseph M. Strauss (O-1080154), Coast Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. In view of the efficiency and previous good conduct of the accused, I recommend that the sentence be confirmed but commuted to a reprimand 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,
Major General,

3 Incls. The Judge Advocate General.

- Incl.1-Record of trial.
- Incl.2-Draft of let. for
sig. Sec. of War.
- Incl.3-Form of Ex. action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 361, 12 Nov 1943)

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

(83)

SPJGH
CM 239173

8 Sept 1943

U N I T E D S T A T E S)

v.)

First Lieutenant MELVEN)
OESTREICH (O-276801),)
Corps of Military Police. .)

NORTHERN CALIFORNIA SECTOR
WESTERN DEFENSE COMMAND

Trial by G.C.M., convened
at Fort Winfield Scott,
California, 3 August
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 Charge and Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that 1st Lt. Melven Oestreich, CMP, SCU #1932, Fort Winfield Scott, California, was, at Fort Winfield Scott, California, at approximately 11:35 o'clock on 23 July 1943 found drunk while on duty as Officer of the Day of said Fort Winfield Scott, California.

He pleaded not 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 competent evidence for the prosecution shows that accused was detailed as officer of the day for Fort Winfield Scott, California, to serve from 8:00 a.m. to 5:00 p.m. on 23 July 1943. At about 8:00 a.m. on that day, he reported as officer of the day to Chief Warrant Officer John A. Peyton, Assistant Post Adjutant, who handed accused the guard book and told him to carry out his usual instructions. At that time

accused was sober and appeared to be perfectly normal. At noon, when First Lieutenant Arthur J. Fidgeon gave accused some orders in connection with his duty as officer of the day, accused was sober (R. 6-11; Ex. 2).

At 1:30 p.m., Colonel Arthur E. Rowland, the commanding officer of accused and Assistant Post Commander, directed Captain DeWitt D. Davis, Acting Post Executive, to have accused report immediately at Post Headquarters. When accused entered the office of Captain Davis at about 2:30 p.m., Captain Davis did not notice the odor of liquor, nor anything unusual about the way accused walked a distance of about 12 feet to the door of Colonel Rowland's office, nor anything else unusual about accused. Captain Davis knew that Colonel Rowland wanted to see accused immediately, "took no time" to observe accused at all, and escorted him to Colonel Rowland's office, adjoining. Captain Davis then returned to his own office (R. 11-12, 29-30, 43-47).

Accused seated himself in a chair about six feet from that of Colonel Rowland, who then asked him what orders he had given to the sentry at the "toll plaza gate" with reference to the passage of enlisted men and vehicles. After some hesitation accused replied, rather thickly, "Did you say the 25th Avenue gate?" Colonel Rowland then stated that he did not say the 25th Avenue gate, and repeated his original question. Accused apparently made a considerable effort to reply, his lips and chin moved, but "no sound came". Colonel Rowland, believing that he smelled liquor on accused, then rang for Captain Davis. When Captain Davis entered the office, Colonel Rowland directed him to be seated and to listen to what accused had to say. Colonel Rowland then repeated his question to accused. After a "little hesitation" accused asked in a "somewhat low" voice "The general or special orders?", to which Colonel Rowland replied, "No, that is not what I mean, what are the special orders that the sentry has at the Toll Plaza gate?" Accused hesitated and then said "I don't know". Colonel Rowland asked "Are you Officer of the Day?" and accused replied that he was. Colonel Rowland then stated that accused would be relieved as officer of the day, and in the presence of accused, telephoned to the Post Commander, advised him that accused was drunk and would be relieved from duty, and asked for instructions as to what action should be taken. Colonel Rowland first noticed the odor of liquor after accused had been in his office about five minutes when accused failed to answer his question the second time, identified a drawing showing the arrangement of his office (Ex. 3), and demonstrated

to the court the manner in which accused answered his questions (R.13-17, 28, 30-38).

Colonel Rowland summoned Second Lieutenant John L. Crilly, informed him that he would be designated to investigate charges of drunkenness against accused, and instructed him to observe the condition of accused. When asked how many drinks he had had, accused stated that he had been worrying about his son in the Air Corps. When the question was repeated accused stated that he did not believe he should incriminate himself. Colonel Rowland then stated that he would not ask any more questions. When the new officer of the day entered the office, accused arose from his chair at the direction of Colonel Rowland, stood without moving, was not unsteady, and was relieved as officer of the day. Accused then started to leave the office, stopped, and asked whether he should remove his side-arms. Colonel Rowland replied "no, take them with you to your quarters", and accused left the room. Colonel Rowland did not place accused in arrest, but told him to go to his quarters and "sleep it off" and restricted him to the limits of the post (R. 17-19, 21, 27, 40, 47-51).

During the time accused was in Colonel Rowland's office, about thirty minutes, accused did not mention any illness, his face was flushed, there was an odor of liquor about him, his response to questions was very hesitant, his speech was thick and difficult to understand, his enunciation not clear, and his demeanor was not the same as usual. Accused was dressed neatly, his clothes and hair were in good order, there was nothing unusual in his appearance, and he was steady when he stood up. On previous occasions, his responses had been prompt and his speech clear. Colonel Rowland and Captain Davis were of the opinion that accused was drunk and not in condition to perform his duties as officer of the day. No medical examination of accused was made at that time (R. 14, 16, 19-20, 26-29, 37-45, 51-52, 55-56).

4. For the defense it was stipulated that accused was a patient in the Camp Santa Anita Hospital from 18 to 22 December 1942, with "bronchitis, acute catarrhal, bilateral" and that according to the hospital records accused had suffered from that condition for one week prior to admission; that accused was a patient in the same hospital from 4 to 22 January 1943 with influenza; and that accused was a patient in Army Airbase Station Hospital, Reno, Nevada, from 2 to 11 February 1943 with "nasal pharyngitis, acute catarrhal" (R. 68-69).

Accused testified that he had reported to Camp Winfield Scott on 12 June 1943 from Reno, Nevada, and that he was three days late in

reporting because of an illness on 7, 8 and 9 June, a difficulty in breathing and a feeling of suffocation, for which he had been attended by a civilian physician. He did not call an Army doctor at that time because he did not want to go to the hospital again, and he thought he could fight off the illness. At Fort Winfield Scott, he contracted a cold about a week before 23 July, "felt bad", on the night of 21 July, and on 23 July the cold was getting worse, he had difficulty in breathing and his lungs hurt. He took some aspirin but did not report that he was ill and ask to be relieved, because he did not think it was serious enough. He did not go to the Army doctors for a proper prescription because he knew he would just go to the hospital again. He did not want to go there and he thought he could fight off the illness (R. 69-72, 76-77, 81-82).

On 23 July accused felt that he was qualified to perform the duties of officer of the day, and reported to Mr. Peyton at 8:00 a.m. During the morning, he performed his duties. After talking with Lieutenant Fidgeon at about 12:00 o'clock, he went to his room to lie down. At that time his lungs hurt, he could not breathe properly and thought if he took a drink it would relieve him as it had done in the past. About 12:15 p.m. he took a drink of whiskey, "a good swallow", a "little bit" more than a normal jigger, and it relieved him for a time. About an hour later he took a second drink of the same size, ate no lunch because food formed gas and made his breathing more difficult when he was "choking up that way", and remained in his quarters from 12:15 until about 2:30 p.m. When he received a telephone call from the First Sergeant that Colonel Rowland wished to see him at once, he immediately proceeded to headquarters as fast as he could walk, hesitated at the outer door for a few moments to get "some more" breath, reported to Captain Davis, and then went to Colonel Rowland's office (R. 71-74, 76-78, 80, 82-84).

Colonel Rowland began to question him about teaching the guards and what inspections the guards were given. Accused was confused because there were different guard posts, did not know which post Colonel Rowland was referring to, asked if it was the 25th Street gate and did not understand what Colonel Rowland was talking about. Colonel Rowland repeated the question, then said "you have been drinking" and questioned accused about drinking. Other officers were then present. Accused was relieved as officer of the day. When he asked whether he should remove his side-arms, Colonel Rowland said "no". Accused was confused by being interrogated, knew that he was not acting correctly, but had difficulty in getting his breath and in speaking. He had had only two drinks and was not intoxicated or under the influence of liquor. About 10:00

o'clock that night, accused called for a doctor. Captain George J. Rossi, Medical Corps, answered the call and sent accused to the hospital. When accused left the hospital, a few days before the trial, he reported to Colonel Rowland and was assigned to duty (R. 73-76, 78-81).

Captain Rossi examined accused in his quarters at 9:30 p.m. on 23 July 1943. At that time, accused had rather marked rales in his chest, his breathing was labored, and he had a temperature of 99.8. Captain Rossi diagnosed the condition as a moderately severe case of acute bronchitis, which had taken from twelve to twenty-four hours to develop, thought accused might be developing bronchial pneumonia, and directed that accused be sent to the hospital immediately. Captain Rossi did not notice the odor of alcohol. Accused spoke clearly and distinctly. At about 10:00 p.m. accused was examined at the Station Hospital by Captain Benjamin D. Erger, Medical Corps, who diagnosed his condition as acute, diffuse, bilateral, bronchitis, and ordered him to bed. The next morning accused was examined by Captain Mervyn Goldman, Medical Corps, who confirmed the other diagnoses. Accused remained in the hospital until 30 July (R. 58-59, 65-67, 84-91).

Captain Rossi testified as an expert that the history of accused showed that he was susceptible to bronchitis. In a certain percentage of cases, it is likely that an individual with acute bronchitis would have a transitory laryngitis. A man with acute bronchitis, after walking fast, would have a tendency to lose control over his speech, his breathing would be definitely affected, and he would have difficulty in expressing himself, which would evidence itself in the slurring of words and in hoarseness rather than thickness of speech. At one time, alcohol was prescribed for bronchitis. A "good quantity" of alcohol might make breathing more difficult and might aggravate bronchitis. Failure to understand questions, slurred or thick speech, and incoherent answers are evidence of the influence of alcohol, but might be symptoms of something else. It is possible, but not probable, that two large jiggers of whiskey would cause a slurring of speech. Four ounces of whiskey would not make the average man drunk or intoxicated, although that much whiskey would make a man feel "a little high", and might have an effect on his speech (R. 88-98).

When Captains Rossi, Erger, and Goldman examined accused they did not observe that his speech was affected by the bronchitis, no

laryngitis was found, and there was evidence of hoarseness but accused was able to express himself clearly and distinctly (R. 64-65, 67, 90-91).

5. In rebuttal, Colonel Zeno C. Holt, commanding Fort Baker Station Hospital, testified for the prosecution that the effect of alcohol varies greatly in different people. When taken in sufficient quantity, it affects the ability to enunciate and speak coherently, and impairs mental capacity and judgment. Intoxication cannot be defined in every instance except with laboratory tests of blood and spinal fluid. Drunkenness is a narcotic effect of alcohol that affects the person taking it into his system, to the point that where he has two or three tenths of one per cent of alcohol in his blood and about half that amount in his spinal fluid, he is usually considered drunk. A man taking a large amount of whiskey into his system usually has some of it for almost 24 hours, but it is probable that after seven hours he would not smell of whiskey. It is possible for a man to take two large drinks of whiskey and not be drunk. Inability to enunciate properly or speak coherently and failure to understand questions are symptoms of drunkenness. Many people have bronchitis without the larynx being involved. Acute bronchitis without other involvements does not usually affect one's ability to speak clearly. If a person suffering with acute bronchitis drank some whiskey at one o'clock, was drunk and unable to speak coherently or understand questions asked him at three o'clock, and at 9:30 p.m., although still suffering from acute bronchitis, was able to talk coherently and clearly, Colonel Holt would assume that his inability to speak correctly at three o'clock was caused by the whiskey. If a man had two drinks of whiskey, was neat and well dressed, stood erect without instability, and walked without any apparent difficulty and without reeling or being unstable, that would be some evidence that he was sober (R. 100-109).

6. The evidence shows without dispute that accused was on duty as officer of the day at Camp Winfield Scott on 23 July 1943 from 8:00 a.m. until relieved about 3:00 p.m. and that at 8:00 a.m. and about noon he was sober. About 12:15 p.m. and again about an hour later he took a drink of whiskey, a little more than a jigger, at his room, for medicinal purposes. At the time, he had a cold, his lungs hurt and he had difficulty in breathing. About 2:30 p.m. he reported to the office of his commanding officer, Colonel Rowland, in answer to a call and was interrogated about orders given to the sentry at one

of the gates. He remained at the office about thirty minutes, other officers were called in to observe him, and he was then relieved as officer of the day.

During the time accused was in Colonel Rowland's office, it was observed that he was able to stand without moving, was not unsteady, and was dressed neatly; his clothes and hair were in good order and there was nothing unusual in his appearance. It was also observed that accused hesitated in answering the questions of Colonel Rowland, did not seem to understand the questions, once made a considerable effort to reply, moved his lips and chin, but made no sound; he spoke in a low voice, his enunciation was not clear, and his speech was thick and difficult to understand; his face was flushed, there was an odor of liquor about him, and his demeanor was not the same as usual. Both Colonel Rowland and the Acting Post Executive, Captain Davis, were of the opinion that accused was drunk and not in condition to perform his duties as officer of the day. No medical examination of accused was made. About 9:30 or 10:00 p.m. accused called a doctor, was sent to the hospital and found to have acute bronchitis..

Accused testified that he was not under the influence of liquor and that his condition during the interview resulted because he had walked fast and was out of breath and was confused by Colonel Rowland's questions.

Although accused was not grossly drunk and was not disorderly, he drank intoxicating liquor while on duty as officer of the day and in the opinion of Colonel Rowland and Captain Davis, who observed him for about thirty minutes during the interview, accused was drunk and not in condition to perform his duties as officer of the day. It is the opinion of the Board of Review that the intoxication of accused was sufficient sensibly to impair the rational and full exercise of his mental and physical faculties. Such intoxication constitutes drunkenness in violation of the 85th Article of War (MCM, 1928, par. 145).

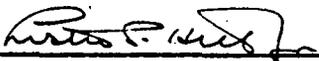
7. Testimony was erroneously admitted that during the interview on 23 July 1943, Colonel Rowland prior to advising accused of his rights under the 24th Article of War, asked "Have you been drinking?", to which accused replied that he had (R. 16, 38). In view of the fact that accused testified that he had in fact had two drinks, it is the opinion of the Board that this error did not injuriously affect the substantial rights of accused.

8. The accused is 48 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service,

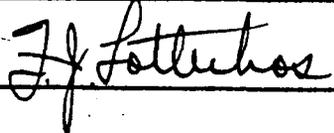
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U. S. Navy, 5 July 1917 to 17 October 1919; Enlisted Reserve Corps from 18 March 1930; appointed second lieutenant, Infantry Reserve, from enlisted reserve, 8 August 1930; reappointed 8 August 1935; appointed first lieutenant, Infantry Reserve, 1 June 1936; reappointed 1 June 1941; active duty, 19 May 1942.

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


_____, Judge Advocate

(Sick)
_____, Judge Advocate


_____, Judge Advocate

1st Ind.

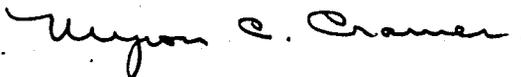
War Department, J.A.G.O., 10 SEP 1943 - To the Secretary of War.

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 Melven Cestreich (O-276801), Corps of Military Police.

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 found drunk while on duty as officer of the day. Although his intoxication was sufficient sensibly to impair the rational and full exercise of his mental and physical faculties, accused was neither grossly drunk nor disorderly, and his condition resulted from two drinks taken on account of illness. 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 your signature, transmitting the record of trial to the President for his action, and a form of Executive action carrying into effect the recommendation made above.



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

3 Incls.

Incl.1- Record of trial.

Incl.2- Drft. ltr. for sig.

Sec. of War.

Incl.3- Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 321, 23 Oct 1943)

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

(93)

SPJGN
CM 239239

20 NOV 1943

UNITED STATES)
) v.)
Privates LAWRENCE MITCHELL)
(36169482), Service Company,)
367th Infantry; RICHARD P.)
ADAMS (35271976), 364th)
Infantry; JOHN W. BORDENAVE)
(6267618), 364th Infantry.)

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES
Trial by G.C.M., convened at
Camp Maxey, Texas, 28, 29,
30 July 1943. Each: Death
by hanging.

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

1. The record of trial in the case of the soldiers 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 were tried upon the following Charges and Specifications:

CHARGE I: Violation of the 86th Article of War.

Specification: (Nolle prosequi entered by direction of convening authority).

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

Specification 1: In that Private John Walter Bordenave, 364th Infantry (then 1st Bn., 367th Infantry), did, at Camp Claiborne, Louisiana, on or about May 9, 1942, forcibly and feloniously, against her will, have carnal knowledge of Hattie Rose Mason, now Mrs. George Schuler.

Specification 2: In that Private Richard Phillips Adams, 364th Infantry (then 1st Bn., 367th Infantry), did, at Camp Claiborne, Louisiana, on or about May 9, 1942, forcibly and feloniously, against her will, have carnal knowledge of Hattie Rose Mason, now Mrs. George Schuler.

(94)

Specification 3: In that Private Lawrence Mitchell, 364th Infantry (then 1st Bn., 367th Infantry), did, at Camp Claiborne, Louisiana, on or about May 9, 1942, forcibly and feloniously, against her will, have carnal knowledge of Hattie Rose Mason, now Mrs. George Schuler.

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

Specification: In that Private John Walter Bordenave, Private Richard Phillips Adams and Private Lawrence Mitchell, all 364th Infantry (then 1st Bn., 367th Infantry), acting jointly and in pursuance of a common intent, did, at Camp Claiborne, Louisiana, on or about May 9, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private George Schuler about one Dollar in lawful money of the United States, the property of Private George Schuler.

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

Specification 1: (Nolle prosequi entered by direction of convening authority).

Specification 2: In that Private John Walter Bordenave, Private Richard Phillips Adams and Private Lawrence Mitchell, all 364th Infantry (then 1st Bn., 367th Infantry), acting jointly and in pursuance of a common intent, did, at Camp Claiborne, Louisiana, on or about May 9, 1942, willfully, wrongfully and without proper authority apply to their own use a Government vehicle, known as a "jeep" of the value of about One Thousand Thirty Six Dollars and Seventy Six Cents (\$1,036.76), property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. Each accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence, and forwarded the record of trial for action under Article of War 50½. The record has been reviewed as if forwarded under Article of War 48.

3. The history of this case was presented to the court-martial by a stipulation which provides as follows:

"That the three accused were tried in July 1942 in Cause No. 10246 Criminal, Styled United States of America versus Private Richard Phillips Adams, Private Lawrence Mitchell, and Private John W. Bordenave, in the United States District Court for the Western District of Louisiana, Alexandria Division, on

the charge of committing rape on Hattie Rose Mason, now Mrs. George Schuler; that on appeal the question was raised as to whether the United States Government had criminal jurisdiction over the land where these offenses were alleged to have been committed; that it was decided by the Supreme Court of the United States on certified questions that inasmuch as the United States of America had not accepted jurisdiction over this land, the United States District Court was without criminal jurisdiction to try the accused and, accordingly, the convictions were reversed. The trial, conviction and sentence were void and of no effect for want of jurisdiction, and the cause was dismissed on said ground by said United States District Court pursuant to the directions of the United States Circuit Court of Appeals for the Fifth Circuit" (Pros. Ex. A).

4. The jurisdiction of the court-martial over the person of each of the accused is shown by a stipulation wherein it was agreed between the prosecution, the defense counsel, and each of the accused, as follows:

"That each of the three accused, to-wit: Private Richard Phillips Adams, 35271976, Private Lawrence Mitchell, 36169482, and Private John W. Bordenave, 6267618, were on May 9th and May 10th, 1942, in the Military Service of the United States, and that each of said accused have been continuously since those dates, and are at the present time in the military service of the United States" (R. 10).

5. The evidence for the prosecution concerning the charges of rape as presented by the testimony of Hattie Rose Mason Schuler, the victim of the alleged assaults, shows that on 9 May 1943, she was living at Camp Claiborne, Louisiana, having recently moved there from Ohio, and secured employment in the local service club cafeteria in order to be near Private George Schuler to whom she was then engaged, and to whom she was subsequently married. On the evening of 9 May 1943, Hattie Rose Mason, hereinafter referred to as the prosecutrix, met George Schuler at the service club where they wrote "some" letters. After writing their letters they took a stroll in the area in the rear of the service club and, as was customary "with the girls" carried a blanket with them. Approximately 150 yards to the rear of the service club they seated themselves on the ground. After talking for a time they went to sleep and were awakened some time later by the noise of an approaching jeep. Three colored soldiers in the jeep "hollered 'halt' the first thing" and then began cursing, calling George Schuler a "lousy son-of-a-bitch for being out there". The prosecutrix described one of the three soldiers as "very dark", another as "light" and the third as having a "large head". One was carrying a rifle, and the dark one took an automatic pistol from the light one and pointed it at George Schuler saying, "I ought to blow your dirty brains out". The soldier with the rifle then marched Schuler away in one

direction, while the other two "took" the prosecutrix in the opposite direction. After going a short distance, they brought the prosecutrix and George Schuler back to the jeep and demanded that both get in, asserting "We are taking him home to his barracks and we will bring you back to yours". The soldiers explained that they were taking Schuler home first in order to keep from making an extra trip. They also stated that when they met a guard they would tell him that "they were out doing the same thing that he was". Thereafter, when they reached a "white guard", the driver of the jeep, the dark soldier, said to the guard, "I am driving these two in". After passing this guard, they drove past Schuler's barrack and then stopped, told him to get out, and go to his barrack, adding "Don't worry about her. We will take her right back and see that she gets back home safe". After Schuler had left the jeep, the soldiers covered the prosecutrix with a blanket, explaining to her that they were doing this so that the guard "wouldn't say anything if he saw me". The jeep soon passed another guard to whom one of the colored soldiers stated, "We are doing the same thing that you are", and the jeep was driven on. During this time the prosecutrix thought that she was being carried to her quarters, and that she had been covered with the blanket merely to prevent the guard from asking questions. She did not realize that she had been carried out of the camp area until the blanket which covered her was removed. When she realized that she was out in an open field she was "very much frightened". When the blanket was removed, one of the soldiers asked her the question, "Have you ever been loved by a nigger" to which she replied "No, and I don't want to be". The dark soldier then said, "I am going to show you how it is to be loved by a negro". The soldier making this statement had a gun and she was "very scared" and afraid for her life. She began to cry and to beg the soldiers to take her home. She even told one of them that "if he would let me go home that maybe I would meet him some place else". She told him that because she knew that if she "got away from him then he wouldn't get ahold of" her again. One of the three soldiers then placed the blanket on the ground and another led her to it and "shoved" her down on the blanket. She was afraid to "holler" because "there were three of them there and * * * there was a rifle and an automatic and I was afraid to do anything". The dark soldier who had the automatic pistol in his pocket then had sexual intercourse with her while the other two soldiers stood "Right close by". Then the other two in "immediate succession" similarly attacked her. During each of these attacks, the prosecutrix was afraid that a gun might be used upon her. She was "so scared and so frightened and nervous and crying all the time and begging them all the time to not be so cruel to me, to let me go on home. That was about all I could do at that point. * * * I was even afraid to say anything. I talked anyhow and begged them to please let me go" (R. 12-37).

After the third soldier had completed his attack, the prosecutrix was placed in the jeep, the blanket placed over her again and she was carried back to a place near the camp guest house, and there released. As she left the jeep she was warned that if she said anything about what had

occurred, "they would make it plenty hard on" her (R. 23-24).

At 3:28 a.m. she entered her tent which she shared with another waitress, lay down, and cried until morning. At about 6:00 a.m. her tent mate asked her what she was crying about. She reluctantly told her. Thereafter, her tent mate reported the attacks to the authorities, and the prosecutrix called George Schuler over the telephone (R. 24-25).

The prosecutrix testified that she was 21 years of age at the time of the trial and that she weighed 104 pounds. When she was 17 years of age she had married but later left her husband because he "was running around with other women" (R. 13).

Upon cross-examination, the prosecutrix admitted that prior to her marriage to George Schuler she had engaged in sexual intercourse with him. She testified that if she had a venereal disease known as gonorrhea on 9 May 1942, she had not known of it. She also testified that she had lived with her first husband approximately three months and that he had procured a divorce from her at Covington, Kentucky. So far as she had known, her first husband had not had a venereal disease. She admitted that when she had been halted by one of the accused that he had carried her to the jeep. She explained that when awakened by the three accused she had not insisted upon returning directly to her tent because she "didn't know what rights the guards had". She further explained that she had not made an outcry at that time because she thought the guards were doing their duty. She also explained that when the jeep had been halted by the second guard she had made no outcry because she "was too scared to make any outcry in any way". On redirect examination, she explained further that when she passed both guards she did not believe that she would be attacked but thought that she would be taken home. She denied that anyone of the accused had given or paid her \$2 on the night of the alleged attacks. She explained that she did not report the attacks to the authorities upon her return to her tent because she was "worried and nervous and upset", and because she did not "know what to do until" she had talked with George Schuler (R. 27-37).

George Schuler testified that he was 29 years of age and had lived at Georgetown, Ohio, prior to entering the Army on 30 March 1942; but recently he had been given an honorable discharge because of a spinal fracture. He had known Hattie Rose Mason since she was approximately 9 years of age and they had been "going together" for about a year. During the time he was stationed at Camp Claiborne they were engaged to be married and it was because of their engagement that she had secured employment at Camp Claiborne (R. 38-39).

On the night of 9 May 1942, after writing some letters at the guest house, George Schuler and the prosecutrix secured a blanket from her tent and took a walk into the field. About 100 yards from the service club they sat down and talked. Other couples were out in this area and

Schuler did not consider that he was doing anything wrong. After talking for a time they went to sleep and remained there longer than they had intended. They were awakened by the approach of a jeep occupied by three negro soldiers. One of the three soldiers cursed Schuler, calling him a "lousy son-of-a-bitch". One of the soldiers walked out in the field and inquired if there were "Any more couples around". No other couples were observed and this soldier walked back to the jeep. During the period in which this soldier was looking for other couples he talked to Schuler and told him "where he was from and things like that". After they had returned to the jeep, another of the soldiers asked him "how much it would be worth to get out of it". This soldier then told Schuler that if Schuler would give him what money he had he would let him go. Schuler then gave the soldier all the money he had with him, an amount between 50 cents and \$1. Schuler testified that he delivered the money to the soldier because the soldier had a gun against his, Schuler's ribs, and because he was afraid for his life. At the time this occurred, all three soldiers were present. During the conversation between Schuler and the accused, one of them had threatened to "blow my damned brains out" (R. 39-42).

Schuler and the prosecutrix were ordered to get into the jeep and were told that Schuler was going to be taken to his barrack, and the prosecutrix "where she belonged". When Schuler had been taken to the medical unit barracks, which were about a quarter of a mile from his own barrack, the driver of the jeep told him, "Don't worry about her, we will take her back right away". Schuler testified that he believed this statement and that he had no fear at that time that an attack might be made upon his companion. He further testified that at that time there was no indication that they might mistreat her. He identified with positiveness the accused, Bordenave, as one of the soldiers who took part in the events described (R. 42-45).

On cross-examination, Schuler testified that the largest one of the colored soldiers who had walked with him in the field after he and the prosecutrix had been awakened, had acted in a friendly manner and had told him that he, the particular accused, lived in Columbus, Ohio. Schuler admitted that when he left the jeep and saw it driven away in the opposite direction from the guest house he was afraid for the prosecutrix's life, but felt there was nothing he could do, and that it did not occur to him at that time to inform anyone of what had happened.

After the jeep had driven away, Schuler went to his barrack and to sleep. The following morning, about 7 o'clock, the prosecutrix called him by telephone. He then went to see her and, about 9 o'clock, he was called before a major at the guest house and questioned concerning the events of the previous night (R. 46-55).

By stipulation it was shown that one of the sentinels, previously described as having halted the accused in their jeep on the night in question,

had gone on guard duty at Post 24 at 12 o'clock and had remained on duty until 4 o'clock. During that interval only one jeep passed his post. He halted, then permitted it to pass, upon recognizing the accused, Bordenave, whom he knew to be a corporal of the guard, and also the accused, Adams. The third person he saw in the jeep was a colored man whom he could not identify. The sentinel did not observe any bundle or anything covered with a blanket between the two men on the front seat, nor anything that appeared suspicious (R. 57-61).

By further stipulation it was shown that the sentinel on Post 3 was on duty between 2:15 and 2:45 a.m. on 9 May 1943. During that interval he halted the occupants of a jeep which he permitted to pass when told by the driver that they were doing the same thing he was. He observed five people in the jeep, two colored soldiers and a white woman in the back seat and a colored soldier and a white man in the front seat. He did not recognize any of them. When the jeep passed his post it was going in the opposite direction from the guest house (R. 67-76).

Miss Vera Mae Wilson, who, on 9 May 1942, was employed at the service club of Camp Claiborne, and at that time and for several weeks prior thereto, had shared a tent with the prosecutrix, testified that at about 2:30 on Sunday morning, the exact date of which she could not remember, the prosecutrix came into their tent crying. Since Miss Wilson did not want to completely arouse herself, she did not speak to her tent mate. Miss Wilson did observe, however, as long as she was awake, that the prosecutrix continued crying. The next morning about 6 o'clock, Miss Wilson was awakened by the prosecutrix moving about the tent. She appeared to be disturbed and told Miss Wilson "* * * something terrible had happened". She did not, however, at that time tell her the details of what had happened. When Miss Wilson went to work she reported to the service club hostess the information she had gained from the prosecutrix. The latter did not report to work that morning but did report for work at noon. Miss Wilson, testifying as to the prosecutrix's condition on the morning of 10 May described her both as being "disturbed" and as "not so very much" disturbed. She also asserted that she was "not particularly" friendly with the prosecutrix (R. 106-113).

A written statement signed by the accused, Bordenave, dated 30 May 1942, and shown to have been voluntarily made, was received in evidence over the objection of the defense that the reference in the statement to the other two accused would be prejudicial to their rights and that therefore such references should be deleted from the statement before it was received into evidence or considered by the court; despite which the statement was admitted in its entirety under the law member's ruling that it would be considered only as relating to Bordenave. The statements which relate to Bordenave contain admissions by him that on 9 May 1942 he was corporal of the guard at Camp Claiborne, that on that night he was on a tour of duty from midnight to 4:00 a.m., that he used a jeep in inspecting

the guard after midnight, that he had a .45 automatic pistol with him, that he found a white soldier and white girl under a blanket in the area behind the camp guest house, that when his jeep approached them, the man and girl jumped up and started to run, that they were called to the jeep, that he told the white girl and soldier that it was wrong for them to be out there at that time, that the white soldier was carried back to the area of the camp, that thereafter the jeep was driven out into an open field, and that one of the other guards had sexual intercourse with the girl. The statement contains the additional admission, as follows: "I took my penis out of my pants and got down on top of her. Her dress was above her middle and she was naked from the waist down. I inserted my penis into the white girl but I did not go off. I pulled it out fast" (R. 76-78; Pros. Ex. 2).

Similarly, a voluntary statement made by the accused, Adams, was received into evidence over the same objection as presented in the case of Bordenave's, and subject to the same ruling by the law member. In this statement, Adams admits that on the night of 9 May 1942, he and two other guards on duty at Camp Claiborne, drove a jeep on patrol duty, that they found a white couple lying on the ground under a blanket, that the other two guards got the white woman and placed her in the jeep, that the white man was taken back to where he "belonged", that he, Adams, then tried to get out of the jeep but was told by one of the other guards with the .45 automatic pistol to stay in the jeep, that one of the other guards then drove the jeep into an open field, and that one of the other guards told the woman to get out of the jeep and she began to cry. "She was scared when * * * drove into the field and appeared to be in a dazed condition". The statement then asserts that the first man to attack the white girl threw himself on her twice, that the second guard then had sexual intercourse with the girl and that after this had occurred, when brought back to the jeep, "The woman was out on her feet". The statement further asserted that Adams would have left the field but he was afraid of the other two guards (R. 86-89, 93; Pros. Ex. 3).

A letter written by the accused, Mitchell, to his commanding officer, dated 10 June 1942, was received into evidence subject to the same objection as had been presented to the court upon the reception of the statements of the other two accused and was received under the same ruling that the statements contained therein would be considered only as they related to Mitchell. The letter, as it relates to Mitchell, admits that on the night of 9 May 1942, he and two other guards discovered a white soldier and girl lying upon a blanket in the area behind the camp guest house, that he and the other two guards carried the white soldier back to his company area, that he asked the girl if she were not ashamed of herself and she replied that she was working and making money, that he took for granted that she would go with them for money; that they then drove into an open field and spread a blanket on the ground, that the

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white girl lay down on the blanket and he had intercourse with her and "she started crying as soon as I started. I got up and went back to the boys and told the boys not to bother with her but they did after they got through they put her back into the jeep" and "I wrapped the blanket around her to keep her from getting cold and gave her \$2.00 then we took her back to the guest house and she said don't tell anybody" (R. 93-94; Pros. Ex. 4).

By a stipulation it was shown that the jeep referred to in Specification 2, Charge IV, on 9 May 1942, had a reasonable market value at Camp Claiborne, Louisiana, of \$1,036.76 (R. 123).

6. a. Major William C. McGuffin, a medical officer, testified for the defense that on 11 May 1942, about 30 hours after the alleged attack, he examined the prosecutrix and found no bruises or scratches upon her. He did find, however, that she had a chronic case of gonorrhoea. He quoted her as asserting that she was not aware that she had gonorrhoea. He testified further that the prosecutrix had not been nervous or excited during the examination and that he would have expected her to have been nervous within 30 hours after the alleged attack (R. 124-132).

b. The accused, Mitchell, after his rights relative to testifying or remaining silent had been explained to him, testified that he was 19 years of age and that he had falsified his age at the time of his enlisting in the service. On the night of 9 May, he drove a jeep for Corporal Bordenave while they were inspecting the guard. During this tour of inspection they came upon the prosecutrix and Private Schuler lying "in one another's arms". Upon being discovered, the couple jumped up and each ran in opposite directions. Adams, one of the other two guards, jumped out of the jeep and ran after Schuler, while the witness, armed with a .45 automatic pistol, ran after the prosecutrix. Upon catching her, he told her that the corporal of the guard wanted to ask her some questions. In the conversation which followed, Corporal Bordenave asked her why she was out there, and she replied that "she had no place else to go, that was the only place they had to come". The witness then asked " * * * if she would go with us for money and she said, 'If you boys have any money we can get together and have a nice time' ". The witness and Corporal Bordenave were standing with the prosecutrix during this conversation. She was barefooted and the witness carried her to the jeep. After driving to a place near Schuler's company, the prosecutrix said to him, "Your Company is there". When Schuler started to leave the jeep he asked, "What are you going to do with her?" and the prosecutrix replied, "Don't worry, * * * I will be all right". The witness then told Schuler that he "would take her back". On the way to the open field the witness asked her "how much money she was going to charge us to go with us and she said '\$2.00' ". "She asked me did I know any place where we could go where we wouldn't be seen". When the

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jeep stopped, she said, "Give me the money". The witness testified that "I gave her the money and we walked off a little ways and she spread the blanket on the ground and I started having my intercourse with Mrs. Schuler. She told me, 'Do not shoot off in me.' I told her I wouldn't. By the time I got to shoot off in her she started crying". When he carried her back to her tent she got out of the jeep and said, "Don't tell anybody. Good night!" (R. 137-162).

The accused testified further that subsequent to the alleged attack, he was examined by a physician and was told that he did not have a venereal disease (R. 161).

c. The accused, Adams, after his rights relative to testifying or remaining silent had been explained to him, testified that he had completed the seventh grade in school and that he had been inducted into the Army on 9 January 1942. Adams testified that on the night of 9 May 1942, he and the other two accused apprehended the prosecutrix and Private Schuler lying under a blanket in the area behind the service club. When he and the other two guards approached them, the couple jumped up and ran. Adams chased Private Schuler about 25 yards, stopped him, and brought him back to the jeep. On the way back he had a friendly conversation with Schuler in which they discussed the fact that they were from the same state. Adams saw Mitchell with a raised pistol in his hand but he did not see Mitchell point it at Schuler. Later when Schuler was let out of the jeep near his barrack, he asked the question, "What are you going to do with the lady?" and one of the guards answered, "Don't worry about her". The prosecutrix then said, "Don't worry, honey, I will be all right". After driving out into an open field the jeep was stopped and its lights turned out. Mitchell then got out of the jeep and picked up the blanket which had been over the prosecutrix, who then "raises up and gets out and goes on with him". Mitchell spread the blanket on the ground about 15 or 20 paces from the jeep and "The next thing I see the actual intercourse going on". When Mitchell had finished "He gets up and comes back to the Jeep", and " * * * she layed there". Bordenave then went out to her. "After he has his intercourse he comes back and I goes out myself. I had mine and I comes back". When Adams went out to the prosecutrix he did not carry a gun with him (R. 163-170).

Adams testified further that between June and July, he had been examined by a physician and told that he had syphilis, a disease which he asserted he had had "all my life". Adams stated further that the medical report did not show him as having gonorrhoea. Adams asserted that at no time did he see anyone using threatening gestures towards either the prosecutrix or Schuler (R. 171-172).

Upon cross-examination Adams testified that he was 26 years of age, that he weighed between 190 and 200 pounds. He also testified that

he had made a statement to the Louisiana state authorities because they had whipped him. He asserted, however, that he had never been mistreated by anyone in the Army. He stated further that the references in his prior statement concerning the pointing of a gun were not true and that "No one was held at the point of a gun". He also stated that his previous statement was untrue in asserting that he did not have intercourse with the prosecutrix. Adams testified further that he did not attempt to prevent Mitchell and Bordenave from doing anything that they did on the night of 9 May, explaining that "It was told to me \$2.00 had been paid her". Adams did not remember, however, seeing the money paid (R. 172-180).

On redirect examination Adams testified that in 1935 he had escaped from the Institution for the Feeble-Minded at Orient, Ohio. Following this assertion, the defense counsel stated that no question was being raised as to the sanity of the accused (R. 182).

d. The accused, Bordenave, after his rights relative to testifying or remaining silent had been explained to him, testified that he had been in the Army since 6 February 1937, and that before entering the Army he had lived in New Orleans, Louisiana. On the night of 9 May 1942, he was on duty as a corporal of the guard at Camp Claiborne. About 2:00 a.m. on the morning of 10 May, while he was inspecting the guard, assisted by Privates Mitchell and Adams, he came upon a couple. The prosecutrix ran in one direction, Private Schuler in the opposite. Mitchell said to Bordenave, "how about having the gun so I can halt this lady, since you are feeling bad?" So he halts her a little ways down from the Jeep", to which he returned with his captive. Mitchell told Bordenave that he had asked her certain routine questions and, "if she didn't know it was against the rules to be out there at that time and she said that she was out there with Mr. Schuler, Private Schuler, and she was out there having some fun with him because she needed some money and that was the reason she was out there". Bordenave testified further that Mitchell told him the prosecutrix "suggested to Private Mitchell that all of us could have a little fun out there - in other words, a little sport" (R. 189). When the group had driven back into the area of camp and Private Schuler had got out of the jeep, she said to him, "Honey * * * I will get home" and "He did not say anything more to her". Later she said to Mitchell, "If we are going to have a good time we are going to have to pick out a safe place where no one will see us" (R. 191). When they had driven off the road, Mitchell gave her \$2 and she took the money. Private Mitchell then had intercourse with her.. Bordenave then testified that, "After he (referring to Mitchell) got through he called me over and I went over and when I got there she says, 'Don't shoot off in me', just like that. So I had my intercourse with her and after I was finished Adams came over and he had his and after he finished he brought Mrs. Schuler in to the Jeep, and brought the blanket. There

wasn't any struggling of any kind. She did it with willful consent" (R. 191). Bordenave testified further that his pistol was in his holster while Mitchell was having intercourse with the prosecutrix, and that it was in the front seat of the jeep while he was having intercourse with her. He asserted that the gun was not carried to the spot where the intercourse occurred (R. 192).

On cross-examination Bordenave testified that while he was in the custody of the civilian authorities two "F.B.I. men" told him "that if he didn't make a statement they would turn him over to the mob" and that the statement which he thereafter made was not voluntarily made. At the time the statement was secured he was called a "black son-of-a-bitch". (In rebuttal, the prosecution presented the testimony of Thomas C. Allen, special agent of the Federal Bureau of Investigation, who testified that no statement was made in his presence to Bordenave, before the securing of Bordenave's statement, threatening to turn him over to the Louisiana mob (R. 213)).

7. Specification 1, Charge II, alleges that the accused, Private John Walter Bordenave, did, at Camp Claiborne, Louisiana, on or about 9 May 1942, "forcibly and feloniously, against her will, have carnal knowledge of Hattie Rose Mason, now Mrs. George Schuler". Similarly, Specifications 2 and 3, Charge II, make the same allegations against Privates Richard Phillips Adams and Lawrence Mitchell. These Specifications allege the commission of the crime of rape, one of the two crimes made punishable by life imprisonment or death under Article of War 92.

Rape is defined as " * * * the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 148b). The Manual for Courts-Martial, in discussing this definition, states that:

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent.

"It has been said of this offense that 'it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.'" (MCM, 1928, par. 148b, p. 165).

The evidence must be examined in the light of the above definition and with due consideration for the admonitions of caution presented in connection therewith. In view, however, of the admission in the testimony of each accused that he had sexual intercourse with the prosecutrix on the occasion alleged, it is of primary concern to determine whether or not the act was done with "force and without her consent". Since much of the testimony has at least an inferential bearing on this issue it must be carefully considered in its entirety.

The testimony of the prosecutrix shows that on the night of 9 May 1942, she and Private George Schuler, to whom she was then engaged, took a stroll in the open area to the rear of the Camp Claiborne service club. In accord with the custom of the girls working at the camp they carried a blanket with them and seated themselves upon it about 150 yards behind the service club. After talking for a time they went to sleep and were awakened by the noise of an approaching jeep. Three colored soldiers in the jeep called to them and proceeded to curse Private Schuler, calling him a "lousy son-of-a-bitch" for being out there. One of the soldiers was armed with a rifle and another with an automatic pistol which he pointed toward Private Schuler with the threatening statement "I ought to blow your dirty brains out". One of the soldiers carried the prosecutrix in his arms to their jeep. Private Schuler was also conducted there and ordered to get in. The soldiers then told the couple that they were going to be returned to their barracks. Upon re-entering the camp area, they were halted by a white guard who permitted them to pass upon being told by the driver of the jeep that "I am driving these two in". After passing this guard the jeep was driven past Private Schuler's barrack. The jeep was then stopped and Private Schuler was told to get out and directed to go to his barrack and not to "worry about her. We will take her right back and see that she gets back home safe". The accused then covered the prosecutrix with a blanket explaining to her that he was doing it so that the guard "wouldn't say anything if he saw me". The jeep was again halted by a colored guard who permitted it to pass upon being told that "We are doing the same thing you are". During this time the prosecutrix thought she was being carried to her quarters and that she had been covered with the blanket merely to prevent the guard from asking questions. She did not realize that she was being carried out of the camp area until the blanket was removed. When she realized that she was out in an open field she was "very much frightened". Her fear was then intensified when the dark soldier asked her, "Have you ever been loved by a nigger", to which she replied, "No, and I don't want to be". The soldier making these remarks was armed with a gun and the prosecutrix was "very scared" and afraid for her life. She began crying and begged the soldiers to take her home. One of the soldiers then placed the blanket on the ground and another led her to it and "shoved" her down on the blanket. She was afraid to "holler" because "there were three of them there and * * * there was a rifle and an automatic and I

was afraid to do anything". The dark soldier with the automatic pistol in his pocket then had sexual intercourse with her while the other two soldiers stood "Right close by". The other two in "immediate succession" similarly attacked her. She was "so scared and so frightened and nervous and crying all the time and begging them all the time to not be so cruel to me, to let me go on home". She testified that that was all she could do at that point and that she was even afraid to say anything although she talked and begged them to let her go. After the third soldier had completed his attack she was carried back to a place near the guest house and released with the warning that if she said anything about what had occurred they would make it plenty hard on her. She then returned to her tent and cried until morning. At about 6 o'clock in the morning her tent mate asked her what she was crying about and she reluctantly told her. Thereafter her tent mate reported the attack to the authorities and the prosecutrix called Private Schuler over the telephone.

The testimony of the prosecutrix that she did not consent to having sexual intercourse with the three accused and that her submission to them was prompted solely because of her fear is corroborated in part by the testimony of the accused, Mitchell, the first accused to attack her, who admits that the prosecutrix cried when he was having intercourse with her. Under the circumstances, the fact that even the accused, Mitchell, testified that she was crying gives an assurance of trustworthiness to her testimony that she was shoved to the ground and submitted to sexual intercourse only because of the overwhelming demonstrated force of the three accused.

Although each of the accused asserted that the prosecutrix was paid \$2 by the accused, Mitchell, as a consideration for the three acts of intercourse with them, it must be observed that the accused, Adams, although present according to the other's testimony, neither saw the money paid, nor heard the financial arrangements being made, testifying merely that, "It was told to me \$2.00 had been paid her". Though Bordenave's statement of 30 May 1942 is devoid of any reference to this significant transaction, he testified to such a payment following Mitchell's testimony, corroborating Mitchell's testimony that it was paid in the jeep before alighting for intercourse. But Mitchell's letter to his commanding officer, written 10 June 1942, only one month after the alleged offense (whereas the trial was 14 months after) clearly asserts that the alleged payment was made after intercourse with all three was completed. These discrepancies discredit the testimony of the accused concerning the payment of \$2 which is denied by the prosecutrix. Moreover, it is rather inconceivable that even the lowest prostitute would sell herself under such conditions for the price of \$2. It appears, that the testimony of the three accused concerning the payment of \$2 to the prosecutrix and her consent to the three acts of intercourse is unworthy of being believed.

Although she does not testify that her life was directly or

specifically threatened by any one of the accused, she does testify to circumstances in which such a threat is implicit in the show of force directed against her. In this connection it should be observed that she weighed only 104 pounds whereas one of the accused weighed nearly 200 pounds. Wharton in his treatise on criminal law states:

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"* * * it may now be received as settled law that rape is proved when carnal intercourse is effected with a woman without her consent, although no positive resistance of the will can be shown." (Wharton's Criminal Law, 12th Ed., Sec. 700)

He further states that:

"Consent, however reluctant, negatives rape; but where the woman is insensible through fright or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape." (see Sec. 701, Wharton, supra).

Similarly, Miller on Criminal Law states that "Fear of death is not necessary; it is sufficient to excuse lack of resistance and to evidence the presence of force, that the woman had good reason to consider resistance dangerous or absolutely useless" (Miller on Criminal Law, p. 298). In Vanderford v. State, 126 Ga. 753, 55 S.E. 1025, the court asserted that "* * * though a man lay no hand on a woman, yet if, by an array of physical force, he so overpowers her mind that she dare not resist, he is guilty of rape by having the unlawful intercourse". In the light of the above authorities we must conclude that the evidence shows beyond a reasonable doubt that each of the accused committed the crime of rape alleged.

8. The special civilian counsel for the three accused submitted to the Board of Review both a written brief and an oral argument in which three general propositions are contended for, as follows: (I) that the prosecution failed to prove beyond a reasonable doubt that the accused were guilty of the crime of rape, (II) that the use of leading questions by the trial judge advocated constituted reversible error, and (III) that the court committed reversible error in admitting into evidence the statement or the confession of each accused which implicated the other two accused.

I. Under the first general proposition that the prosecution failed to prove beyond a reasonable doubt that the accused were guilty of the crime of rape, the special counsel presents points which may be summarized and analyzed as follows:

a. The observation was made that the accused, Adams, gave his

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name and address in Ohio to Private Schuler on the occasion of their meeting on the night of 9 May 1942 and engaged with him in friendly conversation. Special counsel insisted that a criminal or one planning a crime does not give his name and address to a prospective victim. Obviously, as a general proposition, the deduction contended for is true. It appears, however, that the subsequent criminal acts which were participated in by Adams had not been conceived of by him at the time of the conversation in question.

b. The evidence shows that the prosecutrix, when apprehended on the night of 9 May 1942, was carried to the jeep in the arms of the accused, Mitchell, without protest or objection. Counsel insisted that the prosecutrix's submission showed that she had neither fear of nor aversion toward the accused. Neither conclusion is necessarily correct. The prosecutrix was apprehended under compromising circumstances, and may well have submitted to the familiarity in question through fear of the accused, one of whom had just halted her flight at the point of a gun, and a desire to avoid violent action being taken against her or Private Schuler.

c. The special counsel insists that the statement made by the accused to the prosecutrix that they were taking Private Schuler to his quarters before taking her to her quarters in order to avoid an extra trip was so obviously false that she and Private Schuler should have recognized the falsehood - the prosecutrix's quarters being closer to the scene of apprehension than were Schuler's. It is obviously true that had she been less gullible and shown less faith in the assurances of the three accused she might have avoided being raped. Her gullibility does not, however, justify an inference that she consented to sexual intercourse with the accused.

d. Neither Private Schuler nor the prosecutrix made any outcry to the guard upon being returned to camp, despite the fact that Schuler testified that he had been robbed and his life threatened. This assertion is true. The robbery which involved the financial loss of less than a dollar may well, however, have been considered by Private Schuler a small matter as compared with the possible results of being reported by these guards for improper conduct. There are reasons, therefore, why he may have refrained from making an outcry concerning the offense which had been committed against himself. Furthermore, the fact that he had been robbed of a small sum would not necessarily cause him to believe that his fiancée was in danger of being raped by the guards who robbed him.

e. Private Schuler made no outcry after seeing the accused drive away with the prosecutrix in the opposite direction from her quarters. Schuler testified that he did not suspect at that time that she would be attacked by the accused.

f. The prosecutrix made no outcry when the jeep in which she was being carried out of camp was stopped by a second guard. The evidence shows that, at this time, she was covered by the blanket, and she testified that she did not realize that she was being taken from the camp - that she thought she had been covered by the blanket merely to prevent questioning from the other guard.

g. Special counsel insists that there is no evidence in the record showing that the prosecutrix was ever threatened by any of the accused, and that, to the contrary, the accused, Mitchell, testified that he assured her that he would not hurt her. In contradiction of this statement, it must be observed that she was "shoved" to the ground just prior to the attack upon her. Although she did not testify to a direct threat against herself, a threat to her life or safety is implicit in the circumstances of her being shoved to the ground under conditions which indicated that resistance by her would be useless.

h. Counsel insists that the testimony of Major McGuffin to the effect that the prosecutrix showed no excitement or concern upon being examined by him 30 hours after the alleged rape, afforded the inference that no rape had occurred. The existence of excitement or lack of excitement under the conditions in question can afford no trustworthy inference either of rape or no rape. Obviously, the circumstance in question presents no trustworthy inference of the existence of any particular fact and has no probative force. Furthermore, Major McGuffin, upon cross-examination clearly testified that in view of the fact that no struggle occurred in the process of the alleged rapes and considering the further fact that the prosecutrix had been a married woman, one would not expect to find any physical evidence or any objective symptoms of the attack having taken place.

i. Counsel insists that the failure of the prosecutrix to report the alleged rape or to make an outcry upon returning to her tent, other than to tell her tent mate the following morning that "something terrible had happened", is a significant factor justifying the inference that she did in fact consent to the intercourse with the accused. In the light of the entire record such an inference is altogether unjustified. The record shows the prosecutrix to be a woman of limited intelligence. This deduction is inescapable from all the evidence adduced both by the prosecution and by the defense. She occupied a humble position in a military environment to which she was unaccustomed. These facts give credence to her explanation of dazed bewilderment, which is further corroborated by the accused, Adams', sworn statement that following the three acts of intercourse, "The woman was out on her feet". The prosecutrix testified that the accused threatened that if she told what had occurred "they would make it plenty hard on" her. Moreover, the audible continued sobbing to which her tent mate testified is far more consistent with the prosecutrix's version of what had occurred than with the defense contention that the whole transaction was a commercial one.

j. Counsel argues that the fact that the accused brought the prosecutrix home suggests that prostitution rather than rape had been

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engaged in. Such an inference appears, however, to be altogether fallacious. The conduct of the prosecutrix shows that she had been so completely intimidated that it does not appear illogical for the accused to have concluded, after having accomplished their purpose, that they ran less risk by bringing her home than by any other course they might have pursued. Additional force is given to this conclusion by the fact that each of the accused knew that they had been seen with the prosecutrix both by George Schuler and by at least one sentinel.

k. Counsel argues that there was a psychological factor in this case which affected the deliberation of the fact-finding group, causing them, because of their preconceived convictions and basic inability to believe that a white woman would willingly consent to sexual intercourse with a negro, to shift in their thinking the burden of proof from the prosecution to the defense on the issue of consent or no consent. Obviously, the statement of counsel is based merely upon an assumption. If, in fact, such a psychological factor did exist, it in no way prejudiced the rights of the accused for a close analysis of the evidence shows that the prosecution has discharged its burden of proof and has proved beyond a reasonable doubt every essential element of the crimes alleged.

II. Secondly, special defense counsel contends that the use of leading questions by the trial judge advocate constitutes reversible error.

In his brief he quotes an analysis from Wigmore concerning the dangers involved in leading questions, as follows:

"The essential notion, then, of an improper (commonly called a leading) question is that of a question which suggests the specific answer desired. It will be seen that a collusive or conscious intention of the witness to answer as desired is here not a necessary assumption. That is a frequent danger, but not the only one; for the known principles of human nature tell us that a witness may also unconsciously accept the suggestion of a question. It is therefore not necessary to attribute a corrupt intention either to witness or to counsel; since the danger has larger aspects than that." (Wigmore on Evidence, 3rd Ed., Sec. 769)

The correctness of the above principles is readily recognized. The United States Supreme Court in its opinion in United States v. Dickinson, 2 McLean 331 (Fed. case 14,958), asserted that "a question shall not be so propounded to a witness as to indicate the answer desired". At the same time the authorities recognize and approve the use of leading questions when the interests of truth suggest the necessity for their use. In particular the use of leading questions is approved when a witness's recollection is exhausted, when a witness is unable to understand the direct question as in the case of children, illiterates, or dull or stupid witnesses. Likewise, it is recognized that witnesses who are too talkative, or hostile, biased or unwilling, must be directed in their testimony by leading questions. Also in proving by a witness a

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self-contradiction, leading questions are approved (Wigmore on Evidence, 3rd Ed., Sec. 770-779).

It must be observed that Wigmore after analyzing the general principle quoted above states in the following section of his treatise that:

"It follows, from the broad and flexible character of the controlling principle, that its application must rest largely, if not entirely, in the hands of the trial Court. So much depends on the circumstances of each case, the demeanor of each witness, and the tenor of the preceding questions, that it would be unwise, if not impossible, to attempt in an appellate tribunal to consider each instance adequately. Furthermore, the harm in a single instance is inconsiderable and more or less speculative, and the counsel's repetition of an impropriety can be so easily controlled by the trial Court, that no favor is shown in the appellate tribunals to objections based merely on the form of the question." (Wigmore on Evidence, 3rd Ed., Sec. 770)

Moreover, Mr. Justice Harland in St. Clair v. United States, 154 U.S. 134, 150, 14 Sup. C.R. 1002, asserts,

"In such matters much must be left to the sound discretion of the trial judge who sees the witness, and can, therefore, determine in the interest of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing him."

Likewise Mr. Justice Shiras in Northern Pacific Railroad Company v. Urlin, 158 U.S. 273, 15 Sup. C.R. 8401, states that "The allowance of a leading question is within the discretion of the court, and is no ground for reversal". Similar principles are announced in the Manual for Courts-Martial (MCM, 1928, par. 121c). Although the above authorities clearly show that the control over the form and manner of questioning a witness is a matter which lies within the sound discretion of the court, the importance of the matter under consideration suggests that each of the leading questions complained of be considered in detail, as follows:

a. Without any previous evidence concerning a "holster", the trial judge advocate asked the question, "Which one of them wore the holster?" (R. 15). Although this question is leading in the sense that it suggests that a holster was worn by one of the accused, the answer is relatively immaterial. This is true because the chief inquiry at this point was directed toward the use of an automatic pistol, and no substantial harm resulting from the form of the question and the resulting answer.

b. Following the above question, the further question was asked,

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"Was the gun pointed at any one?" (R. 16). Technically this question may suggest that the gun was in fact pointed at someone and a more carefully phrased question might have been asked - in what position the gun was held, or what, if anything, was done with the gun. The difference, however, between the questions suggested and the question asked is relatively insignificant and resolves itself into a quibble over phraseology. Moreover, the answer which was elicited from the present witness was corroborated by other testimony, i.e., that the gun in question was pointed against Schuler's ribs (R. 41).

c. The further question was asked the prosecutrix "Were you afraid that if you attempted to make an outcry a gun would be used on you, an automatic?". Just prior to this question the prosecutrix had testified that she was very afraid and that "there was a rifle and an automatic and I was afraid to do anything". The conclusion seems implicit in the foregoing answer that she was afraid that the rifle or automatic would be used against her and consequently the answer to the leading question which followed merely added clarity to that which was already obvious from a previous answer.

d. The trial judge advocate asked the prosecutrix the question, "State whether or not you did everything you felt you could do to protect yourself and prevent it". This question was answered as follows: "Yes, sir. I did everything I felt I could do and I think if any other girl had been in my place - -." The latter part of the answer was stricken from the record at the direction of the law member. Although this question, by giving the witness an alternative choice, is free from defects of form, it is leading in that it rehearses essential facts and calls for a summarization and conclusion on the part of the witness. Because of these characteristics the question was clearly improper. On the other hand, the witness had previously testified to what she had done and to the fear which she had felt. Her answer, therefore, "Yes, sir" added only a conclusive element, and presented no new or material facts for the consideration of the court. The effect of the question and resulting answer were therefore harmless.

III. Thirdly, the special defense counsel contends that the court committed reversible error in admitting into evidence the statement or confession of each accused which implicated the other two accused.

The special counsel contends specifically that although the three statements or confessions were each received under the ruling that the admissions therein would be considered only as relating to the accused making the particular confession or admission, their reception into evidence was, nevertheless improper because the confession in question necessarily implicated, in the mind of the court, the other two accused. Counsel cites and relies primarily upon the opinion of the Circuit Court of Appeals in

Hale v. United States, 25 F. (2) 430 (C.C.A. 8th), wherein the court held that the confession by one of the defendants which implicated his codefendant was improperly admitted into evidence. Counsel quoted from the opinion, as follows:

"* * * but it is inconceivable that the impression made upon the minds of the jurors could have been removed by these formal remarks of the Court * * * the unavoidable mischief of a joint trial is thus made clear * * * It is fundamental that no man can confess for anyone but himself".

In evaluating the above opinion it is necessary to observe that the court also asserted that,

"The connection of Hale with the crime rested almost entirely upon the testimony of Burkhart, himself a confessed criminal and a man of bad general character. It is debatable whether the conviction of hale would have resulted from his testimony in the absence of the strong corroboration contained in the Ramsey confession, but concededly the confession of Ramsey was incompetent to bind Hale."

The latter quotation shows that the precedent relied upon involved a case different from the present case. In the present case, in contrast to the case cited, each accused admitted in his own testimony his presence at the scene of the crime and his act in having sexual intercourse with the prosecutrix. Moreover, the testimony of the prosecutrix and of George Schuler clearly shows that each accused committed crimes on the date alleged. None of the accused can be said, therefore, to have been convicted because of any statement contained in the confession of either of the other two. The particular Federal case relied upon by defense counsel does not, therefore, condemn the procedure employed in the present case.

Wigmore, in discussing this problem states that,

"Since Confessions are not admissible against third persons (ante, ss. 1076, 1079), the names of other co-indictees, mentioned in a confession used and read against the party making it, were by most English judges ordered to be omitted. But by other judges the names were ordered read and the jury instructed not to use the confession against them. In Canada and the United States the latter practice is favored." (Wigmore on Evidence, 2nd Ed., Sec. 2102d).

Further, Wharton, in his treatise on evidence in criminal cases similarly asserts that,

"The recognized practice in such a situation is to admit the act or declaration as against the actor or declarant, but the court must instruct the jury that such act or declaration is not

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admissible against the other defendant or defendants, and is not to be considered in determining their guilt." (Wharton's Criminal Evidence, Sec. 700).

Furthermore, the Supreme Court of the United States in United States v. Ball, 163 U.S. 662, a case similar to the present one, in speaking of the action of the trial court in receiving evidence which was competent as to one defendant only, asserted as follows:

"It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together, or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against the others."

In view of the above precedents, and in the light of the fact that there is evidence, independent of the several confessions, showing that each accused committed the crime alleged, the acceptance by the court of the confessions in question, did not injuriously affect the substantial rights of the accused. Not only did the ruling of the law member delimit the individual confession to the accused in question, but the same delimiting restraint has been exercised by the Board of Review in determining the legal sufficiency of the record of trial, to establish beyond a reasonable doubt the guilt of each accused.

9. The Specification, Charge III, alleges that each of the accused " * * * acting jointly and in pursuance of a common intent, did, at Camp Claiborne, Louisiana, on or about May 9, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private George Schuler about one Dollar in lawful money of the United States, the property of Private George Schuler".

The evidence presented in support of the above Specification shows that on the night in question, after George Schuler had been escorted by one of the accused to their jeep, that one of the accused pressed an automatic pistol against Schuler's ribs and asked Schuler how much it would be worth to him "to get out of it". This accused demanded that Schuler give him his money, whereupon Schuler gave him between 50 cents and \$1. The other two accused were present when Schuler was thus intimidated into handing over the money which he was carrying on his person. Schuler testified that he would not have surrendered his money "if the gun hadn't been drawn".

The Manual for Courts-Martial states that,

"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.

* * *

"The violence must be actual violence to the person

but the amount used is immaterial. It is enough where it overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance,
* * *.

"It is equally robbery where the robber by threats or menaces put his victim in such fear that he is warranted in making no resistance. The fear must be a reasonably well-founded apprehension of present or future danger, and the goods must be taken while such apprehension exists." (MCM, 1928, par. 149f).

In the light of the above definition not only the individual accused demanding money from Schuler, but also the other two accused who stood by and supported him by their presence and cooperative conduct are guilty of the robbery as charged. The evidence before the court was legally sufficient beyond a reasonable doubt to support the finding of guilty of the Specification, Charge III, and Charge III.

10. Specification 2, Charge IV, alleges that each of the accused "acting jointly and in pursuance of a common intent, did, at Camp Claiborne, Louisiana, on or about May 9, 1942, willfully, wrongfully and without proper authority apply to their own use a Government vehicle", of the value of \$1,036.76, property of the United States. The uncontradicted evidence shows that the accused wrongfully drove a Government vehicle of the value alleged to an unauthorized place near Camp Claiborne, and by such unauthorized use committed the offense alleged.

11. 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. A sentence of death or imprisonment for life is mandatory upon a conviction of rape, in violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

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War Department, J.A.G.O.,

- To the Secretary of War.

7 FEB 1944

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 Privates Lawrence Mitchell (361694S2), Service Company, 367th Infantry; Richard P. Adams (35271976), 364th Infantry; and John W. Bordenave (6267618), 364th 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. As shown in the foregoing opinion, each of the accused has been found guilty of the wrongful conversion of a Government vehicle of the value of \$1036.76, in violation of Article of War 94; of feloniously taking a small sum of money of about \$1 from Private George Schuler, in violation of Article of War 93; and of forcefully and feloniously having carnal knowledge of Hattie Rose Mason, now Mrs. George Schuler, in violation of Article of War 92. Each accused was sentenced to be hanged by the neck until dead. It was, of course, the crime of rape which authorized the imposition of the death penalty and it is now that sentence with which we are primarily concerned.

The history of this case shows that the three accused were first tried for rape of Hattie Rose Mason, now Mrs. George Schuler, in July 1942, in the United States District Court for the Western District of Louisiana. Each of the accused was then convicted and sentenced to death. In response to a question certified by the 5th Circuit Court of Appeals, the Supreme Court of the United States held that the United States had not accepted jurisdiction over the land where the alleged crimes had been committed, and that, therefore, the trial court had no jurisdiction over the alleged offenses. Accordingly, the proceedings of the trial were held void and the case was dismissed. Subsequently, each of the accused was tried by a general court-martial upon the charges and with the result stated above.

The record of the present trial shows that after midnight on 9 May 1942, the three accused discovered the prosecutrix and Private George Schuler, the soldier to whom the prosecutrix was then engaged and to whom she was subsequently married, asleep on a blanket about 150 yards in the rear of the Camp Claiborne service club. Upon being awakened, the prosecutrix and Private Schuler

arose and sought to escape detection. The accused, asserting their authority as armed guards, pursued and seized the prosecutrix at the point of a gun. They also seized Private Schuler, cursed him for his presence there, and robbed him of a small sum of money. The accused then placed Private Schuler and the prosecutrix in a Government jeep and entered the camp area where they directed Private Schuler to return to his barrack and assured him that the prosecutrix would be returned safely to her quarters. The accused then, under the pretext of avoiding questioning by the other guards, placed a blanket over the prosecutrix, and transported her to a lonely field where they, still armed, took her by force from the jeep, "shoved" her to the ground, and in disregard of her tears and protests and against her will, each in the presence of the other, had carnal knowledge of her. The prosecutrix was then carried back to the area of her quarters, warned not to report what had occurred, and released. The prosecutrix returned to her tent and cried until morning. A physical examination conducted thirty hours after the attack revealed no physical injury to the prosecutrix. It did reveal, however, that she was suffering from a chronic case of gonorrhoea. The prosecutrix testified that she was unaware of the existence of the disease, that she had been married at the age of 17 and later divorced, that she had had sexual intercourse with Private Schuler prior to her marriage to him, and that she and Private Schuler had married subsequent to the events in question.

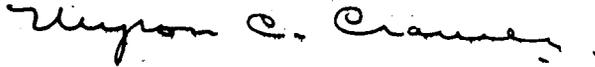
The above facts show beyond a reasonable doubt that the accused, taking advantage of their positions as armed guards, maneuvered the separation of the prosecutrix from the soldier to whom she was engaged, carried her to a field removed from Camp Claiborne, and there, each in the presence of the other, and in ruthless and cowardly disregard of her helpless position, ravished her. Each of the accused is equally guilty. Although the accused Adams testified that he at one time escaped from an institution for the feeble minded, there is no indication in the record that he was mentally impaired either at the time of the commission of the offenses or at the time of the trial. I recommend that the sentence of each accused be confirmed and ordered executed.

3. Approximately 375 letters addressed to the President requesting either the disapproval of this case or the extension of some form of clemency to each of the three accused have been referred to this office. Most of these requests appear to have been inspired by a notice in the October 1943 issue of the National Association for the Advancement of Colored People urging "Every Branch, College Chapter, Youth Council and individual member * * * to write to President Roosevelt immediately, urging him to give the case of the three soldiers * * * his most careful

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consideration", and " * * * to either order a retrial by court-martial, to commute the sentence from death, or to release the men". Consideration has also been given to the brief submitted in this case by the special defense counsel.

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



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

5 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for sig. Sec. of War.
- Incl 3 - Form of Executive action.
- Incl 4 - Approx. 375 letters from various persons addressed to President.
- Incl 5 - Brief submitted by special civilian defense counsel.

(Sentence of each accused confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life.
G.C.M.O. 180, 29 Apr 1944)

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

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SPJGN
CM 239304

9 SEP 1943

U N I T E D S T A T E S)	SOUTHERN LAND FRONTIER SECTOR
)	WESTERN DEFENSE COMMAND
v.	)	Trial by G.C.M., convened at
	)	Camp Lockett, California, 12
Private FRANK STENNIS	)	July 1943. Dishonorable
(38178876), Troop F,	)	discharge and confinement for
10th Cavalry.	)	life. Penitentiary.

REVIEW by 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.

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

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

Specification: In that Private Frank Stennis, Troop F, Tenth Cavalry, did, at Campo, California, on or about June 26, 1943, with malice, aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private William L. Muckelroy, Headquarters Troop, Tenth Cavalry, a human being, by shooting him with one United States Army pistol, caliber .45.

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

Specification 1: In that Private Frank Stennis, Troop F, Tenth Cavalry, did, at or near Campo, California, on or about June 26, 1943, with intent to commit a felony, viz, murder, commit an assault upon Staff Sergeant John L. Austin, Weapons Troop, Tenth Cavalry, by willfully and feloniously shooting the said Staff Sergeant John L. Austin in the left upper abdomen and left forearm with a dangerous weapon, to wit, a United States army pistol, caliber .45.

Specification 2: In that Private Frank Stennis, Troop F, Tenth Cavalry, did, at or near Campo, California, on or about June 26, 1943, with intent to commit a felony, viz, murder, commit an assault upon Mary Austin, Campo, California, by willfully and feloniously shooting the said Mary Austin in the right forearm with a dangerous weapon, to wit, a United States army pistol, caliber .45.

Specification 3: In that Private Frank Stennis, Troop F, Tenth Cavalry, did, at or near Campo, California, on or about June 26, 1943, with intent to commit a felony, viz, murder, commit an assault upon Laura Mitchell, otherwise known as Laura Mitchell Stennis, Campo, California, by willfully and feloniously shooting at the said Laura Mitchell, otherwise known as Laura Mitchell Stennis with a dangerous weapon, to wit, a United States army pistol, caliber .45.

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

Specification: In that Private Frank Stennis, Troop F, Tenth Cavalry, did, on or about June 26, 1943, wrongfully take and use without the consent of the proper authority one United States army pistol, caliber .45, serial number 52140, the property of the United States of America, of the value of about \$26.92.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and all Specifications but in the Specification, Charge III, the figures "\$26.92" were excepted and the figures "\$26.42" substituted, with finding of the excepted figures, not guilty, and of the substituted figures, guilty. The offense was committed in time of war. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that about 2000 o'clock on the night of 26 June 1943, the accused appeared at the trailer home of Sergeant John L. Austin and wife, Mary Austin, where they were entertaining Laura Mitchell, who was also known as Laura Mitchell Stennis, Sergeant Jack Parker and Private William L. Muckelroy with a fish dinner. At this time Laura went to the door and talked to the accused about a letter which the accused had brought and which he permitted her to read. At this time the accused evidenced no signs of anger (R. 9-11, 56-58, 59-61, 63, 64).

The accused departed and returned to his troop where he got ready for bed but, after thinking things over, he decided he was not being treated right. He then dressed, went to the guard quarters, and stealthily acquired possession of a pistol and ammunition from a guard sleeping in his bunk. On his way to the trailer home of the Austins, he once decided not to go any further with his design but ultimately determined to continue and proceeded to the trailer home (R. 89-91).

When he reached the trailer home the second time at about 2100 o'clock on the same night, Austin was asleep on one of the beds with his wife sitting beside him; Laura was sitting on the other bed in the corner of the trailer; Muckelroy was sitting on a chair before a dressing table; and Parker was sitting in a chair by the door with his back to the wall. The accused entered the door and said in substance "Muckelroy, do you think you are treating me right", to which Muckelroy replied in substance "I don't know as I have ever done anything to you". No argument ensued and no one made a hostile move toward accused or threatened him but he commenced firing towards all of them except Parker at which time the accused was heard to remark "I am going to kill everybody in there". About the time of the first shot, the lights went out but he continued firing until the gun was empty. Muckelroy was fatally wounded in the abdomen; Austin received serious, but not fatal, abdominal and arm wounds; Mrs. Austin acquired a superficial injury; and Laura Mitchell and Parker escaped unscathed. The accused immediately left and encountered another soldier who took him to the military police, to whom he surrendered himself and the pistol (R. 11-12, 18, 59, 66, 71-72).

Competent medical testimony established the death of Muckelroy, subsequent to the shooting and prior to the trial, from the gun shot wound and also described the wounds inflicted on Sergeant Austin and Mrs. Austin (R. 103-106).

After the surreptitious acquisition of the weapon was shown, it was identified as Government property and admitted in evidence. Its value was proven to be \$26.42 (R. 101-102).

The accused, after proper warning of his rights to speak or remain silent, made oral statements to his company commander, who was permitted to testify about them, over the objection of the defense. The material parts of the statements were substantially to the same effect as the testimony presented by the prosecution, except that the accused asserted that he knew there had existed illicit relations between Laura and Muckelroy, that Mrs. Austin, on accused's first visit to the trailer on the fatal night said "tell that Negro son-of-a-bitch to go on away from there and quit bothering us", and that he intended to shoot only Laura and Muckelroy (R. 83-101).

The evidence for the prosecution also shows that the law of the State of California does not recognize common law marriages (R. 48).

4. The evidence for the defense was submitted in part upon the collateral issue of accused's claimed marriage to Laura Mitchell, who was offered as a witness by the prosecution and permitted to testify over the objection of the defense. The objection was based on the asserted marriage of the witness and the accused. Upon the collateral issue, the accused also testified solely upon that issue, and the evidence thereon shows that Laura Mitchell, at the request of the accused, came to Camp Lockett, California, from Starr City, Arkansas, on 22 December 1942 with an Arkansas marriage license to marry the

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accused; that the license was lost although accused testified a chaplain married them, which was denied by Laura; that the accused had arranged for her to work at the post exchange and to live at the quarters provided for its employees where they lived together as man and wife until about the middle of May, 1943; that Laura was employed as Laura Mitchell Stennis, went by that name and was held out as the wife of the accused, who was issued and used a married man's pass during such period of time; that accused gave his earnings of several hundred dollars to her; and that, after her arrival, the accused was generally reputed to be married to her. It also shows that Laura left Camp Lockett in May, 1943, since which time she had resided in San Diego, California, and that, on the night of 26 June 1943, she was visiting the Austins (R. 21-32, 33-36, 37-38, 41-47, 39-40, 59).

The evidence for the defense by several witnesses also shows that the accused had an excellent reputation and was a good soldier. Furthermore, it shows by the testimony of two witnesses that his claimed wife, Laura, while living at the post exchange house, on several occasions had illicit relations with Muckelroy (R. 107-109, 119-130, 109-112, 117-119).

The accused, having been properly advised of his rights, elected to remain silent (R. 130).

5. The accused is charged with the murder of William L. Muckelroy. The Specification, Charge I, alleges that the accused did * * * with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill * * * the deceased by shooting him with a pistol. In order to sustain the finding of guilty under this Specification, it is necessary that the evidence be legally sufficient to support the conclusion that the accused unlawfully killed the deceased with malice aforethought.

Murder is defined as * * * the unlawful killing of a human being with malice aforethought. The word "unlawful" as used in this definition means * * * without legal justification or excuse. A justifiable homicide is "A homicide done in the proper performance of a legal duty * * *". Therefore, a homicide not done in the proper performance of a legal duty is without legal justification. Also, a legally 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 * * * must take place within a year and a day of the act or omission that caused it, * * * (M.C.M., 1928, par. 148a). The most unique characteristic of murder is the element of "malice aforethought", which according to all authorities is a technical term and cannot be accepted in the ordinary sense in which it may be used by laymen. The Manual for Courts-Martial, which is supported by universal authority, defines the term "malice aforethought" as follows:

Malice aforethought.--Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony * * * (M.C.M., 1928, par. 148a).

The uncontradicted evidence shows that the accused shot the deceased, Muckelroy, on 26 June 1943, inflicting wounds from which he died prior to the date of the trial on 12 July 1943. It is clear that the homicide was unlawful in that it was done without legal justification or excuse and an analysis of the evidence reveals ample proof to support the finding that the homicide was done with malice aforethought. The accused and his claimed wife had separated about the "middle of May" and prior to the separation the accused, according to his statements had learned of her illicit relations with the deceased. Under the evidence as to the law of the State of California, the accused was not married to Laura Mitchell. All of the uncontradicted evidence, including the accused's oral statements which were properly and lawfully secured and admitted into evidence, shows that, on the fatal night, the accused visited the trailer where Sergeant and Mrs. Austin were having a fish dinner for their company, Laura Mitchell, Sergeant Parker and Private Muckelroy, had a peaceful conversation with Laura Mitchell, and departed, although possibly told to leave in opprobrious terms by Mrs. Austin. At that time he was not and could not have been in the heat of sudden passion because his knowledge of the illicit relations between Laura Mitchell and the deceased had been acquired long before and nothing then was done that the law recognizes as adequate to excite uncontrollable passion. Nevertheless, the evidence conclusively shows that he meditated upon and deliberately calculated upon his further acts, resulting in his stealthy acquisition of an army pistol and ammunition which he used on his second visit to the trailer home of the Austins a short time later on the same night.

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The uncontradicted evidence further shows that, on this second visit, the accused, for the above reasons, was acting according to a coldly calculated and premeditated design and that upon entering the trailer he asked the deceased, who was sitting in a chair and did not get up, "Muckelroy, do you think you are treating me right" and received the reply "I don't know as I have ever done anything to you". Whereupon, without further words, the accused started shooting at Muckelroy, the deceased, and continued firing at all inmates of the trailer, except Parker, even after the lights were extinguished, until the gun was empty. The fusillade resulted in the infliction of mortal wounds upon the deceased, whilst the intent of the accused at this time was expressed in his remark "I am going to kill everybody there".

All of the medical testimony competently established the deceased's death within a short time thereafter, as a result of the wounds so inflicted. The exact date of death does not appear in the record of the evidence but is sufficiently established by the testimony of Captain Stanford B. Rossiter that he saw the deceased after he was dead and performed an autopsy upon him. Consequently the death occurred subsequent to 26 June 1943, the date of the shooting, and prior to 12 July 1943, the date of the trial, which fulfills the requirement that death must take place within a year and a day from the act that caused it.

The evidence for the defense presents no issue of insanity, self-defense or other legal defense but merely establishes the former good character of the accused and the illicit relations between the deceased and Laura Mitchell while she and the accused were living together without benefit of legal sanction. It does not in any way debilitate the evidence for the prosecution below the required standard of proof of every element of the offense charged beyond a reasonable doubt. On the contrary, considering the oral statement of the accused to his company commander that he intended to kill only the deceased and Laura Mitchell and his remark at the time of the crime that he intended to kill everyone in the trailer, in the light of accused's actions on the fatal night, immediately prior to and at the time of the brutal shooting, the prosecution fully met the burden of proving beyond a reasonable doubt that the homicide was with "malice aforethought". Therefore, under controlling legal principles, the prosecution introduced competent evidence to establish every element of the offense charged in the Specification under Charge I, ample to sustain the court's findings of guilty of the Specification and the Charge.

6. Specifications 1, 2 and 3, Charge II, allege that the accused did " * * * with intent to commit a felony, viz, murder, commit an assault upon" John L. Austin, Mary Austin and Laura Mitchell, otherwise known as Laura Mitchell Stennis, respectively, " * * * by willfully and feloniously shooting * * *" the two persons first named, in specified parts of their bodies, and by so shooting at the person, last named, with a dangerous weapon, to wit, an

Army pistol. Since an assault with intent to commit a felony, viz, murder, is an assault made with a specific intent to murder, it is necessary for the evidence to be legally sufficient to support the conclusion that the alleged assaults were made unlawfully and with murderous intent, i.e. malice aforethought, if the findings of guilty under these three Specifications are to be sustained.

The offense of assault with intent to commit a felony, viz, murder, is defined by the Manual for Courts-Martial as follows:

*Assault with intent to murder. - This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense * * *.

* * * * *

*Assault. - An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another * * *.

*Some overt act is necessary in any assault * * *.

*The force or violence must be physical; * * *.

*Furthermore, in an assault there must be an intent, actual or apparent, to inflict corporal hurt on another. * * *
(M.C.M., 1928, par. 1491).

The evidence is uncontroverted that the accused deliberately acquired possession of the weapon between his first and second visit to the trailer on the night of 26 June 1943. It is also undisputed that the second visit was avowedly made for the purpose of killing Laura Mitchell and Muckelroy because he acknowledged such purpose in his oral statement to his company commander. Furthermore, the evidence is uncontradicted that Sergeant Austin and Mary Austin were wounded and Laura Mitchell, although unwounded, was shot at in the same affray in which Muckelroy was murdered, as hereinabove shown, and that during the affray the accused was heard to remark "I am going to kill everybody in there". It is clear from all the evidence that the accused assaulted all inmates of the trailer except Parker, who was unassaulted because from his position he was not in the line of fire. The weapon used, was a dangerous one and obviously calculated to accomplish the accused's expressed intent. That Sergeant Austin was wounded, seriously, while

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he slept and his wife received a minor gunshot injury is conclusively established by the evidence. Fortunately they both recovered, and, equally fortunately, Laura Mitchell escaped uninjured. Where, as here, one is shot at but is missed, the assault is nevertheless complete and, if it is made with the specific intent to murder, it is an assault with intent to murder because the actual infliction of injury is not necessary to complete the offense. The failure of the accused to express any murderous intent toward Sergeant and Mrs. Austin does not militate against the gravamen of the offenses charged to have been committed upon them, because where one fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group (M.C.M., 1928, par. 1491).

The evidence, when tested by pertinent authorities, unquestionably establishes beyond a reasonable doubt the consummation of an assault with intent to murder upon each of the three persons as alleged in the Specifications. Therefore, the court's findings of guilty of the three Specifications under Charge II and of the Charge, were fully warranted under the uncontradicted competent evidence.

7. The Specification which alleges a very minor offense, comparatively, under Charge III, as revised by exception and substitution in connection with the value of the pistol and the finding of guilty thereof, alleges that the accused * * * did, on or about June 26, 1943, wrongfully take and use without the consent of the proper authority * * * one pistol, the property of the United States, which had a value of about \$26.42. To support a conviction for this alleged offense the evidence must conclusively show "(a) That the accused misappropriated or applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done and (d) the value of the property as specified", when charged under Article of War 94 because under that Article of War the acts must be willfully and knowingly done (M.C.M., 1928, par. 150i, Dig. Ops. JAG, 1912-40 par. 452 (17) and (18)). The use of the word "wrongfully" in lieu of the words "willfully and knowingly" permits the offense to be charged, appropriately, under Article of War 96.

The evidence upon the allegations of this Specification is undisputed. The soldier to whom the pistol had been issued identified it by number and testified that it had been taken without his permission by someone while he was on relief, sleeping. The accused, in his oral statement to his company commander, admitted the surreptitious and unauthorized acquisition of the weapon for the purpose of using it in the perpetration of his crimes. The value of the pistol was adequately shown as \$26.42 from the Ordnance Catalogue, an official government publication, which was read into evidence without objection. Consequently, the prosecution introduced competent evidence to establish every element of the offense charged by this Specification, ample

to sustain the court's findings of guilty of this Specification and the Charge. However, such an insignificant act could well have been omitted and not included with crimes of such great magnitude as murder and assault with intent to murder.

8. The court properly allowed Laura Mitchell to testify upon the trial not only because the law of the State of California does not recognize a common law marriage, which the evidence upon the collateral issue appears to indicate existed except for the provisions of the law of the state, but also because Laura Mitchell, regardless of whether she was the wife of the accused, was one of those injured by an offense charged against the accused. The following excerpt from the Manual for Courts-Martial is conclusive:

*Wife and husband may testify in favor of each other without limitation; but unless both consent, neither wife nor husband is a competent witness against the other except as follows: A wife may testify against her husband without his consent whenever she is the individual or one of the individuals injured by an offense charged against her husband. * * *
(M.C.M., 1928, par. 120d).

The question of whether the accused and Laura Mitchell were married to each other, either at common law or by legal ceremony, under the circumstances was, therefore, immaterial as affecting her competency to testify against the accused.

9. The accused is 31 years of age. He was inducted at Camp Robinson, Arkansas, 22 June 1942, with no prior service.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence of either death or of imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Shas. Bresson, 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.

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SPJGQ
CM 239317

31 AUG 1943

UNITED STATES)	93RD INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at
	)	Camp Clipper, California, 20
Private THEODORE W. BRANCH	)	July 1943. Dishonorable dis-
(32329621), Headquarters	)	charge and confinement at
Battery, 594th Field Artillery	)	hard labor for ten (10) years.
Battalion.	)	Federal Correctional Institu-
	)	tion, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
ROUNDS, HEPBURN and LATTIN, 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 only question requiring consideration is the propriety of the designation of a Federal correctional institution as the place of confinement.

Confinement in a Federal reformatory or correctional institution is not authorized under letter dated February 26, 1941 (AG 253 (2-6-41) E), from The Adjutant General to all commanding generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized under Article of War 42 for willful disobedience of the lawful commands of superior officers, the offenses of which accused was found guilty.

3. For the reasons stated the Board of Review holds the record of trial 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 ten years in a place other than a penitentiary, Federal reformatory or correctional institution.

William A. Rounds, Judge Advocate.

Paul H. Hurn, Judge Advocate.

Norman D. Lattin, Judge Advocate.

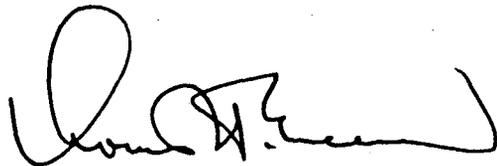
1st Ind.

War Department, J.A.G.O., 4 SEP 1943 - To the Commanding General,
93rd Infantry Division, APO 93, c/o Postmaster, Los Angeles, California.

1. In the case of Private Theodore W. Branch (32329621), Headquarters Battery, 594th Field Artillery Battalion, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend 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 ten years in a place other than a penitentiary, Federal reformatory or correctional institution. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50¹/₂, and Executive Order No. 9363, 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 239317).



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

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

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SPJGN
CM 239341

13 SEP 1943

U N I T E D S T A T E S)	2ND DISTRICT, ARMY AIR FORCES
)	TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at
	)	Chicago, Illinois, 7 August
First Lieutenant JAMES L.	)	1943. Dismissal.
JOHNSTON (O-559181), Air)	
Corps.)	

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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant James L. Johnston, Air Corps, Headquarters and Headquarters Squadron, Chicago Schools, Army Air Forces Technical Training Command, then Second Lieutenant, did, at Chicago, Illinois, from on or about November 1, 1942, to on or about December 20, 1942, wrongfully convert to his own use without the consent of the owner, United States currency and coins of an amount and value of more than Fifty Dollars, property of the Young Men's Christian Association of Chicago.

He pleaded guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence but remitted the confinement and forfeitures and forwarded the record of trial for action under the 48th Article of War.

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3. The evidence for the prosecution supporting and confirming the plea of guilty in brief is as follows:

About 15 October 1942 a number of men assigned to the 996th Technical School Squadron, Chicago Schools, AAFTTC, Chicago, Illinois, had their quarters changed from the YMCA Hotel in the city to the Stevens Hotel in the same city with possibly some of them being sent to George Williams College. At the time of the change they were indebted to the YMCA in varying amounts for quarters, subsistence, barber, tailor and canteen charges. The YMCA furnished the commanding officer of the 996th Technical School Squadron with a list of the indebtedness showing the amounts due for each service and the total due from each man. Collection was made from the men when they were paid in the first week of November, at which time the accused was the Class A Finance Officer and Captain William J. Bell, then a first lieutenant, was the witnessing officer. The accused counted out the money, it was verified by Captain Bell who delivered it to the men, and they proceeded to a separate desk in charge of Staff Sergeant Clyde N. Prentice who received the payment for the YMCA account and marked the list paid by the amount shown opposite the name of each man making payment. Approximately \$11,900 of the YMCA account was thus collected and the accused, Captain Bell, and possibly one of the sergeants put it in the vault which was accessible to other officers upon securing the key thereto from the accused (R. 34-40, 41-44).

Mr. Paul F. Peterson, auditor for the YMCA Hotel and Mr. Freel W. Hubbard, assistant auditor, testified for the prosecution concerning the bookkeeping methods used and the discovery of the shortage. On 19 December 1942 the accused delivered to Mr. Peterson the list upon which the payments had been noted and approximately \$11,500, which Mr. Peterson only counted by verifying the change and "spot-checking" the bundles of currency and for which he gave the accused a receipt in the amount stated by the accused to be the sum delivered. Mr. Hubbard, shortly thereafter, actually counted the money and a discrepancy ultimately developed of approximately \$411 between the amount actually delivered and the amount receipted for, which the accused had attempted to conceal by falsifying the list and which he further attempted to conceal by subsequently securing the list from Mr. Hubbard under the pretext of writing to some of the men for the purpose of securing payment (R. 6-17, 18-34).

By deposition and statements of some of the men, which were admitted into evidence by agreement, it was shown that they had made payment of their account which was not reflected on the list. The accused's written confession of the embezzlement was lawfully secured, after full warning to the accused of his rights, by the investigating officer and upon his proper identification thereof, it was admitted into evidence (R. 45-48; Pros. Exs. 2, 3, 4, 5).

4. The evidence for the defense shows that the accused made restitution of about \$100 of the defalcation before the day of trial and that on the morning thereof he paid an additional \$225 and gave his obligation for the balance of \$80.23, for which payments the YMCA Hotel had given him a release. Testimony to the previous good character of the accused and his efficiency as an officer with "superior rating" was also adduced (R. 17-18, 39-40, and Defense Exs. 1, 5, 6).

The accused, having been fully advised of his rights, elected to be sworn and to testify. After relating his enlisted service from 12 October 1937 to 11 May 1942, when he graduated from Officer Candidate School at Miami Beach, Florida, and was commissioned a second lieutenant, he testified that on 2 December 1942 he converted to his own use approximately \$411 of the money and falsified the list with reference thereto. The expense in connection with the birth of his son on 18 August 1943, and the additional expense of assisting his mother-in-law subsequent to her husband's death on 6 June 1942, had left him without funds on 16 November 1942 when he was confronted with a demand for \$400 from a young woman acquaintance whom he had known since July 1942 who had claimed she was pregnant by the accused and who threatened to report him to his commanding officer. He had made an unsuccessful trip home in an effort to borrow the money and had also been unable to cash his war bonds. He sold his two cameras to secure the \$225 which he paid on the morning of the trial. He identified a list of unpaid items on the hotel's bill and explained his notations thereon. Upon receipt of inquiry from the Area Air Inspector on 21 June 1943 relative to the shortage, he readily admitted it by certifying to its existence. Neither his father, a major in World War I, nor his two brothers, one a flying officer with the rank of lieutenant commander in the Navy and the other a staff sergeant in the Army who is now a Japanese Prisoner in the Philippines, knew about his trouble (R. 49-71, and Defense Exs. 2, 3, 4).

5. The Specification of the Charge alleges that the accused " * * * did, at Chicago, Illinois, from on or about November 1, 1942 to on or about December 20, 1942, wrongfully convert to his own use * * *" money to the value of more than \$50, the property of the Young Men's Christian Association of Chicago without its consent. The gravamen of the offense is that of embezzlement. The offense is defined by the Manual for Courts-Martial as follows:

"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." (MCM, 1928, par. 149h.)

The accused cannot be legally convicted upon his unsupported confession. There must be evidence of the corpus delicti other than the confession itself but such other evidence need not be sufficient in itself to convince beyond a reasonable doubt that the offense charged has been committed, or be complete, or even to connect the accused absolutely with the crime (MCM, 1928, par. 114). The evidence for the prosecution, exclusive of the accused's confession, fully meets this burden and establishes every element of the offense. The testimony of the hotel auditors, Captain Bell and Sergeant Prentice completely demonstrates that the accused was intrusted with the hotel's money which had come into his hands lawfully. The testimony of the hotel auditors also competently establishes the fraudulent conversion or appropriation of a portion thereof, approximately \$411, and the repayment of a portion of it before the day of trial with further payment being made and release being given on the morning of the trial. Such payments are extraneous of the confession and may properly be considered as admissions of guilt. Consequently, the evidence for the prosecution contained abundant proof of the corpus delicti, exclusive of the accused's confession, and such proof was ample to support the facts stated in the confession and the plea of guilty.

Furthermore, the accused in his testimony fully admitted the embezzlement and every essential element of the crime. He also offered in evidence his Exhibit 2, a list with his own notations thereon relative to the conversion about which he testified extensively, and the letter of the Area Air Inspector with his reply thereto, certifying to his embezzlement. The guilt of the accused, therefore, overwhelmingly establishes every element of the offense charged.

6. The accused is about 25 years of age. He has prior enlisted service from 13 October 1937 to 22 February 1942; Officer Candidate from 22 February 1942 to 11 May 1942; commissioned second lieutenant, Army of the United States 11 May 1942; and promoted to first lieutenant 18 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 and the sentence. Dismissal is authorized upon conviction of violation of Article of War 96.

Shasch Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 239341

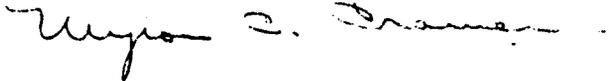
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War Department, J.A.G.O., 17 SEP 1943 - To the Secretary of War.

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 James L. Johnston (O-559181), 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 as approved by the reviewing authority, and legally sufficient to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and carried into execution.

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



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

3 Incls.

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

(Sentence confirmed. G.C.M.O. 354, 11 Nov 1943)



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

(137)

SPJGH
CM 239356

8 OCT 1943

UNITED STATES)

v.)

Private WILLIAM H. BROWN)
(39844469), 112th Liaison)
Squadron, 70th Reconnaissance Group.)

FOURTH AIR FORCE

Trial by G.C.M., convened
at Army Air Base, Salinas,
California, 24 July, 2 and
5 August 1943. Dishonorable
discharge and confinement
for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
DRIVER, LOTTERHOS, and LATTIN, 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 William H. Brown, 112th Liaison Sq., 70th Reconnaissance Gp., did, at Salinas, California, on or about the 11th day of July, A.D. 1943, forcibly and feloniously, against her will, have carnal knowledge of Ida Mae Banks.

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 and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. In July 1943, Miss Ida Mae Banks and Mrs. Frances Diehl, employees at the Army Air Base at Salinas, roomed and boarded at the home of Miss Ellen McDougall, 223 John Street, Salinas, as did Mrs. Elizabeth McDougall and her daughter, Jean. Miss Banks was 30 years of age and had been engaged for four years to an Army sergeant who had been stationed at Salinas prior to his transfer to Mississippi in January 1943. She had had sexual intercourse with the sergeant after becoming engaged to him, and prior to his transfer, but not with anyone else. Mrs. Diehl was a divorcee with a child thirteen years old (R. 19, 30, 51-52, 54, 58-59, 67, 82, 85).

After dinner on 10 July 1943, Miss Banks and Mrs. Diehl decided to go out and have a few drinks. About 9:30 p.m. they entered the Rex Bar, owned by Robert M. Cashen. On that night, accused was working there as an extra bartender, wearing an apron over his Army uniform. Mrs. Diehl asked Cashen where he "got the good looking bar tender". There was some conversation between accused and the two women. Mrs. Diehl was "kidding across the counter" with him. She had two highballs and Miss Banks had part of a Scotch and soda and another drink. About 10:15 p.m. they went across the street to the Cominos Bar, where Mrs. Diehl had four highballs and Miss Banks had some beer. About 11:00 p.m. they returned to the Rex, as Mrs. Diehl wished to see accused again. Cashen told her that she had better leave the boy alone because he was a married man. Mrs. Diehl asked accused if he were married and he replied that he was not. After Mrs. Diehl had another highball and Miss Banks had another bottle of beer, accused found places for them at his station. Accused took out a small notebook and Mrs. Diehl wrote in it her name, address, and telephone number. There was "eye-play back and forth". Accused said he would walk home with them if they would wait for him, but Miss Banks did not want him to do so. Mrs. Diehl remarked to accused that they were going to "Tiny's" to eat, and he said that if he got through early, he would meet them there. The women left about 11:50 p.m. and went to "Tiny's", where accused joined them about fifteen minutes later. They had some food, for which accused paid, and then at about 12:35 a.m. walked to 223 John Street. On the way, Mrs. Diehl walked between the other two, holding their arms, and Miss Banks and accused did most of the talking (R. 9-12, 16-17, 19-24, 31-39, 59-63, 67-71).

When they came to the house, Miss Banks said good night, took Mrs. Diehl's key and entered by the back door, went to Mrs. Diehl's room, turned on the light, laid the key on the dresser, returned to her own room which was next to the kitchen, undressed by the light of a table lamp, and went to bed. Mrs. Diehl remained at the back steps with accused for approximately five minutes, during which they kissed more than once. Accused stated that he was going to Oakland to get his car and would call her that night. Mrs. Diehl then went in the house, made sure that the door was locked, went to her room, found the light on, went to Miss Banks' room, returned to her own room, undressed, turned out the light and went to bed about 1:00 a.m. The house was a one-story residence, with four bedrooms. Mrs. Diehl occupied a rear room, and Miss Banks had a room toward the front of the house, adjoining that of Mrs. McDougall and her daughter. Miss McDougall, the owner, normally occupied another front room, but she was away that night (R. 25, 39-40, 63-65, 82, 85-86).

Miss Banks went to sleep about 1:00 a.m. and awakened later to find someone standing over her. She thought it was Frances Diehl, and said "Fran". A man seized her by the throat and whispered "Be quiet, this is Bill". She recognized him as the accused by the tone of his voice and what he said. By her luminous clock, which was ten minutes fast, it was then ten or fifteen minutes to three o'clock. She pushed accused from her and told him to get out. He told her that if she moved or screamed he would kill her, and said "Move over I am going to get in bed with you". He was holding her throat with both hands. She had difficulty in getting her breath but whispered "No". She was afraid. Accused removed his left hand from her throat, threw back the covers, got in bed with her, pulled off the lower part of her pajamas, got on top of her, and had sexual intercourse with her. Accused was fully clothed. She did nothing and made no outcry, did not fight or scream, because he said he would kill her, and made no effort to stop him. During the whole time, accused retained his hold on her throat, and she was very much afraid, "couldn't scream" or move, and was "paralyzed". She stated that the intercourse was "definitely" against her will. During the act accused asked if she loved the sergeant, and she answered "Yes". He made her put her arms around him. She was in great pain and thought she was dying. She threw her hands over her head and "everything went black". After accused had completed the act, he asked her if she would see him at the base. As soon as she could talk and in order to get rid of him, she promised to see him on Monday. He walked out of the room, came back and said, "Don't say anything about this to Frances". He then left, and after a few minutes Miss Banks placed a chair against the door, went back to bed, and covered herself with the lower part of her pajama top to keep from soiling the bed linen. About thirty minutes later, after talking with Mrs. Diehl, she took a douche and went back to bed (R. 25-29, 40-47, 49-50, 52-53, 56).

Mrs. Diehl was awakened about 3:00 a.m. by someone shutting the door of her room. She thought at first that it was Miss Banks and called her name, "Jiggs", but then saw a figure at the foot of her bed and recognized accused in a shaft of light which came in the window. Accused said "keep quiet" and "this is Bill". Mrs. Diehl asked what he was doing there and accused repeated his warning to keep quiet. He then ran to the window, unlocked the screen, and as he jumped out, remarked, "God damn it, after all the trouble I have had getting in here". Mrs. Diehl was frightened and went to Miss Banks' room. There was no light in the room. Miss Banks then went to Mrs. Diehl's room. Mrs. Diehl said "Jiggs, Bill Brown got into my room" and Miss Banks, who appeared to be very upset and hardly able to talk, replied "he has been in mine, too" and "he has choked me". Mrs. Diehl suggested that they wait until morning to tell Mrs. McDougall

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what had happened, that Miss Banks leave her door open, and "if you hear anything, just start screaming" (R. 28, 46-47, 56, 65-66, 72, 74-78, 81).

Jean McDougall and her mother slept in the room adjoining that of Miss Banks, and Jean's bed was right next to the door connecting the two rooms. She went to bed at 1:30 a.m. and was not disturbed during the night. Mrs. McDougall was awakened about 2:30 or 3:00 a.m. by the sound of footsteps in Miss Banks' room, but did not investigate (R. 82-86).

When they talked at about 3:00 a.m., nothing was said to Mrs. Diehl by Miss Banks about the intercourse with or attack by accused. The next morning about eight o'clock Mrs. McDougall said to Miss Banks that a man had been in the house during the night, and Miss Banks replied that he had been in her room, but did not state that she had been attacked. About that time Miss Banks, who was "very much agitated", stated to Mrs. Diehl "I will just kill myself if anything happens to me"; Mrs. Diehl then said "don't tell me that"; and Miss Banks replied "yes, that is true". Mrs. Diehl stated that they should report "it" to the commanding officer of accused, and they did report the occurrence to him about 10:30 a.m. (R. 28-29, 47-48, 51, 66, 78-79, 88-89, 98-99).

At about 8:30 p.m. on 11 July, Miss Banks was examined by Dr. Werner Meyenberg, who found no evidence of any injury to her throat, no trauma, no black and blue marks, no fingerprints. He also made a vaginal examination which showed an abrasion on the left side of the vulva, but no evidence of bleeding. The abrasion could have been caused by force during an act of intercourse or by numerous other things. In his opinion, it is possible to choke a person, "block off the wind", with one hand, and that the throat of the victim might show no evidence of pressure after three or four hours. On 15 July 1943, Mr. David Q. Burd, a chemist for the Division of Criminal Investigation of the State of California, examined two small pieces of cloth cut from the bottom of the upper part of Miss Bank's pajamas, and found human spermatozoa on the cloth, but no blood stains. He identified enlarged photographs of these cells (Exs. 2-5), which he had made (R. 29, 49, 90-92, 95-98).

When accused returned from leave in Oakland on Monday, 12 July, Second Lieutenant William D. Vacin, commanding officer of accused, warned him of his rights and asked him if he cared to make a statement. Accused stated that he had met "the girls" in a saloon or beer garden, when he got off from work took them to some other

restaurant, where they ate ham and eggs, walked home with them, and then went to the depot to catch a train to Oakland. He denied raping either of the women. An employee of the railroad testified that the passenger train from Salinas to Oakland was due to arrive in Salinas at 2:35 a.m. and depart at 2:54 a.m., but that it was late on the morning of 11 July and did not depart until 3:26 a.m. (R. 98-102).

4. The defense offered no testimony. Accused elected to remain silent (R. 103).

5. The evidence shows that on the evening of 10 July 1943, Miss Ida Mae Banks and a friend, Mrs. Frances Diehl, went to the Rex Bar in Salinas, California, where they became acquainted with accused, who was employed there at the time as an extra bartender. Shortly after midnight accused joined them at a nearby restaurant, where they ate some food, and he then walked with them to the residence where both lived. Accused left them at their home, and the two women went to bed in separate rooms about 1:00 a.m. Shortly before 3:00 a.m. Miss Banks was awakened by someone in her room, at first thought it was Mrs. Diehl, and then recognized the person as the accused, by his voice and what he said. Accused seized her by the throat and told her to be quiet. When she pushed him from her, he told her that if she moved or screamed he would kill her. Accused threw the covers back, pulled off the lower part of Miss Banks' pajamas, got on top of her and had sexual intercourse with her.

During the whole time accused kept one hand on her throat. She did not fight, scream or make any effort to stop him, because she was afraid he would kill her. She testified that the intercourse was "definitely" against her will. After accused had warned her not to tell Mrs. Diehl what had happened, he left her room and went out of the house through the window of the room of Mrs. Diehl, who saw him there about three o'clock. When he had gone, Mrs. Diehl and Miss Banks talked about his being in the house, and Miss Banks stated that he had choked her, but did not mention the act of intercourse. The next morning, when Mrs. Diehl learned what had happened, she suggested that they report it, which was done.

Rape is the unlawful carnal knowledge of a woman by force and without her consent. Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par. 149b). 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).

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Although even reluctant consent negatives rape, 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; CM 236612, Tyree; CM 238172, Spear).

Although Miss Banks made no outcry, nor any effort to stop accused other than pushing him away when he first approached her, yet it appears that her lack of resistance was caused by fear of death or great harm, rather than by consent to the act of intercourse. Accused grasped her by the throat, and threatened to kill her if she moved or screamed. In the opinion of the Board of Review the evidence sustains the findings of guilty.

6. Careful consideration has been given to recommendations for clemency, addressed to the reviewing authority, by Colonel Theodore M. Bolen, commanding Army Air Base, Salinas, California, and by all seven members of the court.

7. The charge sheet shows that the accused is 27 years of age and that he was inducted on 23 June 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. A sentence either of death or imprisonment for life is mandatory upon conviction of rape in violation of the 92nd Article of War. Confinement in a penitentiary is authorized under the 42nd Article of War for the offense of rape, by section 22-2801 of the District of Columbia Code, 1940.

Samuel M. Liver, Judge Advocate

J. F. Lottichos, Judge Advocate

Norman D. Lattin, Judge Advocate

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

(143)

8 SEP 1943

SPJGH
CM 239368

UNITED STATES)

v.)

Second Lieutenant PAUL A.
TARAJACK (O-1313321),
Company K, 289th Infantry.)

75TH INFANTRY DIVISION

Trial by G.C.M., convened
at Fort Leonard Wood,
Missouri, 17 August 1943.
Dismissal and total for-
feitures.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Paul A. Tarajack, Company "K", 289th Infantry, did, without proper leave, absent himself from his organization and station at Fort Leonard Wood, Missouri, from about 2 August 1943 to about 6 August 1943.

He pleaded guilty to and was found guilty of the Charge and Specification. 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, recommended suspension of the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: The morning report of Company K, 289th Infantry (Ex. 1) for August 1943, shows the accused from duty to absent without leave on 2 August 1943, and from absent without leave to arrest "of quarters" on 6 August 1943. First Lieutenant Arthur F. Scott, commanding Company K, 289th Infantry, testified that accused was platoon leader of the first platoon of Company K, and that he was absent

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from his company on 2 August 1943, when the company moved out to a bivouac area, and was not seen again by Lieutenant Scott until 7 August 1943, after the company returned from bivouac (R. 6a).

4. For the defense: Accused testified that he had been commissioned on 6 March 1943 after approximately eighteen months of service as an enlisted man, during nine months of which he had served as platoon sergeant and drill sergeant, and that his character as an enlisted man was excellent. On examination by the court, he stated that he drank heavily on Saturday night, drank again the next morning, and on Monday morning, 2 August, he "just took off"; that he knew he had to go on bivouac Monday morning and that he would not have absented himself without leave if he had been sober (R. 6c-6e).

Lieutenant Scott, when recalled by the defense, testified that the character of accused as an officer was very good, that his duties in the company were performed satisfactorily, that this was his first offense, and that he can be salvaged as an officer and if retained would be of benefit to the service. Lieutenant Scott had considered accused dependable, had relied on him in company duties, and still desired to have him in Company K (R. 6e-6f).

5. Colonel Robert H. Chance, Commanding Officer of the 289th Infantry, called as a witness by the court, stated that in his opinion accused is of very little value to the service (R. 6f).

6. The evidence shows and the accused admits his absence without leave for a period of four days, as alleged. The accused states that he had been drinking heavily and would not have committed the offense if he had been sober. His company commander believes that he can be salvaged as an officer and if retained, would be of benefit to the service. His regimental commander is of the opinion that accused is of very little value to the service. The division commander recommends that execution of the sentence be suspended.

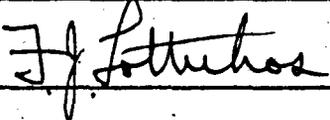
7. The accused is 27 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 29 October 1941; appointed second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 6 March 1943.

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

trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

, Judge Advocate

(Sick), Judge Advocate

, Judge Advocate

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1st Ind.

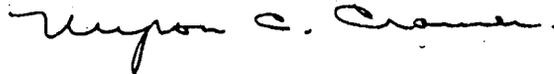
War Department, J.A.G.O., 10 SEP 1943 - To the Secretary of War.

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 Paul A. Tarajack (O-1313321), 289th Infantry.

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

The accused absented himself without leave for four days. He stated that he had been drinking and would not have absented himself if he had been sober. The reviewing authority recommends that the execution of the sentence to dismissal and total forfeitures be suspended. I recommend that the sentence be confirmed, but that the forfeitures adjudged be remitted and that the execution of the sentence as modified be suspended during the pleasure of the President.

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



Myron C. Cramer,
Major General,

3 Incls.

Incl.1-Record of trial.

The Judge Advocate General.

Incl.2-Drft..ltr. for sig.

Sec. of War.

Incl.3- Form of action.

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 302, 6 Oct 1943)

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

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SPJGK
CM 239409

6 OCT 1943

UNITED STATES)

SEVENTH AIR FORCE

v.)

) Trial by G.C.M., convened
) at A.P.O. #953, 12-14 July
) 1943. Dismissal and con-
) finement for five (5)
) years.

) Captain JACK A. GAYGAN
) (O-399514), Air 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 Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Jack A. Gaygan, Air Corps, 58th Bombardment Squadron (Dive), did, at Schofield Barracks, T.H., on or about 18 March 1943, with intent to commit a felony, viz., murder, commit an assault upon Captain Robert F. Golden, Medical Corps, North Sector General Hospital, Schofield Barracks, T.H., by willfully and feloniously shooting the said Captain Robert F. Golden in the chest with a .45 caliber revolver.

He pleaded "the general issue" to the Charge and Specification (R.8,9). This was equivalent to a plea of not guilty. He was found guilty of the Charge and guilty of the Specification except the word "murder", substituting therefor the word "manslaughter", of the excepted word, not guilty, and of the substituted word, guilty. This constituted a finding of guilty of assault with intent to commit manslaughter. No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. The events connected with the present case revolve about

three people: Second Lieutenant Janie C. Randolph, Army Nurse Corps, Army Air Corps Station, General Hospital, Kaneohe, Territory of Hawaii; Captain Robert F. Golden, Medical Corps, North Sector General Hospital, Schofield Barracks, Territory of Hawaii; and accused. To avoid confusion, Lieutenant Randolph will be referred to as Miss Randolph.

Captain Golden, a married man, had been acquainted with Miss Randolph since March 1942, - in fact for a time she had worked in his ward at the hospital. Miss Randolph had also been going around with accused, but not exclusively; in other words, she had dates with other men also. In the late autumn of 1942, accused was sent to Canton Island. He corresponded with Miss Randolph, but she went out with other men, including Captain Golden, and apparently there was no "understanding" between her and accused at that time (R.11,27,48,61-63,76).

During the absence of accused, Captain Golden, who did not then know him, became aware of Miss Randolph's interest in accused (R.48,57,61). Captain Golden testified that Miss Randolph was in "a very great state of confusion" and sought his advice about accused. Captain Golden's views were based upon the opinions of people who knew accused. Captain Golden told Miss Randolph that accused had a bad temper and was "too handy" with his gun; that the officers and men of his squadron did not like him and were likely to shoot him down in combat; and that he (accused) was not good enough for her. Captain Golden advised Miss Randolph to see all her friends and not "go steady" with accused. He also advised her not to marry until after the war (R.48-50,52,61).

Accused returned about 3 February 1943, after which Captain Golden and Miss Randolph saw one another only a couple of times (R.50,76).

On or about 3 March 1943, accused received an anonymous letter (R.11; Def. Ex. B). The letter stated that accused's "one and only girl friend" (undoubtedly meaning Miss Randolph) had been going around with a "Schofield Hospital M.C. Captain" and had not stopped since accused's return. It stated further that the girl and the Medical Corps captain wanted to keep accused "in the dark", expecting that he would be moved soon, after which they would not need to worry any more. The letter asserted that the relationship between Miss Randolph and the captain was well-known to everyone except accused. It included the exhortation, "Why be a fish?", and adjured accused not to be a "fool" all his life (Def. Ex. B).

On 3 March, Miss Randolph and accused went to Captain Golden's quarters. They showed him the letter. Captain Golden told them that it was "a lot of foolishness". On the witness stand, Captain Golden denied

any connection with the letter and stated that he did not see it until accused brought it to him as related above (R.11,12,37-39).

Captain Golden spoke about the letter to Major George E. Sexton, Medical Corps, North Sector General Hospital, Schofield Barracks. According to the latter, Captain Golden seemed "a little uneasy" about it and wondered who had written it. Captain Golden also told Major Sexton that he thought a lot of Miss Randolph, did not consider accused the man for her, and "would like to break them up". Major Sexton advised Captain Golden to drop the matter, to which advice Captain Golden agreed that the course proposed would be the "smart thing to do", but that he doubted whether he would do it (R.90-91). On 13 March 1943, accused and Miss Randolph became engaged (R.62,76).

On or about 13 March, accused received another anonymous letter (R.58; Pros. Ex. 6). The writer referred to the first letter and intimated that the woman (referring of course to Miss Randolph) had been involved with several men, including the "Doc" mentioned in the prior communication. The writer said that the girl was not the kind that anyone would want to "present to the family". He suggested that accused have a talk with the "Doc". He said that accused was being fooled by the girl and was "playing sucker" (Pros. Ex. 6). On the witness stand Captain Golden denied knowledge of or connection with the letter (R.39).

On the afternoon of 15 March, Captain Golden learned of the engagement between Miss Randolph and accused. He telephoned Miss Randolph to congratulate her. She told him that earlier in the day accused had attempted to reach her by telephone and had left a message that Captain Golden had called. Captain Golden was displeased with accused's conduct in using his name in that manner (R.41,53,54).

Giving vent to his anger, Captain Golden caused an anonymous letter to be typed by Sergeant Charles W. Ray, Medical Corps, North Sector General Hospital, Schofield Barracks. Captain Golden testified that he had no desire to break up the engagement, but wished to "confuse" and "bother" accused. Sergeant Ray prepared the letter, and witness (Captain Golden) edited it, withdrawing some matters which were "too improper". He did not add anything of a "salacious nature" to the original draft. Sergeant Ray prepared a second draft, embodying the corrections, and, as directed by Captain Golden, the letter was sent to accused through the message center, reaching him on 18 March (R.28-30,32,35-37,47,64).

Unlike its predecessors, this letter referred to Captain Golden and Miss Randolph by name. Certain passages warrant quotation:

"Jack, do you think Randy was home knitting sweaters while you were down there? Well I and others know different. For

Instance there is a Medical Officer named Captain Golden, whom myself and a few other people know has been out with Miss Randolph on a steady basis for months. you apparently have not known and I believe she has'ent told you the truth about the two of them but it has not been causal [undoubtedly meaning "casual"] and I know it, or is that the same line women usually use to hook a sucker?

"Knowing this you can't trust her, I can't blame you. * * * If I were in your shoes I would check the background of this woman, and then pull up my steaks and get out. For when you find out the love she has for another man on this Island and she tries to find ways to see this other man, you will be very disappointed of the judgment you made of this woman, and I think you will know your mistake, so I say you had better do her before she does you" (Def. Ex. A).

On the witness stand, Captain Golden admitted that the "stuff" in the letter is untrue (R.54).

On the evening of 18 March, accused showed the letter to Miss Randolph. Both were very angry about it. They discussed this and the other letters, and decided to call upon Captain Golden to find out about them. Accused strapped on his sidearms, saying that he intended to scare Captain Golden into telling the whole story (R.63-68,79,80).

Arrived at Captain Golden's quarters at about 10 p.m., they had a beer with Captain Golden, who congratulated them on their engagement. Then they handed Captain Golden the second and third letters and asked him about them. Captain Golden sat on the bed and apparently perused one of the letters. Accused remained standing (R.12,13,16,19,28,39,40, 58,68,81).

Noticing a picture of Miss Randolph on Captain Golden's bureau, accused removed it and tore it into several pieces. Miss Randolph did not know that Captain Golden had the picture. Captain Golden became very angry and asked accused why he had torn the photograph. Accused replied, "'Because you don't have any right to it'". Captain Golden said that he could get another print of the same picture. Accused asked Miss Randolph whether she had procured all the negatives which had been in Captain Golden's possession, to which she replied that she had not. According to Captain Golden, accused then "bawled out" Miss Randolph for having failed to recall all her photographs and negatives (R.16,40-42, 69).

Accused then asked Captain Golden to resume the reading of the letters, and Captain Golden apparently did so (R.17,42,69). Several times accused asked Captain Golden what "the story" was, and each time Captain Golden

answered in a sarcastic manner that there was "no story". Captain Golden also said, "You better take her as she is and be damn lucky to get her" (R.69,71).

Accused had been walking up and down, but, while Captain Golden was looking at the letters, he noticed by his "peripheral vision" that accused had stopped walking (R.16-18,42,43). He saw accused reach around with both hands to his revolver and holster, which were on accused's right side (R.17,18,43,44). He saw accused pull the revolver from the holster and pull back the hammer, and he heard the hammer click as it went back. He looked directly at accused, who raised the revolver to eye level and took a "dead level beam" (R.18,43,44). Witness "ducked" to the right and forward, and raised his left arm across his face (R.18,19,44). Accused fired (R.18,43).

Miss Randolph did not see Captain Golden duck or raise his arm (R.72, 77). However, she looked up and saw the gun pointing toward Captain Golden. It was fired at the same instant (R.70,71,74,77).

According to the medical testimony, the bullet entered the upper left arm, penetrated the biceps muscle, went through the arm, entered the chest wall near the armpit, coursed downward, and came out posteriorly through a jagged wound near the left kidney (R.95,97,157,158). The examining physician thought that "most probably" Captain Golden's arm was up at the time of the shot (R.158-160).

After the shot, Captain Golden fell back on the bed (R.22,44,72). Miss Randolph testified that accused said, "I didn't mean to shoot" and also, "Now you know how much I love her", whereupon Captain Golden said, "Yes, take her, take her" (R.72,84). According to Captain Golden, accused kept asking him what it was all about, and threatened to "plug" him, to which he responded that Miss Randolph was a "swell girl", that accused was lucky to be engaged to her, and that the attitude of accused was "crazy" (R.23).

At Captain Golden's request, accused went to call Major Sexton, who occupied the same house (R.22,23,45,66,72). Miss Randolph testified that accused met Major Sexton in the hallway and asked him to call an ambulance (R.72,73).

Major Sexton's version was as follows: He was awakened by the sound of loud voices engaged in an argument, followed by a shot. He arose and went from his room into the unlighted hallway. Suddenly a hard object was stuck against his ribs and a voice asked whether he was a medical officer. When Major Sexton replied in the affirmative, the voice exclaimed, "Get in there and take care of Golden, or I will plug you, too". The voice sounded excited. Major Sexton could not see the face

of his assailant. Major Sexton went to Captain Golden's room, looked him over, and conversed with him. Captain Golden said he had been shot, but did not say by whom. He also instructed Major Sexton to keep everything quiet. Major Sexton left to call an ambulance. In the hallway, "the voice" asked him whom he intended to call and told him "to keep quiet on anything other than to call for the ambulance". As a matter of fact, in addition to calling for an ambulance, Major Sexton called the Military Police. Major Sexton was not acquainted with accused (R.87-94).

Captain Golden testified that accused reentered the room and told witness to remember that it had all been an accident and that they had been drinking, and not to remember anything else (R.24).

Captain Golden was taken to the hospital and operated upon. He had to be kept in an oxygen tent for several weeks. One lung was totally collapsed and was still partially collapsed at the time of the trial, at which time he was still a patient at the hospital (R.24,56,57,88,95).

The shot was fired from a .45 caliber Colt revolver, which was identified and received in evidence (R.18,19; Pros. Ex. 4). Captain Edward J. Schisler, Ordnance Department, ammunition officer of the 7th Air Force, and admittedly an expert in firearms, testified that the safety on the revolver was not faulty, that the revolver could not be fired without pulling the trigger, and that it could not go off accidentally (R.162-164).

The day following the shooting, accused received a fourth anonymous letter. Captain Golden denied all knowledge of the document (R.39,58,59).

b. The defense admitted the shooting and the course of the bullet (R.9,21). Testifying for the defense, Sergeant Ray stated that he had worked with Captain Golden for about four months. Captain Golden told him that through some channel of information he knew when Miss Randolph went out with accused and knew every move they made when they left the base. Captain Golden did not approve of their going together and said he would like to see it broken up. On or about 15 March, Captain Golden said something to the effect that accused was a "sucker" to get mixed up with a woman like Miss Randolph. Sergeant Ray testified to the writing of the letter, which, it will be recalled, was the third received by accused. In substance Sergeant Ray's testimony on the subject conformed to that of Captain Golden, except that Sergeant Ray detailed a number of additions which Captain Golden made to the original draft. Captain Golden gave witness the name and address of accused, erroneously spelling the name "G-A-Y-G-E-N". As instructed by Captain Golden, witness sent the letter through the message center (R.138-147).

Accused's commanding officer, Major John J. Van Der Zee, 7th Bomber Command, testified that accused was at witness' quarters about 5:45 p.m.

18 March 1943, and that an anonymous letter [obviously the third] was delivered to accused. After reading it, accused became "practically livid" with rage, and said that he wished he knew the identity of "the so and so" who was writing those letters. At about 11 o'clock that evening, accused again visited Major Van Der Zee's quarters, told witness about the shooting, and requested his advice. Major Van Der Zee testified that accused is "a sort of excitable Irishman", who is quick to anger but does not harbor a grudge. Accused's father is a detective and accused has been familiar with firearms all his life (R.152-155).

Major Van Der Zee and two other officers testified with reference to the character and reputation of accused. They were Brigadier General William J. Flood, Chief of Staff, 7th Air Force, and Colonel William J. Holzapfel, Air Corps, Commanding Officer of the 11th Bombardment Group. The testimony of the three character witnesses agreed on the following points: (1) Accused possesses a good reputation for truth, honesty, and veracity, and the witnesses would believe him either under oath or not under oath; (2) he is an excellent and courageous combat pilot; (3) he is of great value to the service as a combat pilot. Two of the witnesses testified that his reputation for morality is good so far as they know (R.123,124,149,153,154).

o. Testimony of the accused.

Before entering the military service, accused had not handled revolvers, but he was accustomed to other kinds of firearms. He had fired about 30 rounds from his revolver before 18 March (R.127,128). His testimony concerning his relations with Miss Randolph and the receipt of the anonymous letters need not be completely detailed, since it is in substantial accord with that outlined in the summary of the prosecution's evidence (R.100-105,109,110).

Upon receipt of the first letter on 3 March, accused suspected that Captain Golden knew something about the authorship, and Miss Randolph thought that he was the medical officer referred to. It was at her suggestion that they called upon Captain Golden. Accused wore his side-arms (R.120,129). Asked by accused what he had to say, Captain Golden, "in a sneering, sarcastic manner", replied that he had nothing to say and that he had no idea who had written the letter (R.103). He told accused to pay no attention to the letter (R.109). As they left, Captain Golden said that accused "undoubtedly" would meet him again (R.103).

Shortly before 18 March, accused telephoned Miss Randolph, and, upon learning that she was out, instructed the operator to tell her that Captain Golden had called (R.111). He did this on the spur of the moment and did not know why he gave Captain Golden's name (R.127).

The testimony of accused with reference to the early evening of 18 March corroborates Miss Randolph (R.105,113,132). Accused knew that his revolver was loaded, but did not notice whether it was cocked. It was his custom to wear his sidearms most of the time (R.107,114,126). Accused did not believe that the statements and insinuations about Miss Randolph, contained in the letters, were true (R.108,129,131). When he went to Captain Golden's quarters, he intended merely to scare the captain, not to shoot anyone. It never occurred to him to unload the revolver (R.108,118,119).

Accused testified to the tearing of Miss Randolph's photograph, stressing that Captain Golden upbraided him about the matter "in a snarling voice" (R.105). There was nothing in his testimony to indicate that he "bawled her out". He testified also to the conversation between Captain Golden and himself about the letters (R.105,106,109,115, 131). From Captain Golden's unwillingness to attempt to clear Miss Randolph, and from his sneering attitude, accused believed that he had written the letters (R.120).

At length accused said, "You are not going to say anything else?" Captain Golden said, "No". Accused said, "Oh, yes you will" (R.106). At this time accused was about 13 feet from Captain Golden (R.114,115). Accused drew his revolver, thinking this would scare Captain Golden into talking (R.108). The revolver stuck in the holster, and accused had to pull hard to remove it (R.126). As he pulled it out, the revolver went off (R.106,115,131). This was entirely unexpected and had never happened before (R.119). Accused did not cock the revolver, did not consciously pull the trigger, and did not intend to shoot, although he believed that his finger was on the trigger (R.115,118,127,130). He was "surprised and shocked" (R.106). He thought that the bullet had gone into the floor or some other place in the room and did not think that Captain Golden had been shot (R.106,116,126).

At the time of the shot, Captain Golden did not duck (R.116). He put up his arm and rolled back on the bed (R.106). He asked accused why the latter had done it. Accused said that he had not intended to shoot. He also said, "Now do you believe I love her? Tell me, tell me". Captain Golden replied, "Yes. Take her. Take her. She is a good kid". Accused asked, "Why didn't you tell me that before?" (R.106,116).

After noticing a hole in Captain Golden's sleeve and blood running down the side, accused realized what had happened. Captain Golden told accused to get Miss Randolph out of there and to summon an ambulance or call "George" (Major Sexton) (R.106). Accused went into the dark hallway, and was aware of someone coming down the hall, although the darkness prevented his seeing who it was. He supposed that it was Major Sexton.

He denied having put the revolver against Major Sexton's back or having told Major Sexton that he would "plug" him too unless Major Sexton entered Captain Golden's room. He merely told the major that Captain Golden had been shot, and asked him to call an ambulance (R.106,117).

Accused admitted having asked Major Sexton to say nothing about the affair, meaning that nothing should be mentioned about Miss Randolph's connection with it (R.106,118). As instructed by Captain Golden, accused took the letters and the pieces of the torn photograph (R.106,121).

After escorting Miss Randolph to her home, accused returned to his quarters, where he told "Captain Rice", a fellow-occupant, what had happened. He also reported the matter to Major Van Der Zee, and, after his arrest, told "Colonel Green" the details (R.106,107).

4. As noted, the court found accused guilty of assault with intent to commit manslaughter. In so finding, the court must have decided that adequate provocation existed to reduce the grade of the offense from assault with intent to commit murder. Whether the court decided that issue correctly need not be determined, for accused benefitted by its conclusion.

The evidence proves beyond a reasonable doubt that accused intended to kill Captain Golden. Witnesses testified that the revolver was pointed at Captain Golden immediately prior to its discharge. One of the witnesses so testifying was accused's fiancée, whose interest, if any, lay in protecting accused. The ammunition officer testified to the virtual impossibility of the shot's being accidental. Furthermore, at a distance of 13 feet it is exceedingly unlikely that an accidental discharge during the withdrawal of the revolver from its holster would result in a hit at about shoulder height. In the opinion of the Board of Review, accused shot Captain Golden intentionally. It is axiomatic that intent to kill may be presumed from the use of a deadly weapon in such a manner. The finding of the court is entirely justified.

5. Nine of the ten members of the court recommended clemency. The reasons for the recommendation varied somewhat among the individual members. They included the previous good record of accused, his value to the service, the probability of successful rehabilitation, the desire of accused for combat duty, and the provocative circumstances leading up to the shooting.

Three members of the court recommended specifically that the dismissal be suspended, the confinement remitted, and the total forfeitures reduced to forfeiture of \$100 per month for 15 months. Two members recommended that the period of confinement be reduced to one year. One member recommended the suspension of the entire sentence. The others made no definite

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recommendation on the subject.

6. War Department records show that accused is 25 years of age and a graduate of the University of Pennsylvania. He was appointed a Flying Cadet on 13 March 1940. After the prescribed training courses he was appointed a second lieutenant, Air Corps Reserve, on 15 November 1940, with the aeronautical rating of pilot. As of 1 March 1942 he was appointed a first lieutenant, Army of the United States (Air Corps). He was promoted to captain on 7 August 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 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 authorized under Article of War 93.

Lucy L. Gann, Judge Advocate.

Wm. H. Hamilton, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 OCT 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 Jack A. Gaygan (O-399514), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. All but one member of the court recommended clemency. Accused is rated as an excellent combat pilot, with exceptional courage demonstrated under trying conditions in a combat zone. Directing attention to that fact, the Commanding General, Army Air Forces, recommends that the forfeitures and confinement be remitted and that the execution of the dismissal be suspended. In view of the nature of the provocation, the previous record and demonstrated ability of accused as a combat pilot, his exceptional value to the service, and the recommendations for clemency, it is believed that substantial mitigation is desirable. However, the offense committed by accused is of a serious nature and requires adequate punishment. Considering all the circumstances, I recommend that the sentence be confirmed but that the confinement be remitted and the forfeitures reduced to forfeiture of \$100 pay per month for 10 months. I recommend that as thus modified the sentence be carried into execution, but that the execution of that portion thereof adjudging dismissal be suspended during the pleasure of the President.

3. Consideration has been given to a number of letters attached to the record of trial. The letters are from the following persons: Brigadier General L. H. Hedrick, Air Judge Advocate (for the Commanding General, Army Air Forces); Honorable John Edward Sheridan, Congress of the United States (3 letters); Honorable James C. Crumlish, Judge, Court of Common Pleas, Philadelphia, Pa.; Mr. and Mrs. James F. Gaygan, parents of the accused; Reverend Charles J. Flanagan, St. Matthias Church, Bala-Cynwyd, Pennsylvania; Dr. Lester L. Bower, Philadelphia, Pennsylvania; Honorable Adrian Bonnelly, Judge, Municipal Court of Philadelphia, Pennsylvania; Honorable Vincent A. Carroll, Judge, Court of Common Pleas, Philadelphia, Pennsylvania; Major Mason S. Cooper, Air Corps; Vice Dean T. A. Budd, Wharton School, University of Pennsylvania; Lester E. Klimm, Arlington, Virginia; and Lemuel B. Schofield, Philadelphia, Pennsylvania.

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,

15 Incls. The Judge Advocate General.

- Incl.1-Record of trial.
- Incl.2-Draft of let. for sig. Sec. of War.
- Incl.3-Form of Ex. action.
- Incl.4-Ltr. fr. Br. Gen. L.H. Hedrick, 23 Sep 1943.
- Incl.5-3 Ltrs. fr. Congressman Sheridan, 2 dated 13 Aug 1943, 1 dated 7 Sep 1943.
- Incl.6-Ltr. fr. Judge, 1st Jud. Dis. of Pa., 20 Aug 1943.
- Incl.7-Ltr. fr. Mr. and Mrs. Gaygan, 17 Aug 1943.
- Incl.8-Ltr. fr. Rev. Chas.J. Flanagan, 17 Aug 1943.
- Incl.9-Ltr. fr. Dr. L.L. Bower, 18 Aug 1943.
- Incl.10-Ltr. fr. Judge, Municipal Court of Phila., 17 Aug 1943.
- Incl.11-Ltr. fr. Judge, Court of Common Pleas, 17 Aug 1943.
- Incl.12-Ltr. fr. Maj. Mason S. Cooper, AC, 18 Aug 1943.
- Incl.13-Ltr. fr. Vice Dean, Wharton School, 17 Aug 1943.
- Incl.14-Ltr. fr. Lester E. Klimm, 9 Aug 1943.
- Incl.15-Ltr. fr. Lemuel B. Schofield, 19 Aug 1943.

(Sentence confirmed but confinement remitted. Forfeitures reduced to \$100 per month for ten months. Execution of that portion of sentence adjudging dismissal suspended. G.C.M.O. 323, 25 Oct 1943)

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in arrest in the vicinity of Buit, Tennessee, on or about 4 June 1943, did, in the vicinity of Hyder, Arizona, on or about 12 July 1943, break his said arrest, before he was set at liberty by proper authority.

He pleaded guilty to Charge I and both Specifications thereunder, not guilty to Charge II and the Specification thereunder and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution, in brief, is as follows:

The morning reports of Company H, 322nd Infantry, for May, June and July, 1943, were identified by First Sergeant Britton Hoskins, who read from them and testified they showed the accused as AWOL from 30 April to 19 May 1943 and also from 12 July to 24 July 1943, as alleged in Specifications 1 and 2, under Charge I, to which the accused pleaded guilty (R. 6-6a).

It was stipulated by all parties that on 2 May 1943 Major Chester A. Lively received a note from Lieutenant Colonel Gebert stating that the accused, umpire for the cannon company, had been missing since 30 April; this had been reported to Colonel L. H. Caruthers, chief umpire, and a replacement requested. On 15 May Major Lively received a telegram from the accused from Nashville, saying he would report back on 14 May; upon his return on 25 May Major Lively drove him in to Lebanon, and reported to Colonel Caruthers (R. 6c).

It was also stipulated that Lieutenant Colonel Henry W. McGowen would testify that on 4 June 1943 he informed the accused that he was under "technical arrest", on verbal orders of Colonel B. W. Venable; to save embarrassment and to facilitate his performance of normal duties he would not be placed under guard but would be denied pass privileges. The accused, having stated that he would like to get his wife located and transact necessary business at Lebanon, was told it was impossible then, but would be worked out at the proper time. When on 1 July the accused again applied to go to Lebanon, he was again reminded that he was under "technical arrest" and could only go by special permission, with necessary restrictions. The order placing the accused under "technical arrest" had never been terminated (R. 6d, 6e).

The accused was notified on 1 July 1943 by Captain Harry F. Dennis, that he was under arrest but was not present for duty on 12 July when a search was made for him. The accused was considered by Captain Dennis as a very able officer but was under an emotional strain from family

troubles (R. 6b-6c).

4. The defense introduced no evidence except that of the accused, who, at his own election, after his rights as a witness had been explained to him, testified under oath as follows: On 9 December 1942, having graduated from Cannon Class No. 2, at Fort Benning, he went to town to celebrate and contracted a venereal disease; following which he was court-martialed for failure to take a prophylaxis, and sentenced to be dismissed. Although the sentence was ultimately disapproved, the proceedings involved the accused in great mental strain, and all the derelictions charged in the instant case occurred during the time he was waiting for the final decision in the previous one. He believed dismissal was too severe in that case; all his life he had been a soldier, and wanted to continue to be one. It was all he knew. As he understood "technical arrest", he thought that when he was told he had received a call from his wife at Phoenix, Arizona, his arrest was temporarily suspended. Before that, he had understood that he was under "technical arrest", but was to continue performing his duties. He had always requested of his company commander the privilege of going into town before he had done so; but the reason he did so was not because he was under arrest. After he received the message about the phone call, Captain Dennis gave him permission to make the call. It was Sunday, and he thought the only place he could do this was from the village, so he requested a pass from Captain Dennis, told him where he was going, and was furnished a driver. After he talked to his wife, who was in Phoenix alone, he did not return, but went into town on Sunday night, saw her on Monday morning down at Gile Bend, and took her into Yuma. When Captain Dennis gave him permission to make the phone call he did not remind the accused that he was under arrest, or tell him that he must report back at once; he guessed Captain Dennis took that for granted. He was placed in technical arrest on 4 June; after leaving the regiment on 12 July, he returned on 24 July (R. 6d-6f).

5. Specifications 1 and 2, Charge I, allege absence without leave; the Specification, Charge II alleges breach of arrest. The pleas of guilty to Charge I and its Specifications are fully corroborated by the uncontradicted evidence, which also establishes the breach of arrest alleged in the Specification, Charge II. The accused's testimony, in confession and avoidance that, at the time he broke it, he thought his arrest had been temporarily suspended, presents no reasonable basis for such a misconception. The evidence establishes the commission by the accused of all the offenses charged.

6. Records of the War Department show the accused is 28 years of age, with enlisted service from 6 March 1934 to 15 October 1942; and that on 16 October 1942 he was appointed temporary second lieutenant, Army

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of the United States.

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. Dismissal is authorized upon conviction of violation of Article of War 61 or 69.

Shasib Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.C., 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 Second Lieutenant Raymond L. Chambers (O-1296812), 322nd 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 be confirmed and carried into execution.

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



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

3 Incls.

Incl 1 - Record of trial.

Incl 2 - Dft. of ltr. for
sig. Sec. of War.

Incl 3 - Form of Executive
action.

(Sentence confirmed. G.C.M.O. 331, 28 Oct 1943)



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

(165)

8 SEP 1943

SPJGH
CM 239432

UNITED STATES)

v.)

Second Lieutenant HOYT C.
GRIFFIN (O-1542239),
Medical Administrative
Corps.)

87TH INFANTRY DIVISION

Trial by G.C.M., convened
at Camp McCain, Mississippi,
10 August 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Hoyt C. Griffin, 312th Medical Battalion did on February 7, 1943 at Marion, Arkansas commit the crime of bigamy by marrying one Catherine Donald of Memphis, Tennessee while he, the said Hoyt C. Griffin was married at that time to one Thelma Griffin, which marriage was on said February 7, 1943 valid and subsisting.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by general court-martial of absence without leave for five days was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution consists entirely of signed stipulations and other documents and is substantially as follows:

It was stipulated that accused was married to Thelma R. Griffin on 19 June 1935 in Henderson County, Illinois; that such marriage never had been terminated by divorce or annulment and that Thelma R. Griffin is still alive; and that on 7 February 1943, at Marion, Arkansas, accused married Catherine Donald Griffin. Two marriage licenses were received in evidence, one showing the marriage of accused on 19 June 1935 to Thelma R. Caparoon and the other showing his marriage on 7 February 1943 to "Katherine" Donald of Centerville, Mississippi (R. 6a-6b; Exs. A, B, C and D).

4. For the defense Lieutenant Colonel James P. Healey and Captain Samuel Carriere, who had known accused for six months and three months respectively, testified that the work of accused as an officer was excellent. At the time of the trial accused was assigned as mess officer of his company. He also taught classes in medical aid, gave instruction in infantry drill, took the men out on marches and over the obstacle course and gave them conditioning exercises (R. 6b-6e).

Accused testified that he enlisted in the National Guard in April 1939 and entered upon active duty in that organization in December 1940. He went to Fort Dix in December 1941, and overseas to North Ireland in January 1942. After successive promotions to Corporal, Staff Sergeant, Technical Sergeant and Master Sergeant, accused received an appointment to Officer Candidate School in July 1942. He returned from Ireland to the United States, attended the school, was commissioned second lieutenant and assigned to the 312th Medical Battalion, 87th Division. He was appointed Personnel Adjutant, subsequently was re-assigned to the Division Surgeon's Office, and worked there until he was transferred back to the 312th Medical Battalion. He had also worked in a Casual Battalion, processing and administering "shots" to casualties. His work was mostly administrative (R. 6e-6g).

Accused further testified that proceedings had been instituted for the annulment of his "alleged last marriage" and the date set for the hearing was 17 August 1943. He wanted the proceedings to go through. He had received a copy of the bill for annulment filed in Shelby County, Tennessee, in which Catherine "Donall" Griffin was named as the complainant. The bill alleged that accused married the complainant on 7 February 1943, and that he was then already married by a valid and

subsisting marriage to "Telma" Griffin. At the request of an attorney, accused wrote and signed a statement to the effect that the allegations of the bill were "the whole truth" (R. 6g-6i; Exs. E and F).

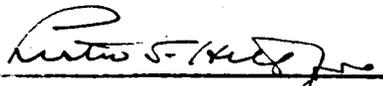
Upon examination by the court accused stated that when he "joined the armed forces" in 1939 he and his wife Thelma R. Griffin were separated and that he had ceased to live with her "about 7 months prior to 1939". When he was asked whether, upon his return from overseas to attend Officer Candidate School he had renewed his relationship with his "original wife", accused replied "I do not believe I will answer that, sir" (R. 6i-6j).

5. It clearly appears from the stipulations and other documents received in evidence, and from the admissions of accused in his testimony at the trial, that accused was legally married to Thelma Griffin, and while she was still living and their marriage had not been terminated by divorce or annulment, contracted a bigamous marriage with Catherine Donald as alleged in the Specification of the Charge.

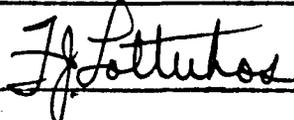
6. Careful consideration has been given to a letter dated 31 August 1943 to The Judge Advocate General from Mrs. Hoyt C. Griffin, Morning Sun, Iowa, the lawful wife of accused, in which she requested clemency for her sake and that of her four year old son.

7. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 10 February 1941; appointed temporary second lieutenant, Medical Administrative Corps, Army of the United States, and active duty, 25 November 1942.

8. 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 of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

, Judge Advocate

(Sick) _____, Judge Advocate

, Judge Advocate

(168)

1st Ind.

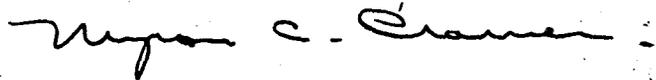
War Department, J.A.G.O., 10 SEP 1943

- 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 Hoyt C. Griffin (O-1542239), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused, while his lawful wife was still living, unlawfully married another woman. I recommend that the sentence to dismissal be confirmed and carried into execution.

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



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

3 Incls.

Incl.1- Record of trial.

Incl.2- Drft. ltr. for sig.

Sec. of War.

Incl.3- Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 317, 22 Oct 1943)

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

SPJGN
CM 239448

10 SEP 1943

UNITED STATES)

ARMY AIR FORCES GULF COAST
TRAINING CENTER

v.)

Trial by G.C.M., convened at
San Angelo, Texas, 9 August
1943. Dismissal.

Second Lieutenant HENRY G.
PRUSSMAN (O-671174), Air
Corps, 371st Base Head-
quarters 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 Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Henry G. Prussman, Air Corps, did, at San Angelo Army Air Field, San Angelo, Texas, on or about 3 July 1943, with intent to defraud, falsely sign a certain charge sales ticket known as a "mess chit" in the following words and figures, to wit:

"GUEST CHECK

Table No.	No. Persons	Check No.	Server No.
	1	9788	W
		7-3-43	
Lunch			.50
Cream			.05
	Lt. Murphy		<u>.55"</u>

by forging the name of "Lieutenant Murphy" thereto, which said mess chit was a writing of a private nature which might operate to the prejudice of another.

And three additional Specifications, identical in form with Specification 1, alleging, in substance, that accused, at the same place and on 6 July 1943:

Specification 2: Forged signature of Lt. Ryon to mess chit No. 5748 for "Tost Milk Juice", total amount \$.35.

Specification 3: Forged signature of Lt. Murphy to mess chit No. 0151 for "Lunch" in amount of \$.50.

Specification 4: Forged signature of Lt. Wood to mess chit No. 20407 for "5 Cigars" in amount of \$.25.

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

3. The evidence for the prosecution shows that at the time of the trial, and continuously prior thereto from an earlier date than that of the first alleged offense, the Officers' Mess and the Officers' Club at the accused's station were operated as a single unit by the same management, both being "officially termed Officers Mess"; Captain Percy R. Perry was the officer in charge; Mrs. Kathleen Isaacs was cashier; and Will Earl, a bartender. Officers patronizing either mess or club were permitted to sign sales tickets, known as "chits", for their purchases, and these chits constituted vouchers, on the basis

of which the officers signing them were subsequently billed for their purchases. As expressed in Captain Perry's testimony, "They represent money and are the same as money" (R. 1, 2, 4, 5).

During the lunch hour, on 6 July 1943, while Mrs. Isaacs was on duty as cashier in the mess hall, charged among other responsibilities, with making sure all mess chits were properly signed - looking out "for any forged tickets or any irregularity along that line" - she saw the accused sign "Lt. Murphy" on the chit for his fifty-cent lunch. "I knew both Lieutenants Murphy", she testified, "and he was not one of them. I sent for Captain Perry". She watched the accused leave the mess and enter the club; when Captain Perry arrived, a few minutes later, he accompanied Mrs. Isaacs to the club where they found the accused standing at the cashier's window, preparatory to leaving. When he had departed, Mrs. Isaacs went to the bar, which Will Earl was tending, and inspected all tickets signed that day, withdrawing one evidencing the purchase of five nickel cigars, signed "Lt. Wood". She knew Lieutenant Wood, as well as his signature, and the signature on the chit was not his. Will Earl, who did not then know the accused's name, remembered the sale, which was the "biggest sale" he had made that day, and identified the accused as the officer who had purchased the cigars and signed the chit (R. 5-18; Exs. 1,2).

It was stipulated that First Lieutenant George S. Murphy, Jr., did not sign the fifty-five cent lunch chit dated 3 July 1943, which purports to be signed by "Lt. Murphy", nor the fifty cent lunch chit dated 6 July 1943, similarly signed in Mrs. Isaacs' presence. The only other Lieutenant Murphy stationed at the San Angelo Army Air Field was Second Lieutenant Randolph R. Murphy, who testified that he did not sign either of these chits. Both Lieutenants Murphy's signatures were introduced in corroboration of this direct evidence (R. 2-4, 27, Exs. 3-6).

Second Lieutenant W. C. Ryon testified that he did not sign the mess chit for a thirty-five cent purchase of "Tost Milk" and "Juice" dated 6 July 1943, bearing the signature "Lt. Ryon". On the same date Lieutenant Ryon did sign "W. C. Ryon BOQ" to another mess chit which was introduced in evidence, for a twenty-five cent purchase of cereal and grapefruit (R. 2, 3, 37; Ex. 7).

Second Lieutenant Wayne G. Wood testified that he had not signed the twenty-five cent chit for five cigars dated 6 July 1943, on

which Will Earl had testified the accused had written "Lt. Wood" when he purchased the cigars. Incidentally, Lieutenant Wood was absent from the post on leave on 6 July 1943 (R. 10, 12, 17, 37; Ex. 2).

Lieutenants Murphy, Ryon and Wood had none of them authorized the accused to sign their names to the chits in question or to any other written instrument (R. 28-30).

E. N. Martin, Questioned Documents Examiner for the Texas Department of Public Safety at Camp Mabry, Texas, whose experience in identifying handwriting is ample to qualify him as an expert, testified that the signatures to the chits described in the Specifications appear to be in the handwriting of the same person who had written various other duly established specimens of the accused's handwriting which, for the purpose of comparison, were introduced in evidence (R. 38-45).

4. Although the accused, in an effort to exclude the signed statement which he had made to Captain Owen D. Barker, the investigating officer, testified - in rebuttal only - that Captain Barker told him both before and after he made the statement, that by making a statement he would get his only chance for clemency and his only chance to escape a general court, Captain Barker testified that the statement was voluntary and made only after due and proper warning. The statement, admitted in evidence, recites:

"During the past several days I have been deeply worried and prior to my conference today with Capt. Owen D. Barker I had been trying to summon the courage and find the means of going to see Col. Palmer and of making a clean breast of the matter. I have been shown a mess chit dated 7-6-43 in the amount of 50 cents for lunch, numbered 0151. I signed this mess chit 'Lt. Murphy' and handed it to the young lady at the desk by the west door of the north wing of the mess hall around 1 o'clock p.m. and walked over to the Officers Club where I signed 'Lt. Wood' on a check of the same date numbered 20407 for 5 cigars, 25 cents. Capt. Perry followed me over and asked me about the matter and went with me to see Lt. Col. Carr. I was so taken aback that I did not know what to do. I regret that I was not frank with Col. Carr. I had been signing

the names of other officers to mess chits occasionally for a period of about three months, including Lt. Murphy, Ross, Ryon, and Wood. It is hard to explain how I started doing this and I know any explanation I might make would not appear adequate, nor do I want to appear to try to excuse my conduct. I have never before been guilty of such a weakness and I am positive that I have learned my lesson to the extent that it will never happen again whatever may be the consequence of what I have done. I have worked hard at the job of trying to do my job in the army and hope it is possible that, whatever punishment may be given me, I may be allowed to continue to use what I have learned in the capacity I have been trained for. I would like an opportunity, to see Col. Palmer so that I may personally present my apology to him and to the other Officers involved. I do not feel I am in a position to ask for clemency but I do hope and pray that whatever punishment may be given, I may be allowed to continue in my work which is the greatest interest I have in life.

"I understand that I did not have to make this statement and that it may be considered by Higher authority in determining what my punishment should be and that if I am required to stand trial the statement may be read in evidence against me at the trial. I have read over this statement after dictating it and it is my own free and voluntary statement made by me without being influenced by anything said to me by the officer who interviewed me or by any one else" (R. 45-50; Ex. 13).

5. The defense did not introduce any evidence and the accused, after being advised of his rights, elected to remain silent as to the general issue (R. 50).

6. Each of the four Specifications alleges the forgery of an officer's name on a writing of a private nature which might operate to the prejudice of another, in violation of Article of War 93.

"Forgery is the false and fraudulent making

or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice.

* * *

"The writing must be false--must purport to be what it is not.

* * *

"To constitute a forgery the instrument must on its face appear to be enforceable at law, for example, a check or note; or one which might operate to the prejudice of another, for example, a receipt. * * * the fraudulent making of a signature on a check is forgery even if there be no resemblance to the genuine signature, and the name is misspelled.

* * *

"The false writing must be made or altered with intent to defraud or injure another" (M.C.M., 1928, par. 1491, pp. 175-176).

The proof required for a conviction of forgery is:

"(a) That a certain writing was falsely made or altered as alleged; (b) that such writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (c) that it was the accused who so falsely made or altered such paper; and (d) the facts and circumstances of the case indicating the intent of the accused thereby to defraud or prejudice the right of another person.

"The instrument itself should be produced, if available. The falsity of a written instrument may be proved by calling as a witness the person whose signature was forged, and showing that he had not signed

the document himself, and that he had not authorized the accused to do so for him" (ibid).

In the instant case, all of the elements of the offense, as described in the Manual, are alleged in each of the four Specifications, and conclusively established by the proof, in the exact manner which the Manual prescribes.

7. War Department records show the accused to be 23 years of age. He enlisted at Camp Edwards, Massachusetts, 16 January 1943, for three years, extended to duration of the war, plus six months, having had service before that in the National Guard of Massachusetts from 8 February 1937 to 16 January 1941. He was an aviation cadet from 16 July 1942 to 27 January 1943, and was commissioned a second lieutenant, Air Corps, 28 January 1943.

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

Ernest L. Benson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(176)

SPJGN
CM 239448

1st Ind.

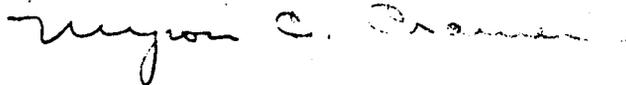
War Department, J.A.G.O., 14 SEP 1943

- 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 Henry G. Prussman (O-671174), Air Corps, 371st 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 and the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and carried into execution.

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



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

3 Incls.

Incl 1 - Record of trial.

Incl 2 - Dft. of ltr. for
sig.Sec. of War.

Incl 3 - Form of Executive
action.

(Sentence confirmed but execution suspended. G.C.M.O. 320, 23 Oct 1943)

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

(177)

9 SEP 1943

SPJGH
CM 239449

UNITED STATES)

v.)

Major Maurice M. Condon,
(O-901339), Air Corps.)

ARMY AIR FORCES GULF COAST
TRAINING CENTER

Trial by G.C.M., convened
at Randolph Field, Texas,
9 August 1943. Dismissal
and forfeiture of \$150.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Major Maurice M. Condon, Air Corps, was, enroute between Dallas, Texas, and San Antonio, Texas, on or about 23 July 1943, drunk and disorderly in uniform in a public place, to wit, a railroad car of the Missouri, Kansas and Texas Railroad and the Missouri, Kansas and Texas Railroad Depot, San Antonio, Texas.

He pleaded guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service and to forfeit one hundred fifty dollars of his pay. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

On 23 July 1943, Privates William Burkowski and Robert L. Ethridge were on duty as military police train riders on a train of the Missouri, Kansas and Texas Railroad which left Dallas about 11:40 a.m. and arrived at San Antonio about 7:40 p.m. On several occasions between 5:35 p.m. and 7:40 p.m. they observed accused in the smoking compartment of a chair car of the train. When first observed, accused had a quart bottle of whiskey and was conversing and drinking with four or five enlisted men. He had had a little too much to drink; he could stand, but his speech was incoherent. Burkowski ordered the enlisted men out of the compartment and told accused to lie down. When Ethridge saw accused, some enlisted men were putting towels on his head, and he was in no shape to take care of himself. Accused told several civilians that they could not use the toilet and to "get the God-damn hell out of there", but they knew that he had been drinking and overlooked his remarks. Accused did not say much; he was too drunk to talk. He did call Ethridge a son-of-a-bitch once or twice, but "talked very nice" to him when the latter asked if he could be of help. Part of the time, accused was asleep on the bench or on the floor of the compartment. The enlisted men were "pretty full" but were not disorderly or drunk enough to be arrested. After the train reached San Antonio, Burkowski reported the matter (R. 7-18).

When Sergeant John J. Fitzmartin (a witness for the prosecution and for the court) and Captain S. J. Maloukis, Provost Marshal at San Antonio, appeared on the scene about ten minutes later, there was no crowd, all the passengers had left the train, and accused, in uniform, was reclining on the divan in the smoking compartment of the car. He was drunk and had to be assisted from the train, through a side gate at the end of the station and into a patrol wagon. According to the driver of the patrol wagon, accused called him a "god damned G.I." and said "I'll get even with you". Sergeant Fitzmartin, however, did not recall that accused had used any profane language, but he did keep talking, and did not seem to "make any sense" (R. 19-23, 27-30; Ex. 2).

Accused was then taken to the station hospital at Randolph Field, where he was examined by First Lieutenant W. B. Boone, Medical Corps, who found that accused was "mildly drunk". His clothing was in disorder, he could not stand at first without wavering or without assistance, he was ataxic, mildly incoordinate, and showed a "staggering" or difficulty of speech. A blood test showed 2.5 milligrams of alcohol per hundred cubic centimeters of blood, which according to the usual interpretation, would indicate that accused was "between the range of

mildly drunk and drunk and disorderly". Lieutenant Boone gave accused a sedative and sent him home to get a good night's rest (R. 5-6, 19).

4. For the defense, the accused testified that he had been at Fort Worth on a cross-country flight and had intended to fly back, but on receipt of a wire from his pilot, had arranged to take the train from Fort Worth to San Antonio. He had a seat in the train but gave it up to an older woman, and then, as the train was full, he went back to the smoking compartment and remained there all the way to San Antonio. Accused had been out the night before and had a hangover. He was not drunk, but he had not felt "so good" and had not eaten any breakfast or any lunch. In the smoking compartment, he had a conversation with a civilian salesman, and as accused was feeling "pretty rocky" and had a bottle of whiskey in his suitcase, he asked the salesman to have a drink and they sat there for some time, talking and drinking whiskey. It was very hot, and accused must have fallen asleep, because he remembered nothing from that time until he was awakened by the Provost Marshal at San Antonio. As far as he remembered, he did not offer a drink to any enlisted men. He was all right and able to carry out his duties the next morning (R. 24-25).

Major William R. Heath, Assistant Commandant of the Student Officers Detachment at Randolph Field, testified that accused was able to carry out his duties the next morning, without any difficulty (R. 26-27).

5. The pleas of guilty and the evidence show that accused was drunk and disorderly in uniform at the time and place and under the circumstances alleged.

6. All of the members of the court signed a recommendation of clemency, stated that the experience and ability of accused would be of definite value to the Army, and recommended that that portion of the sentence adjudging dismissal be suspended.

7. The accused is 39 years of age. The records of the Office of The Adjutant General show his service as follows: Cadet, United States Military Academy, 1 July 1921 to 12 June 1926; appointed second lieutenant, Field Artillery, Regular Army, 12 June 1926; resignation accepted effective 19 September 1930; appointed temporary captain, Army of the United States, 20 March 1942; active duty, 9 April 1942; appointed major, 5 October 1942.

(180)

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Arthur S. Keed, Judge Advocate

(Sick), Judge Advocate

J. Lott, Judge Advocate

1st Ind.

War Department, J.A.G.O.,

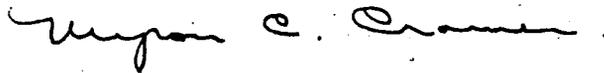
- To the Secretary of War.

14 SEP 1943

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 Maurice M. Condon (O-901339), 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. Accused was drunk and disorderly in uniform on a passenger train. All members of the court signed a statement that the experience and ability of accused would be of definite value to the Army and recommended that that portion of the sentence adjudging dismissal be suspended. I recommend that the sentence to dismissal and forfeiture of \$150 of pay be confirmed, but in view of all the circumstances that the dismissal be remitted, and that the sentence as thus modified be carried into execution.

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



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

3 Incls.

Incl.1- Record of trial.

Incl.2- Drft. ltr. for sig.
of Sec. of War.

Incl.3- Form of action.

(Sentence confirmed but dismissal remitted. G.C.M.O. 312, 15 Oct 1943)

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

(183)

SPJGN
CM 239481

8 OCT 1943

U N I T E D S T A T E S	)	SOUTHERN CALIFORNIA SECTOR
	)	WESTERN DEFENSE COMMAND
v.)	
Captain HERBERT R. WICKHAM	)	Trial by G.C.M., convened at
(O-264034), 174th Infantry.	)	Pasadena, California, 14
	)	August 1943. Dismissal.

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 Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Captain Herbert F. Wickham, 174th Infantry, did, at Recreation Center, Santa Monica, California, on or about 13 July, 1943, wrongfully strike and kick Private Clifton L. Vaughn, Company E, 174th Infantry, on his head and body, with his fists and feet.

The accused pleaded not guilty to and was found guilty of both the Charge and the Specification thereunder. He was sentenced to be dismissed the service. The reviewing authority approved the sentence

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

3. The evidence for the prosecution shows that on the night of 13 July 1943, Private Clifton L. Vaughn, Company E, 174th Infantry, the victim of the alleged attack, was arrested for being absent without leave from his organization and returned after midnight to the area of his company. There, Staff Sergeant Harold E. Carlson, Company E, 174th Infantry, attempted to force Private Vaughn to go to his own tent and upon his refusal to go, a struggle followed. During this struggle, and while Private Vaughn and Sergeant Carlson were wrestling together on the ground, the accused came upon the scene and directed Sergeant Carlson to release Vaughn. When Vaughn rose to his feet, the accused asked, "What's the matter, Vaughn?", and when Vaughn made no reply the accused struck him in the face. Thereupon Vaughn grappled with the accused and threw him to the ground, and was "half-way on top of" him when the two were pulled apart. At about this stage in the struggle, Vaughn told the accused "I wouldn't give in to you, you son of a bitch". After they had regained their feet, accused is quoted as saying "Nobody is going to call me a yellow bastard" and "I wouldn't take son of a bitch from anyone" (R. 10, 21). The accused then struck Vaughn again, causing him to fall to the ground. He then kicked Vaughn three or four times, striking him on the body, head and chest. While kicking Vaughn, the accused asserted "I will kill you or make a soldier out of you" (R. 17). The accused was also quoted as having said "This man thinks he's tough. He needs toughening up" (R. 26). At this point Sergeant Carlson stepped between the accused and Vaughn saying, "That's enough", and prevented the accused from again striking him. Vaughn, who had become unconscious, was then carried to the dispensary. His face was cut and bruised and an examination revealed that he had a fractured nose. As a result of his injuries, he was hospitalized for ten days. The accused's face was also bloody and his eyes were blackened. At the time in question, the accused appeared to be sober. Vaughn, on the other hand, appeared to be under the influence of intoxicating liquor although he was not drunk and was able to offer rather stubborn resistance both to Sergeant Carlson and to the accused. It was also shown that Vaughn had not been a good soldier and that at times he had been surly and disobedient (R. 5-10, 10-24, 25-28, 28-36, 36-37).

4. The accused testified in his own behalf that shortly after midnight on 13 July 1943, he was aroused by the charge of quarters and told that "two AWOL's" had been returned to camp. He directed that the men

be brought to him in the orderly room. When the men were not promptly brought in, he went to investigate and found two men struggling on the ground in the company street. As he bent over to recognize the men, Vaughn lashed out with his feet and kicked the accused in the stomach and ribs. The accused then ordered Sergeant Carlson, who was struggling with Vaughn, to release him and the accused assisted Vaughn to his feet. The accused then asked Vaughn "why he couldn't straighten out and act like a good soldier". He then directed Vaughn to go immediately to his quarters. Vaughn replied that he didn't have to go to his quarters and that he felt that the accused couldn't make him. Thereupon the accused struck Vaughn in the face with his fist. Vaughn immediately grasped the accused around the neck in a manner to shut off his breathing and threw him to the ground. The accused's face struck the ground and a small gash was cut over his eyes. His nose was injured and began to bleed. The accused and Vaughn rolled over several times and worked their way between two tents where it was very dark. The accused finally freed himself from Vaughn's grasp on his throat and rolled him over. The accused then took him by the hair of the head and shoved his face into the ground two or three times rather hard. The accused then got up with nobody pulling him up and again ordered Vaughn to his quarters. When he didn't get up the accused kicked him in the rear with the side of his foot. Then Sergeant Carlson and Private First Class Phillip D. Rosenberg, Medical Detachment, interceded and told the accused not to kick Vaughn any more. The accused testified that at this point he was very angry and he didn't remember whether he kicked him again or not. The accused told Rosenberg to take care of Vaughn and walked away to his quarters. The accused testified that his own clothes were bloody and his face was hurting him "quite a bit" (R. 43-48). The accused testified further that prior to the occasion in question, he had been absent from his organization attending military school and that upon his return he found that many of the men in his organization were in the practice of going absent without leave. The day before his difficulty with Vaughn, the accused had called his company together and warned them that he intended to take drastic measures by restricting the entire company for the weekend in order to put a stop to the extensive practice of some of the men in going out without leave. He asserted that he did about everything he knew and that the absence without leave situation in his company had "just about had me licked". He described Vaughn as one of the soldiers who had repeatedly gone absent without leave (R. 44-45).

On cross-examination he testified that Vaughn did not strike him before he had struck Vaughn and that he did not remember Vaughn calling him a "son of a bitch" (R. 46).

Major Perry R. Little, Executive Officer, First Battalion, 140th Infantry, testified that he had known the accused for about 22 years and that he knew that the accused had an excellent reputation in civilian life and he thought he would be classified as an excellent officer in the Army. The accused had been in the same regiment with him but never under his direct command (R. 40).

Lieutenant Colonel Wesley B. Post, Second Battalion, 174th Infantry, testified that as the accused's commanding officer, he would classify the accused as an excellent officer and would be pleased to have him again in his organization. He explained that the accused had recently returned from a course of instruction at the General Staff School, Fort Leavenworth, Kansas (R. 41).

5. The Specification alleges that the accused did, on or about 13 July 1943, "wrongfully strike and kick Private Clifton L. Vaughn * * * on his head and body, with his fists and feet". The evidence as presented by the prosecution establishes beyond a reasonable doubt that the accused wrongfully and without legal justification struck Private Vaughn both with his, the accused's, hands and feet, and justifies both the findings of guilty of the Specification and of the Charge. The conduct of the accused in striking and kicking an enlisted man under his command is clearly conduct unbecoming an officer and a gentleman in violation of Article of War 95.

6. The records of the office of The Adjutant General show that the accused is approximately 36 years of age, and that he served as an enlisted man with the Missouri National Guard from 28 October 1921 until he was commissioned a second lieutenant in that organization on 1 June 1929. He was thereafter promoted to a first lieutenant on 4 April 1934, promoted and federally recognized as a captain, Infantry, Missouri National Guard on 1 July 1940, entered upon extended active duty on 23 December 1940.

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

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

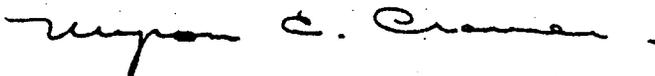
War Department, J.A.G.O., 16 OCT 1943 - To the Secretary of War.

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 Herbert R. Wickham (O-264034), 174th 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 of dismissal be confirmed but suspended during the pleasure of the President.

3. Consideration has been given to the attached letters from Honorable Bennett Champ Clark, United States Senate; Honorable Orville Zimmerman; Major Roger A. Pfaff; Mr. James A. Finch, Mr. R. P. Smith, Mr. W. P. Parker, and Charles G. Wilson, all of whom urge clemency in behalf of the accused.

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



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

10 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for
sig. Sec. of War.
- Incl 3 - Form of action
- Incl 4 - ltr. fr. Hon. Clark
- Incl 5 - Ltr. fr. Hon. Zimmerman
- Incl 6 - Ltr. fr. Major Pfaff
- Incl 7 - Ltr. fr. Mr. J. A. Finch
- Incl 8 - Ltr. fr. Mr. R. P. Smith
- Incl 9 - Ltr. fr. Mr. W. P. Parker
- Incl 10- Ltr. fr. Mr. C. G. Wilson

(Sentence confirmed but execution suspended. G.C.M.O. 360, 12 Nov 1943)

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

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SPJGN
CM 239502

13 SEP 1943

UNITED STATES)	104TH INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at
	)	Camp Adair, Oregon, 27 July
Second Lieutenant ROBERT	)	1943. Dismissal and total
E. HEERING (O-1299237),	)	forfeitures.
414th Infantry.)	

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

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

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

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

Specification: In that, Second Lieutenant Robert E. Herring, Four Hundred and Fourteenth Infantry, did, without proper leave, absent himself from his command in the regimental maneuver area near Lewisville School at Camp Adair, Oregon, from about 1845 June 6, 1943 to about 0030 June 7, 1943.

CHARGE II: Violation of the 94th Article of War.
(Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Robert E. Herring, Four Hundred and Fourteenth Infantry, did, at Camp Adair, Oregon, on or about June 10, 1943, with intent to deceive Major Robert R. Clark II, Commanding First Battalion, Four Hundred and Fourteenth Infantry, make a false official report, as follows:

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*COMPANY *D* 414TH INFANTRY
Camp Adair, Oregon

TO WHOM IT MAY CONCERN:

At 1700, June 7, 1943, Lts Herring, Doerr and Isaacs started on a reconnaissance to the AA and March Outpost positions of the 1st and 2d Platoons of Co. D. This protection was furnished for the Regiment and was the responsibility of the Company Commander to see that every gun was in position.

1730. Arrived and inspected outpost gun at vicinity of Lewisville School BM 278.

1800. Arrived and inspected gun position at vicinity of BM 300.

1845. Arrived and inspected gun position at McTimmons and County RD.

1915. Arrived and inspected gun position at vicinity of McTimmons School.

1945. Left for Lt. Doerr's gun position and only found 2 positions and the other two were not found.

2245. Started back to bivouac area and returned at 2345 and reported to Major Clark at 2400.

/s/ T. W. Isaacs
/t/ T. W. ISAACS,
2d Lt., 414th Inf

/s/ Robert E. Herring
/t/ ROBERT E. HERRING,
2d Lt., 414th Inf, *

which report when made to said Major Robert R. Clark II was known by said Second Lieutenant Robert E. Herring to be untrue in that said Second Lieutenant Robert E. Herring had absented himself from his command during all or a part of the period covered by said official report.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Charge III, guilty of the remaining Specifications, except the words and numbers *numbered respectively W-20205721 and W-20251657*, in the Specification, Charge II, and of all three Charges. He was sentenced to be dismissed the service and to forfeit

all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of the Specification, Charge II, and of Charge II, approved only so much of the findings of guilty of the Specification, Charge I, and of Charge I as involves a finding of guilty of absence without leave from about 1845 o'clock, 6 June 1943, to about 2100 o'clock, 6 June 1943, 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 afternoon of 6 June 1943 the accused became the acting company commander of Company D, 414th Infantry, which was in the field near the Lewisville School on the Camp Adair Military Reservation when the preceding company commander went on leave. The town of Salem, Oregon, is approximately 28 miles from the Lewisville School, which was also 10 miles northwest of the headquarters of the 104th Division, and the town of Salem, Oregon, was 26 miles from the headquarters in a northeasterly direction. The battalion commander, during the period the battalion was in the field, including Company D, had not given authority or permission to any of its members to visit Salem, Oregon, or to leave the maneuver area. At about 1630 o'clock on 6 June 1943, the accused, Second Lieutenant Travis W. Isaacs and Second Lieutenant Doerr, all of the same company, failed to appear at the battalion critique of the problem just completed, although a notice was sent around to all the commissioned and noncommissioned officers requiring their attendance. The battalion commander at 1800 o'clock and again at 2100 o'clock visited the quarters of Company D in an unavailing effort to locate the three officers (R. 9-11, 12-13, 17, 91-92).

Private Alford H. Hanlon, Company "D", 414th Infantry, was a "jeep" driver for the company, who on 6 June 1943 had been assigned to drive the company commander, and sometime after 1500 o'clock, while driving the accused, they encountered another company jeep in which were riding Lieutenants Doerr and Isaacs, Sergeants Earl C. Axberg and Randall B. Rauk, and Private Di Tocco all of Company "D". After some rearrangement of seating in the two jeeps, the party started out to check gun positions with the three lieutenants in the first jeep, which was driven by Private Di Tocco, and with the others following in the second jeep, which was driven by Private Hanlon. Some two or three gun positions were checked but, in searching for the third or fourth, the party became lost on the country road and eventually emerged upon the paved highway a few miles from Salem, Oregon. Proceeding into the town at a high rate of speed, the leading jeep was stopped some three miles west of Salem about 1845 o'clock by Captain Alexander G. Eagle, 104th Infantry Division Headquarters, who was driving in the same direction and to whom the accused was unable to make an explanation for the excessive speed. After procuring sandwiches and coffee at a drive-in stand located in the western outskirts of Salem, the party went to Lieutenant Doerr's apartment a

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short distance away. Lieutenant Doerr had expressed a feeling of illness and the entire party remained there some 30 to 45 minutes before departing for the return trip to the camp. On the way back the party again became lost but with the assistance of some local civilian travellers arrived shortly before 2400 o'clock. The accused reported their return to the battalion commander and explained that the delay had been occasioned because they had lost their way and the vehicles had been "stuck", without mentioning the visit to Lieutenant Doerr's apartment (R. 21-22, 23-28, 28-35, 35-39, 68-70, 15).

At that time the battalion commander was satisfied and did not then, or subsequently, ask the accused for a written report but a few days later Captain Elmer H. Bauer, Commander of Company "D", who on 6 June 1943 had been on other duty, was requested by the battalion commander to investigate and report on the matter to him. The purported statement, which is incorporated in Specification 2, Charge III, was delivered to the battalion commander by Captain Bauer about 11 June 1943. The statement had been typed by the company clerk shortly after 6 June 1943 from a written memorandum given him by the accused. However, the clerk did not see the accused sign it and refused to identify the statement offered as Exhibit "A" as the identical one typed by him. Captain John L. Welbourn, S-1, First Battalion, 414th Infantry, found the statement marked Exhibit "A", upon his desk at Battalion Headquarters about 1030 o'clock on the morning of 10 June 1943 which was a proper method for an officer to use in turning in a report, although ordinarily it would be handed to the adjutant or personnel officer (R. 16, 18-20, Ex. "A", 57-59, 59-60).

The evidence for the prosecution concerning the genuineness of accused's signature included the testimony of an enlisted clerk in the personnel office of the 414th Regiment to the effect that about 8 July 1943 at the instruction of his superior officer, he took an officer's pay voucher to the barracks of the accused, who signed it in his presence, that he returned the signed voucher to his superior, but that he was unable to identify it, Exhibit "B", as the identical one signed by the accused, although there was "only one voucher made per month for an officer." The witness also testified that he at that time did not know the accused but that, when he arrived at the barracks, he asked for the accused, that an orderly took him to a bunk where a man was lying down whom he now recognized as the accused, and that the man on the bunk signed the pay voucher. The clerk's superior officer testified that only one pay voucher per officer per month was drawn, that it was not possible for an officer to be given more than "one blank for signature", that there was no additional pay voucher for the accused, for July, 1943, but that he "didn't say Lieutenant Herring signed that document". The assistant finance officer of the division identified the War Department

signature card of the accused, Exhibit "C", and testified that it had been received in due course of regular business shortly after accused reported to the division, that it was kept in the division finance office as part of its records, that the card, since its receipt, had been used as the basis for comparing the signature of the accused, that the signature of accused on the pay voucher (Ex. "B") when compared with the signature on the signature card would warrant payment of the voucher, but he had not seen the accused sign the signature card. A sergeant, who was chief clerk of the officers' section in the personnel division, identified the accused's "personnel information sheet", which was marked Exhibit "D", and testified that all officers, when reporting to the division for the first time, filed it and that the accused's 201 file showed no claim by the accused for non-payment of pay vouchers. A handwriting expert identified photographic enlargements of accused's name on Exhibits A and B as being true reproductions which were marked Exhibits "X-A" and "X-B", and testified that the signatures of Robert E. Herring appearing on Exhibits "A", "B" and "C" were all written by the same person. Over the objection of the defense that the accused's signature to none of them had been proved, the court admitted all of the exhibits into evidence (R. 40-43, 53-56, 43-46, 46-50-51-52-60-64).

4. A motion for findings of not guilty to all Specifications and Charges having been overruled, the evidence for the defense as presented by the testimony of Lieutenant Isaacs, shows that on the evening of 6 June 1943 the actions of the accused were substantially the same as shown by the evidence for the prosecution. However, prior to starting into the town of Salem, Lieutenant Doerr had complained of a terrific headache and the party had become lost both before reaching the paved road leading into the town and again while attempting to return to camp. The witness had not accompanied the accused when he reported to the battalion commander that the party had returned. A few nights later, Captain Elmer H. Bauer, Commander of Company "D", told the witness and the accused "Well you and Lieutenant Herring will make a statement to me reporting where you were every hour when you left the Regimental Bivouac". The witness and the accused then contacted the battalion commander who said that he did not want a statement at all. The witness admitted his signature to the statement involved, Exhibit "A", but did not testify that the accused had signed it or to any other fact relative thereto except that he had been punished under Article of War 104 for it and the court sustained the objection of the defense to further questions concerning it for the reason that the answers to them might tend to incriminate the witness (R. 73-81).

The evidence for the defense, elicited from ten of his fellow officers, including the regimental chaplain, further shows that the accused was of excellent character, had a fine reputation, was an efficient officer, and had a good reputation for truth and veracity. It was also shown that Lieutenant Doerr became ill shortly after 6 June 1943

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from an undefined ailment, was taken to the hospital, and had not yet returned to duty, being confined to Barnes General Hospital on the date of the trial.

The defense announced that the accused had been advised of his rights and that he elected to remain silent (R. 81-92).

5. The Specification, Charge I, alleges that the accused did, "without proper leave, absent himself from his command" "* * * from about 1845 June 6, 1943 to about 0030 June 7, 1943". Only so much of the findings of guilty of the Specification of the Charge, and of the Charge, as involved a finding of guilty of absence without leave from about 1845 June 6, 1943 to about 2100 June 6, 1943 was approved. It is, therefore, necessary to determine whether the evidence was legally sufficient to support the findings of guilty thereof under applicable legal principles.

The elements of this offense and the proof required for conviction thereof are as follows:

* * * (a) That the accused absented himself from his command, * * *, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave.* (M.C.M., 1928, par. 132).

The evidence is uncontroverted that the battalion commander had not given permission or leave to the accused or to any other member of the battalion to visit Salem, Oregon, on 6 June 1943. The testimony of the battalion commander himself to this effect is clear and unchallenged. Equally as clear and unchallenged is the testimony of numerous witnesses to the effect that the accused at about 1845 o'clock on 6 June 1943, with other members of his party, had left the maneuver area, was upon the highway driving into the town of Salem, Oregon, where food was obtained and Lieutenant Doerr's apartment visited for some forty minutes before undertaking the return trip to the camp. The time elapsing during these activities was from about 1845 o'clock to about 2100 o'clock on 6 June 1943. Although the accused's departure from duty was possibly caused by Lieutenant Doerr's headache, which developed within a short time thereafter into a protracted illness requiring hospitalization, the evidence establishes beyond a reasonable doubt every element of the approved findings of guilty.

The findings of guilty of the Specification, Charge I, and of Charge I, as approved by the reviewing authority, are amply sustained by the competent evidence introduced by the prosecution as well as by the evidence presented by the defense.

6. Specification 2, Charge III, alleges that the accused did, on or about 10 June 1943 with intent to deceive his superior officer, make a false official report, as set forth in this Specification, and that this report was known by the accused to be untrue.

Notwithstanding the strenuous objection of the defense to the admission into evidence of the statement forming the foundation for the Specification, upon the contention that the genuineness of accused's signature had not been adequately established by competent evidence, it and the other exhibits relative to accused's signature were properly admitted because the authenticity of the signatures were competently and satisfactorily established. However, the proof of the mere execution of the statement does not fulfill the requirements of the proof of the commission of the offense alleged. The offense charged is that the accused, with intent to deceive Major Clark, did on or about 10 June 1943 make a false official report to Major Clark, which the accused knew to be untrue. To make a false official report encompasses not only the execution thereof but also its delivery because without delivery the full act is not consummated and, certainly, without delivery thereof no intent to deceive could arise. The only evidence offered by the prosecution in an attempt to establish the delivery of the statement is the testimony of Captain Welbourn, S-1 of the battalion, that he found it on his desk at the battalion headquarters about 10:30 o'clock on the morning of 10 June 1943 when he returned from the company orderly room. Captain Welbourn, when asked whether it was the usual procedure for officers to hand in reports by placing them on his desk, replied:

"Well the Battalion Headquarters isn't an administrative headquarters. We don't get very many reports like that but it would be proper for an officer to hand in a report in that manner. Its a normal rule it should be handed to the Adjutant or personnel and shouldn't just be left there".

The record is void of any direct evidence upon how, by whom, or upon whose authority the statement was placed upon Captain Welbourn's desk. Two men, the accused and Lieutenant Isaacs, had signed it. It had been prepared by them at the request of Captain Bauer and not Captain Welbourn. The battalion commander had told them that he did not want a statement and that it was all Captain Bauer's idea. More reasonably then, it would have been delivered, if at all, to Captain Bauer and not left upon Captain Welbourn's desk. Furthermore, two men had signed it, as above stated, and it was shown to have been in their joint possession. The evidence

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does not show whether it was placed on Captain Welbourn's desk by both of them, by one of them with the authorization and consent of the other, or by someone else, with or without the authorization of the accused, of Lieutenant Isaacs or of both of them. All of the evidence of the delivery of the statement by the accused, or by his authority or consent, is purely circumstantial. "Where circumstantial evidence is relied upon as proof of guilt, all the circumstances must be inconsistent with any reasonable hypothesis of the defendant's innocence" (Dig. Ops. JAG, 1912-40, par. 454 (82)). The evidence, therefore, does not, beyond a reasonable doubt, establish the delivery of the statement by the accused or by his authority and, failing in that essential, it ipso facto fails to establish that the intent to deceive existed, which is equally fatal to the guilty findings.

Yet another reason appears from the allegations of the Specification why the findings of guilty thereof and of Charge III cannot be sustained when viewed in the light of the evidence revealed by the record. The statement clearly recites that the actions of the accused therein stated took place on 7 June 1943. There is no substantial evidence in the record that the accused on that date did not perform the acts recited in the statement. On the contrary, all of the evidence in the record relates to the actions of the accused on 6 June 1943 concerning which the statement on its face does not purport to deal. Consequently the proof does not support the allegations of the Specification relative to the veracity of the statement's contents, which are alleged to be false, and perforce the statement was not then known by the accused to be untrue or made with intent to deceive.

The evidence for the prosecution therefore does not establish beyond a reasonable doubt every essential element of the offense alleged by Specification 2, Charge III. Consequently, in the opinion of the Board of Review the evidence is insufficient to sustain the findings of guilty of Specification 2, Charge III, and of Charge III, or to show the commission by the accused of any lesser included offense.

7. The War Department records show the accused is 30 years of age. He was inducted into the service 2 June 1941, transferred to Enlisted Reserve Corps in August, 1941, recalled to active duty in January, 1942, attended OCS at Fort Benning, Georgia, commissioned second lieutenant on 11 November 1942 and on active duty with 414th Infantry from 2 December 1942 to date.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion the record

of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, as approved by the reviewing authority; legally insufficient to support the findings of guilty of Specification 2, Charge III, and of Charge III. Dismissal is authorized upon conviction of violation of Article of War 61.

Chas. L. Bresson, Judge Advocate

Abner C. Lippcomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

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SPJGN
CM 239502

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 Robert E. Herring (O-1299237), 414th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding that the accused made a false official report (Spec. 2, Chg. III), legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a reprimand

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,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 384, 2 Dec 1943)

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

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8 SEP 1943

SPJGH
CM 239554

UNITED STATES)

v.)

Second Lieutenant PHILIP
M. HAAS (O-736189), Air
Corps.)

SECOND AIR FORCE

Trial by G.C.M., con-
vened at Geiger Field,
Washington, 11 August
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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specifications: In that Second Lieutenant Philip M. Haas, 542nd Bombardment Squadron, 383rd Bombardment Group (H), Army Air Forces, did at Army Air Base, Rapid City, South Dakota on or about May 19, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Omaha, Nebraska on or about July 11, 1943.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave", and not guilty of the Charge but guilty of a violation of the 61st Article of War. 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. In May 1943 the 542nd Bombardment Squadron, 383rd Bombardment Group was located at Army Air Base, Rapid City, South Dakota. First Lieutenant James L. Coley, Squadron Adjutant, who supervised "the work

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on the Morning Report", had some correspondence with accused, called the operations officer, asked him to get in touch with accused, called the group adjutant and asked him if the group had any knowledge of the whereabouts of accused. The operations officer said he had not heard from accused for some time and gave the approximate date when he saw accused. The group adjutant said that the group did not know where accused was and that he "must be AWOL". Lieutenant Coley told First Sergeant Robert V. Button, 542nd Bombardment Squadron "to enter the remarks and to drop Lieutenant Haas to AWOL". The morning report of 542nd Bombardment Squadron for 27 May 1943 (Ex. A) showed accused (attached) from duty to absent without leave effective 19 May, and (absent without leave) relieved from attached and assigned effective 23 May. The entry was made by "the clerk" under the supervision of Sergeant Button, who checked it. It was initialed by Lieutenant Coley and Major Kermit D. Messerschmitt. Lieutenant Coley did not have any contact with accused after the time of the entry until about the middle of July, and accused did not report in for duty at any time or telephone (R. 6-10).

On 11 July 1943 accused was apprehended in Omaha, Nebraska by First Lieutenant William A. Hayward. First Lieutenant Elnord L. Grosz returned accused from the custody of authorities at Fort Omaha, Nebraska to his organization at Geiger Field, Washington. After Lieutenant Grosz had warned accused of his rights and that anything he said might be used against him, accused admitted that he had been "AWOL from about the middle of May, 1943, until he was picked up in Omaha" (R. 11; Exs. B and C).

4. The accused testified substantially as follows:

Upon graduation from Luke Field Advanced Training School on 4 January 1943 as a fighter pilot, he was looking forward to going into combat with his associates. He was sent to Salt Lake City and then assigned to Heavy Bombardment Squadron, Walla Walla, Washington, as a co-pilot. He was disappointed, as he wanted to be a fighter pilot. He worked hard and did his best until he reached Pierre, South Dakota. At the end of his training there, he was sent back to Rapid City, while the others who had been in training with him probably went to a port of embarkation. Upon his return to Rapid City he was told by the operations officer of his squadron, the 542nd, that he would await further training as an instructor pilot. He was discouraged and restless and went through five weeks of inactivity. His mother had written him and expected him at home. Finally the day came for his "check ride". During the test

he did not do very well, and was told that he could not be accepted as first pilot material and would be returned to first phase training. That evening he went to a home about five miles from Rapid City, with friends, most of whom were flight commanders. He spent about three days there with these friends, rode, fished, had a "grand time", and did too much drinking. He then decided that since he had been inactive he would go home to see his mother and father (R. 14-15).

Accused got on the train without returning to the base, took with him only what was in his bag, went to Minneapolis and then to Chicago to see a girl who was attending Northwestern University. When he had been gone about two weeks, he went to St. Louis to visit his parents, spent five or six days there, went to Kansas City and Topeka to visit his grandparents and see old friends, and then went to Lincoln, Nebraska with his grandfather to see the uncle of accused, who was in the Army and stationed at that place. At this time accused had recovered from his despondency and desired to return to his organization. The family of accused were worried about his uncle, who had been emotionally upset since childhood. For about a week and a half accused conferred at night with an officer at Lincoln Air Base in an effort to accomplish the discharge of his uncle. At Lincoln accused met a girl, married her, and then proceeded to Omaha, on the way to Rapid City. He did not know that he could report to the Army Air Base at Lincoln. He was apprehended in Omaha on 11 July (R. 15-17).

When accused left Rapid City he was drinking more than he was accustomed to. During his absence he wore his uniform and intended to return to his organization. He was not dissatisfied with the military service. Accused thought that the cause of his absence without leave was drinking and also "an emotional upset". From 19 May to 11 July he did not submit a pay voucher. When apprehended at the Hotel Blackstone in Omaha, he was asked if he was "AWOL" and replied "Yes I am". He was then taken to Fort Omaha. Accused had never done any drinking or smoking until he was 21 years old, at the request of his father and because he was in rigid training as an athlete. He had never done any drinking to excess until after he was commissioned (R. 12-14, 17-23).

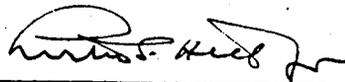
5. The morning report entry was inadmissible to prove the beginning of the absence, because Lieutenant Coley, who initialed the report, obtained his information with respect to the absence of accused by telephoning the group adjutant and the operations officer. It is clear that Lieutenant Coley based his action on information acquired from these officers, and himself had no personal knowledge of the absence (Dig. Op. JAG, 1912-30, sec. 1507; CM 235717, Bickmore).

The absence without leave for substantially the period alleged is, however, otherwise shown by the admission of accused to Lieutenant Grosz that he had been absent without leave from the middle of May 1943 until he was apprehended in Omaha on 11 July; by the testimony of Lieutenant Coley that he had no contact with accused, who did not report for duty, from the date of the morning report entry to the middle of July; and by the testimony of accused. In the opinion of the Board of Review the competent evidence is of such quantity and quality as practically to compel, in the minds of conscientious and reasonable men, the finding of guilty. Therefore, the erroneous receipt in evidence of the morning report entry showing the initial absence did not prejudice any substantial right of accused (CM 235717, Bickmore; CM 237711, Fleischer).

6. Consideration has been given to a letter dated 19 July 1943 attached to the record, from First Lieutenant William A. Hayward, who apprehended accused, wherein it is stated that Lieutenant Hayward had observed accused from 11 July to about 18 July 1943, that the letter was written without the suggestion of accused, and that clemency was recommended because of the writer's firm belief that accused would make good.

7. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 16 April 1942; appointed second lieutenant, Army of the United States, and active duty 4 January 1943.

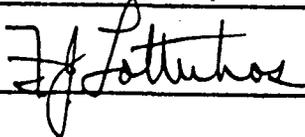
8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation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



_____, Judge Advocate

(Sick)

_____, Judge Advocate



_____, Judge Advocate

1st Ind.

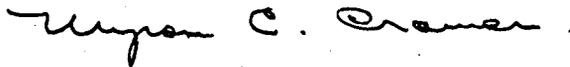
War Department, J.A.G.O., 10 SEP 1943

- 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 Philip M. Haas (O-736189), 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 was absent without leave from about 19 May to 11 July 1943. I recommend that the sentence to dismissal be confirmed and carried into execution.

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



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

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

(Sentence confirmed but execution suspended. G.C.M.O. 327, 26 Oct 1943)

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

SPJGN
CM 239576

8 OCT 1943

UNITED STATES

v.

First Lieutenant GEORGE H.
PECK (O-1287937), Air Corps.

ARMY AIR FORCES
SOUTHEAST TRAINING CENTER

Trial by G.C.M., convened at
Selman Field, Monroe, Louisiana,
26 July 1943. Dismissal.

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 93rd Article of War.

Specification: In that George H. Peck, 1st Lieutenant, Air Corps, did, at Monroe, Louisiana, on or about March 29, 1943, with intent to defraud, falsely make in its entirety, a certain check in the following words and figures, to wit:

The Ouachita National Bank 84-31
in Monroe Monroe, La. March 29, 1943.

Pay to the
order of Cash \$25.00

Twenty-five Dollars and 00/100 Dollars
19—This check is in full settlement of account as
shown hereon.

Acceptance by endorsement constitutes receipt in full.

/s/ H. L. Sigmor

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

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

Specification 1: (Finding of not guilty on former trial).

Specification 2: In that George H. Peck, 1st Lieutenant,
Air Corps, being indebted to the Frances Hotel, in
the sum of \$449.16 for services and merchandise in-
curred and money advanced while a guest of said hotel,
which amount became due and payable from on or about
February 11, 1943, did, at Monroe, Louisiana, from
on or about February 11, 1943 to date, dishonorably
fail and neglect to pay said debt.

Specification 3: In that George H. Peck, 1st Lieutenant,
Air Corps, having on or about January 12, 1943, be-
come indebted to A. K. Touchstone, doing business
as Three Way Finance Company, in the sum of \$130.00
for money loaned, and having failed without due cause
to liquidate said indebtedness, and having on or
about February 12, 1943 promised said Three Way
Finance Company that he would on or about March 1,
1943, pay on such indebtedness, the sum of \$57.58,
did, without due cause, at Monroe, Louisiana, on
or about March 1, 1943 dishonorably fail to keep
said promise.

Specification 4: (Disapproved by the reviewing authority).

Specification 5: (Disapproved by reviewing authority).

Specification 6: (Disapproved by reviewing authority).

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

Specification: In that George H. Peck, 1st Lieutenant, Air Corps, did at Selman Field, Monroe, Louisiana, on or about March 15, 1943, borrow from Frank J. Zigmont, Private, 922nd Guard Squadron, Selman Field, Monroe, Louisiana, an enlisted man under his immediate command, the sum of sixty dollars (\$60.00).

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 4, 5 and 6, Charge II, 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 7 October 1942, the accused and his wife registered in the Hotel Frances, Monroe, Louisiana, where he had formerly resided for some time. During his former residence there he had kept his account current and upon leaving had paid his account in full. From 7 October 1942 until 31 March 1943, when he left by request, he had incurred a bill of \$1085.34 for room rent, telephone and telegraph charges, laundry service, cafe purchases and cash advances upon which he had paid the sum of \$645 on various occasions. The last payment was in the sum of \$130 on 11 February 1943. Since this latter date no further payment had been made notwithstanding repeated requests therefor and numerous promises by the accused to comply therewith. The balance of \$440.34 was still due and unpaid (R. 18-21).

On 12 January 1943 the accused borrowed \$130 from the Three Way Finance Company, repayable in five monthly installments of \$25.79 each, commencing on 12 February 1943. At the time the loan was made, the accused indicated to the manager of the finance company that he intended to use the money to pay house rent in advance. The accused did not pay the first installment when it matured but promised the manager of the company to pay two installments on 1 March 1943 which promise was not performed. The accused promised to come to the company's office on 10 March 1943 but failed to do so. In response, however, to another telephone call on 11 March 1943, he appeared at the office and

offered to pay \$10 on the loan which payment was refused but his account was renewed as of that date upon his promise to report to the office again on 13 March 1943 and to pay two installments on 20 March 1943. The accused did not keep these promises but subsequently a Major Baker paid the account in full by making two payments, \$102.67 on 5 May 1943 and the balance of \$45.98 on 3 June 1943 (R. 21-23).

Private Frank J. Zigmont, 922nd Guard Squadron, who had testified at the former trial, was at the time of the instant trial, on furlough. The defense, however, interposed no objection to the action of the court reporter in reading into evidence the former testimony of Private Zigmont, which shows that about 15 March 1943, the accused, who was then gunnery instructor of his organization, borrowed \$60 from Private Zigmont which was to be repaid at the end of the month. The money was not repaid as agreed, and Private Zigmont did not approach the accused at any time to request payment, but the loan was repaid either in the first week of April or May 1943, in cash, delivered by Major Baker (R. 23-25).

On or about 29 March 1943, the accused drew a check on the Ouachita National Bank in Monroe, Louisiana, for cash in the sum of \$25, signed it with the fictitious name of "H. L. Sigmor", endorsed it with his own signature, and cashed it at the Selman Field Exchange. The check was dishonored by the bank which returned it to the exchange with the notation thereon of "Unable to locate account". The signature on the check of "H. L. Sigmor" was shown to be in the accused's handwriting by the testimony of a handwriting expert, and the cashier of the bank testified that neither the accused nor "H. L. Sigmor" had an account in the bank on or about 29 March 1943 or at any other time. The investigating officer testified that, during the investigation and after the accused had been fully apprised of the Charges and Specifications and of his rights to speak or remain silent, the accused orally admitted signing "H. L. Sigmor" to the check and that the Charges and Specifications were true. The accused then signed a sworn statement admitting that the Charges and Specifications were true and correct which was admitted into evidence over the belated objection of the defense that it was not a confession under the true meaning of the word (R. 7-9, 9-11, 12, 15; Exs. 1-4).

4. After the prosecution had rested, the defense moved for a finding of not guilty of all Specifications, Charge II, and Charge II, asserting that there was an insufficiency of evidence to establish a dishonorable failure to pay the debts in question. This motion was,

however, denied and the accused, after having been advised of his rights relative to testifying or remaining silent, elected to testify. He testified that in the latter part of April 1943, he was called before Colonel Naiden and Major Baker. It was suggested that he retain only \$20 out of his monthly pay of about \$285 and permit Major Baker to distribute the balance of about \$265 to his creditors until all of his obligations were paid. To this suggestion he readily agreed and all of his debts were thereafter paid except the hotel bill which would have been reduced materially by a payment, except for the fact that the delivery of his last check for June 1943, had been delayed. He had lived at the Hotel Frances from 15 August 1942 until about 2 October 1942 when he checked out after paying his bill in full. He had endorsed his checks for April, May and June 1943 to Major Baker who allowed him \$20 from each, and distributed the balance to his creditors. He had discontinued deductions for insurance and bonds in order to accelerate the liquidation of his debts. The charges had been preferred on 19 May 1943, since which date he had not been off the limits of the field (R. 26-29).

A former commanding officer of the accused, by deposition, testified that he rated the accused "superior" for military knowledge and efficiency and as a trainer and leader of small units of enlisted men. Certified copies of accused's record in Officer Candidate School, showing him second in leadership out of a class of 248, and three efficiency ratings from 1 October 1942 to 31 March 1943 showing ratings of "Superior", "Very Satisfactory" and "Excellent", respectively, were introduced into evidence (R. 29; Exs. A-E).

5. The Specification, Charge I, alleges that the accused at Monroe, Louisiana, on or about 29 March 1943 "with intent to defraud, falsely" made in its entirety the described check "which said check was a writing of a private nature, which might operate to the prejudice of another". The offense charged thereby is that of forgery which is defined as:

"* * * the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice.

* * *
 "The writing must be false -- must purport to be what it is not. * * * Forgery may also be committed by signing a fictitious name, as where a person makes a check payable to himself as drawee and signs it with a fictitious name as drawer" (M.C.M., 1928, par. 149j).

The evidence, when measured by the foregoing legal principles, establishes the guilt of the accused of the offense charged beyond a reasonable doubt. The testimony of the investigating officer, the handwriting expert and the party cashing the check, even without the aid of the accused's written and sworn admission, conclusively shows that the accused made the instrument in its entirety. The testimony of these witnesses and the evidence furnished by the check itself amply corroborates the written and sworn admission. The evidence is, likewise, conclusive and uncontradicted that the accused cashed the check, received the money in the face amount thereof, and that he did not have an account at the bank upon which it was drawn either in his own name or the fictitious name used. The prosecution, therefore, adduced competent evidence to establish, beyond a reasonable doubt, every element of the offense alleged by the Specification, Charge I, and legally sustains, therefore, the findings of guilty of the Specification, Charge I and of Charge I.

6. Specifications 2 and 3, Charge II, allege that the accused, during specified periods, dishonorably failed and neglected to pay two separate debts, one in the amount of \$449.16 due the Frances Hotel and the other in the amount of \$130 due the Three Way Finance Company. The offenses are charged in violation of Article of War 95 and the following authorities are, therefore, controlling:

"The mere failure by an officer to keep his promise to pay a debt is not a dishonorable act in violation of A.W. 95 unless the promise to pay is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment. C.M. 220760 (1942)." (Bull. JAG, Vol. I (1942), par. 453 (13), p. 22).

"An officer was charged with 'dishonorably' failing to meet his obligations and to keep a promise to meet them, in violation of A.W. 95. The court found, by substitution, that accused 'wrongfully' failed to meet his obligations and to keep the promise in violation of A.W. 96. Held: Such findings are legally insufficient to support a conviction. The failure of an officer to pay a pecuniary obligation or to keep a promise to do so is not a military offense unless characterized by dishonorable conduct, such as deceit or a fraudulent design to evade payment. C.M. 221833 (1942)." (Idem., p. 106).

"Accused was found guilty of dishonorable failure and neglect to pay two promissory notes owed by him and failure to keep a promise to pay another note, in violation of AW 95. There was evidence that accused was financially unable to meet all his debts, his income in the Army being much smaller than it had been in civilian life, but that he could have made substantial partial payments on the notes in question. Held: The record is legally sufficient to support the findings of guilty. Failure by accused to meet his obligations to the extent his income permitted was dishonorable. C.M. 228894 (1943)." (Bull. JAG (1943), par. 453 (13), p. 64).

Applying these principles to the evidence adduced it is apparent that the conduct of the accused toward the two debts in question does not reflect either a fraudulent purpose or a deceitful design to evade payment. The evidence, on the contrary, reveals that although the accused had become entangled with financial obligations with various creditors over and above his present ability to meet such obligations, currently, he had, upon realizing his financial condition, been making an honest effort to discharge all his debts. On 11 March 1943 he offered a partial payment to the finance company which was refused. Subsequently, on 31 March 1943, he was requested to move out of the hotel. In the latter part of the next month, by agreement, Major Baker, under the supervision of Colonel Naiden, undertook the liquidation of accused's debts by distributing among his creditors his monthly pay, less the sum of \$20 which he was permitted to retain. In this fashion all of his debts had been paid prior to the instant trial except the hotel bill which had not been reduced because Major Baker had made no payment thereon as the delivery of the accused's last pay check had been delayed. These facts do not establish beyond a reasonable doubt that the accused "dishonorably" neglected or failed to pay his debts. In view of these facts, the admissions contained in the accused's sworn and written statement that he had read all the Charges and Specifications and that they are true and correct, are manifestly insufficient to supply the necessary evidence of a deceitful purpose and a fraudulent design. The evidence, therefore, is insufficient to support the findings of guilty of Specifications 2 and 3, Charge II, and of Charge II.

7. The Specification, Charge III, alleges that the accused on or about 15 March 1943, at Selman Field, Monroe, Louisiana, borrowed the sum of \$60 from an enlisted man under his immediate command. The offense alleged is purely a military one and the following authorities are controlling:

"The act of an officer in borrowing money from noncommissioned officers of his organization is conduct which is clearly prejudicial to good order and military discipline within the meaning of A.W. 96. CM 221833 (1942)." (Bull. JAG (1942), par. 454 (19), p. 106) (See also CM 117782 (1918) and CM 130248 (1919), Dig. Ops. JAG, 1912-40, par. 454 (19)).

The testimony of Private Frank J. Zigmont at the former trial was read into evidence without objection by the defense, and is corroborated by proven admissions made by the accused in his written and sworn statement. This testimony conclusively establishes that the accused on or about 15 March 1943 borrowed the sum of \$60 from the witness, who was an enlisted man in the same organization. Consequently, the prosecution adduced competent evidence of every element of the offense charged by the Specification, Charge II, ample beyond a reasonable doubt to support the findings of guilty of the Specification, Charge III, and of Charge III.

8. The accused is about 36 years old. The records of the War Department show that he was inducted on 7 March 1941 at Camp Upton, New York, that he was honorably discharged on 13 October 1941 as being over 28 years of age and placed in the Enlisted Reserve Corps, that he was recalled to active duty on 27 January 1942 and served until 15 July 1942 when he was discharged to accept a commission as a second lieutenant on 16 July 1942, that since such latter date he has been on active duty as an officer, and that on 10 December 1942 he was promoted to first lieutenant.

9. The court was legally constituted. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge II and Charge II; legally sufficient to support the findings of guilty of Charge I and its Specification and Charge III and its Specification; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96.

Abner E. Lifecant, Judge Advocate.

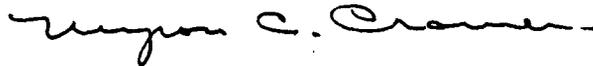
Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 OCT 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 George H. Peck (O-1287937), Air Corps.
2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of dishonorably failing and neglecting to pay an indebtedness of \$449.16 and of failing to keep a promise to make a payment of \$57.58 on a loan of \$130 (Specs. 2, 3, Chg. II and Chg. II); legally sufficient to support the findings of guilty of fraudulently making a check in the sum of \$25, in violation of Article of War 93 (Chg. I and its Spec.), and of borrowing \$60 from an enlisted man, in violation of Article of War 96 (Chg. III and its Spec.), legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and carried into execution.
3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should such action meet with approval.



Myron C. Cramer,
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.

(Findings of guilty of Specifications 2 and 3, Charge II, and
Charge II, disapproved. Sentence confirmed.
G.C.M.O. 372, 15 Nov 1943)

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

(215)

SPJGN
CM 239609

13 SEP 1943

UNITED STATES)

v.)

Second Lieutenant FRANCIS
O. MULROY (O-1317188), 289th
Infantry.)

75TH INFANTRY DIVISION

Trial by G.C.M., convened at
Fort Leonard Wood, Missouri,
19 August 1943. Dismissal,
total forfeitures and confine-
ment for five (5) years.

OPINION of the BOARD OF REVIEW
GRESSION, 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 Second Lieutenant Francis Mulroy, Company M, 289th Infantry, did, without proper leave, absent himself from his organization and station at Fort Leonard Wood, Missouri from about 2 August 1943 to about 6 August 1943.

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

Specification 1: In that Second Lieutenant Francis Mulroy, Company M, 289th Infantry, did, at Fort Leonard Wood, Missouri, on or about 28 July 1943, wrongfully strike Private William M. Sickler, Company M, 289th Infantry, on the face with his open hand.

Specification 2: In that Second Lieutenant Francis Mulroy, Company M, 289th Infantry, did, at Fort Leonard Wood, Missouri, on or about 28 July 1943, wrongfully strike Private William M. Sickler, Company M, 289th Infantry, on the head with his fist.

(216)

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

Specification 1: In that Second Lieutenant Francis Mulroy, Company M, 289th Infantry, did, at Fort Leonard Wood, Missouri, on or about 28 July 1943, wrongfully strike Private William M. Sickler, Company M, 289th Infantry, on the face with his open hand.

Specification 2: In that Second Lieutenant Francis Mulroy, Company M, 289th Infantry, did, at Fort Leonard Wood, Missouri, on or about 28 July 1943, wrongfully strike Private William M. Sickler, Company M, 289th Infantry, on the head with his fist.

He pleaded guilty to Charge I and the Specification thereunder and to Charge III and its Specifications, and not guilty to Charge II and its Specifications, and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five (5) 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 First Lieutenant Robert D. Moore, commanding Company M, 289th Infantry, of which organization the accused was mortar platoon leader, was on leave on 2 August 1943. On his return the following day, Lieutenant Moore found the accused absent. He next saw him on 6 August 1943, when the accused stated, with reference to his absence, that he had a drink too much, and did not realize what he was doing when he left. The Company M morning report, of which a properly authenticated extract copy was introduced in evidence, shows by entry dated 9 August 1943, that the accused was absent without leave from 2 August 1943 to 6 August 1943 (R. 7-9).

On 28 July 1943, Private William M. Sickler, a member of the accused's company, was washing dishes in the company kitchen when the accused entered. Private Sickler came to attention, the accused walked over, asked him some questions, then slapped him on the left cheek with his open right hand, and told him to report after he had finished in the kitchen. Private Sickler reported, and the accused struck him again, this time with his fist. In the kitchen the accused asked Sickler if he had written a letter to the general, but Sickler refused to answer. This was after supper, and there were six or seven persons present; Sickler was standing at attention and did not endeavor to strike the accused in return (R. 9-13).

According to Privates Harold Truswell and Fred L. Clausen, they and

Private Sickler were in the mess hall of Company M, when the accused walked into the kitchen, and, after a few words with Private Sickler, slapped him with his open hand on the left side of his face. The accused had asked Sickler about writing a letter to the general, then if he wanted to fight it out, man to man; Sickler had replied in the negative. After he was struck, Sickler remained at attention (R. 13-17).

When Private Sickler had finished in the mess hall, he started toward the orderly room. The accused called to him from between the two barracks. Sickler came to attention and was asked some more questions. When he hesitated, and then refused to relate the contents of the letter, the accused struck him just once with his clenched fist, knocking his helmet liner to the ground. Meanwhile Second Lieutenant Christopher Kilmer, of the same company, observing the accused and Private Sickler in conversation, had joined them "to see what was being said". According to Lieutenant Kilmer, the accused was endeavoring to find out what Sickler had written to the general. Sickler answered evasively; and the accused hit his helmet liner with closed fist just once, which scared Sickler a little but did not knock him to the ground. Sickler had neither spoken nor acted in a threatening manner. There were about twenty-five men in sight, so Lieutenant Kilmer suggested to the accused who was not drunk and had not been drinking that it would be a good idea to adjourn to the orderly room (R. 17-22).

4. Lieutenant Moore testified that the reputation of the accused for truth and veracity and his character were good (R. 27).

5. The accused, after his rights as a witness had been properly explained to him, was sworn and testified that on 28 July 1943, after supper, he met an officer who asked him if he knew about an investigation relative to the sale of passes and privileges in the accused's platoon. The accused replied he knew nothing of it, but would endeavor to find out. Having ascertained that the investigation resulted from a letter written by Private Sickler to the general, the accused went to the mess hall where he found Sickler washing dishes, and asked him if he had written the letter. At first Sickler refused to answer, but then said that he had. Asked by the accused what were the contents of the letter, Sickler stated he did not remember, whereupon the accused, being quite angry, slapped him across the face with his left hand, offering to remove his insignia and settle it with him, man to man; which offer Sickler refused. The accused then went back to the barracks to seek more information; he found that some of whom he inquired had heard there was such an investigation, but had no detailed knowledge of the situation involved. He then went back toward the orderly room, met Sickler in the area outside, and asked him what were the contents of the letter he had admitted writing

to the general. Sickler, again stating that he did not know what he had written, asked for a moment to collect his thoughts. The accused waited, then asked him again. Sickler said he had informed the general that, when he received a pass, it cost him a certain amount of money, which he paid to Corporal Bennett; and that Sergeant Van Meter knew of these transactions. The accused sent for Sergeant Van Meter and asked Sickler to repeat his statement to the sergeant, which he did, adding that he had already spoken to Van Meter about being able to buy off Corporal Bennett. Sergeant Van Meter said he knew nothing of any sale of passes or privileges, so the accused sent for Corporal Bennett, since he was directly accused of receiving money from Sickler. When Bennett arrived, Sickler re-stated his accusation, which Bennett characterized as a lie. The accused having become quite angry, struck Sickler with his right hand on his helmet liner, and knocked it from his head; then stepped back, and he and Lieutenant Kilmer decided it was best for him - the accused - to go to the orderly room to report the incident to the acting company commander. The accused had never been previously tried for any offense. After being fully advised of his rights, he voluntarily made a written statement to Colonel Milton C. Taylor, investigating officer, which he identified, and which was introduced in evidence, reciting substantially the same facts as the accused's testimony on the trial (R. 22-27).

6. The Specification, Charge I, alleges absence without leave for three days. The accused's plea of guilty is corroborated by competent evidence, consisting of his company commander's testimony, and his organization's morning report.

7. Specifications 1 and 2, Charge II, allege striking an enlisted man, on two distinct occasions, on 28 July 1943. The uncontradicted evidence, including the accused's own testimony, establishes the commission of both offenses as alleged. Moreover the accused pleaded guilty to identical Specifications, alleged, under Charge III, as violations of Article of War 96. The Judge Advocate General has held that there is no inconsistency in the findings of guilty, upon identical Specifications, under both Articles of War 95 and 96, where the proof supports conviction under each (CM 230222 (1943)).

"An officer has no right to punish, by assault, any offense or dereliction of duty on the part of an enlisted man. Such action constitutes an offense against military law, and charges may be preferred against the officer under either A.W. 95 or A.W. 96. 250.4 Sept. 3, 1918" (par. 453 (3), p. 341, Dig. Ops. JAG, 1912-40).

In the light of the foregoing authorities, the Board is of the opinion

that the evidence sustains the findings of guilty of both Specifications under Charge II, in violation of Article of War 95, and under Charge III in violation of Article of War 96.

8. War Department records show the accused is 22½ years of age. He was inducted 17 September 1942, discharged to accept a commission of second lieutenant, Army of the United States on 13 April 1943, and so commissioned on 14 April 1943.

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. Dismissal and such other punishment as a court may direct are authorized upon conviction of a violation of Article of War 61 or 96 and dismissal is mandatory upon conviction of a violation of Article of War 95.

Shas. B. Bresson, Judge Advocate.

Abner E. Lifscout, Judge Advocate.

Benjamin K. Sleeper, Judge Advocate.

(220)

SPJGN
CM 239609

1st Ind.

War Department, J.A.G.O.,

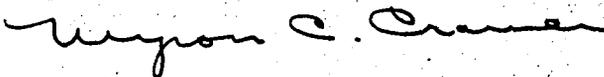
17 SEP 1943

- 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 Francis O. Mulroy (O-1317188), 289th 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 confinement and forfeitures imposed be remitted and that the execution of the sentence as thus modified be suspended during the pleasure of the President.

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



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

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

(Sentence confirmed but confinement and forfeitures remitted.
Execution suspended. G.C.M.O. 344, 9 Nov 1943)

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

14 SEP 1943

(221)

SPJGH
CM 239665

UNITED STATES)

FORT BENNING)

v.)

Trial by G.C.M., convened
at Fort Benning, Georgia,
6 August 1943. Dismissal.

Second Lieutenant GUSTAVE
E. PETERSON (O-1824360),
Army of the United States.)

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 Gustave E. Peterson, Company "I", First Parachute Training Regiment, Fort Benning, Georgia, did, without proper leave, absent himself from his organization at Fort Benning, Georgia, from about July 6, 1943 to about July 7, 1943.

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

Specification: In that Second Lieutenant Gustave E. Peterson, Company "I", First Parachute Training Regiment, Fort Benning, Georgia, did, at Fort Benning, Georgia, on or about July 10, 1943, with intent to deceive Captain William V. Zandri, Adjutant, First Parachute Training Regiment, Fort Benning, Georgia, officially state to said Captain William V. Zandri, "that he was not absent without leave on July 6 and 7, but was sick in quarters," which statement was known by the said Second Lieutenant Gustave E. Peterson to be untrue.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, forwarded the record of trial for action under the 48th Article of War, and recommended that execution of the sentence be suspended during the pleasure of the President.

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

The accused was a member of Company T, First Parachute Training Regiment. The morning report of Company T showed accused from duty to absent without leave as of 8:30 a.m., 6 July 1943, and from absent without leave to duty as of 8:30 a.m., 8 July 1943 (R. 7-8; Ex. A).

On 15 July, after Major Clyde C. Collins, the investigating officer, had advised him that he need not make a statement and that if he did it could be "held" against him, accused made a written statement (Ex. B), substantially as follows:

On 23 June accused made application for leave to be effective 28 June, which was disapproved by the company commander. Accused then filed a second application to be effective 2 July. On 29 June he was informed by "1st Sgt. Thomas" that his leave had been approved, and on 30 June made inquiry of "Sergeant Hoyle", who informed him it had been approved, read "it" off a mimeograph sheet, and stated it would not "be ready" until 1 July. After one o'clock roll call on 1 July, accused had no further duties to perform, believed his leave would come through, wanted to gain a little time, and left without obtaining the leave order. On 4 July he received a telegram stating that his leave had been disapproved. He returned as soon as possible and arrived on 8 July (R. 12-14).

On cross-examination of Major Collins, it was brought out that the officers in Company T were students taking parachute training, that some of them were disqualified students awaiting reassignment or recovery from injuries, and that the disqualified students had no duties other than to help the company commanders of other companies when requested to do so (R. 15).

On 8 July 1943, accused asked Master Sergeant William H. Hoyle, on duty as sergeant major at regimental headquarters, whether a leave had been granted him. It was the practice of Sergeant Hoyle, when an officer inquired about leave, to have the officer identify himself and then to check the files, and if leave had been granted to show the stencil

and give the paragraph and number of the special order authorizing the leave. Sergeant Hoyle informed accused that a leave had been granted to "a Lieutenant Peterson" and that he had just seen a copy of it. There was more than one Lieutenant Peterson in the regiment. All mimeograph stencils at regimental headquarters passed through Sergeant Hoyle's hands, and it was not possible that a leave could have been entered on a stencil and withdrawn prior to the time that he saw the stencil. The special order of 8 July 1943 was the only order, so far as Sergeant Hoyle knew, which granted leave to a Lieutenant Peterson. That leave had been granted in response to a telegraphic request for leave of five days beginning 7 July. No leave had been granted accused since he had been in the regiment. So far as Sergeant Hoyle knew, he had never seen accused prior to 8 July. (R. 16-20, 31).

On 10 July, Captain William V. Zandri, adjutant of the regiment, questioned accused as to the reason for his absence on 6 and 7 July 1943. Accused stated that he was not absent without leave on those days, that he had gone to his quarters and had been in his quarters on those dates due to an attack of dysentery, and that he had not thought it necessary to report to his commanding officer and go to the dispensary, because he had had a previous attack of dysentery for which he had been given some medicine. When asked whether he had reported anything at all to any officer, accused stated that he had been absent on one previous day which he had mentioned to a Major Hinkle. Captain Zandri saw all requests for leave except those handled by the assistant adjutant in his absence, and did not recall having seen a request submitted by accused. It was not possible for a leave to be typed on the mimeograph stencil and then withdrawn without the correction showing on the onion skin cushion sheet which was kept in the files. These cushion sheets were checked and there was no mention on any of them of any leave to accused (R. 7-12).

4. For the defense, First Lieutenant John P. Reidt, commanding Company T, testified that the student officers in Company T undergoing parachute training were attached to the company merely for administration, and that 40 or 45 of them were disqualified parachute students, who had no duties. Accused had been with Company T for a month or a month and a half as a disqualified parachute officer awaiting orders. He had no particular duties, but his presence was required at roll call twice daily, except on Saturday afternoon and Sunday. Lieutenant Reidt did not recall whether accused had been granted a leave while attached to Company T but did remember that accused had requested a leave of absence on one occasion. Lieutenant Reidt had disapproved that request

and turned it over to the first sergeant. Officers going on leave were supposed to sign out on the officer register. Accused did not sign out on or subsequent to 1 July 1943 (R. 21-25).

According to First Sergeant John A. Thomas, Company T, accused requested a leave of absence on or about 1 July 1943, the request was disapproved by the company commander, accused then changed the dates on the request and it was put back in the "in" basket of the company commander. Sergeant Thomas did not see the request again. It may have gone to regimental headquarters without his knowledge, as disapproved applications for leave went to the regimental adjutant for final action. Accused asked Sergeant Thomas two or three times whether the leave had been approved. Sergeant Thomas stated to accused that he had not seen the special orders and suggested that accused inquire of Sergeant Hoyle at regimental headquarters. Four or five days later a Lieutenant Roberts, who was leaving for another station, asked Sergeant Thomas if the leave had been granted and, when he was told that it had not been granted, stated that he would wire accused to return (R. 25-30).

Accused testified that he reported to Company T on 22 May 1943, was disqualified for parachute duty on 12 June, and, on 23 June, submitted a request for leave to commence on 28 June. He had previously used up his accrued time but believed that he might get leave because he was doing nothing at all in the company. When his request was disapproved, he changed the dates on the application and resubmitted it. On 30 June he checked at regimental headquarters to see if his leave had been approved. The sergeant major brought out a mimeograph stencil, read off the name of accused and the time he was to go on leave, and stated that the orders would come through the next morning or afternoon. On the morning of 1 July, the orders did not come through, but accused was so sure that they would that he asked Lieutenant Roberts to send the orders to him at New York by air mail, special delivery, and left camp immediately after the afternoon roll call. He wanted to get married and was in a great hurry to get out of camp. He had quite a few things to do before the train left and did not sign out. On 3 July, while at his home in New York, he received a telegram from Lieutenant Roberts, stating that "they couldn't find" his leave and that he was to come back as soon as possible. He left New York on Tuesday, 6 July, and reached camp on the evening of 7 July. On the morning of 8 July he learned that Lieutenant Roberts had been answering roll call for him. He had not asked Lieutenant Roberts to do this and did not wish to get Lieutenant Roberts in trouble. When called to the adjutant's office to explain the reason for his absence,

accused stated that he had not been absent without leave and had been sick in quarters, but he was excited and shocked at being booked for absence without leave, did not want to make trouble for Lieutenant Roberts about the telegram, and did not realize what he was saying. He did not see Sergeant Hoyle on 8 July or at any time from 1 July until he went to headquarters with "Major Huff", and at that time Sergeant Hoyle stated to Major Huff that accused had inquired about his leave on 30 June (R. 32-42).

Accused served two years in the Regular Army from 1935 to 1937, was a private first class and corporal, and received an honorable discharge. Later he enlisted in the National Guard and after going on active duty was a sergeant and first sergeant. He then went to Officer Candidate School and was commissioned. He valued his commission and wanted to go back to the "Tank Destroyers" (R. 35-36, 40-42; Def. Exs. A-D).

5. Sergeant Hoyle was recalled as a witness for the court and testified that he did not remember telling Major Huff that he saw any leave for accused, but that he did tell Major Huff that a leave had been granted to "a Lieutenant Peterson" (R. 30-31).

6. The evidence shows and accused admitted that he was absent without leave from his organization on 6 and 7 July 1943, that when asked the reason for his absence by the regimental adjutant on 10 July he stated that he had not been absent without leave but had been sick in quarters, and that the statement was untrue and known by accused to be untrue.

About the end of June accused applied for leave and on 1 July understood that his application had been approved. After one o'clock roll call on that day he had no further duties, the order granting his leave had not come through, he requested another officer, Lieutenant Roberts, to forward the leave order to him, and caught a train for his home in New York. When the leave order did not come through, Lieutenant Roberts, unknown to accused until after his return, answered roll call for accused. On 3 July Lieutenant Roberts, who was about to leave the station, sent a telegram to accused advising him that "they couldn't find" his leave and that he should return. When accused made the statement to the regimental adjutant that he had been sick in quarters, he wanted to protect Lieutenant Roberts against getting in trouble.

7. The accused is 27 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service

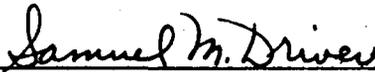
(226)

from 10 February 1941; appointed temporary second lieutenant, Army of the United States, and active duty, 11 March 1943.

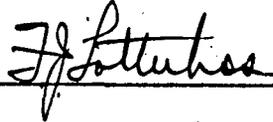
8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation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

- To the Secretary of War.

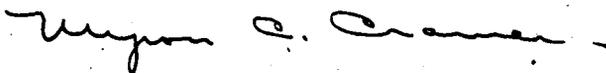
17 SEP 1943

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 Gustave E. Peterson (O-1824360), Army of the United States.

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 about two days and with intent to deceive made a false official statement that he was not absent without leave but was sick in quarters. The false statement was made to protect another officer. The reviewing authority recommended that execution of the sentence be suspended. 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 your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.



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

3 Incls.

Incl.1- Record of trial.

Incl.2- Drft. ltr. for sig.

Sec. of War.

Incl.3- Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 330, 28 Oct 1943)



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

(229)

SPJGQ
CM 239676

- 8 SEP 1943

UNITED STATES)

FORT ORD, CALIFORNIA)

v.)

Private WILLARD L. AUSTIN)
(35433857), Company F,)
2nd Battalion, 543rd)
Engineer Boat and Shore.)
Regiment.)

Trial by G.C.M., convened at
Fort Ord, California, 21
August 1943. Dishonorable
discharge and confinement
for five (5) years. Federal
Correctional Institution,
Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
ROUNDS, HEPBURN and LATTIN, 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 only question requiring consideration is the propriety of the designation of a Federal correctional institution as the place of confinement.

Confinement in a Federal reformatory or correctional institution is not authorized under letter dated February 26, 1941 (AG 253 (2-6-41) E), from The Adjutant General to all commanding generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized under Article of War 42 for assault and battery and attempt to commit sodomy, the offenses of which accused was found guilty.

3. For the reasons stated the Board of Review holds the record of trial 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 reformatory or correctional institution.

William A. Dornes, Judge Advocate.

Charles Steplum, Judge Advocate.

Norman D. Lattin, Judge Advocate.

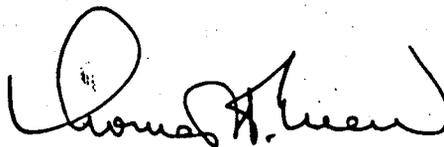
1st Ind.

War Department, J.A.G.O 9 Sep 1943 To the Commanding Officer,
Fort Ord, California.

1. In the case of Private Willard L. Austin (35433857), Company F, 2nd Battalion, 543rd Engineer Boat and Shore Regiment, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend 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 five years in a place other than a penitentiary, Federal reformatory or correctional institution. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50 $\frac{1}{2}$, and Executive Order No. 9363, 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 239676).



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

SEP 10 43 AM



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

(231)

SPJGK
CM 239688

9 OCT 1943

UNITED STATES	)	MILITARY DISTRICT OF WASHINGTON
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Belvoir, Virginia, 17
Second Lieutenant FERNANDO	)	August 1943. Dismissal.
J. PALICIO (O-1110703),)	
Corps of Engineers.)	

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that 2nd Lieutenant Fernando J. Palicio, Company "A", 939th Engineer Aviation Camouflage Battalion, Fort Belvoir, Virginia, having received a lawful command from 1st Lieutenant Henry F. Dombrowski, Company "A", 939th Engineer Aviation Camouflage Battalion, his superior officer, to remain in the company bivouac area, Fort Belvoir, Virginia, for an organizational conference called by order of the Battalion Commander, Major Edward J. Fletcher, 939th Engineer Aviation Camouflage Battalion, Army Air Base, Richmond, Virginia, did at Fort Belvoir, Virginia, on or about 1 July 1943 willfully disobey the same.

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

Specification: In that 2nd Lieutenant Fernando J. Palicio, Company "A" 939th Engineer Aviation Camouflage Battalion, Fort Belvoir, Virginia, did without proper leave, absent himself from his organization and station at Fort Belvoir, Virginia from about 2 July 1943 to about 9 July 1943.

He pleaded guilty to Charge II and its Specification and not guilty to Charge I and its Specification. He was found guilty of all Charges and

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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. The evidence for the prosecution shows that on 1 July 1943 accused was a platoon commander of Company A, 939th Engineer Aviation Camouflage Battalion, at that time stationed for a month of temporary duty at the Engineer Board bivouac area, Fort Belvoir, Virginia (R. 7, 8, 15, 18). First Lieutenant Henry F. Dombrowski, 1897th Engineers, was commanding officer of Company A. On the evening of 1 July, between 5:15 and 5:30, Lieutenant Dombrowski saw accused in the company area "ready to go to town, with a suit case". Lieutenant Dombrowski told accused "that he would not be able to go to town that evening as we had an organizational meeting that the Major" wanted Lieutenant Dombrowski to hold that night. He explained that the meeting would be right after mess and would be held "at the officers B.O.Q. in our barracks" (R. 8, 9). Major Edward J. Fletcher, commanding officer 939th Engineer Aviation Camouflage Battalion, heard this conversation. Major Fletcher testified that accused "walked up to company headquarters with a suit case * * * in hand * * * and his company commander told him that there would be no passes for that evening, that officers would have an officers' meeting; that the meeting had been called at" the request of the witness (R. 13, 14). At approximately 5:30 that evening Lieutenant Dombrowski, accused, and Second Lieutenants William S. Tilton and William R. Blount, Jr., both Corps of Engineers, and officers of Company A, attended mess together. According to Lieutenant Dombrowski, he reminded accused of the meeting and accused asked him "what he would get" if he went "AWOL". Lieutenant Dombrowski told accused that there would be a possibility of his being punished under Article of War 104, or of his being court-martialed, or that "he could get the book". The lieutenant also told him that "he would not be able to leave the area that evening and that we might have to stay longer until we found out just what was going to develop from that meeting * * *". Lieutenant Tilton testified, with respect to this conversation at "mess": "Lieutenant Dombrowski told us that all officers and men would remain in the area and Lieutenant Palicio indicated that he didn't intend to stay * * * and asked the company commander what would be done to him if he did go away * * *". Lieutenant Blount testified to the same effect (R. 9-11, 15, 16, 18). While the officers were at the "mess" table, a messenger came in and told accused that someone wanted to see him, whereupon he got up and left. Accused was not present at the meeting after "mess" (R. 11, 12, 16, 19). First Sergeant Samuel S. Gregory, Company A, stated that on the evening in question, between 5:30 and 6:00 he saw accused approach a car driven by a woman. Accused placed his elbow on the door of the car and spoke to her "very cordially". After that accused went to the officers' quarters, came out with a suitcase in his hands, climbed into the car and was driven off. According to Sergeant Gregory, it was "a plain civilian car" (R. 24, 25).

Without objection the prosecution introduced in evidence a duly authenticated extract copy of the morning report of accused's company for

2 July 1943 which showed the initial absence of accused on that date at "0600hrs". Also without objection, there was introduced a duly authenticated extract copy of the morning report of accused's company showing his return from "AWOL to duty as of 9 July 1943 1500hrs" (R. 6, 7; Exs. 1, 2).

Accused testified in his own behalf. He was born in Havana, Cuba, and when the war started he felt that he "was about as much called to it as anybody else" so he came "here" and joined the United States Army, took his three months basic training, went to officer candidate school, obtained his American citizenship and was graduated as a second lieutenant. He said that there was "trouble" very soon after his first assignment. He did not know why, except perhaps it was because he had an "accent". His testimony indicated his dissatisfaction because in the leadership of his platoon he did not have that authority to which he was entitled as a second lieutenant. He was not asked for "recommendations" for promotion to Private First Class. His recommendations for passes were not followed. On one occasion, he stated, he was cursed in the orderly room in the presence of the First Sergeant and the Charge of Quarters. Accused explained:

"The conditions were so bad that I had to break the law or take the law in my hands to bring to the officers of a courts martial, knowing that they would charge me in a courts martial, the conditions in that company such as it was. Knowing that the majority of the officers would say it was just an idea of mine probably I could not go to my Battalion Commander because I did not feel he would rely on my words * * *."

Accused admitted that Lieutenant Dombrowski told him "that evening" of the meeting to be held later. According to accused, "that reached the peak" and, "naturally", he asked the lieutenant what "the punishment would be for going AWOL". Accused then decided to go "AWOL". He had previously planned to go to town and had hired a taxi. While in the "mess" hall word came to him that somebody was waiting for him. He went out and "it was the taxi itself". Accused said he did not intend to disobey an order of his superior officer. He thought that the meeting was to be informal. He said:

"Actually that night I wanted to go to Washington to visit * * * the Naval and Military Attache to the Cuban Embassy * * *".

He added that when Lieutenant Dombrowski told him of the meeting, he thought it was one of those tricks to keep him there, "to pile one thing after the other".

4. The Specification of Charge I alleges willful disobedience by accused of a lawful order "to remain in the company bivouac area for an organizational conference". The actual wording of the "order" as testified to by Lieutenant Dombrowski varies from that set forth in the Specification. Lieutenant Dombrowski testified he told accused "that he would not be able

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to go to town that evening" because of the meeting. Standing by itself, this statement sounds more advisory than directive in character. The testimony of Lieutenants Tilton and Blount gives more the ring of command to the words employed. They said that Lieutenant Dombrowski told them, including accused, that "all officers would remain in the area". Even this, while strongly indicating a mandate, by itself does not show an order specifically and individually given in contradistinction to one of a general scope, applying no more to accused than the rest of the command. However, the circumstance that accused was on the point of leaving the area to go to town with his suitcase when he specifically was told "you will not be able to go to town" and "all officers will remain in the area", has the effect of bringing this directive from the general to the specific, and of making it mandatory in nature in order to meet the exigency of accused's threatened departure. This conclusion is substantially sharpened by what ensued. Accused asked what would happen if he went "AWOL" and was promptly told that he would be punished, possibly to the extent of dismissal by a general court-martial. In view of this there can be no doubt that Lieutenant Dombrowski intended to order accused not to leave the area and no doubt that accused understood the purport of what was said. It is improper to split hairs in such a situation when it so clearly appears that there was a meeting of the minds. The command was lawful, it was understood by accused and was willfully disobeyed. The explanation of accused that he disobeyed the command in order to bring the condition in his company to the attention of the officers of a general court-martial indicates that he understood the order and that his disobedience was willful. The real reason for accused's disobedience may well be found in the testimony of Sergeant Gregory who told of the cordial meeting by the accused and the woman waiting for him in the car.

The Specification, Charge II was proved and was admitted by accused in his plea of guilty to the Specification and to Charge II.

5. Accused is 24 years of age. He was commissioned second lieutenant, Corps of Engineers, 17 February 1943. There was enlisted service from 7 August 1942 to 17 February 1943. War Department records show that accused was born in Havana, Cuba. He attended Colegio De Belen-Havana School for 10 years, graduating in 1935. He was graduated from Florida Military Academy in 1937 and from the Institute de la Havana in 1938. He studied architecture at the University of Havana for two years but did not graduate. He took a three months' course in military camouflage at the University of Havana in the summer of 1941. In the first indorsement upon accused's application for admission to Officer Candidate School his rating for leadership is given as "average" and his character "excellent".

6. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial

rights of accused were committed during the trial. In the opinion of the Board of Review the record 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 Articles of War 61 and 64.

Wm. E. Goy , Judge Advocate.
Wm. Hambrick , Judge Advocate.
Fletcher R. Andrews , Judge Advocate.

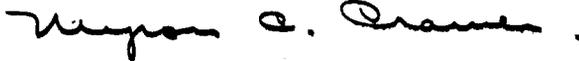
(236)

SPJGK
CM 239688

1st Ind.

War Department, J.A.G.O., 13 OCT 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 Fernando J. Palicio (O-1110703), 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 and sentence, and to warrant confirmation thereof. Under all the circumstances, I recommend that the sentence be confirmed and carried into execution.
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,
Major General,

The Judge Advocate General.

- 3 Incls.
Incl.1-Form of Ex. Action.
Incl.2-Record of trial.
Incl.3-Draft of let. for
sig. Sec. of War.

(Sentence confirmed. G.C.M.O. 377, 20 Nov 1943)

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

(237)

SPJGH
CM 239692

15 SEP 1943

UNITED STATES)

CAMP ROBERTS

v.)

Trial by G.C.M., convened
at Camp Roberts, California,
20 August 1943. Dismissal.

Second Lieutenant BERNARD
A. LEVITT (O-1182631),
Army of the United States.)

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

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Bernard A. Levitt, Field Artillery Officers Replacement Pool, Camp Roberts, California, attached to Battery D, 51st Battalion, Eleventh Field Artillery Training Regiment, Camp Roberts, California, did, without proper leave, absent himself from his proper station and duties at Camp Roberts, California, from about 1400 17th July, 1943, to about 0800 9th August, 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 evidence for the prosecution shows that accused was on 24 June 1943 assigned to the Field Artillery Officers' Replacement Pool School at Camp Roberts, California, and attached to Battery D, 51st Field Artillery Training Battalion. Accused attended the school from

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26 June 1943 until 17 July 1943, when he was directed by an order posted on the school bulletin board to report at 1400 hours for supervised study. The defense conceded that accused read the bulletin board and disobeyed the order. He did not report on 17 July. On 19 July Second Lieutenant Raymond Q. Hennicke, the school adjutant, went to the orderly room of Battery D and to the quarters of accused, but was unable to locate him. Accused did not report for duty with the school at any time from 1400 on 17 July 1943, to 0800 on 9 August 1943. The morning reports of Battery D for July and August 1943 showed the accused from student officer FACRPS to absent without leave, 1200 17 July 1943, and from absent without leave to duty 0800 9 August 1943. During that period, accused had no leave or permission to absent himself from the school (R. 6-14; Exs. A and B).

4. For the defense, accused testified that he had attended college for one year and had been a sales tax investigator for the City of New York. He was interested in engineering, and prior to his entry into the Army, took an eight months engineering course, sponsored by the Government, in the Defense Training Institute in Brooklyn, New York. He was inducted on 27 October 1942. In his application for Officer Candidate School, he gave "Field Artillery" as his first choice, because he was given to understand that he would only be considered for that arm of the service, and that he might be able to specialize in something of an engineering nature. After thirteen weeks at Fort Sill, he was commissioned and sent to Camp Roberts, where, about a week after his arrival, he was ordered to attend the Field Artillery Officers Replacement Pool School. He found the school "abominable". He had been going to school all his life and had never had any trouble at all but the pool school was of a different type; the work seemed drudgery, he took no interest in it, did very little studying, and the lack of interest showed in his poor grades, which was the reason why he "eventually wound up" in supervised study. He had thought that after graduation from Officer Candidate School he would get into something in which he could take an active part. Instead of that, it was just day after day and eight hours a day of classroom work. The subjects of study for the first two weeks were almost exclusively methods of instructional training, and during the period from 26 June to 17 July he had completed only two weeks of the course. He did not like the theoretical side of the work, and he told Major Kiely and Lieutenant Colonel Hasslock that he would like to be given something more in the line of engineering, like drafting, machine shop work or chemistry. Major Kiely told him that they would decide

where they wanted to put him, and intimated that accused had an ulterior motive in making the request. On 17 July 1943, when he found that he was ordered to the study hall, he was "spurred by disgust", he just couldn't stand it any more and decided to go to Los Angeles. He stayed a week with some relatives in Los Angeles, and spent the next two weeks at a hotel. He then realized that he had committed a senseless "unheard of" act, and hoping that he would be given another chance to make good, he returned to the school and since that time had applied himself to his studies. He had learned his lesson and felt that he could serve best in the status in which he was placed by his superiors (R. 15-30).

5. The evidence shows and the accused admits by his plea of guilty and his testimony that he was absent without leave from 17 July to 9 August 1943, as alleged. The accused stated that he absented himself because his lack of interest in the school resulted in poor grades and the requirement of supervised study, and he became disgusted and could not stand it any longer.

6. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 27 October 1942; appointed second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 3 June 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 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.

Walter S. Hill, Judge Advocate

Samuel M. Davis, Judge Advocate

J. J. Lott, Judge Advocate

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4. The evidence for the defense shows that the accused served under the command of Lieutenant Colonel Lawrence J. Ferguson from 1 June 1942 to 3 July 1943, joining his battalion as a second lieutenant, and acting as platoon leader, until transferred to battalion headquarters as special service officer. His service during that time was superior. He was promoted to first lieutenant, in which grade he acted as company commander and executive officer, as well as special instructor and director of small unit combat demonstrations. All the older officers were well acquainted with him, and he "enjoyed a reputation of high standing in every respect".

About 5 June the accused verbally requested a transfer to a combat unit; and on 17 June he repeated this request in a letter, in which he admitted a "lack of self-confidence, incompetency, inability, incapability, indifference, lack of leadership, and lack of desire or ambition to command a company"; whereupon Lieutenant Colonel Ferguson relieved the accused of his command, turned the letter over to his regimental commander, and initiated reclassification proceedings against the accused, who was transferred, several days thereafter, to the 16th Regiment. Data accompanying Lieutenant Colonel Ferguson's recommendation to the commanding general for reclassification of the accused included the statement he had made about himself in his letter of 17 June 1943, asking to be relieved from his command. All the actions of the accused indicated to Lieutenant Colonel Ferguson the intense desire of the accused for combat duty (R. 16-31).

Lieutenant Colonel R. W. Barber had known the accused for about eight months, and considered him above average as a junior officer and platoon leader, who performed his duties with initiative, imagination and above-average energy. He was always well thought of by his brother officers, who considered him reliable, cheerful and a good companion. Lieutenant Colonel Barber thought the accused entitled to an average rating of "Excellent" (R. 31-32).

Major Harry N. Roback, Medical Corps, Camp Roberts psychiatrist, after an interview with the accused, concluded he was sane, but mildly emotionally unstable, with a tendency to elation and depression. The accused had gone to college before coming into the Army, where he was well adjusted and happy not only as an enlisted man, but also at Camp Roberts, until his promotion to first lieutenant. As a platoon leader he was happy, but when he became company commander he began to feel inadequate for that position, that he was not winning the respect of his subordinates, and so inferior that he asked in a letter to be relieved. He wanted to be sent to combat. He is not able to bear prosperity, but adjusts well when he has to struggle and suffer. His periods of elation and depression are

not sufficient to classify the symptoms as part of an insanity, and there appeared to be no history of mental disease in his family. He stated he preferred to be a second lieutenant and platoon leader, or an enlisted man driving a truck, for he was happy when doing that work. Major Roback recommended that the accused should not be sent to combat, but transferred to another post and reclassified for limited service. He saw the accused twice, the last time on 28 July, the day he returned from AWOL. On 19 July, in their first talk, the accused stated he contemplated going AWOL, and asked what the punishment would be; he said he planned to do this because he was not able to stand it much longer at Camp Roberts. He also made it clear that he was reluctant to continue as a commissioned officer. Major Roback believed, with a transfer to another post, in time the accused would be completely normal; but that he was not emotionally stable enough to be an officer. The accused was mentally sound on 17 and 18 July 1943. On 17 July he telephoned Major Roback, who told him his transfer could not be arranged for at least thirty days. Major Roback believed that between 18 and 28 July 1943 the accused was mentally sound all the time. The defense stated they were not making the defense of insanity, but admitted and insisted the accused was mentally sound; the medical testimony was offered only in mitigation (R. 33-47).

Second Lieutenant James H. McPheeters testified he had known the accused since 1 June 1942; his reputation was very good as a soldier and also good as to his character (R. 47-48).

5. After being fully advised of his rights the accused elected to be sworn and testified, in brief, as follows. He was inducted 21 March 1941, at Fort MacArthur, California, and served with antitank forces at Fort Lewis, Washington, for thirteen months as a private until 9 October when he was made a corporal. He never had any difficulty, and was happy there. He made an application to go to Officers' Candidate School, at Fort Benning, without realizing the responsibilities involved. About a month later he took his physical examination, went out on maneuvers, was called in, left, and arrived at Fort Benning, 22 February 1942. He had no difficulties as a second lieutenant in which grade he served until 26 December 1942, enjoying his work and putting a good deal of energy into it. He had no particular ambition to advance, being quite satisfied with his assignment as platoon leader. When made a first lieutenant, he became executive officer, and found the duties not to his liking; he served as company commander about a month and a half, but did not perform his work satisfactorily in his own estimation, and did not try particularly; despite which he was not criticized, there were no complaints about his work, though he even "fished" for a couple. He still desires very much to get into combat, would like to retain his commission, but more than

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that wants to return to the enlisted ranks. His primary motive for absenting himself without leave was his impatience to get away from Camp Roberts; he had been there well over a year, although he had been promised he would be relieved after serving a year there, and thought he might be shipped out for not living up to the standards of an officer - for combat preferably; that was his reason.

He talked with Major Roback who indicated to the accused that he would not be transferred to combat service upon Major Roback's recommendation. He had seen officers who did not amount to much shipped out, so concluded, if he were not wanted around so much, he might be also, but would not be if his superior officers requested his retention. He made up out of his own mind the characteristics he gave himself in the letter. He did not think he possessed them, and knew he could do much better than what he put down. He adopted the worst possible plan to accomplish his purpose in order to get quicker action, feeling he had exhausted all other avenues of approach and found them unsatisfactory as far as results were concerned. He had requested a transfer by letter, asked the adjutant to put him on order, and also asked S-3, his former company commander, who said yes at first, but later the accused discovered the adjutant was striking his name off every transfer order; although he too had said he would recommend the accused's transfer, still he was eliminating his name because the battalion commander insisted that the accused remain.

When he was away, he went to his home at Whittier, California, for five days, telling his mother and father he was on leave; then to the mountains for four days. He honestly had the idea he could accomplish his purpose of getting into combat by going AWOL. He had not talked it over with any other officer; possibly it was the long hard way, but shorter than staying at Camp Roberts (R. 48-65).

6. The Specification alleges absence without leave from 18 July to 28 July 1943. The plea of guilty is corroborated by full and uncontradicted evidence, including the accused's own testimony. The record establishes a most unusual motive for the accused's deliberate and - in his case - unprecedented dereliction, namely, his desire to expedite the fulfillment of his heretofore thwarted efforts to obtain a transfer to foreign service. This motive, and the accused's splendid record, demonstrated capacity, and excellent character - all clearly shown by the uncontroverted testimony of highly credible witnesses - furnish no defense to the Charge, but are eligible for consideration in extenuation only.

7. War Department records show the accused is 24 years of age. He

enlisted 31 March 1941; went to Officers' Candidate School 22 February 1942, was temporarily commissioned second lieutenant, Army of the United States, 22 May 1942, and promoted to first lieutenant, 26 December 1942.

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

Chas. B. Lession, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin H. Sleeper, Judge Advocate.

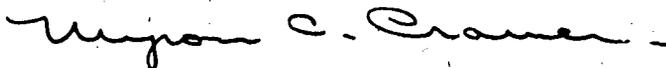
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SPJGN
CM 239693

1st Ind.

War Department, J.A.G.O., 17 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 Harold C. Burton (O-1284096), 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 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,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but execution suspended. G.C.M.O. 339, 6 Nov 1943)

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

(247)

SPJGN
CM 239710

7 OCT 1943

U N I T E D S T A T E S)
)
 v.)
)
 Private SAM (NMI) PARKER)
 (360L4616), Headquarters)
 Battery, 930th Field)
 Artillery Battalion.)

XII CORPS

Trial by G.C.M., convened at
Camp Butner, North Carolina,
3, 5 and 6 August 1943.
Dishonorable discharge and
confinement for life.
Penitentiary.

REVIEW by the BOARD OF REVIEW
LIPSCOMB, GOLDEN 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.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Sam Parker, (Then Technician Fourth Grade) Headquarters Battery, Nine Hundred Thirtieth Field Artillery Battalion, did, at 512 $\frac{1}{2}$ Proctor Street, Durham, North Carolina, on or about 0030 7 July 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class James E. Chambers, Nine Hundred Seventy Seventh Air Base Security, Camp Butner, North Carolina, a human being by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. The offense was committed in time of war. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that the accused, a colored soldier, then a sergeant, met his friend, Ethel Swindell, a beautician by trade, as she emerged from a picture show, in Durham, North Carolina, at about seven o'clock on the evening of 6 July 1943.

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After imbibing soft drinks, they proceeded to her room, on the second floor of a rooming house, one means of access to which was an outside stairway leading up to a screened porch, whence a door opened into a bedroom adjoining Ethel's. Shortly after the accused and Ethel had arrived at her room, the deceased, somewhat intoxicated, came to this screened porch door, which Ethel opened, standing there and talking to him for about an hour, while the accused remained seated in her room, within sight of the other two, through the bedroom door. Finally the deceased struck Ethel, once on her face and twice on her side. At this, the accused rose to his feet and stood in the doorway. Ethel had said goodnight and started away from the deceased, when he, seizing her arm, snatched her toward him "in a fast pull". The accused, speaking then for the first time, and in a normal tone of voice, remarked to the deceased that "it had better be goodnight", whereupon the deceased relinquished his hold upon Ethel, and put his hand in his pocket. Ethel beat a hasty retreat up the hall toward the bathroom. Departing, she observed a momentary "glint" in close juxtaposition to the accused's hand at about the level of his waist. Before she reached the bathroom, she heard a shot; then, after a very brief interval, three more, in quick succession (R. 10-15, 18, 22-25, 28-29, 34-43, 53-57).

According to the accused's statement - made the following day, and introduced in evidence by the prosecution - upon releasing Ethel, the deceased started toward the accused.

"Then I drew my 25 cal. automatic * * * and * * * fired one shot at him. My bullet did not hit Private Chambers. Then Pvt. Chambers turned, and ran down the stairs. I walked outside of the house onto the porch, and I fired, I guess, three shots. After I fired these three shots, I walked down the stairs and saw Private Chambers lying on the floor. Then, I went to the bus station, got on a bus, and returned to camp" (R. 92-93; Ex. 6).

Shortly after the shooting, the deceased was found on a landing halfway down the stairs, with a bullet wound in his head from which, at seven o'clock the next morning, he died (R. 16, 17, 26, 27, 149; Ex. 10).

About eight feet above the floor of the bedroom into which the door from the screened porch opened, and directly above it, was a bullet groove observed for the first time after the shooting, the only one inside the room. Outside, another groove indicated that a bullet, fired from the screened porch above, had penetrated a banister of the stair rail, bordering the landing where the deceased was found (R. 57-59, 96-98, 107-109, 113-115).

4. Adduced on behalf of the defense, the evidence of the duly qualified chief of the neuro-psychiatric section at the station hospital indicates that the accused is a dull, phlegmatic and sluggish individual, with a mental aptitude rating of 8 years, 9 months, who has made an adequate

adjustment to Army life, leading "a routine, more or less humdrum existence, complying with all the orders and regulations," working satisfactorily as a cook, and meriting his promotion to sergeant, the grade which he had attained prior to the shooting. Despite his "limitation of innate intellectual endowment, * * * he is not mentally ill and is fully responsible for his behavior" (E. 157-158).

He was characterized by his mess sergeant as "always a very workable type of person, very easy to get along with", quiet, good-natured, cooperative, and never known to cause any trouble. This characterization was corroborated by both his battery commander and his mess officer (R. 158-166).

Ethel Swindell, recalled as a defense witness, testified that when the deceased knocked on the door, the night he was killed, she first told him she was in bed, to which he replied, "No you're not because you are sitting beside the bed in a chair", which she was, and which the deceased could only know by looking through the window (R. 154-156).

5. The accused, after his rights as a witness had been fully explained to him, testified, under oath, that after Ethel and the deceased had talked for an hour at the screened porch door, the deceased entered the bedroom adjoining Ethel's, where the accused was waiting, moving out of range of the accused's vision. "They talked for about 15 minutes," he continued,

"and I noticed, I could hear them talking, and I noticed that they were arguing and I noticed that he struck Miss Swindell twice. * * * Miss Swindell either set on the bed or he knocked her on the bed, but when licks were passed she hit on the bed. Miss Swindell would tell him to stop, said 'Don't do that,' and he does it again, and Miss Swindell, I could hear her, tried to get loose from him, and then I gets up and walks to the door * * * I didn't do anything, just stood there in the door. * * * He turned and she walked a couple of steps back from him and he leaned his left hand up on the dresser and put his right hand in his pocket. * * * Well, he stayed there for awhile and then he walked over by the * * * door leading out on the porch. * * * He takes his right hand out of his pocket and leans up against the door and puts his left hand in his pocket. * * * He takes and leans up against the door and puts his left hand in his pocket and he takes his right hand and grabs Miss Swindell and jerks her over to him. * * * Then I spoke. * * * I said, 'Don't you think it is time you should go now?' * * * He didn't say anything but he let Miss Swindell go and that is the time she steps back from him. * * * He straightens up, stands up straight in the door and puts his right hand in his pocket and starts toward me. * * * He had both hands in his pockets. * * * I tried to back up but the bed was behind me. * * * I takes my right hand and reaches in * * * my right hip pocket. * * * I drew a revolver. * * * When I

drew the revolver I fired. * * * Over his head. * * * To frighten him, to keep him from coming on me. * * * He turned and goes out the door, * * * I stood there for a second or two. * * * I goes out on the porch * * * I was afraid of what he would do to me through the window. * * * Because he could see me through the window and I couldn't see him * * * He had made the statement that he seen Miss Swindell setting on the bed. * * * through the window."

In going down the steps it is necessary to pass that window. "I walks out on the porch and fires four shots." It was dark, and the accused neither saw the deceased when he fired, nor intended to hit him nor any other person, aiming all four shots at the victory garden planted below the outside stairway, expecting to shoot into the ground. "If I just shot out straight from me", he testified, "I would have shot in through a house that was setting across the street. * * * I fired the shots to frighten, merely to frighten * * * him off because I thought he might have decided to shoot or throw a brick through the window." The deceased had had his hands in his pockets when he left, and, the accused continued, "I was afraid he might have — didn't know what he might have in his pockets, * * * he might have had a gun, a knife or most anything" (R. 178-182, 185-187).

After firing these shots, the accused, finding the room deserted, departed via the outside stairway leading down from the screened porch. As he descended, he testified, "I seed the soldier lying on the steps and I was frightened." He did not think, however, that any of the shots which he had fired had struck the soldier. Upon returning to camp, the accused went to bed and slept for an estimated hour and a half until awakened by an orderly who told him to get up, that the military police wanted to speak to him (R. 189).

6. The Specification alleges that the accused, with malice aforethought, feloniously slew the deceased by shooting him with a pistol. The evidence shows that the accused, on a dark night, after firing over the deceased's head while the two were still in a lighted room where the deceased had just desisted from physically abusing the woman on whom the accused was calling, followed the deceased on to an unlighted screened porch, a few seconds after the deceased had started down an unlighted stairway leading therefrom, and there fired three or four more shots, at least two of them in the direction of the landing halfway down the stairway, where the deceased's body was later found. This evidence clearly establishes the killing by the means alleged, upon provocation inadequate to reduce the grade of the offense; and the Manual explicitly provides that

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind * * * co-existing with the act * * * by which death is caused: * * * knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, * * * although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may not be caused; * * *" (MCM, 1928, par. 148a, pp. 163-164).

The accused's own testimony as to the circumstances surrounding the shooting, supports the conclusive inference therefrom that he certainly must have known that shooting down the stairway would probably result in the deceased being hit, although he may not have intended to hit him, and even hoped that he would not. Thus the element of "malice aforethought", as well as all others essential to establishing the commission of the offense alleged, is shown by the evidence, which, in the opinion of the Board of Review, is sufficient to support the court's findings of guilty of murder, as alleged.

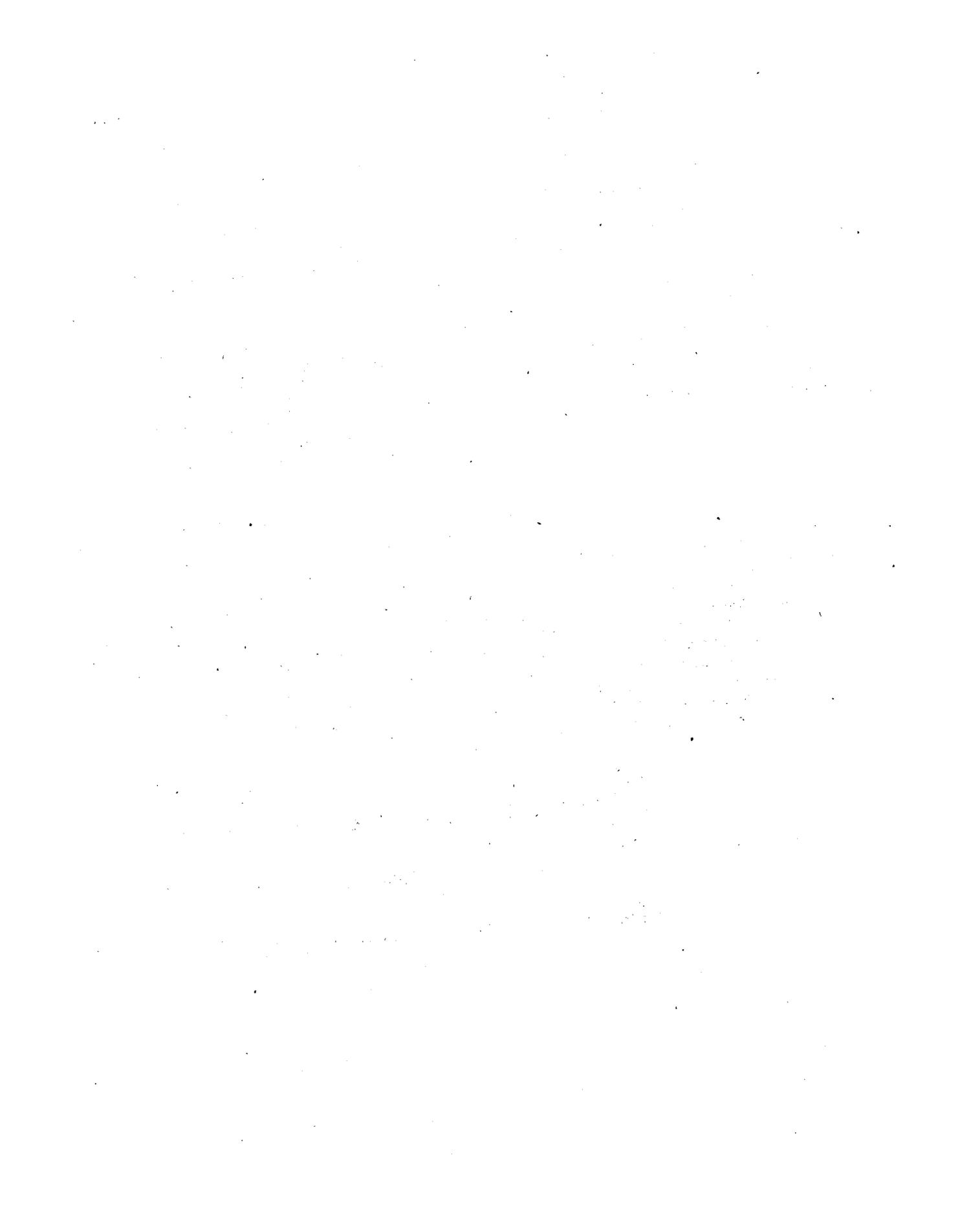
7. The accused is 26 years of age. He was inducted at Chicago, Illinois, 1 April 1941. His record shows no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence either of death or of imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin P. Sleeper, Judge Advocate



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

(253)

SPJGQ
CM 239730

18 SEP 1943

UNITED STATES)

v.)

Private JESSE STANTON (35673571),)
Private First Class SYLVESTER L.)
BROOKS (13136661), Private GONZLEE)
GIBSON (33381014), Private First)
Class FRANK BRUNSON (33381024),)
Private FRED GAINES, JR. (37243260),)
all of 855th Engineer Aviation)
Battalion; Private JOHN T. ROBINSON)
(38326773), Detachment No. 2, 4th)
Air Force Replacement Depot, March)
Field, California; Private JAMES LEE)
DAVIS (32214174), 1887th Engineer)
Aviation Battalion; Private First)
Class ALBERT W. HALL (37234690), and)
Private HASKELL E. HALL (35577349),)
both of 855th Engineer Aviation)
Battalion.)

FOURTH AIR FORCE

Trial by G.C.M., convened at
March Field, California, 29-
31 July and 2, 3 August 1943.
As to Stanton, Brooks, Gibson,
Brunson, Gaines: Dishonor-
able discharge and confine-
ment for twenty (20) years.
Penitentiary. Robinson
(acquitted). Davis, Albert
W. Hall, Haskell E. Hall (dis-
approved by the reviewing
authority).

HOLDING by the BOARD OF REVIEW
ROUNDS, HEPBURN and LATTIN, Judge Advocates.

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

2. The only question requiring consideration is the designation of a penitentiary as the place of confinement.

Confinement in a penitentiary in this case is not authorized by Article of War 42. The offense of committing a riot is not punishable by confinement in a penitentiary for more than one year by some statute of the United States of general application within the continental United States or by law of the District of Columbia.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentences as involves dishonorable discharge, forfeiture of all pay and allowances

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due or to become due, and confinement at hard labor for twenty years in a place other than a penitentiary, Federal correctional institution, or reformatory.

William A. Bonds, Judge Advocate.

Earle Stephum, Judge Advocate.

Norman D. Lathin, Judge Advocate.

1st Ind.

War Department, J.A.G.O., **18 OCT 1943** - To the Commanding General,
Fourth Air Force, San Francisco, California.

1. In the case of Private Jesse Stanton (35673571), Private First Class Sylvester L. Brooks (13136661), Private Gonzlee Gibson (33381014), Private First Class Frank Brunson (33381024), and Private Fred Gaines, Jr. (37243260), all of 855th Engineer Aviation Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentences as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years in a place other than a penitentiary, Federal correctional institution, or reformatory, which holding is hereby approved. Under the provisions of Article of War 50½, and Executive Order No. 9363, dated July 23, 1943, and upon the designation of a place of confinement other than a penitentiary, Federal correctional institution, or reformatory, 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 239730).

James E. Morrisette
Colonel, J.A.G.O.
Assistant Judge Advocate General,
In Charge of Military Justice.

OCT 19 43 PM



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

(257)

SPJGV
CM 239731

1 OCT 1943

UNITED STATES

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

v.

Second Lieutenant RENE E.
BUCK (0471770), Infantry,
Camp Wolters, Texas, and
Technical Sergeant RALPH W.
VAN STEENHOVEN (16043604),
Medical Detachment, Camp
Hood, Texas.

Trial by G.C.M., convened at
Camp Hood, Texas, 17 and 18
June 1943. As to Lieutenant
Buck: To be dismissed the
service. As to Sergeant Van
Steenhoven: Findings and
sentence disapproved.

OPINION of the BOARD OF REVIEW
MORRISETTE, McCOOK and CLEMENTS, Judge Advocates.

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

2. The accused were arraigned and tried on the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specifications: In that Second Lieutenant Rene E. Buck, Infantry, and Technical Sergeant Ralph W. Van Steenhoven, Medical Detachment, Camp Hood, Texas, acting jointly, and in pursuance of a common intent, did at Temple, Texas, on or about April 27, 1943, wrongfully and feloniously, with intent to procure the miscarriage of Miss Dessie Denson, insert an instrument or instruments into her vagina, or use other means, which act was not necessary to preserve her life or health and was not done under the direction of a competent licensed practitioner of medicine, and in consequence of which act the said Miss Dessie Denson died.

3. After a motion to strike and plea in abatement submitted by the joint defense, both of which were without merit, had been respectively denied and overruled by the court, each accused pleaded not guilty to

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the specification. Each was found guilty as charged. No evidence of previous convictions was offered. Lieutenant Buck was sentenced to dismissal, total forfeitures, and confinement at hard labor at such place as the reviewing authority may direct for five years. Sergeant Van Steenhoven was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor at such place as the reviewing authority may direct for seven years. The reviewing authority disapproved the findings and sentence as to Technical Sergeant Van Steenhoven. He approved the findings as to Lieutenant Buck except the words "and in consequence of which act the said Miss Dessie Denson died," approved the sentence but remitted so much thereof as provides for total forfeitures and confinement at hard labor for five years. He recommended that the execution of the sentence to dismissal so approved by him be suspended and forwarded the record of trial for action under Article of War 48.

4. Between about 7:30 and 8:00 o'clock on the evening of 27 April 1943, a young woman identified as Miss Ileta Shannon and an unidentified soldier in the automobile with her rented a cottage at the Roselawn Tourist Courts, Temple, Texas, from a Mrs. T. F. Gilleland, who testified that about a week earlier Miss Dale in the same car had rented a cottage from her. On that earlier occasion the soldier registered as Lieutenant Dale (R. 10, 12). About 10:30 o'clock of the evening of 27 April 1943 Miss Rita M. Gray, a graduate nurse at the Scott and White Hospital, Temple, Texas, saw both accused, Lieutenant Buck and Sergeant Van Steenhoven and Miss Shannon at the Scott and White Hospital with the "Denson girl," who at that time was on a stretcher, dead. She, with Dr. Stroble and several nurses, attempted first aid. At that time, in the presence of accused Buck, Sergeant Van Steenhoven made the statement "that they had been riding around in the evening, she was in the front seat with the Lieutenant and he was in the back with Miss Shannon, Miss Denson fainted and they tried to revive her and could not, he also said she had two small glasses of wine during the evening." The examination appears to have been casual, Dr. Stroble having satisfied himself by using a stethoscope that the young woman's heart had stopped beating (R. 18-20). Wiley M. Fisher, night watchman at the Scott and White Hospital, also saw both accused and Miss Shannon at the hospital about 11:30 the same night (R. 15, 16). The Denson girl was pronounced dead by Dr. Stroble.

The same night at 3:15 a.m., 28 April 1943, Dr. Charles Phillips, a Surgical Pathologist at Scott and White Hospital, conducted an autopsy on what he described as the body of Miss Dessie Denson. From his testimony and copy of the autopsy report over his signature, admitted in evidence as Exhibit A, it sufficiently appears that the young woman was about six to eight or ten weeks' pregnant and that there had been a relatively recent attempt, "roughly twenty-four hours", to bring about a miscarriage. There was a moderate amount of tearing and laceration in the lower part of the

canal from which there was a certain amount of bleeding, and "a certain amount of force was used in attempting to empty the euretus" which is ordinarily "considered as attempting an abortion." (R. 21-23) (He used the word abortion in testifying--the word "miscarriage" in the autopsy.)

5. Over the objection of accused Buck, after the court had heard testimony including that of the accused concerning the circumstances under which it was given, a confession made by him on 24 May 1943 in the presence of Lieutenant Colonel Walter S. Hunnicutt and the investigating officer, later trial judge advocate, Captain William V. Lemens, was admitted in evidence.

The pertinent and important statements contained in the confession may be summarized as follows (R. 54-57):

Lieutenant Buck, while stationed at McCloskey General Hospital, first met Miss Dessie Denson when he was "picked up" by her in a motion picture show the latter part of February. Thereafter they became well acquainted. He visited her in her home and met her father. Within about four weeks he began to have sexual intercourse with her, and about a week after such an occasion when a "condom" was broken, she informed him that she was pregnant. She insisted upon having an abortion and when she persisted over his objections, he finally consented to assist her. A friend, Miss Shannon, first attempted to find a nurse, but failing in that, they arranged, at Miss Shannon's suggestion, to have the abortion performed by Sergeant Van Steenhoven, who, Miss Shannon said, knew about such things and would do it for nothing. The first attempt was made at a tourist camp, which the confession describes as the Woodlawn Tourist Court, north of Temple, Texas, but which in all probability was the Roselawn Tourist Camp, managed by Mrs. Gilleland. Whatever the correct name of the tourist camp, it is sufficiently clear from the testimony and the confession that the place described by the accused and Mrs. Gilleland are the same. At this first attempt Steenhoven tried to insert a rubber tube of some sort into Miss Denson's vagina but was unsuccessful in bringing about an abortion.

The next attempt, the confession continues, took place at the same tourist camp about 7:30 in the evening about one week later. Sergeant Van Steenhoven, Miss Shannon, Lieutenant Buck and Miss Denson were present. The cabin was small with only one chair in the room. Steenhoven had a bag or a brief case containing some tools, one shaped like four spoons for dilating purposes, some probes, "Hemostats", some wires, coil springs, Kahn hypodermic needles, other hypodermic needles and little bottles, which the Sergeant said contained distilled water. He also had some forceps and seemed to be proud of the fact that they were curved and were from the dispensary at Camp Hood. The confession then describes the clumsy, ignorant,

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brutal efforts of this Sergeant to perform an abortion on the young woman, during part of which time accused Buck participated by holding a flashlight until "he got sick and refused to help any more." While Sergeant Van Steenhoven was resting, he got some wine which he, accused Buck, and Miss Denson drank. Thereupon Steenhoven tied the unfortunate young woman's feet to the bed and started to work with her again. Accused Buck now participated by holding her head and she dug her fingernails into his arm, apparently from the pain. Again they suspended the operation while they drank some more wine and Miss Denson lighted a cigarette, and, apparently, Miss Shannon and Steenhoven engaged in "necking." Thereupon Miss Denson's cigarette went out entirely. She "kinda groaned and made a gurgling sound from inside, he grabbed her pulse and her pulse was kinda cutting up." Sergeant Van Steenhoven suggested spirits of ammonia, but Lieutenant Buck refused and after hastily re-dressing the young woman, he put her in the car and drove to Temple with a view to taking her to McCloskey General Hospital. On the way they found themselves close to Scott and White Hospital where they were finally admitted. At that time accused Buck felt the young woman's pulse and it seemed to be still beating. He called for a doctor while he and the Sergeant took her out of the automobile and into the hospital on a wheelchair or stretcher. The doctor and two nurses worked on her for five or ten minutes whereupon Lieutenant Buck began to get upset, and not knowing what to do, he decided to shoot himself with a Luger pistol which he had in the pocket of his car, but Miss Shannon prevented him from doing so. From then on he could not remember very well what happened.

6. Although the corpus delicti, namely, that an abortion or miscarriage was attempted on the body of a young woman at the time and place alleged, and the identity of the young woman as Miss Dessie Denson as alleged are both inartificially and amateurishly established by the evidence offered by the trial judge advocate, they are, nevertheless, sufficiently established. It likewise sufficiently appears from competent and undisputed evidence that at or about the time and near the place alleged there was an attempt in substantially the manner alleged to procure the miscarriage of Miss Dessie Denson and that the act was not necessary to preserve her life or health and was not under the direction of a competent, licensed practitioner of medicine. The confession of accused Buck is full and complete, showing not only his presence at the time and place, but his active participation in the crime.

7. The result of the foregoing is that the only serious question raised by the record of trial is whether the confession of the accused was voluntarily made without coercion, duress or promise of reward, with full knowledge of his privileges against self-incrimination.

8. The confession relied upon and introduced in evidence by the prosecution was made by accused on 24 May 1943 in the room used as a courtroom in Camp Hood, Texas. There were present at the time Lieutenant Colonel Walter S. Hunnicutt, Staff Judge Advocate, Camp Hood, Captain William V. Lemens, the investigating officer and subsequently appointed trial judge advocate of the general court before which accused was tried, and the stenographer. On that date accused was a prisoner in the prison ward of the Camp Hood Station Hospital, was taken to the courtroom under armed guard, and at the time of the confession it may be assumed that he was under restraint (R. 31, 43, 50). From the testimony of Colonel Hunnicutt, a prosecution witness, and independently by that of the accused himself, who testified in his own behalf in opposition to the admission of the confession, the following facts are established:

Prior to making the confession, accused Buck was informed of the offense with which he was charged, the names of the witnesses who would appear against him, his right to cross-examine, the purpose of the investigation, and his right to submit a statement which, however, might be used against him (R. 32, 51).

In addition to the foregoing information and before he made any statement of any kind, accused was advised first by Captain Lemens and then by Colonel Hunnicutt that he did not have to make a statement of any kind unless he desired to do so and that any statement made by him should be purely voluntary and could be used against him. Colonel Hunnicutt reminded accused that he had previously warned him at previous investigations in the case and then proceeded again to explain to the accused his rights against self-incrimination. On each occasion, after each warning, accused stated that he fully understood his rights and desired to make a statement (R. 32). It clearly appears from the testimony of Lieutenant Buck himself that no threats were made against him nor any offers of reward or leniency. Except for the fact that he was under restraint, worried, and as he himself expressed it, angry, there is no suggestion of duress (R. 51-52).

9. The claim of the defense that the confession was involuntarily made or was otherwise inadmissible is based on evidence which is likewise undisputed that accused had been examined and interrogated on three previous occasions, first in the police station on 28 April 1943, where the interrogation was conducted principally by the county prosecutor. Colonel Hunnicutt was present for the double purpose of protecting not only the rights of the Government but also the rights of the accused in his interrogation by a civil prosecutor. At that time the rights of Lieutenant Buck against self-incrimination were explained to him by Colonel Hunnicutt, and thereafter accused did make a statement (R. 35-36, 46).

The next interrogation took place on 3 May 1943 and was conducted primarily by Colonel Hunnicutt, who testifies again that he fully warned and acquainted the accused of his rights against self-incrimination. The accused made a statement at that time (R. 36). The third interrogation on 5 May occurred at the police station in Temple, Texas, and again the county prosecutor was the principal interrogator. During the course of the investigation the accused is shown to have said to the county prosecutor, "I have made too many statements previously covering what I know about the incident and I do not at this time desire to make a further statement." Thereupon the county prosecutor, identified as Judge White, replied, "Of course, that is your privilege, Lieutenant, and you have that right, but we know that you lied in those other statements, if you want to correct that it might help you in our attitude later." Thereupon, Judge White continued to question the witness, and apparently Colonel Hunnicutt "asked him some questions." During the course of the proceedings Judge White suggested that the statements would be off the record but Colonel Hunnicutt immediately made it clear that so far as he was concerned that "it was on the record." (R. 36, 37, 48, 49, 50)

The defense insisted that the foregoing occurrences influenced the attitude and mental condition of the accused at the time of the confession actually introduced in evidence, namely, 19 days later on 24 May, and further complained that he had been locked up, threatened with a court-martial and told that they had sufficient proof of his participation in the offense. He admitted that his rights had been explained to him but claimed that he was all mixed up and understood only vaguely. When asked the direct question whether the confession was a voluntary statement, willingly made, he replied, "Not exactly voluntary statement, it was not voluntary, I made it to get out of arguing, I felt I had been badgered and had been locked up." He later said that he was angry (R. 51-52).

For the purpose of this discussion only, it may be conceded that at the interrogation in the police station on 5 May 1943, accused was improperly interrogated after he had announced that he did not desire to make any further statements and likewise conceded that the statements of the county prosecutor contained at least some inference of a reward or leniency in the event accused made a more satisfactory statement. None of these conditions existed at the time the last confession relied upon by the prosecution was made by the accused. At that time his rights against self-incrimination, his privilege to remain silent and the consequences of talking were carefully and fully explained to him both by Captain Lemens, the investigating officer, and by Colonel Hunnicutt. It likewise appears that the explanation had been made to the accused on at least two other occasions. No threats were made against him at that time nor was there any duress, force or hope of reward or promise of leniency. The accused made the statement knowing full well the consequences, and the fact that he was angry, naturally worried and alarmed is of no importance.

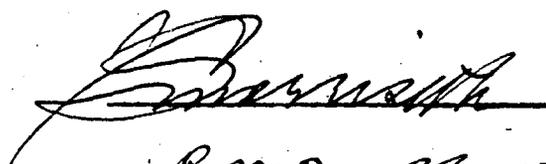
10. The confession itself then made by the accused is obviously a statement made by a man in full possession of his faculties and with a clear recollection of dates, places and detailed occurrences. It rings true. It is corroborated in some important details; for example, accused describes two visits to a tourist camp, one a week before the date of the alleged offense and another on the date of the offense. At both of them Miss Shannon was present. This testimony is corroborated by the testimony of Miss Gilleland, supra, who testified Miss Shannon rented a cottage from her on both dates. The confession is further corroborated by the fact that accused was present at the Scott and White Hospital with the body of the young woman on the evening she was brought there dead or dying. The report of the autopsy corroborates his testimony that a crude, unskillful attempt at abortion had been attempted.

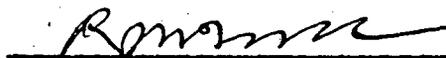
In the opinion of the Board of Review, the court who listened to the testimony of Lieutenant Colonel Hunnicutt and to the accused himself, with the opportunity of observing the demeanor of each and weighing the testimony, properly concluded that the confession by accused on 24 May 1943 was voluntarily submitted by him after he had been fully acquainted with all of his rights against self-incrimination.

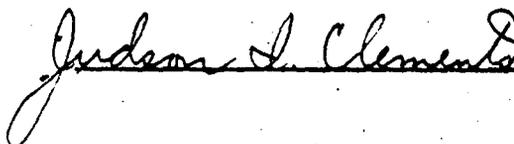
11. Consideration has been given to a letter from Mrs. Virginia Buck, the wife of the accused, and a letter from Lieutenant Buck, dated 17 August 1943, both addressed to the President of the United States, which are inclosed with the record of trial.

12. War Department records show that accused is over twenty-one years of age (born 16 December 1921), served two years in Junior R.O.T.C., graduated from high school, was appointed second lieutenant 14 May 1942 and ordered to active duty 29 May 1942.

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

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

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SPJGV CM 239731 1st Ind.
War Department, ASF, J.A.G.O.,

27 OCT 1943

To: The Secretary of War.

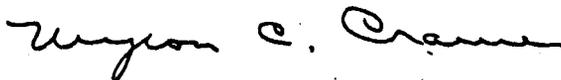
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Rene E. Buck (O-471770), Infantry.

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, as modified and approved by the reviewing authority, and to warrant confirmation of the sentence.

Upon the repeated insistence of Miss Dessie Denson, with whom he had been having intimate relations, the accused agreed to assist her in having a miscarriage. Miss Shannon, a friend of Miss Denson, suggested that a Sergeant Van Steenhoven knew about such things and would do it for nothing. On a designated evening the four parties named went to a tourist camp and made an unsuccessful attempt to bring about a miscarriage. About one week later they met at the same tourist camp and Sergeant Van Steenhoven, in the presence of Lieutenant Buck who held a flashlight, attempted in a crude manner to produce the miscarriage of Miss Denson. During the attempt she collapsed and was rushed to a hospital where she was pronounced dead. The doctor who performed the autopsy testified that the attempted miscarriage was not the cause of death and that the cause of death was unknown.

The reviewing authority recommends that the execution of the sentence to dismissal be suspended. Although Lieutenant Buck reluctantly consented, upon the insistence of Miss Denson, to assist her in accomplishing an abortion and rushed her to an excellent hospital when she collapsed, the fact remains that he participated in the crude attempt to perform an illegal abortion. His usefulness as an officer has been destroyed, and society demands that he be punished. It is believed that sufficient clemency has been extended by the action of the reviewing authority in remitting that part of the sentence which provided for forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. I therefore recommend that the sentence to dismissal be confirmed and carried into execution.

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 foregoing recommendation should such action meet with approval.



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

- 3 Incls.
Incl. 1 - R/T.
Incl. 2 - Drft. ltr. for
sig. Sec. of War.
Incl. 3 - Form of Executive action.

(Sentence of dismissal confirmed. Execution suspended.
G.C.M.O. 394, 21 Dec 1943)

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is crucial for ensuring transparency and accountability in the organization's operations.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It highlights the need for consistent and reliable data collection processes to ensure the validity of the results.

3. The third part of the document describes the different types of data that are collected and how they are used to inform decision-making. It notes that a combination of quantitative and qualitative data is often used to provide a comprehensive view of the organization's performance.

4. The fourth part of the document discusses the challenges and limitations of data collection and analysis. It identifies common issues such as data quality, bias, and incomplete information, and offers strategies to mitigate these risks.

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

(267)

SPJGH
CM 239778

6 OCT 1943

UNITED STATES)

v.)

Second Lieutenant WILLIAM
P. AQUINO (O-792671), Air
Corps.)

ARMY AIR FORCES
EASTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Marianna Army Air
Field, Marianna, Florida,
19 August 1943. Dis-
missal.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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

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

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

Specification 1: In that 2nd Lieutenant William P. Aquino, Headquarters and Headquarters Squadron 17th Single Engine Flying Training Group, Army Air Forces Advanced Flying School, Marianna Army Air Field, Marianna, Florida, having been restricted to the limits of his Post, did, at Marianna Army Air Field, on or about July 18, 1943, break said restriction by going to Dothan, Alabama.

Specification 2: In that 2nd Lieutenant William P. Aquino, Headquarters and Headquarters Squadron 17th Single Engine Flying Training Group, Army Air Forces Advanced Flying School, Marianna Army Air Field, Marianna, Florida, did, at Marianna Army Air Field, on or about July 18, 1943, wrongfully take and use without consent of the owner a certain automobile; to wit, a 1940 Willis Coupe, Motor Number 47882, Florida State License Number 25-373, property of 2nd Lieutenant Robert B. Kehrein.

He pleaded not guilty to Specification 2, and guilty to Specification 1 and the Charge (designated in the record as Charge I). He was found guilty

of the Charge and both Specifications and sentenced to be dismissed the service. Evidence of one previous conviction by general court-martial for conduct of a nature to bring discredit upon the military service in violation of the 96th Article of War was introduced. 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 by sentence of a general court-martial adjudged 28 June 1943 and promulgated by order dated 8 July 1943 (Ex. 1), accused was restricted to the limits of the post at Marianna Army Air Field, Marianna, Florida, for three months. A copy of the order was delivered to accused on 14 or 15 July. At 1:30 a.m. on 18 July 1943 as Second Lieutenant Robert H. Kehrein left a dance at the Officers' Club at Marianna, he noticed his automobile, a 1940 Willis coupe, being pushed by another car toward the Club. As it was going too fast for him to stop it, he went to the gate and asked the "MP" who was driving the car. The latter informed him that accused was the driver. Lieutenant Kehrein had not then or on any other occasion given accused consent to "take and use" his automobile. Private First Class John L. Vance, who was on duty at the gate, had recognized accused as he drove up in a "bluish-green" Willis car. He asked accused where he was going and accused replied "Dothan". At about 1:45 a.m. on 18 July, accused was observed by Lieutenant Colonel John H. Cheatwood and Private Max Gewirtz in the Greyhound Bus Station at Dothan, Alabama. Accused started to enter a telephone booth and asked Gewirtz to get him some change as he had to make a long distance telephone call. A few minutes later accused came out of the booth with his cap off and left the station. Then the telephone rang, Colonel Cheatwood answered it, and the operator asked if the party who made the call to the Marianna Army Air Field was there (R. 6-8, 11-16).

At about 1:30 a.m. Lieutenant Kehrein reported to the Officer of the Day that his car had been stolen and the latter authorized transportation to take Lieutenant Kehrein's "date" to Cottondale. At 2:15 a.m. Private Hubert E. Parrish, a member of the guard squadron on duty in Dothan, stopped a green 1941 Willis car which he had received orders to pick up. Accused was driving the car and Parrish took him to police headquarters where accused made some telephone calls. Lieutenant Kehrein received a telephone call from an "MP" at Dothan who said accused was there and suggested that Kehrein talk to accused. Accused stated that he had asked "Lt. Thompson" to tell Kehrein that accused was going to use the latter's car and inquired as to whether Kehrein had received the message. Lieutenant Kehrein told accused "to come on back and everything would be OK". He gave his consent to accused to drive

the car back as he thought it was the only way he could get it without expense and inconvenience. Lieutenant Kehrein had gone up on flights with accused and regarded him as a friend. At about 3:00 a.m. Private Frank J. Zmyewski, Guard Squadron, was instructed to take accused from the Armory in Dothan to the car. The headlights were out of order and accused asked Zmyewski to help him find an address in Dothan. By the time they found the house it was 4:30 a.m. At 6:28 a.m. on 18 July, accused returned in the car to the Marianna Army Air Field. The car was then in good condition (R. 9-13, 15-17).

4. For the defense, accused made an unsworn statement substantially as follows: While at the dance at the Officers' Club on the night of 17-18 July he received a telephone call which was supposed to be an emergency call. Before he received the call accused saw Lieutenant Kehrein and started to request the loan of his car but remembered that Kehrein had asked how the court-martial of accused came out, was afraid that Kehrein might become involved and "told somebody else to tell him". Accused "borrowed" the car and went to Dothan to call the party who he thought had called him. When he started back to the field, he put in a call for Lieutenant Kehrein at the bus station, and while waiting there saw Colonel Cheatwood. He asked a soldier if Colonel Cheatwood had seen him, as he preferred to report his absence rather than have Colonel Cheatwood do so. Accused then telephoned Lieutenant Kehrein and the latter said "it was all right to come on back". Accused did not try "to hide it". He had "told an officer to tell him" and he told the guards at the gate that it was Lieutenant Kehrein's car. The next morning accused tried to trace the emergency call and found that no long distance call had been received for him. He never did find out where the call "came from". "Lt. Thompson, a flying officer" remembered that accused talked to him that night but did not recall that accused had asked him (Lieutenant Thompson) to tell Lieutenant Kehrein (R. 18).

5. In rebuttal, the civilian telephone operator who had been on duty at the Marianna Army Air Field signal office on the night of 17-18 July, when asked whether she had received any telephone call direct to accused that night, testified that she had not "placed" one but that he could have received one through another operator. She also stated that she was the only person "working the switchboard" from 6:00 p.m. to midnight. Sergeant William Lemb was on duty in B.O.Q. 153 on the night of 17-18 July. No telephone call came through him for accused, but there were other telephones nearer to the quarters of accused (R. 18-20).

6. a. Specification 1: It is shown by the evidence and admitted by the pleas of guilty that after accused had been restricted to the

limits of the post by a sentence of a general court-martial duly adjudged and promulgated and of which he had notice, he breached the restriction by leaving the post and going to Dothan, Alabama.

b. Specification 2. The evidence shows that accused took the automobile of Lieutenant Kehrein, which was parked near the Officers' Club, and without the knowledge or consent of the owner drove it off the post to a nearby town. Accused was apprehended in possession of the car several hours later after Lieutenant Kehrein had reported it stolen and the military police had been instructed to look out for it. After his apprehension accused talked by telephone with Lieutenant Kehrein and the latter told him "to come on back and everything would be OK". In explanation of such statement Lieutenant Kehrein testified that he gave his consent to accused to drive his car back to the post as he thought it would avoid expense and inconvenience. He expressly denied that he had at any time prior to the taking of his car at the Officers' Club, authorized accused to use the car. In the opinion of the Board of Review accused wrongfully took and used the automobile of Lieutenant Kehrein without the consent of the owner as alleged in Specification 2 of the Charge.

7. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 12 January 1942; appointed second lieutenant, Army of the United States and active duty 9 October 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 96th Article of War.

Samuel M. Driver, Judge Advocate
J. J. Lotterhos, Judge Advocate
Norman D. Lattin, Judge Advocate

1st Ind.

War Department, J.A.G.O., 11 OCT 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 P. Aquino (O-792671), 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. By sentence of a general court-martial adjudged 28 June 1943, for the offense of throwing a glass of beer upon his wife in the Officers' Club, in violation of the 96th Article of War, the accused was restricted to the limits of his post for three months and \$200 of his pay was forfeited. At about 1:30 a.m. on 18 July 1943 he took and drove away the automobile of another officer, without the consent of the owner (Spec. 2), and breached the restriction by driving off the post to a nearby town from which he did not return until about 6:30 a.m. of the same day (Spec. 1). I recommend that the sentence to dismissal 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 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. G.C.M.O. 412, 24 Dec 1943)

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

(273)

22 SEP 1943

SPJGH
CM 239839

UNITED STATES)

ARMY AIR FORCES SCHOOL
OF APPLIED TACTICS.

v.)

Private EDWARD B. HARRISON)
(33012240), Headquarters)
and Service Company, 841st)
Engineer Aviation Battalion.)

) Trial by G.C.M., convened
) at Army Air Forces School
) of Applied Tactics Air Base,
) Florida, 6 August 1943.
) Dishonorable discharge and
) confinement for twenty (20)
) years. Penitentiary.

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 tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

-Specification: In that Private Edward B. Harrison, Headquarters and Service Company, 841st Engineer Aviation Battalion, did, at Leesburg, Florida, on or about 6 July 1943, with intent to commit a felony, viz, rape, commit an assault upon one Frankie Darby, a female, by willfully and feloniously forcibly throwing her to the ground and throwing himself upon her.

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 twenty years. The reviewing authority approved the sentence and designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 6 July 1943, Frankie Darby, a girl nearly 14 years of age and weighing about 99 pounds, and her half-sister, Vivian Collins, aged nine years,

attended a motion picture theatre in Leesburg, Florida. At about 9:00 p.m., they left the theatre and purchased some candy at a popcorn stand, where they noticed accused with some other soldiers. The girls started toward their home, but happened to look back and saw accused standing "up there". When they walked on, he crossed behind them. Then the street lights went out and accused began "trotting". Vivian remarked "That soldier is drunk and he is following us" and both girls ran. When a car passed, accused slowed down and so did they. After the car passed, accused and the girls began running again. He then crossed to the opposite side of the street and kept abreast of them until the girls turned in at the driveway of their home. He then ran across the street, put his hands on the back of Frankie Darby's waist or hips, and pushed. Her foot caught on the curb and she fell flat on her stomach in the driveway. He fell on top of her, with the upper part of his body across her back and his head about a foot from hers. She tried to get him up. He put his hand on her leg under her dress, halfway between the hip and knee. Frankie knocked his hand away, turned on her side, and struck him on the head with the hand in which she was holding some blocks of candy. She was "knocking" him. Vivian was screaming and ran to the house. Accused started to put his hand on Frankie's leg again, but someone came to the door of the house, and he ran away. During the incident, nothing was said by Frankie Darby or accused, and Frankie was not hurt (R. 10-15, 19-36, 41-55).

On cross-examination of Frankie Darby, there was introduced in evidence a written statement (Def. Ex. 1) which she had signed before the investigating officer, after reading it. The statement concluded with the words "The soldier did not do anything to me except throw me down and fall on me * * *". On further questions by the prosecution she stated that accused "put his hand up my dress" (R. 37-41).

After Frankie Darby had brushed the dirt from her clothes, she told her stepfather what had happened. He reported the matter to Mr. L. C. French, a city policeman, and then to Corporal Olaf I. Gresham, on military police duty, and to Captain J. J. Marsh, Provost Marshal. A search was made for a soldier answering the description which Frankie gave. Shortly afterward, accused was taken in custody near the popcorn stand, and was positively identified by each girl separately. He had a cut on his chin, from which blood was flowing, and there was a spot of blood on the back of Frankie Darby's blouse. Accused

denied following or attacking Frankie, and stated to Captain Marsh that he had been at Venetian Gardens, a city park, where he had fallen and hit his chin. Captain Marsh advised accused "of his rights" and informed him that anything he said could be used against him. After further questioning, accused said it was possible that he had attacked the girl, and admitted that blood from the cut on his chin might have caused the blood spot on the back of her blouse. Accused had been drinking. Corporal Gresham could smell liquor on his breath, but accused walked all right and did everything he was told to do. To Captain Marsh accused seemed to have a full realization of what he was doing and saying, and to be not under the influence of liquor (R.16-19, 29-30, 51-72).

4. The evidence for the defense shows that Technician Fifth Grade Dewey Sims and Private First Class Hunder S. Hamm observed accused in Leesburg at about 5:30 p.m. and again at about 8:00 p.m. on 6 July. On each occasion they spoke to him, and he replied "Who in the hell are you". They were in the same company as accused, who had been first sergeant of the company at one time. If accused had been in his right mind; he would have called them by name. He was drunk and crazy, acted as if he were more crazy than drunk, and "stared wild out of his eyes". Sims had been drunk with accused but had never seen him "drunk that way". Accused was "a mighty good man" and "a lot better man" than Hamm, so they made no further attempt to talk with him. Technician Fifth Grade Henry E. Frye sat beside accused in a bar at Leesburg about 6:00 p.m. on 6 July, and saw him take five drinks of whiskey. Frye, who had known accused for ten months, made three attempts to talk with him at the bar, but accused did not answer questions or say anything during the time that Frye was there (R.73-86).

First Lieutenant Verginio Renzi, the commanding officer of accused, testified that Frankie Darby had made a statement to him in which she said that when accused approached her he did not grab her, but she stumbled and fell, and accused fell on her or close by her, and that he "did not make any moves to get off her clothing or anything like that" (R. 86-88).

Accused testified that he had been a physical instructor prior to his induction into the Army. He became first sergeant of his company but had been reduced to private prior to 6 July, because he had missed inspection while he was sick at home. He married in September 1942, and his wife lived with him at Leesburg until about 18 June 1943 when she went to New York. They expected a child to be born

in November or December. On 6 July 1943, accused was in Leesburg on pass. He started drinking about noon in the tap room of the Night Owl and drank a quantity of beer. He could not recall anything from that time until he was picked up by the military police at the popcorn stand that evening. His mind was a blank as to intermediate events and he did not recall having seen the witnesses at that time. He had a vague recollection of being taken to the police station and being there identified by the two girls (R. 98-106).

First Lieutenant F. S. Racey, Corps of Chaplains, who had known accused since November 1942, testified that his reputation was good (R. 93-97).

5. The evidence shows that at about 9:00 p.m. on 6 July accused, who had been drinking, saw two girls, Frankie Darby, nearly 14 years of age, and her half-sister, Vivian Collins, nine years of age, walking home from the picture show. Accused followed them along the street. When he ran the girls ran and when he walked they walked. He crossed to the other side of the street and kept abreast of them. When they turned into the driveway of their home, he ran across the street, put his hands on the back of Frankie Darby's waist or hips and pushed her. She stumbled on the curb and fell flat on her stomach in the driveway. Accused fell on top of her, with the upper part of his body across her back and his head about a foot from hers. She tried to get him off. He placed his hand on her leg under her dress, halfway between the hip and knee. The girl knocked his hand away, turned on her side and struck him on the head. She was fighting or "knocking" him, and the other girl ran to the house screaming. Accused started to put his hand on Frankie's leg again, but someone came to the door of the house and accused ran away.

The evidence clearly establishes that at the time and place alleged, accused assaulted Frankie Darby by pushing her down and placing his hand on her leg. The sole question requiring consideration is whether there is any substantial evidence that the assault was made with intent to commit rape. 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 (MCM, 1928, par. 1491). The intent to commit rape must appear from the evidence to have been such as that the accompanying battery, if effectuated, would have amounted to the legal crime of rape. It must be inferable from all the circumstances that the design of the assailant, in the battery, was to

gratify his passions at all events and notwithstanding the opposition offered--to overpower resistance by all the force necessary to the successful accomplishment of his purpose (Winthrop's Military Law and Precedents, Reprint, p. 688).

The question whether there is any substantial evidence to sustain the finding of the court that at the time of the assault accused had the intent to rape the girl, is a question of law which must necessarily be considered by the Board of Review and does not involve determining the weight of the evidence or passing upon the credibility of witnesses. Where an assault is committed on a woman or girl, and the facts do not afford a reasonable basis for the inference of an intent to commit rape, the Board of Review will not approve a finding of guilty of assault with such intent (CM 199369, Davis; CM 220805, Peavy; CM 230541, Daniel).

The facts set out above--in brief, that accused followed the two girls, pushed one of them down on her stomach, fell on her, and placed his hand on her leg--do not, in the opinion of the Board, support an inference that accused intended to overcome any resistance by force and penetrate the girl's person. The evidence supports only a finding of guilty of the lesser included offense of assault and battery, in violation of the 96th Article of War.

6. The maximum limit of punishment on conviction of an assault and battery is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (MCM, 1928, par. 104c).

Confinement in a penitentiary is not authorized by the 42nd Article of War upon conviction of assault and battery in violation of the 96th Article of War.

7. The charge sheet shows that accused is 26 years of age, and that he was inducted 5 April 1941.

8. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involves findings of guilty of assault and battery, in violation of the 96th Article of War, and legally sufficient to support only so much of the sentence as involves confinement at hard labor in a place other than a penitentiary, Federal correctional institution or reformatory for six months and forfeiture of two-thirds pay per month for six months.

W. S. [Signature], Judge Advocate

Samuel M. Druver, Judge Advocate

J. F. [Signature], Judge Advocate

(278)

1st Ind.

War Department, J.A.G.O., 23 SEP 1943 - To the Commanding General,
Army Air Forces School of Applied Tactics, Orlando, Florida.

1. In the case of Private Edward B. Harrison (33012240), Headquarters and Service Company, 841st Engineer Aviation Battalion, 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 as involves findings of guilty of assault and battery, in violation of the 96th Article of War, be approved, and that only so much of the sentence as involves confinement at hard labor in a place other than a penitentiary, Federal correctional institution or reformatory for six months and forfeiture of two-thirds pay per month for six months be approved. Thereupon, you will have authority to order the execution of the sentence.

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

(CM 239839).

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

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

(279)

27 SEP 1943

SPJGH
CM 239845

UNITED STATES	)	FORT KNOX
)	
v.	)	Trial by G.C.M., convened
	)	at Fort Knox, Kentucky, 19
First Lieutenant MORRIS	)	August 1943. Dismissal,
WOHL (O-1011978), Army	)	total forfeitures and con-
of the United States.	)	finement for two (2) years.

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

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Morris Wohl, Infantry, First Company, First Student Regiment, Training Group, The Armored School, having custody of the Company Fund of the First Company, First Student Regiment, Training Group, The Armored School, furnished and intended for the said Company, did, at Fort Knox, Kentucky, on or about 23 July 1943, knowingly and wrongfully deliver to W. L. Adams, Louisville, Kentucky, said W. L. Adams having authority to receive same, a check from said Company Fund for \$124.85 which he, Lieutenant Wohl, then knew was \$29.50 more than the value or price of the merchandise he received from said W. L. Adams.

Specification 2: In that First Lieutenant Morris Wohl, Infantry, First Company, First Student Regiment, Training Group, The Armored School, having the custody of the Company Fund of the First Company, First Student Regiment, Training Group, The Armored School, did, at Fort Knox, Kentucky, on or about the 20th day of July, 1943, wrongfully propose,

suggest to and demand of W. L. Adams, Louisville, Kentucky, that the said Adams deliver to him, Lieutenant Wohl, certain articles of merchandise of the value of \$95.35, and that thereafter, he, the said Lieutenant Wohl, deliver to the said W. L. Adams a check on the Company Fund of the First Company, First Student Regiment, Training Group, The Armored School, in the sum of \$124.85, after the receipt of which, the said Lieutenant Wohl wrongfully proposed, suggested and demanded that he personally receive back from the said W. L. Adams the sum of \$29.50.

Specification 3: In that First Lieutenant Morris Wohl, Infantry, First Company, First Student Regiment, Training Group, The Armored School, being in command of his said organization, and it being his duty to make and render true and proper vouchers for expenditures from the Company Fund, First Company, First Student Regiment, Training Group, The Armored School, did, at Fort Knox, Kentucky, on or about 23 July 1943, knowingly make a false voucher, which voucher was false in that it showed the said Lieutenant Wohl, as Commanding Officer of First Company, First Student Regiment, Training Group, The Armored School, among other things, received two dozen deodorant blocks, twelve dozen bars of soap and two tubes of four ounce deodorant blocks, when in truth and in fact he, the said Lieutenant Wohl, then well knew that he received only one dozen deodorant blocks, six dozen bars of soap, and one tube of four ounce deodorant block.

He pleaded not guilty to and was found guilty of the Charge and all 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 the sentence and the record of trial was forwarded for action under the 48th Article of War.

3. The evidence for the prosecution shows that Mr. W. L. Adams, a salesman who called on company commanders at Fort Knox, went to the orderly room of the First Student Company on 20 July 1943 to see the first sergeant. When he arrived there the first sergeant was out and accused stated that he would see Mr. Adams in a minute. Accused asked Mr. Adams if some merchandise previously ordered had come in and was

advised that it had. Mr. Adams suggested the purchase of various articles which he handled. Accused then gave an order for some merchandise, including deodorant blocks and soap for dispensers. When the order was written up accused asked to see the order and stated "I want you to take and send instead of two dozen deodorant blocks, 2 1/4 ounce size, send only one dozen on that, and on the soap, instead of making it twelve dozen bring six dozen; and on the two tubes of deodorant blocks, instead of sending two tubes sent (sic) one and make the bill as originally planned". In the course of conversation accused stated that he was short 17 or 21 sheets and had to find some way to cover it up, or that the men in the company lost the sheets, that he did not see why he had to "dig down in his own pocket" to make up their shortages, and "Let them pay for it themselves" out of the company funds. Mr. Adams understood that he was to make out his bill to read "Per Merchandise as Delivered", receive a check from accused for \$124.85, and refund to accused in cash \$29.50, the price of the undelivered merchandise. The full order included 12 dozen soap for soap dispensers, two dozen 2 1/4-ounce deodorant blocks, and two tubes of 4-ounce deodorant blocks. After taking the order Mr. Adams left the orderly room. On a previous occasion in June accused had ordered one dozen 2 1/4-ounce deodorant blocks and asked Mr. Adams to deliver a half dozen, bill accused for a dozen, and refund to accused \$7.50, as he wanted to make up for 17 sheets which were short. When it was time to deliver the merchandise ordered in June, Mr. Adams told accused it had not come in (R. 10-12, 15-18, 20, 22-23, 27-28, 34).

When Mr. Adams went home on the night of 20 July he talked to his family and some friends about what had occurred and decided to report it. The next day he talked to an officer of his acquaintance at Fort Knox and was referred to Lieutenant Colonel Benjamin W. Hawes, commanding the First Student Regiment of the Training Group and regimental commander of accused. On 22 July Colonel Hawes talked to Colonel Milton H. Patton, commanding the Training Group, about the matter and then brought Mr. Adams to the office of Colonel Patton. These officers gave Mr. Adams two \$10 bills and two \$5 bills, the serial numbers of which had been recorded, and directed him to complete the proposed transaction with accused and then to notify Colonel Hawes immediately. Colonel Patton directed Colonel Hawes to take another officer with him and be in the vicinity of the First Company on 23 July, and to go to accused and demand the bill for the merchandise and the money received from Mr. Adams, as soon as the proposed transaction had been completed (R. 12, 18-19, 22, 24-26, 29-32, 38).

On 23 July, Mr. Adams telephoned accused and was told to deliver the goods about 1:30 p.m. Mr. Adams went to the office of

accused at that time, made out an invoice as accused had directed, and delivered the merchandise. The invoice (Ex. 1) dated 23 July 1943 was made out on a form of "W. L. Adams" to "1st Co Tr. Gp A.F.S." and included 12 dozen soap for dispensers \$24, two dozen 24-ounce deodorant blocks \$30, and two tubes of 4-ounce deodorant blocks \$5. The total amount of the invoice was \$124.85. All of the merchandise listed on the invoice was delivered to accused by Mr. Adams except 6 dozen soap for dispensers, one dozen 24-ounce deodorant blocks, and one tube of 4-ounce deodorant blocks. Accused then wrote a check (Ex. 2) dated 23 July 1943, payable to "W. L. Adams" in the amount of \$124.85, and signed "Company Fund 1st Co. Tng Gp. A.F.S. Morris Wohl Custodian". Accused delivered the check to Mr. Adams and at the request of Mr. Adams, wrote on the invoice "Rec'd July 23, 1943 Lt. Wohl". Mr. Adams wrote on the invoice "Paid W. L. Adams July 23/43 Thanks". When the check had been delivered Mr. Adams invited accused outside for a "coke", they went to Mr. Adams' car, he handed to accused the four bills that Colonel Hawes had given him, and accused gave him two quarters in change. At this time accused did not ask for or demand the money nor suggest that it be returned to him, and Mr. Adams did not ask for the change (R. 12-14, 24-27, 29).

When Mr. Adams reported about 2:30 p.m. on 23 July that "the deal had gone through", Colonel Hawes and Major Carl Edmonds went to the office of accused, told the enlisted men to leave, asked accused for the invoice, and stated to him that they wanted to inventory the property that had come in. They checked the property against the invoice signed by accused and Mr. Adams, and found that those articles which Mr. Adams had not delivered, though shown on the invoice, were missing. The invoice (Ex. 1), which accused removed from a desk drawer where fund vouchers were kept, was a "Company voucher for the First Company" as shown in the right corner. (There was a notation on the lower right corner of the invoice "Voucher No. 7 Month of July 23, 1943 Amount \$124.85"). Colonel Hawes asked accused for the money and accused handed him the four bills he had received from Mr. Adams, which were the same bills that Colonel Hawes had delivered to Mr. Adams. Colonel Hawes warned accused that he need not say anything and that anything he said could be used against him. Accused stated that he could explain everything, that he was 21 sheets short or that his men had lost some sheets, and that he wanted to make up the 21 sheets. When asked if he did not know how to make the sheets up, accused replied that he did not. They then went to Colonel Patton's office, where accused stated that he did not know he was doing wrong in taking the money, because he was short of sheets and wanted to make them up, and that if he had thought he was doing wrong he would not have done it. Accused admitted to Colonel Patton that he knowingly and willingly made the transaction and gave a company fund check for the full amount when

he knew that he had received only a part of the merchandise. Accused stated that he did this because he needed some sheets, and did not survey them because his supply sergeant told him he could not survey sheets. Colonel Patton had never prohibited the surveying of sheets, but no company commander had ever surveyed any since he had been in the Training Group (R. 31-37, 39-40).

Accused did not attempt to hide anything, answered questions directly, and did not hesitate to turn over the money and explain the transaction. Prior to this occurrence Colonel Patton and Colonel Hawes had rated the efficiency of accused as excellent, and he was a satisfactory company commander. Colonel Patton had considered accused to be one of his "most outstanding" trial judge advocates, regardless of age or experience in the military service (R. 25, 40).

4. The evidence for the defense shows that it was the custom in the First Company for the men to put their beds and bedding out for airing two days each week, and that 10 or more men, including Technicians Fifth Grade Sam Mednic and Edward S. Cimek, had lost sheets while they were being aired. When sheets were lost in this way, accused told Staff Sergeant Albert J. Csobanovits, Supply Sergeant of the company, to give the men new sheets and they were not charged with them. Accused loaned Sergeant Csobanovits \$20 on one occasion, permitted him to charge a telephone call to the account of accused on another, and had never asked for the money. When accused was relieved of command, inventory was taken and there were 30 sheets short (R. 42-44).

Accused testified that he was in the New York National Guard, was inducted into Federal service in February 1941, went to Officer Candidate School in June 1942, graduated 13 September 1942, and was assigned as special service officer and then supply officer in the First Student Group. From 28 December 1942 to 23 July 1943 he was in command of the First Company. In Officer Candidate School he had a very limited course in Administration, and had no experience as company commander prior to December 1942. After assuming command of the company, he received no training other than day to day experience (R. 44-45).

When Mr. Adams came into his office on 20 July, accused told him he could not sell anything to accused that day. Mr. Adams engaged him in conversation. Accused told him about sheets being lost when the men aired their beds and said "I don't know what I am going to do, I have got to make it up somehow, because it is not their fault they

were ordered to put them out in the sun at least twice a week". Mr. Adams then said "I have a suggestion that other Commanders have done", suggested that accused order from him some things that could be used, and said "I will raise the bill" and "You get the allowance due to the particular students who have lost the property and you will deprive them of nothing, because it would benefit the men who lost the particular sheets in the Company". Mr. Adams added "If I raise this item and raise that item, why then you will have enough money to make up for these particular sheets that your men are short". Accused saw nothing wrong about it, so he gave the order. Accused had never had such an agreement with Mr. Adams before (R. 45-46).

On 23 July, Mr. Adams came over with the merchandise about 1:30 p.m., showed accused the three items he had raised, and accused wrote the check and delivered it. Mr. Adams then called accused outside and said "you have thirty dollars coming", and accused gave him 50 cents change. About fifteen minutes later Colonel Hawes and Major Edmonds came to the orderly room, and asked for the voucher and the merchandise. Accused explained about the sheets, that he did not think it right to charge the men for them, that he did not want to charge them, and that he did not think he was doing anything wrong. He gave the money to Colonel Hawes, told him that it was received from Mr. Adams, and that accused was going to use it for sheets the students had lost. When taken to Colonel Patton he repeated his statements (R. 47-48).

There were between 28 and 35 sheets missing. Accused understood, as he had heard Colonel Patton say in lectures, that it is the duty of a company commander to assist his subordinates, try to help them, treat the men "fair", and get them to "love you". Accused described several incidents in which he had been considerate of men under his command. With respect to the money handed to him by Mr. Adams, accused stated that he intended to use it for the purchase of lost property in the company, had no intention to take it, did not need it, and would not touch that amount of money. He was working for the City of New York when inducted into the Army and received the difference in salary. His father held over \$1,000 which was paid to the account of accused, and accused had no intention whatever to apply any part of "this measly sum, \$29.50" to himself. In making the agreement with Mr. Adams he did not think he was doing anything prejudicial to the service, but felt that what he was doing was for the benefit of the men. He did not survey the sheets because his supply sergeant had said that no survey of sheets would go through on "this particular Post" (R. 48-49, 51).

On cross-examination it was brought out that accused had acted as trial judge advocate in about 45 cases before special courts-martial, and as assistant trial judge advocate in about 20 general court-martial cases. He identified a paper handed to him, as voucher No. 7 of the First Company for July, showing money paid from the company fund. He did not receive all of the items shown on the voucher. He felt that he had the responsibility of accounting for funds in his possession, and that a false accounting was wrong (R. 49-51).

5. The evidence shows that the company commanded by accused was short some sheets that had been lost when the men aired their beds and bedding twice a week. New sheets had been issued to the men who had lost sheets but they were not charged with the new sheets, as accused did not consider the men responsible. On 20 July when Mr. Adams, a salesman, called on accused, he and accused entered into an arrangement whereby accused would order merchandise to the amount of \$124.85 to be paid for out of the company fund, Mr. Adams would deliver the merchandise ordered except one dozen 24-ounce deodorant blocks, six dozen soap, for soap dispensers and one tube of 4-ounce deodorant blocks, accused would deliver a check for \$124.85, and Mr. Adams would refund to accused \$29.50, the price of the excepted merchandise. Accused understood that the lost sheets could not be surveyed, did not feel that he should bear the expense, intended to use the \$29.50 to replace the lost sheets, and saw nothing wrong in taking the money for that purpose. The next day Mr. Adams reported the matter to the military authorities.

Mr. Adams testified that accused proposed the arrangement described above. According to accused, it was suggested to him by Mr. Adams. Actually, it is of little importance whether the transaction was suggested initially by accused or the salesman. The prime question is whether accused voluntarily entered into it. The version of the conversation given by accused, however, is not convincing. He testified that he advised the salesman that he would not buy anything that day, that the salesman then engaged him in conversation, and that he (the accused) discussed with the salesman the matter of the sheets and stated that he had "to make it up someday", as a result of which the salesman proposed the plan which was used. According to Mr. Adams accused placed an order in a normal way, and after it was written up requested that certain items be not delivered, but shown on the bill, and explained the reason for the arrangement. Actually, accused ordered a considerable amount of other merchandise. There is no intimation in the evidence of

any possible motive for Mr. Adams to have led accused into the arrangement and then to have entrapped him by reporting it. If Mr. Adams had originated the scheme, it would have been unusual, to say the least, for him to have become convinced of its wrongful character later, and then to have reported it to those in authority rather than to have gone back to accused and withdrawn the proposal. On the other hand if the transaction was initiated by accused there was no reason to go to accused to withdraw the proposition before reporting it. There was no evidence that accused "demanded" that Mr. Adams enter into the plan described.

After Mr. Adams reported the arrangement to the military authorities, he was given \$30 in currency, the serial numbers of which had been recorded, and was directed to complete the proposed transaction with accused. On 23 July, the transaction was completed between accused and Mr. Adams according to their original agreement. After receiving the check for \$124.85, Mr. Adams gave accused the \$30 and received fifty cents in change. The currency aggregating \$30, found in the possession of accused, was identified as that previously delivered to Mr. Adams. At the request of Mr. Adams, accused wrote on the invoice "Rec'd July 23, 1943 Lt. Wohl". The invoice listed the merchandise making up the total amount of \$124.85, including those items not delivered, and was marked paid by Mr. Adams. It became and was used as a company fund voucher.

The evidence shows beyond any reasonable doubt that accused wrongfully delivered a check on the company fund for \$124.85, which he knew was \$29.50 more than the price of the merchandise received (Spec. 1); that he wrongfully proposed to deliver such check and personally to receive back \$29.50, the price of the undelivered merchandise (Spec. 2); and that he knowingly made a false voucher for the company fund by writing thereon a receipt for merchandise which he knew had not been delivered (Spec. 3). In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, except as to the words "and demand of" and "and demanded" in Specification 2.

6. The fact that Mr. Adams reported the proposed transaction to the military authorities and was directed to complete it with accused, did not constitute a defense on the theory of entrapment. Such defense is available in cases where an agent of the Government or his assistant incites or lures an accused into doing a criminal act (Dig. Op. JAG, 1912-40, sec. 395 (35); CM 187319, Line; CM 207652, Fay and Morris). But where a person has formed the intent to commit an offense,

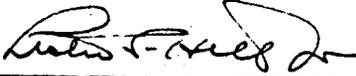
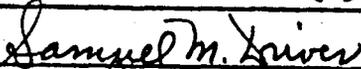
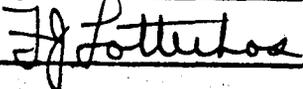
and agents of the Government merely lay a trap to catch him, or even cooperate with him in order to obtain proof of his guilt, the defense cannot be sustained. Decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime (CM 200161, Irving and Morris; CM 211557, Huntress; CM 227195, Franklin). The line of demarcation between the two rules stated above is well shown by the following language from Sorrells v. United States (287 U. S. 435), which has been quoted with approval by the Board of Review:

"The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." (CM 211557, Huntress).

7. Mr. Arthur Garfield Hays and Mr. Sidney Struble made an oral argument in behalf of accused before the Board. They also presented a brief, which has been carefully considered.

8. The accused is 37 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 3 February 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty, 12 September 1942; appointed first lieutenant, 25 May 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Specification 2 except the words "and demand of" and "and demanded", legally sufficient to support the findings of guilty of all other Specifications and of the Charge, 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.


 _____, Judge Advocate

 _____, Judge Advocate

 _____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 4 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 First Lieutenant Morris Wohl (O-1011978), Army of the United States.

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 Specification 2 except the words "and demand of" and "and demanded", legally sufficient to support the findings of guilty of all other Specifications and of the Charge, and legally sufficient to support the sentence and to warrant confirmation of the sentence.

The accused wrongfully proposed to a salesman that the latter deliver merchandise of a value of \$95.35, that accused deliver a check on the company fund for \$124.85, and that accused personally receive back from the salesman the difference of \$29.50 (Spec. 2); wrongfully delivered a check on the company fund for \$124.85, which accused knew was \$29.50 more than the value of merchandise received (Spec. 1); and knowingly made a false company fund voucher which showed receipt of merchandise not actually received (Spec. 3). It appeared that accused engaged in the wrongful conduct of which he was found guilty for the purpose of obtaining money to replace some sheets which his men had lost. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for two years be confirmed, but in view of all of the circumstances that the confinement and the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Careful consideration has been given to a letter dated 20 October 1943, with an inclosed brief in behalf of accused, from Messrs Arthur Garfield Hays, Sidney Struble and Frank W. Ford.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

4 Incls.

Incl.1-Rec. of trial.
Incl.2-Dft.ltr. for sig. S/W.
Acting The Judge Advocate General.

Incl.3-Form of Action.
Incl.4-Ltr. fr. Messrs Hays,
Struble and Ford,
20 Oct. 1943.

(So much of finding of guilty of Specification 2 as involves finding of guilty of the words "and demand of" and "and demanded" disapproved. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 18, 8 Jan 1944)

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

(289)

SPJGQ
JM 239853

13 SEP 1943

UNITED STATES

v.

Private GEORGE R. VAN GLYNN
(14051835), Company "C",
785th Tank Battalion, and
Private HOWARD E. BROWN
(35646251), 3554th Service
Unit.

FORT KNOX, KENTUCKY

Trial by G.C.M., convened at
Fort Knox, Kentucky, 20 August
1943. Each: Dishonorable dis-
charge and confinement for five
(5) years. Penitentiary.

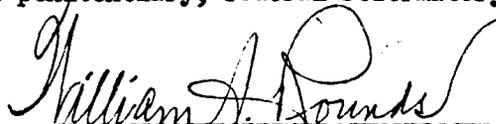
HOLDING by the BOARD OF REVIEW
ROUNDS, HEPBURN and LATTIN, Judge Advocates.

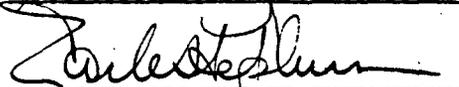
1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

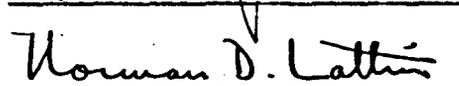
2. The only question requiring consideration is the propriety of the designation of a penitentiary as the place of confinement.

Confinement in a penitentiary, Federal reformatory or correctional institution is not authorized under letter dated February 26, 1941 (AG 253 (2-6-41) E), from The Adjutant General to all commanding generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). (Confinement in a penitentiary is not authorized under Article of War 42 for attempt to commit sodomy, the offense of which accused were found guilty.)

3. For the reasons stated the Board of Review holds the record of trial 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 reformatory or correctional institution.


_____, Judge Advocate.


_____, Judge Advocate.


_____, Judge Advocate.

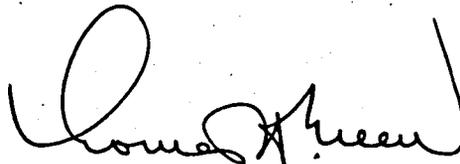
1st Ind.

War Department, J.A.G.O., 14 Sep 1943 - To the Commanding Officer,
Fort Knox, Kentucky.

1. In the case of Private George R. Van Glynn (14051835), Company "C", 735th Tank Battalion, and Private Howard E. Brown (35646251), 3554th Service Unit, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend 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 five years in a place other than a penitentiary, Federal reformatory or correctional institution. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50 $\frac{1}{2}$, and Executive Order No. 9363, you will have authority to order the execution of the sentences.

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

(CM 239853).



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

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

(291)

27 OCT 1943

SPJGH
CM 239909

UNITED STATES)

v.)

First Lieutenant WILLIAM
L. GRADY (O-470836), Army
of the United States.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Hondo Army Air Field,
Hondo, Texas, 13 August
1943. Dismissal, total
forfeitures, and confine-
ment at hard labor for
two (2) years.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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

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

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

Specification 1: In that First Lieutenant William L. Grady, Headquarters & Headquarters Squadron, 88th Navigation Training Group, did, at Waco, Texas, on or about November 19, 1942, with intent to injure and defraud, wrongfully and unlawfully make and utter to the Raleigh Hotel, Waco, Texas, a certain check, in words and figures as follows, to wit:

San Antonio, Texas Nov. 19 1942

NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay to the order of CASH \$25.00
Twenty Five & No/100- - - - - DOLLARS

/s/ William L. Grady

and by means thereof, did fraudulently obtain from the said Raleigh Hotel, Waco, Texas, the sum of twenty-five dollars (\$25.00), he the said Lieutenant William L. Grady, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, for the payment of said check.

Specification 2: Same form as Specification 1 but alleging that the check was of the amount of \$40.

Specification 3: Same form as Specification 1 but alleging that the check was of the amount of \$50.

Specification 4: Same form as Specification 1 except that the check set out was payable to the order of Raleigh Hotel in the amount of \$40.

Specification 5: Same form as Specification 4 but alleging that the check was for \$75.

Specification 6: Same form as Specification 5.

Specification 7: Same form as Specification 4 but alleging that the check was for \$50.

Specification 8: Same form as Specification 7.

Specification 9: Same form as Specification 1 but alleging check dated 18 April 1943, for \$12, made and uttered to Robert E. Lee Hotel, San Antonio, Texas.

Specification 10: Same form as Specification 1 but alleging check dated 10 May 1943, for \$15, made and uttered to the White Hotel Company, San Antonio, Texas, and with an additional stipulation in the body of the check to pay protest fees, a reasonable investigation charge, a reasonable attorney's fee if placed in attorney's hands for collection, and a waiver of all exemption laws of Texas.

Specification 11: Same form as Specification 1 but alleging check dated 11 May 1943, for \$30, made and uttered to the Alamo Driverless Car Company, Incorporated, San Antonio, Texas, the sum obtained representing \$8.65 in services and \$21.35 in cash.

Specification 12: Same form as Specification 11 but alleging check dated 13 May 1943, for \$30, the sum obtained representing \$6.75 in services and \$23.25 in cash.

Specification 13: Same form as Specification 1, but alleging check dated 17 May 1943, for \$15, drawn upon the Hondo National Bank of Hondo, Texas, made to order of cash and uttered to the Pincus Company, San Antonio, Texas.

Specification 14: Same form as Specification 1, but alleging check dated 19 May 1943, for \$50, made to the order of cash and uttered to the Fort Sam Houston Post Exchange, Fort Sam Houston, Texas.

Specification 15: Same form as Specification 1, but alleging check dated 19 May 1943, drawn upon the Hondo National Bank, Hondo, Texas, for \$10, made to the order of cash and uttered to the National Bank of Commerce, San Antonio, Texas.

Specification 16: Same form as Specification 1, but alleging check dated 24 May 1943, for \$20, made and uttered to The Washington-Youree Hotel Company, Incorporated, Shreveport, Louisiana, with representation in the check that drawer had the amount drawn to his credit in drawee bank and had obtained the "above sum" through this representation.

Specification 17: Same form as Specification 16, but alleging check dated 25 May 1943, for \$25.

Specification 18: Same form as Specification 16, but alleging check dated 27 May 1943, for \$25.

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

Specification: In that First Lieutenant William L. Grady, Headquarters & Headquarters Squadron, 88th Navigation Training Group, did, without proper leave, absent himself from his station at Hondo Army Air Field, Hondo, Texas, from about May 18th, 1943, to about June 19th, 1943.

The accused pleaded guilty to Specifications 11, 14 and 15, of Charge I and to Charge I, not guilty to the remaining Specifications of this Charge, and guilty to the Specification, Charge II and to Charge II. He was found guilty of all Charges and Specifications and was sentenced

to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

a. The accused drew two checks only upon the Hondo National Bank, Hondo, Texas. The account of accused in this bank was closed on 27 April 1943. One of the checks was drawn to "Cash" and uttered to the Pincus Company, being for \$15 and dated 17 May 1943 (Spec. 13, Chg. I). The other was drawn to "Cash" and uttered to the National Bank of Commerce, San Antonio, Texas, being for \$10 and dated 19 May 1943 (Spec. 15, Chg. I) (R. 19-21, 25; Exs. C and D).

b. All checks except those set forth in Specifications 13 and 15 of Charge I were drawn upon the National Bank of Fort Sam Houston, San Antonio, Texas. On 19 November 1942, when the accused had on deposit there the sum of \$3.02, he drew eight checks (three to "Cash" and five to the Raleigh Hotel) and uttered seven of them to the Raleigh Hotel for a total of \$365 (Specs. 1, 3-8, Chg. I), and one to "Mr. Lang", a clerk of the Raleigh Hotel, for \$40 (Spec. 2, Chg. I). All were properly presented to the drawee-bank for payment on the following day. Payment was refused due to "Not sufficient funds". The accused promised the Raleigh Hotel Company to make these checks good but to the date of the deposition of Mr. J. L. McLendon, Assistant Manager of the Raleigh Hotel (3 August 1943), he had repaid only \$255. The remaining checks aggregating \$207 (\$12--Spec. 9; \$15--Spec. 10; \$30--Spec. 11; \$30--Spec. 12; \$50--Spec. 14; \$20--Spec. 16; \$25--Spec. 17; \$25--Spec. 18) were likewise made and uttered as alleged at times when the accused did not have on deposit a sufficient balance to meet them. For a check drawn on 13 May for \$30 to Alamo Driverless Car Company, Incorporated (Spec. 12), accused received \$6.75 in services and no cash. They were presented promptly and payment was refused due to insufficient funds (R. 29-33; Exs. E, F, G, H, I, J).

There is evidence to the effect that the accused had made an "allotment" to the bank of \$100 a month but that there were outstanding notes of \$50 denominations for which the bank deducted from the accused's balance this amount monthly. A monthly service charge by the bank left an amount slightly under \$50 to be checked out each month. The allotments ordinarily came to the bank between the 5th and 7th of the month (R. 33-34).

c. As to Charge II and the Specification thereunder, to which he had pleaded guilty, the morning report of the squadron of accused shows the accused from duty to absent without leave at 0600, 18 May 1943 and from absent without leave to arrest in quarters at 1230, 19 June 1943 (R. 35-36; Ex. K).

4. The evidence for the defense is as follows: Captain Martin L. Towler, Medical Corps, a specialist in neuro-psychiatry, testified that he had observed the accused at the Brooke General Hospital from 26 June 1943 to 2 August 1943 and had diagnosed the accused as a constitutional psychopath, one suffering from "inadequate personality, manifested by impulsive, erratic behavior, poor judgment, excessive indulgence in alcohol, emotional instability and immaturity, lack of respect for vested authority and disregard for the rights and feelings of other people, all of which render him wholly unfit to perform the duties of an officer, and in our opinion, the government can obtain no useful service from him". Captain Towler stated that a medical board of which he was a member had recommended that the accused be brought before an Army Reclassification Board and that he be relieved from active service under the provisions of AR 605-230. However, Captain Towler found "no mental or physical reasons" that would render his trial by court-martial improper from any standpoint (R. 37-41).

Witnesses closely associated with the accused testified that he had been an efficient officer with ability and good habits. However, recently the accused seemed to have troubles on his mind, was late or absent entirely from appointments, was moody and erratic. His secretary testified that in dictating letters he seldom, if ever, finished a complete letter. He would start the letter, whether it was important or official or not, then "go off on a tangent" into something else, come back to the letter a little later and have to start it all over again, or not finish it and ask his secretary to do so. That happened very often (R. 46-48, 50, 52-53, 55, 57-59, 62; see letters of commendation, Def. Ex. A).

The accused testified that he was married on 30 May 1942; had been separated from his wife "intermittently since the first of November, last year"; and that there is a "divorce case going on in Dallas today". Accused stated that he had gambled at dice at the Raleigh Hotel, Waco, Texas, 19 November 1942, and had lost; that he had thirty-five or forty dollars in cash in his pocket when he went to the hotel; that he began to lose and thought he would be able to win back his losses so "I wrote my first check, which I had no intent to defraud anybody". He did not know when he wrote the first check whether or not he had sufficient funds

(296)

to cover it. "After I had written as much as fifty or sixty dollars in checks I knew that I had no more". His intention was either to repay the hotel the amounts paid him on these checks or to deposit money in the bank. He tried to secure a loan the following day "to make up the money" but was refused because a civilian indorser could not be procured. He claimed that of the eight checks given (Specs. 1-8), one for \$40 (Spec. 2) and made out to cash, was not cashed by the clerk of the hotel but was put directly into the game. The accused also claimed he was drinking considerably at the time but was not intoxicated (R. 65, 67-72, 79).

Accused arranged with the hotel to repay the money obtained by these checks, paid \$100 on 1 January 1943 and "either eighty or seventy dollars" in February. He then turned over his "entire financial set-up" to "Colonel Evans" who, through correspondence which accused had not seen, arranged to pay the hotel and another indebtedness of accused at the rate of \$37.50 monthly. Accused believed that two payments had been made. He stated that he had not signed a pay voucher since April. He would pay every nickel of the money he owed (R. 72-73).

Accused testified that when he cashed the checks dated 18 April and 10 May at the Robert E. Lee Hotel and the White Plaza Hotel respectively, he had a "reasonable right" to expect that he had money in the bank (Specs. 9 and 10, Chg. I). He had a Class E allotment payable to The National Bank of Fort Sam Houston upon which the checks were drawn and such allotments arrived on or about the 10th of the month (R. 74).

He explained the second check to the Alamo Driverless Car Company, Incorporated (Spec. 12) for \$30 as having been deposited with the payee and not to be cashed, and stated that he was to pay the rental of the car in cash when he returned with it and would then receive back the check. He did not receive any cash from this transaction (R. 75).

Accused had no recollection at all of the check for \$15 given the Pincus Company (Spec. 13). He may have been under the influence of liquor. He remembered being in the Post Exchange and cashing the check for \$50 (Spec. 14), but did not remember the check to the National Bank of Commerce for \$10 (Spec. 15). He may have been intoxicated. He remembered nothing about the three checks given to the Washington-Youree Hotel Company, Incorporated (Specs. 16-18). He was drinking very heavily all the time (R. 75-77).

Regarding Charge II, to which he pleaded guilty, he testified that he went to San Antonio, drank too much, and became "fear stricken", then went to Dallas where he saw his family, and to Shreveport,

Baton Rouge, Lafayette, Louisiana, and New Iberia. He was "picked up" in New Iberia and returned by "Captain Connally". After that, he was taken to Brooke General Hospital at Fort Sam Houston (R. 77-78).

5. a. Charge I: The evidence shows that the accused drew and cashed seventeen checks totalling \$607, and drew one for \$30 upon which he received \$6.75 in services, at times when he knew or should have known that he had insufficient funds in the drawee banks to pay them. As the checks were presented in due course for payment, the drawee bank rightly refused to make payment. In one evening alone the accused drew and cashed eight checks in the total amount of \$405 while having a balance of only \$3.02 in the drawee bank. Furthermore, he drew and cashed two checks totalling \$25 on a bank in which his account had been closed. As to the remaining eight checks there is evidence that accused had assigned to the drawee bank \$100 a month of his pay from which the bank deducted \$50 a month to apply on indebtedness of accused but the evidence clearly shows that at the time the checks were drawn there were not sufficient funds in the drawee bank to meet them and under the facts of this case the accused is properly chargeable with knowledge as to the status of his bank account (CM 202601, Sperti).

Specification 2 of Charge I alleges that the accused fraudulently made and uttered to the Raleigh Hotel, Waco, Texas, a check for \$40. The only evidence that the check was uttered to the Raleigh Hotel was hearsay and the admission of accused. The accused testified that the check was put into a dice game and that "Mr. Lang", one of the hotel clerks, won it. It was thus uttered to Lang and not to the hotel, although the Raleigh Hotel cashed it. The proof fails to support Specification 2 as drawn, but is sufficient to support the finding except the words "to the Raleigh Hotel" and "from the said Raleigh Hotel", and substituting therefor the words "to Mr. Lang" and "from the said Mr. Lang" (See MCM, 1928, par. 78c).

Specification 12 of Charge I alleges that the accused fraudulently obtained the sum of \$23.25 and services of the value of \$6.75. The evidence introduced by both the prosecution and the defense shows that the accused never obtained the sum of \$23.25, but only services of the value of \$6.75.

b. Charge II. It is shown by the evidence and admitted by the pleas of guilty that the accused, without proper leave, absented himself from his station as alleged from 18 May to 19 June 1943.

6. The accused is 33 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from

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22 June 1940 to 16 May 1942; appointed temporary second lieutenant, Army of the United States, 11 May 1942, and active duty, 17 May 1942; appointed temporary first lieutenant, Army of the United States, 9 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 finding of guilty of Specification 2, Charge I, except the words "to the Raleigh Hotel" and "from the said Raleigh Hotel", and substituting therefor the words "to Mr. Lang" and "from the said Mr. Lang"; legally sufficient to support the finding of guilty of Specification 12, Charge I, except the words and figures "the sum of twenty-three dollars and twenty-five cents (\$23.25), and"; legally sufficient to support the findings of guilty of all other Specifications and of the Charges; and legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or the 96th Article of War.

Samuel M. Lurie, Judge Advocate

J. Fottelios, Judge Advocate

Norman D. Lattin, Judge Advocate

1st Ind.

War Department, J.A.G.O., 3 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 First Lieutenant William L. Grady (O-470836), Army of the United States.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of Specification 2, Charge I, except the words "to the Raleigh Hotel" and "from the said Raleigh Hotel" and substituting therefor respectively the words "to Mr. Lang" and "from the said Mr. Lang"; legally sufficient to support the finding of guilty of Specification 12, Charge I, except the words and figures "the sum of twenty-three dollars and twenty-five cents (\$23.25), and"; legally sufficient to support the findings of guilty of all other Specifications and of the Charges; and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused made and uttered with intent to defraud, eighteen checks aggregating \$637.00, for which he received value to the extent of \$613.75, drawn on banks in which he had insufficient funds (Specs. 1-18, Chg. I) and was absent without leave from his station for about 32 days (Spec., Chg. II). Eight of the checks mentioned above, in the total amount of \$405, were drawn and cashed by accused in one evening when he had a balance of only \$3.02 in the drawee bank. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for two years be confirmed and carried into execution.
3. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.
4. Consideration has been given to recommendations of clemency by defense counsel dated 10 September and 21 October 1943, with attached related documents including recommendations of clemency by the president and two other members of the court in the form of indorsements to letters addressed to them, dated 6 October 1943 and signed by First Lieutenant Leslie W. Bland, who, as trustee of accused, states that full restitution has been made to the holders of the checks involved in all of the Specifications of Charge I; and to the personal plea for clemency of accused dated 21 October 1943.

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5. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.



T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

6 Incls.

- Incl.1-Record of trial.
- Incl.2-Dft. ltr. for sig. S/W.
- Incl.3-Form of Action.
- Incl.4-Ltr. fr. def. counsel, 10
Sept. 1943, w/incls.
- Incl.5-Ltr. fr. def. counsel, 21
Oct. 1943, w/incls.
- Incl.6-Ltr. fr. Lt. Grady, 21
Oct. 1943.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but one year of confinement remitted. G.C.M.O. 7, 7 Jan 1944)

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

(301)

SPJGN
CM 239984

24 SEP 1943

UNITED STATES)

v.)

Second Lieutenant WILLIAM
M. HOYT, (O-575042), Air
Corps, 389th Navigation
Training Squadron.)

ARMY AIR FORCES GULF COAST
TRAINING CENTER

Trial by G.C.M., convened at
Army Air Forces Navigation School,
San Marcos Army Air Field, San
Marcos, Texas, 9 August 1943.
Dismissal, total forfeitures and
confinement for one (1) year and,
one (1) day.

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

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

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

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

Specification: In that Second Lieutenant William M. Hoyt, Air Corps, did, at San Marcos, Texas, on or about May 7, 1943, feloniously embezzle by fraudulently converting to his own use One Hundred and Sixty-Three Dollars and Fifty-Three Cents (\$163.53), lawful money of the United States, the property of the 389th Navigation Training Squadron, entrusted to him by the said 389th Navigation Training Squadron.

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

Specification 1: In that Second Lieutenant William M. Hoyt, Air Corps, did, at San Marcos Army Air Field, San Marcos, Texas, on or about May 22, 1943, with intent to deceive Major David E. Filbrun, Air Corps, Commanding Officer of the 389th Navigation Training Squadron, officially report as custodian of the 389th Navigation Training Squadron fund to the said Major David E. Filbrun, a statement of account of the said 389th Navigation Training Squadron with the State Bank and Trust Company, San Marcos, Texas, covering the period of April 30, 1943 to May 22,

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1943, which statement was known by the said Second Lieutenant William M. Hoyt to be a false statement of the said account.

Specification 2: In that Second Lieutenant William M. Hoyt, Air Corps, did, at San Marcos Army Air Field, San Marcos, Texas, on or about May 29, 1943, with intent to deceive Major David E. Filbrun, Air Corps, Commanding Officer of the 389th Navigation Training Squadron, officially report as custodian of the 389th Navigation Training Squadron fund to the said Major David E. Filbrun, a statement of account of the said 389th Navigation Training Squadron with the State Bank and Trust Company, San Marcos, Texas, covering the period of May 22, 1943 to May 29, 1943, which statement was known by the said Second Lieutenant William M. Hoyt to be a false statement of the said account.

Specification 3: In that Second Lieutenant William M. Hoyt, Air Corps, did, at San Marcos Army Air Field, San Marcos, Texas, on or about June 30, 1943, with intent to deceive Major David E. Filbrun, Air Corps, Commanding Officer of the 389th Navigation Training Squadron, officially report as custodian of the 389th Navigation Training Squadron fund to the said Major David E. Filbrun, a statement of account of the said 389th Navigation Training Squadron with the State Bank and Trust Company, San Marcos, Texas, covering the period of May 31, 1943 to June 30, 1943, which statement was known by the said Second Lieutenant William M. Hoyt to be a false statement of the said account.

Specification 4: In that Second Lieutenant William M. Hoyt, Air Corps, did, at San Marcos Army Air Field, San Marcos, Texas, on or about May 7, 1943, with intent to deceive Major David E. Filbrun, Air Corps, Commanding Officer of the 389th Navigation Training Squadron, officially report as custodian of the 389th Navigation Training Squadron fund to the said Major David E. Filbrun, a deposit on May 7, 1943 of \$163.53 to the account of the 389th Navigation Training Squadron with the State Bank and Trust Company, San Marcos, Texas, which report was known by the said Second Lieutenant William M. Hoyt to be false.

Specification 5: (Not arraigned or prosecuted under this specification.)

Specification 6: In that Second Lieutenant William M. Hoyt, Air Corps, did, at San Marcos, Texas, on or about July 7, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Jackson's Grocery (Norman Jackson, owner), a certain check, in words and figures as follows, to wit:

SAN MARCOS, TEXAS, 7/7/43 (303)

STATE BANK & TRUST CO.

88-234
11-S.A.

PAY TO THE
ORDER OF Jacksons Grocery \$ 4.00

no
Four & 100 DOLLARS

FOR _____ William M. Hoyt
2nd Lt A C

and by means thereof, did fraudulently obtain from Norman Jackson (doing business as Jackson's Grocery), merchandise and lawful money of the United States in the total sum of Four Dollars (\$4.00), he, the said Lieutenant William M. Hoyt, then well knowing that he did not have and not intending that he should have sufficient funds in the State Bank and Trust Company for the payment of said check.

Specification-7: (Not arraigned or prosecuted under this specification.)

The accused 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, at such place as the reviewing authority may direct, for one (1) year and one (1) day. 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 1 May 1943 the accused was assigned to the 389th Navigation Training Squadron as adjutant of the organization, in which capacity he became custodian of the squadron fund and was authorized to make deposits in, and withdrawals from the organization's bank account, which was carried in the name of "389th Navigation Training Squadron" with the State Bank and Trust Company, San Marcos, Texas. He executed the usual signature card authorizing him to sign checks against the account. On 7 May 1943 he had in his possession squadron funds in the amount of \$163.53 in cash, representing laundry receipts and collections received from the rental of the squadron's pool table, which he undertook to take to the bank for deposit about noon (R. 19, 33, 36; Exs. 4, 6, 17-19). This sum was not, however, deposited to the organization's account but placed to the accused's personal account in the same bank. On the same day, subsequent to this deposit, the accused, by the use of carbon paper, wrote "389th Sqdn. fund" under his name on the duplicate deposit slip, which he subsequently placed in the organization's records, after submitting it to his commanding officer to show the purported deposit to the organization's account. Thereafter the accused secured some blank bank statements from an assistant cashier of the bank and fabricated three simulated organization bank statements

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which falsely showed the deposit on 7 May 1943 of \$163.53 to that account instead of his own personal account. The three false statements were prepared, certified as correct by the accused, and presented to his commanding officer about 22 May 1943, 29 May 1943, and 30 June 1943, ostensibly showing the condition of the organization's bank account for the periods 30 April 1943 to 22 May 1943, 22 May 1943 to 29 May 1943, and 31 May 1943 to 30 June 1943, respectively. The fabricated statements, bearing accused's false certificates, were identified and admitted into evidence as were also the correct statements for such periods as reflected by the banks records (R. 19-32, 33-39, 49; Exs. 5, 6, 8-11, 13-15, 17-19).

The accused was transferred to Hondo, Texas, on another assignment about 5 July 1943, but on 1 July 1943 deposited to the organization's bank account the sum of \$163.53, by withdrawing that amount from his personal account and depositing it to the organization's account. His delay in securing the bank statements for the periods involved, particularly for the month of June, 1943, aroused the suspicion of his commanding officer, who about 1 July 1943 requested statements directly from the bank, and thereupon discovered the peculation prior to the accused's departure. The accused, being confronted therewith and after being fully warned of his rights, made statements amounting to admissions of the falsification of the deposit slip and three bank statements, but denied the embezzlement of the funds. All of the exhibits were not only properly identified and proven but were also admitted into evidence by stipulation (R. 34-36; Exs. 7, 12).

A witness for the prosecution, Mr. Norman Jackson, testified that the accused's wife gave him, in payment of a grocery bill, a check in the amount of \$4 dated 7 July 1943, drawn on the State Bank and Trust Company, San Marcos, Texas, and signed by the accused, which check was dishonored by the bank for "not sufficient funds". This obligation was subsequently discharged (R. 39-42; Ex. 20).

4. The accused, having been advised of his rights, elected to be sworn and to testify. His testimony corroborates the evidence adduced by the prosecution relative to the falsifications of the deposit slip and the bank statements, which latter were admitted to be pure fabrications. The accused denied the embezzlement, testifying that, about noon on 7 May 1943, he reached the bank which was crowded, left the money in the unlocked glove compartment of his car, and went into a drug store for a Coca-Cola and a package of cigarettes; that, upon returning some few minutes later, finding the money gone, he went home and got \$200 in cash, which he had won in a poker game the night before, deposited \$163.53 thereof to his own account, and falsified the duplicate deposit slip by writing "339th Sqdn. fund" on it under his name as depositor; that he was short of funds for living expenses for his family at that time, and that eventually he intended to deposit the sum of \$163.53 to the organization's account from his salary and winnings at poker, at which he had been unusually lucky. He made no outcry upon his claimed discovery of the loss

of the money and did not report it to the police or anyone else because he preferred to falsify the records rather than admit his carelessness or stupidity. He admitted the manufacture of the "faked" bank statements, his false certificates thereto for the three successive periods thereafter, and the delivery thereof to his commanding officer, but claimed that he made the deposit to the organization's account prior to ascertaining that he was being transferred to another assignment away from San Marcos. Relative to the dishonored \$4 check he testified that he had become dissatisfied with the State Bank and Trust Company, San Marcos, Texas, that he started another account toward the latter part of June, 1943, with a bank at Fort Sam Houston, leaving only a small amount in the San Marcos bank, which he thought sufficient to pay outstanding checks against it, and that the check was made good shortly after its nonpayment. However, he admitted issuing several other checks which had been dishonored about the same time (R. 43-68).

The defense offered into evidence part of the report of investigation showing that accused had told substantially the same story during the investigation that he related in his testimony at the trial (R. 68-70; Ex. 21).

5. The Specification, Charge I, alleges that the accused on or about 7 May 1943 at San Marcos, Texas, did "feloniously embezzle by fraudulently converting to his own use" the sum of \$163.53 in money, the property of the squadron which had been entrusted to him. The offense of embezzlement is defined by the Manual for Courts-Martial as follows:

" 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" (M.C.M., 1928, par. 149h).

Applicable authorities state the rule with reference to the proof of embezzlement as follows:

"Insolvency, flight, falsification of accounts, or refusal to pay, are the usual and most effective evidences of conversion, though they are not the sole facts from which embezzlement can be inferred * * *" (Wharton's Criminal Law, 12th ed., vol. 2, par. 1302). (See also Riley v. State, 32 Tex. 763).

The offense is not obliterated by restitution, either actual or intended (Wharton's Criminal Law, supra, par. 1316 and CM 192530, Dig. Ops. JAG, 1912-40, sec. 451 (18)).

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When measured by the principles announced in the foregoing authorities, the evidence for the prosecution conclusively establishes the commission of the offense charged. The bank statement of the accused (Ex. 5) reflects numerous overdrafts near the date of 7 May 1943. On 5 May 1943 his balance was only seven cents, and on 7 May 1943 eight checks, aggregating \$110.45, were presented to the bank for payment which would have been dishonored except for the deposit on that date of the sum of \$163.53 - no further deposit having been made by the accused until 15 May 1943. The accused unquestionably was aware of these outstanding checks. If he had won \$200 at poker the preceding night, it is hardly conceivable, under the circumstances, that he would not have deposited it to his account to cover the outstanding checks rather than have left it at his home. The identical amount of the squadron's deposit appears upon his own personal account on that day, and the falsification of the duplicate deposit slip which was both proved and admitted, in order to make it appear that the deposit had been made to the proper account, was immediately prepared. The expeditious falsification of the duplicate deposit slip, and the absolute failure of the accused to report the claimed theft of the squadron's funds to proper authorities, are consistent only with the conclusion that the squadron's funds were converted as the result of a calculated plan, the concealment of which was promptly initiated and deliberately perpetuated for over two months, through three official reports, and until discovery became imminent by reason of the accused's change of assignment. These proven and admitted facts emasculate the accused's version of a theft of the funds from him of any and all semblance of truth, and brand it as false and equally as spurious as the admittedly fabricated bank statements.

The evidence for the prosecution, therefore, competently establishes beyond a reasonable doubt every element of the offense charged in the Specification, Charge I, and this evidence amply sustains the court's findings of guilty of the Specification, Charge I, and of Charge I.

6. Specifications 1, 2 and 3, Charge II, allege that the accused, with intent to deceive, on 22 May 1943, 29 May 1943, and 30 June 1943, respectively, officially reported as custodian of the squadron fund to his commanding officer a statement of the squadron's bank account known by the accused to be false for certain specified periods of time. Specification 4, Charge II, similarly alleges that the accused falsely reported to his commanding officer a deposit of \$163.53 to the squadron's bank account on 7 May 1943. The gravamen of the offenses charged is that the accused knowingly made false official statements. These offenses are appropriately charged under Article of War 96. The following provisions of AR 210-50, 29 December 1942 relative to the duties of the custodians of unit and similar funds are pertinent:

"* * * 5b. (1) General. - The custodian of a fund will receive, safeguard, disburse, and account for it, in accordance with the provisions of these regulations * * *. If the custodian is an adjutant * * * he will disburse the fund under the direction of his commanding officer.

"6. How deposited in bank. - Funds will be promptly deposited in banks, wherever feasible, * * *. When funds are deposited in a bank they will be placed under their official designation, as indicated in paragraph 2, and not to the credit of the officer who is custodian * * *.

"18c. Bank statement. - Where the fund or a portion thereof is deposited in a bank, a bank statement will be secured at the end of each month and reconciled with the balance as shown by both the council book and the bank check book * * *. Custodians of funds will note on the face or reverse side of each bank statement the number and amount of each outstanding (unpaid) check and proof of balance" (AR 210-50, supra).

The evidence is uncontroverted that the accused was the organization's adjutant and therefore custodian of its unit funds. Furthermore the evidence is uncontroverted that the accused falsely altered the duplicate deposit slip of 7 May 1943 for \$163.53, that he placed the altered and false duplicate deposit slip in the organization's records, and that he reported to his commanding officer that the deposit had been made to the squadron's account when in truth it had not been so made. By uncontradicted testimony and conclusive documentary evidence, it was also shown that the accused procured some blank bank statements and manufactured and certified to their correctness three spurious bank statements with intent to deceive and for the purpose of concealing his failure to make the deposit of 7 May 1943 to the squadron's account. These spurious statements with accused's false certificates, the accused delivered to his commanding officer who relied thereon and was deceived thereby until other circumstances aroused his suspicion. These acts are admitted from the witness stand by the accused, who seeks to extenuate the effect thereof by placing personal humiliation before personal integrity, honesty, and honor. The funds involved were the property of the enlisted men. The accused was the guardian thereof. His actions and conduct, therefore, were to the prejudice of good order and military discipline and brought discredit upon the military service. Such conduct cannot be tolerated and renders the accused unworthy to continue as an officer.

The competent evidence establishes every element of the offenses charged in Specifications 1 to 4, inclusive, Charge II, abundantly sufficient to sustain the court's findings of guilty of Specifications 1, 2, 3 and 4, Charge II, and Charge II.

7. Specification 6, Charge II, alleges that on or about 7 July 1943 the accused, with intent to defraud, wrongfully and unlawfully, made and uttered a check to a specified payee, for which he secured merchandise and money in the sum of \$4, when he well knew he did not have funds in the bank upon which the check was drawn sufficient to pay it. The following excerpt from the Manual for Courts-Martial is applicable:

"If an officer or soldier by his conduct in incurring private indebtedness or by his attitude toward it or his creditor there-

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after reflects discredit upon the service to which he belongs, he should be brought to trial for his misconduct" (M.C.M., 1928, par. 152b.

The following authority, under the facts shown by the evidence, is also clearly applicable.

"* * * A check given in payment of preexisting debt or a gambling debt, a check given as a charitable contribution or as a gift, are all given without valuable consideration in the eye of the law, yet the giving of a bad check by an officer under the above circumstances would clearly be discreditable to the military service and in many cases conduct unbecoming an officer and a gentleman * * *." (Dig. Ops. JAG 1912-1940, par. 453 (24)).

The evidence is clear that the check was dishonored for "not sufficient funds". The explanation advanced by the accused, that the check was upon an account in which he thought he had enough funds to pay it, is belied by the date of the check, 7 July 1943, because he changed his bank account, according to his own testimony, in the latter part of June and left in his old account in the San Marcos bank only enough money to pay checks then outstanding. Consequently, when he signed the check on 7 July 1943 on the San Marcos bank, he either knew or should have known that it would be dishonored. In addition, he admitted other dishonored checks about the same time and his bank statement (Ex. 5) shows numerous overdrafts, which mutely but persuasively indicate that the accused, during the period involved, was not unaccustomed to issuing checks upon his bank without sufficient funds on deposit there to pay them. Such conduct without question brings discredit upon the military service. The evidence, however, shows that the check was given for a preexisting account of \$3.97 and three cents in cash. Consequently, the evidence does not support the finding that the accused obtained any merchandise but the record of trial does sustain the finding of guilty of Specification 6, Charge II, except the words "merchandise and" and "Four Dollars (\$4.00)" substituting for the latter exception the words "Three Cents", of the excepted words, not guilty, of the substituted words, guilty, in violation of Article of War 96.

8. The accused is 32 years of age. The War Department records show that he enlisted at Detroit, Michigan, 24 December 1941, enlisted service to 2 March 1943 when he was commissioned a second lieutenant upon completion of OCS, and active duty as an officer since the latter date.

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 is legally sufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Specifications 1, 2, 3

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and 4, Charge II, legally sufficient to support the finding of guilty of Specification 6, Charge II, except the words "merchandise and " and "Four Dollars (\$4.00)", substituting for the latter exception the words "Three cents", of the excepted words not guilty, of the substituted words, guilty, legally sufficient to support the finding of guilty of Charge II, and legally sufficient to support the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96.

Charles B. Bresson, Judge Advocate

Abner E. Lipscomb, Judge Advocate

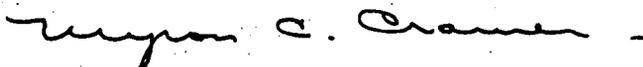
Benjamin R. Sleeper, Judge Advocate

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SPJGN
CM 239984

1st Ind.

War Department, J.A.G.O., 11 OCT 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 M. Hoyt (O-575042), Air Corps, 389th Navigation Training 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 all Charges and Specifications, excepting as to the finding of guilty of Specification 6, Charge II, the words "merchandise and" and "Four Dollars (\$4.00)" substituting for the latter excepted words and figures the words "Three Cents". I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted, and that the sentence as thus modified be ordered executed.
3. Consideration has been given to the attached letters from Mrs. S. Serur, San Marcos, Texas, and Mrs. William M. Hoyt, San Marcos, Texas, wife of accused, 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 approval.



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

- 5 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. Mrs. S. Serur
 - Incl 5 - Ltr. fr. Mrs. W. M. Hoyt

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 410, 24 Dec 1943)

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

(311)

SPJGH
CM 239987

21 SEP 1943

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL
	)	TRAINING COMMAND
v.)	
First Lieutenant JULIUS E.	)	Trial by G.C.M., convened
RANKIN (O-479816), Air	)	at Sheppard Field, Texas,
Corps.	)	24 August 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 96th Article of War.

Specification 1: In that First Lieutenant Julius E. Rankin, Air Corps, assigned 305th Training Group, did, at Dallas, Texas from about 1 June 1943 to about 15 July 1943, drink intoxicating liquors to such an extent as to render himself unfit for the performance of his duty as an officer of the Army of the United States, to the prejudice of good order and military discipline.

Specification 2: In that First Lieutenant Julius E. Rankin, Air Corps, assigned 305th Training Group, having received a lawful order from Captain Gerald S. Backenstoe to "report without delay to the Commanding Officer of the Basic Training Center Number 3, Sheppard Field, Texas", the said Captain Gerald S. Backenstoe being in the execution of his office, did, at Brookley Field, Alabama, on or about 29 May 1943, fail to obey the same.

Specifications 3-7: (Nolle prosequi entered).

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Specification 8: In that First Lieutenant Julius E. Rankin, Air Corps, assigned 305th Training Group, did, at Dallas, Texas, on or about 2 June 1943, with intent to defraud, wrongfully and unlawfully make and utter to the White-Plaza Hotel a certain check in words and figures as follows; to wit:

OFFICIAL DRAFT TEXAS HOTEL ASSOCIATION
Dallas, Texas Date June 2, 1943.

ON DEMAND
PAY TO THE ORDER OF:

THE WHITE-PLAZA HOTEL \$35.00
Thirty-five dollars and No/100 DOLLARS

As maker and/or endorser I hereby agree in case this check is returned from the bank unpaid, to pay protest fees, if any, and a reasonable investigation charge, and in addition, if placed in attorney's hands for collection, To pay a reasonable attorney's fee, all exemption laws of the State of Texas being hereby waived in the enforcement of the above obligations this check being payable where the owner and holder of same reside.

TO: First National Bank { Signature: s/ J. E. Rankin
Wichita Falls, Texas. { Address : Sheppard Field,
Texas. 0-479816

and by means thereof did fraudulently obtain from the White-Plaza Hotel, Dallas, Texas, \$28.30, United States currency, and \$6.70 hotel accommodations, he, the said First Lieutenant Julius E. Rankin, Air Corps, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Wichita Falls, Texas for the payment of said check.

Specification 9: Same form as Specification 8; but alleging check dated 30 May 1943, for \$25, to order of the White-Plaza Hotel, at Dallas, Texas, and the fraudulent obtaining of \$25 in currency.

Specification 10: Same form as Specification 8; but alleging check dated 1 June 1943, for \$10, to order of Jefferson Hotel, at Dallas, Texas, and the fraudulent obtaining of

\$3.50 in hotel accommodations and \$6.50 in currency.

Specification 11: Same form as Specification 8; but alleging check dated 3 June 1943, for \$25, to order of Scott Hotel, at Dallas, Texas, and the fraudulent obtaining of \$25 in currency.

Specification 12: Same form as Specification 8; but alleging check dated 5 June 1943, for \$10, to order of Scott Hotel, at Dallas, Texas, and the fraudulent obtaining of \$10 in currency.

Specification 13: Same form as Specification 8; but alleging check dated 4 June 1943, for \$20, to order of Scott Hotel, at Dallas, Texas, and the fraudulent obtaining of \$20 in currency.

Specification 14: Same form as Specification 8; but alleging check dated 6 June 1943, for \$15, to order of Scott Hotel, at Dallas, Texas, and the fraudulent obtaining of \$15 in currency.

Specifications 15-17: (Nolle prosequi entered).

Specification 18: Same form as Specification 8; but alleging check dated 21 June 1943, for \$20, to order of Officers Mess, Fifth Ferrying Group, Air Transport Command, at Love Field, Dallas, Texas, and the fraudulent obtaining of \$20 in currency.

Specification 19: Same form as Specification 8; but alleging check dated 22 June 1943, for \$20, to order of Officers Mess, Fifth Ferrying Group, Air Transport Command, at Love Field, Dallas, Texas, and the fraudulent obtaining of \$20 in currency.

Specification 20: Same form as Specification 8; but alleging check dated 23 June 1943, for \$20, to order of "____", made and uttered to Officers Mess, Fifth Ferrying Group, Air Transport Command, at Love Field, Dallas, Texas, and the fraudulent obtaining of \$20 in currency.

Specification 21: Same form as Specification 8; but alleging check dated 24 June 1943, for \$20, to order of Officers Mess, Fifth Ferrying Group, Air Transport Command, at Love Field, Dallas, Texas, and the fraudulent obtaining of \$20 in currency.

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Specification 22: Same form as in Specification 8; but alleging check dated 15 June 1943, for \$7, to order of Hospital Fund, Fifth Ferrying Group, Air Transport Command, at Love Field, Dallas, Texas, and the fraudulent obtaining of subsistence of the value of \$7.00.

Specification 23: Same form as in Specification 8; but alleging check dated 13 October 1942, for \$30, to order of Cash, made and uttered to the Country Club of Wichita Falls, at Wichita Falls, Texas, and the fraudulent obtaining of \$30 in currency.

Specification 24: Same form as Specification 8; but alleging check dated 13 October 1942, for \$15, to order of Cash, made and uttered to the Country Club of Wichita Falls, at Wichita Falls, Texas, and the fraudulent obtaining of \$13 in currency and food of the value of \$2.

Specification 25: Same form as Specification 8; but alleging check dated 13 October 1942, for \$70, to order of Cash, made and uttered to the Country Club of Wichita Falls, at Wichita Falls, Texas, and the fraudulent obtaining of \$70 in currency.

Specification 26: (Finding of not guilty).

Specifications 27-28: (Nolle prosequi entered).

Specification 29: Same form as Specification 8; but alleging check dated 18 June 1943, for \$25, to order of Cash, made and uttered to West Disinfecting Company, at Dallas, Texas, and the fraudulent obtaining of \$25 in currency.

Specifications 30-31: (Nolle prosequi entered).

Specification 32: Same form as Specification 8; but alleging check dated 14 July 1943, for \$25, to order of "Lt. J. E. Rankin", made and uttered to Mercantile National Bank, at Dallas, Texas, and the fraudulent obtaining of \$25 in currency.

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

Specification 1: In that First Lieutenant Julius E. Rankin, Air Corps, assigned 305th Training Group, did, without proper leave, absent himself from his proper station at Sheppard Field, Texas from about 15 May 1943 to about 22 May 1943.

Specification 2: In that First Lieutenant Julius E. Rankin, Air Corps, assigned 305th Training Group, did, without proper leave, absent himself from his command at Sheppard Field, Texas, while enroute from Brookley Field, Alabama, to Sheppard Field, Texas from about 29 May 1943 to about 8 June 1943.

Specification 3: In that First Lieutenant Julius E. Rankin, Air Corps, assigned 305th Training Group, did, without proper leave, absent himself from his command at Sheppard Field, Texas from about 15 June 1943 to about 15 July 1943.

The accused pleaded guilty to Charge I and Specifications 1 and 2 thereunder, guilty to Charge II and its Specifications, and not guilty to all other Specifications. He was found not guilty of Specification 26, Charge I, and guilty of all other Specifications and of the Charges. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

a. Specifications 1 and 2, Charge I (rendering himself unfit for duty by excessive use of intoxicants, and failing to obey a lawful order): The prosecution offered no evidence in support of these Specifications to which accused pleaded guilty (R. 20).

b. Specifications 8 and 9, Charge I: Mr. Temple Pouncey, Assistant Manager of the White-Plaza Hotel, at Dallas, Texas, on 2 June 1943, cashed a check drawn by accused in the amount of \$35 (Ex. 1), applied \$6.70 in payment of the bill of accused at the hotel, and gave accused \$28.30 in cash. About 30 May 1943, Mr. Pouncey cashed a check of accused in the amount of \$25 for him (Ex. 2). The checks were deposited for collection in regular course and returned unpaid (R. 22-26, 75-76).

c. Specification 10, Charge I: On 1 June 1943, accused drew a \$10 check (Ex. 3) to the Jefferson Hotel, Dallas, Texas to pay his \$3.50 bill at that hotel, and received \$6.50 in cash. The check was deposited for collection in regular course and returned unpaid (R.26-28).

d. Specifications 11, 12, 13 and 14, Charge I: From 3 to 6 June 1943, the Scott Hotel, Dallas, Texas, cashed for accused checks for

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\$25 (Ex. 4), \$10 (Ex. 5), \$20 (Ex. 6) and \$15 (Ex. 7), drawn by him. These checks were deposited for collection, later returned, and not paid (R. 28-32).

e. Specifications 18, 19, 20 and 21, Charge I: From 21 to 24 June 1943, the Officers' Mess of the Fifth Ferrying Group, at Dallas, Texas, cashed four \$20 checks of accused (Exs. 8-11) for him. The checks were sent through banking channels for payment and later returned. They were not paid (R. 33-38).

f. Specification 22, Charge I: On 15 June 1943, accused gave his check drawn to "Hospital Fund" for \$7 (Ex. 12), to the Station Hospital at Love Field, Dallas, Texas, to cover his subsistence charges at that hospital. The check was deposited for collection in regular course and returned. It was not paid (R. 38-40).

g. Specifications 23, 24 and 25, Charge I: On 13 October 1942, Mr. Solon R. Featherston, Manager of the Country Club, at Wichita Falls, Texas, cashed checks for \$30 (Ex. 14), \$15 (Ex. 13) and \$70 (Ex. 15) for accused. Between \$2 and \$3 of the proceeds of the \$15 check went to pay for the dinner of accused. The balance of that check and the face amounts of the two other checks were paid to accused in cash. The \$15 check was deposited for collection on 14 or 15 October. The other two checks were held for some time pursuant to a request made by accused on the morning of 14 October, and were later presented for payment. All three checks were returned and not paid (R. 40-45).

h. Specification 29, Charge I: On or about 18 June 1943, the West Disinfecting Company, at Dallas, Texas, cashed a \$25 check (Ex. 17) for accused. The check was sent through for payment and was later returned. It was not paid (R. 49-50).

i. Specification 32, Charge I: On 13 or 14 July 1943, the Mercantile National Bank at Dallas, Texas, cashed a \$25 check (Ex. 18) for accused. The check was forwarded to the drawee bank for payment, was later returned, and not paid (R. 51-52).

j. It was stipulated that each of the checks (Exs. 1-15, 17-18) was made and executed by accused on the date appearing on the check. They were drawn by accused on The First National Bank of Wichita Falls, Texas. Miss Pauline Chaffee, bookkeeper of that bank, handled all of the checks except those to the Country Club (Exs. 13-15), and as each check was received, she checked the ledger sheet of accused, found his account insufficient to pay the check, wrote "Insf" on the check, and turned it back (R. 52-63, 75).

Mr. A. G. Reid of the Proof Department of The First National Bank of Wichita Falls, testified from records of the bank (Exs. 19-22), that the balance to the credit of accused in the bank on the dates of the checks drawn from 30 May to 14 July 1943 (Specs. 8-14, 18-22, 29 and 32, Chg. I), was \$3.28 or less, and that the last deposit made by accused in his account was on 7 May 1943. In relation to the three checks drawn on 13 October 1942 (Specs. 23-25, Chg. I), the bank balance of accused on that date was \$123.79, on 14 October \$48.79, on 15 October \$43.87, and on 17 October \$12.47 (R. 63-74, 76).

The Army pay checks of accused were at one time deposited with The First National Bank of Wichita Falls, but the check for January 1943 was the last one so deposited. Accused received his pay for the month of February 1943 in cash, and his pay for March and April by "personal check" (R. 77-78).

k. Specifications 1, 2 and 3, Charge II: (Absence without leave 15-22 May 1943, 29 May - 8 June 1943, and 15 June - 15 July 1943): The prosecution offered no evidence in support of these Specifications to which accused pleaded guilty (R. 20).

4. For the defense, the accused testified that he was 47 years old, enlisted in the Army in June 1916 as a private, rose to the grade of ordnance sergeant and first sergeant, was commissioned as second lieutenant in June 1918 and served as such until he was discharged in December 1918, with character "excellent". He reenlisted on 16 December 1941, became corporal, sergeant, staff sergeant, and first sergeant, was commissioned as first lieutenant on 20 June 1942, later attended Officer Training School at Miami Beach, and returned to Sheppard Field. He is married and has two children; his wife lives in Mobile, Alabama, his older son is a first lieutenant stationed at New Orleans, and the younger is a flying cadet (R. 79-82, 84-85).

Accused had five days leave beginning 10 May 1943, and went to Mobile, Alabama, to visit his family. At the time that his leave expired, he had started drinking and did not report back. He remained in the vicinity of Mobile from 15 until 22 May (Spec. 1, Chg. II), when he reported in at Brookley Field, Mobile, in order to get "straightened out". He left Brookley Field on 29 May under orders to report to Sheppard Field, Texas, but during a lay-over in New Orleans and later on the train, took some drinks. When he arrived in Dallas

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on the afternoon of 30 May, he went to the White-Plaza Hotel, and continued drinking until 8 June (Spec. 2, Chg. II). While in Dallas, he fell on the street, and got two "licks" on the head. When he regained consciousness he was in a private hospital and remained there for five days. As to his absence without leave from 15 June to 15 July (Spec. 3, Chg. II), he stated that for part of the time he was in a private hospital, the rest of the time he "was just drinking". He was under the influence of liquor most of the time. The three checks which he gave to the Wichita Falls Country Club on 13 October 1942 (Exs. 13-15; Specs. 23-25, Chg. I), were cashed when he was drinking at the bar, and the proceeds were put in the fifty cent slot machine at the Club. Accused was "pretty well drunk" at the time that he gave all of the checks which are in evidence, but he was able to get around, and he knew that he did not have the money in the bank to cover the checks. He had not paid any of the checks in question, but he had been in the hospital at Sheppard Field since 15 July 1943, and while there had no opportunity to raise any money. He felt sure that if he had about ten or fifteen days he could raise the money to pay the checks by disposing of his two automobiles. He was last paid to include 30 April 1943 (R. 82-92).

In a statement made to "Major Keach", on 3 August 1943, accused stated that he had always respected the uniform, had worked hard for almost two and a half years to obtain his commission, and had not taken a drink for three months before going on leave. All of the checks were written while he was under the influence of whiskey and under the impression "although that might have been a drunken impression" that his pay checks had been forwarded to the bank. He could not have been in his right mind when "all this" occurred, because he had been an Army officer for some time, knew the penalty, and it meant the loss of his self-respect and the respect of his family (R. 88-89; Def. Ex. A).

Major Thomas C. Owens, Medical Corps, chief of the neuro-psychiatric service at Sheppard Field, examined the accused in the station hospital on 16 July 1943. Accused was then barely able to stand, was very shaky, very weak, and mentally confused; his memory was "very, very bad". Major Owens diagnosed his condition as acute alcoholic hallucinosis. After the acute condition subsided, the diagnosis was chronic alcoholism. Accused had probably been suffering from it for several years, but Major Owens knew nothing about the mental or physical condition of accused on 24 June 1943, or on the earlier dates on which the checks were written. A chronic alcoholic has an unreliable personality. There is something basically wrong with their personality (R. 93-99).

5. a. The pleas of guilty and the testimony of accused sustain the findings of guilty of Specifications 1 and 2, Charge I, of Charge I, of Specifications 1, 2 and 3, Charge II, and of Charge II.

b. As to Specifications 8-14, 18-22, 29 and 32, Charge I, the evidence shows beyond any reasonable doubt, as to each check, that the check was made and uttered by accused at the time and place and under the circumstances alleged, that the face amount of the check was paid to accused in money or money's worth, that the check was presented for payment and was not paid, and that at the time the check was made and uttered accused had insufficient funds in the bank to pay it. Accused admitted that when he passed the checks he knew he had insufficient funds in the bank to cover them. He stated that he might have been under the "drunken impression" that his Army pay had been deposited in the bank, but in fact after January 1943 his Army pay had been delivered to him personally, and not deposited in the bank. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of these Specifications.

c. As to Specifications 23, 24 and 25, Charge I, the evidence shows that on 13 October 1942, accused drew three checks for \$15, \$30 and \$70, and cashed them at the Wichita Falls Country Club. The next morning he requested the club manager to hold the \$30 and \$70 checks for a time. The \$15 check was deposited for collection on 14 or 15 October, and the two other checks were presented for payment at a later date. None of them was paid by the bank. On 13 October 1942 accused had a balance in the bank of \$123.79, which was reduced on 14 October to \$48.79. By these Specifications accused was charged with making and uttering the three checks on 13 October 1942 "then well knowing that he did not have and not intending that he should have, sufficient funds" in the bank to pay the checks. The evidence shows that on that date accused actually had on deposit in the bank sufficient funds to pay the checks. It follows that the record of trial is legally insufficient to support the findings of guilty of these Specifications.

6. The accused is 46 (47 according to his testimony) years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from July 1917 to June 1918; second lieutenant, from 5 June to 16 December 1918; appointed temporary first lieutenant, Army of the United States, 20 June 1942; active duty 27 June 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 insufficient to support the findings of guilty of Specifications 23, 24 and 25, Charge I, legally sufficient to support the findings of guilty of all other Specifications and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War.

Walter S. Hill Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

J. J. Lott, Judge Advocate

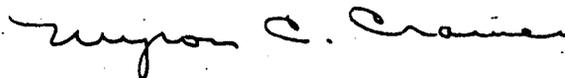
1st Ind.

War Department, J.A.G.O., 25 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 Julius E. Rankin (O-479816), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 23, 24 and 25, Charge I, legally sufficient to support the findings of guilty of all other Specifications and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused drank intoxicating liquor to such an extent as to render himself unfit for the performance of duty for about 45 days (Spec. 1, Chg. I); failed to obey a lawful order to report to Sheppard Field, Texas (Spec. 2, Chg. I); made and uttered with intent to defraud 14 checks aggregating in amount \$277, all drawn on a bank in which he had insufficient funds (Spec. 8-14, 18-22, 29, 32, Chg. I); and was absent without leave on three occasions for about 7, 10 and 30 days, respectively (Specs. 1, 2, 3, Chg. II). I recommend that the sentence to dismissal 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 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-Drft. ltr. for sig.
 Sec. of War.
Incl.3-Form of action.

(Findings of guilty of Specifications 23, 24 and 25, Charge I, disapproved. Sentence confirmed. G.C.M.O. 332, 28 Oct 1943)



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

(323)

SPJCN
CM 240013

15 OCT 1943

UNITED STATES	)	SPOKANE AIR SERVICE COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	Spokane Army Air Field, Spok-
First Lieutenant WOODROW C.	)	ane, Washington, 27 August 1943.
NELSON (O-1634175), 588th	)	Dismissal, total forfeitures
Signal Aircraft Warning	)	and confinement for three (3)
Battalion.	)	years. Disciplinary Barracks,
	)	Fort Leavenworth, Kansas.

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

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

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

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

Specification: In that WOODROW C. NELSON, First Lieutenant, Headquarters & Headquarters Company, 588th Signal Aircraft Warning Battalion, Drew Field, Tampa, Florida, did, without proper leave, absent himself from his post at Drew Field, Tampa, Florida, on or about 13 June 1943, and did remain absent until he was apprehended at Seattle, Washington, on or about 25 July 1943.

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

Specification 1: In that WOODROW C. NELSON, First Lieutenant, Headquarters & Headquarters Company, 588th Signal Aircraft Warning Battalion, Drew Field, Tampa, Florida, did, at Tampa, Florida, on or about 28 March 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Brass Rail, a certain check, in words and figures as follows, to wit: Fifteen and no/100 Dollars (\$15.00), he the said WOODROW C. NELSON, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Tampa for the payment of said check, and did obtain the sum of \$15.00, thereby, fraudulently and unlawfully.

Specification 2: Same form as Specification 1, but alleging check dated 10 May 1943 made and uttered to the Floridian Hotel, Tampa, Florida, and fraudulently obtaining \$20 thereby.

Specification 3: Same form as Specification 1, but alleging check dated 14 May 1943 made and uttered to the Hillsboro Hotel, Tampa, Florida, and fraudulently obtaining \$10 thereby.

Specification 4: Same form as Specification 1, but alleging check dated 12 June 1943 made and uttered to Fred A. Robbins, Tampa, Florida, and fraudulently obtaining \$5 thereby.

Specification 5: Same form as Specification 1, but alleging check dated 16 July 1943 made and uttered to J. C. Penney Co., Portland, Oregon, and fraudulently obtaining \$20 thereby.

Specification 6: Same form as Specification 1, but alleging check dated 4 June 1943 made and uttered to Hotel Thomas Jefferson, Tampa, Florida, and fraudulently obtaining \$15 thereby.

Specification 7: Same form as Specification 1, but alleging check dated 10 May 1943 made and uttered to Maas Brothers, Tampa, Florida, and fraudulently obtaining \$10 thereby.

Specification 8: Same form as Specification 1, but alleging check dated 17 May 1943 made and uttered to the Hotel Tampa Terrace, Tampa, Florida, and fraudulently obtaining \$5 thereby.

Specification 9: Same form as Specification 1, but alleging 70 checks, between dates 27 January 1943 and 19 July 1943 made and uttered to various payees and fraudulently obtaining \$1049.50 thereby.

Specification 10: In that WOODROW C. NELSON, First Lieutenant, Headquarters & Headquarters Company, 588th Signal Aircraft Warning Battalion, Drew Field, Tampa, Florida, did, at Portland, Oregon, on or about 16 July 1943, unlawfully pretend to be a Captain in the Army of the United States, that WOODROW C. NELSON, well knowing that said pretenses were false, and by means thereof did fraudulently have J. C. Penney Company cash a certain check, in the words and figures as follows, to wit: Twenty and no/100 Dollars (\$20.00), and did obtain the sum of \$20.00, thereby fraudulently and unlawfully.

CHARGE III: Violation of the 57th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

The accused pleaded guilty to and was found guilty of all Charges and Specifications, except Charge III and its Specification to which he pleaded not guilty and was so found. 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 three years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence presented by the prosecution supporting and confirming the accused's pleas of guilty, shows that on 13 June 1943 the accused absented himself from his station at Drew Field, Tampa, Florida without proper leave and remained absent until he was apprehended in Seattle, Washington on 25 July 1943. From about 27 January 1943 until a few days prior to his arrest, he had issued some 78 checks in different amounts aggregating approximately the sum of \$1149.50. These checks were drawn upon the First National Bank of Tampa, Tampa, Florida, and were made payable to the order of various payees, who cashed them for the accused. These checks were dishonored by the bank for insufficient funds and were returned to the appropriate endorsers with such notation thereon. None of the checks had been paid by the accused (R. 7-15; Exs. 1, 1a, 2, 2a, 3, 3a, 4, 4a, 5, 5a, 6-9, and 12b).

From about 16 July 1943 until he was taken into custody on 25 July 1943, the accused falsely pretended to be a captain in the Army of the United States, wore the insignia of that rank, and represented himself as being of such rank in inducing persons to cash some of the checks. He registered in hotels as "Captain" W. C. Nelson during this period of time. He had never been promoted to the rank of captain but at all material times involved was a first lieutenant (R. 10, 13; Exs. 5, 5a, 10, 11, 12 and 12a).

4. The defense offered no evidence. The accused was advised of his rights and elected to remain silent (R. 16).

5. The Specification, Charge I, alleges that the accused, without proper leave absented himself from his post at Drew Field, Tampa, Florida, from about 13 June 1943 until about 25 July 1943, when he was apprehended in Seattle, Washington. The elements of the offense and the proof required for conviction thereof, according to applicable authorities, are as follows:

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*** (a) That the accused absented himself from his command, ***, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (M.C.M., 1928, par. 132).

The prosecution introduced into evidence a certified copy of an excerpt from the morning report of the Signal Corps, Drew Field, Headquarters 588th Signal Aircraft Warning Battalion, Drew Field, Tampa, Florida, showing "1st Lt Nelson dy to AWOL as of 0600 June 13, 1943" (Ex. 12b). The condition of absence without leave, when once shown to exist, is presumed to continue, absent evidence to the contrary, until the accused's return to military control (M.C.M., 1928, par. 130). This evidence confirms the plea of guilty and competently establishes every element of the offense charged, ample to sustain the court's findings of guilty of the Specification of Charge I and of Charge I.

6. Specifications 1 through 8, inclusive, of Charge II allege that the accused, on various dates between 28 March 1943 and 16 July 1943, with intent to defraud, wrongfully and fraudulently, made and uttered certain checks in different amounts upon a certain bank in which he knew he did not have sufficient funds to pay them and thereby unlawfully and fraudulently obtained cash in the amount of such checks from the parties cashing them. Specification 9, Charge II, similarly alleges his cashing of some 70 additional checks in the aggregate amount of \$1049.50 on various dates between 27 January 1943 and 19 July 1943 with other parties. The Specifications appropriately stated violations of Article of War 95. The Manual for Courts-Martial defines this offense and the requisite proof thereof as follows:

"Instances of violation of this article are: *** giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be; ***" (M.C.M., 1928, par. 151).

The prosecution adduced evidence of the matters alleged in the first eight Specifications, above-mentioned, by the stipulated testimony of the parties cashing the checks to the effect that they cashed them for the accused by giving him the money therefor, that the checks, when deposited, were later returned marked "not sufficient funds", and that they had never received the proceeds thereon. The stipulated testimony of the cashier of the First National Bank of Tampa, Tampa, Florida, similarly established the gravamen of the offense alleged in Specification 9, Charge II. It was also stipulated that the accused knew he did not have sufficient funds in the bank upon which the checks were drawn to pay them and that the checks could be introduced into evidence without further identification. Five of them were so introduced, showing notation thereon of non-payment for insufficient funds. The stipulations concerning the testimony of the absent witnesses are all signed by the accused, the trial judge advocate, and the Defense Counsel.

The stipulated testimony was properly admitted and considered by the court even though practically amounting to a confession because the accused had pleaded guilty and the court fully explained the meaning of such plea to him and of his right to withdraw such plea. Consequently, no doubt existed as to accused's understanding of the nature and effect of his guilty plea (M.C.M., 1928, par. 126b). This evidence of the prosecution was competent, undisputed, and conclusive. It fully established every element of the offenses charged in Specifications 1 through 9, inclusive, of Charge II and was ample to support and confirm the pleas of guilty. The court's findings of guilty of Specifications 1 through 9, inclusive, of Charge II, and of Charge II, are therefore, sustained by competent and uncontradicted evidence.

7. Specification 10, Charge II, alleges that the accused unlawfully pretended to be a captain in the Army of the United States, knowing that the pretenses were false, and by means thereof, fraudulently, secured cash upon his check for \$20.00 on or about 16 July 1943. The check involved in this Specification is the same as that involved in Specification 5, Charge II, but the offense alleged, of course, is different as it alleges that the accused unlawfully, falsely and knowingly pretended to be an officer of higher rank than he had attained for the purpose of inducing another to cash his worthless check. Such actions fall within the condemnation of the following excerpt from the Manual for Courts-Martial:

"The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms (Winthrop)" (M.C.M., 1928, par. 151).

To this Specification, also, the accused pleaded guilty and, after full explanation by the court of the effect thereof, he refused to plead otherwise. In addition to the plea of guilty, the evidence presented by the prosecution unquestionably establishes the offense as alleged. By stipulation the testimony of the party cashing the check involved was in evidence and was to the effect that the accused represented himself as "Captain" Woodrow C. Nelson. A photostatic copy of the check itself was properly in evidence and shows under the signature "Capt., Sig. C., Drew Field, Fla. O-1634175." (Ex. 5a). The bill of Hotel St. Francis (Ex. 12a) shows registration of the accused as a "Captain" and the stipulated testimony of two witnesses (Exs. 10, 11) shows that the accused, when apprehended, was registered in a hotel as a "Captain" and admitted posing as an officer of that rank and wearing the insignia thereof. Exhibit 12, a stipulation of agreed facts, is to the same effect.

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The accused's pretension to a rank which he had not attained is reprehensible enough in itself, but when such pretension is made for the purpose of fraudulently securing funds upon the officer's worthless check, the acts conclusively indicate that the officer is wholly void of the attributes of honor and character so necessary for an officer to possess. This behavior not only dishonors the individual but renders him morally unworthy to remain a member of the honorable profession of arms. The prosecution, therefore, introduced competent evidence to establish every element of the offense charged by Specification 10, Charge II, ample to sustain the court's findings of guilty of such Specification and the Charge.

8. The accused is about 25 years of age. The records of the War Department show enlisted service from 24 February 1941 to 13 July 1942, when he was commissioned a second lieutenant with active duty as an officer from the latter date. He was promoted to the rank of first lieutenant on 2 February 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 61 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lifecomb, Judge Advocates

Gabriel H. Golden, Judge Advocates

Benjamin R. Sleeper, Judge Advocates

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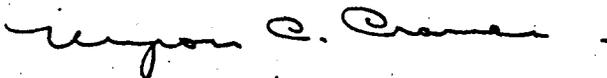
1st Ind.

War Department, J.A.G.O., 21 OCT 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 Woodrow C. Nelson (O-1634175), 588th Signal Aircraft Warning Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and 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,
Major General,
The Judge Advocate General.

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

(Sentence confirmed. G.C.M.O. 358, 12 Nov 1943)

The first part of the document discusses the importance of maintaining accurate records of all transactions.

It is essential to ensure that all data is entered correctly and that the system is regularly updated.

The second part of the document outlines the various methods used to collect and analyze data.

These methods include surveys, interviews, and focus groups, each with its own strengths and weaknesses.

The third part of the document provides a detailed overview of the data analysis process.

This process involves identifying patterns, trends, and correlations within the data set.

The final part of the document discusses the implications of the findings and offers recommendations for future research.

Overall, this document provides a comprehensive guide to the research process, from data collection to analysis and reporting.

It is hoped that this information will be helpful to anyone interested in conducting research in this field.

Thank you for your attention and interest in this document.

Yours faithfully,
[Signature]

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

(331)

25 NOV 1943

SPJGH
CM 240018

N.D.

UNITED STATES

v.

Major MORRIS J. ABELE
(O-908400), Army of the
United States.

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Fort Bliss, Texas, 10, 12 and
13 August 1943. Dismissal,
total forfeitures, and con-
finement for ten (10) years.
Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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

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

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

Specification 1: In that Major Morris J. Abele, then Captain Morris J. Abele, Post Exchange Officer, Fort Bliss, Texas, did, at Fort Bliss, Texas, from about April 28, 1943, to about May 11, 1943, wrongfully use employees of the Post Exchange, Fort Bliss, Texas, to repair the home of Mrs. Margaret E. Parks, 3506 Mountain Avenue, El Paso, Texas, and did, on or about May 10, 1943, wrongfully expend the sum of about \$332.00, funds of the said Fort Bliss Post Exchange, for labor and repairs on the home of the said Mrs. Margaret E. Parks, 3506 Mountain Avenue, El Paso, Texas.

Specification 2: In that Major Morris J. Abele, then Captain Morris J. Abele, Post Exchange Officer, Fort Bliss, Texas, did, at El Paso, Texas, on or about 21 May 1943, wrongfully appropriate to his own use \$500.00, funds of Fort Bliss Post Exchange, furnished and intended for the use of the Fort Bliss Post Exchange.

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Specification 3: (Finding of Not Guilty).

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

Specification: (Finding of Not Guilty).

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

Specification 1: In that Major Morris J. Abele, then Captain Morris J. Abele, Post Exchange Officer, Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about 25 March 1943, wrongfully, indecently and against her will, take Mrs. Edith L. Uecker, a woman not his wife, into his arms and did pull her skirt above her waist.

Specification 2: In that Major Morris J. Abele, then Captain Morris J. Abele, Post Exchange Officer, Fort Bliss, Texas, being indebted to the Fort Bliss Post Exchange in the sum of \$63.04 for merchandise which amount became due and payable on or about 1 October 1942, did, at Fort Bliss, Texas, from about 1 October 1942, to about 28 January 1943, dishonorably fail and neglect to pay said debt.

Specification 3: In that Major Morris J. Abele, then Captain Morris J. Abele, Post Exchange Officer, Fort Bliss, Texas, did, at Fort Bliss, Texas, submit false financial statements to the Post Exchange Council as follows: On or about February 15, 1943, for the period from December 26, 1942, to January 24, 1943; on or about March 25, 1943, for the period from January 25, 1943, to February 24, 1943; on or about April 15, 1943, for the period from February 25, 1943, to March 24, 1943; on or about May 15, 1943, for the period from March 26, 1943, to April 25, 1943, which statements, and each of them, were known by him to be false at the time the same were submitted, and he, the said Major Morris J. Abele, did, thereby, knowingly mislead the members of the Post Exchange Council, Fort Bliss, Texas, as to the true financial condition of the said Post Exchange.

CHARGE IV: Violation of the 85th Article of War.
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 3, Charge I, of Charge II and the Specification thereunder, and of Charge IV 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 ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

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

a. Specification 1, Charge I: Between 28 April and 10 May 1943, the carpenter foreman, a carpenter's helper, a laborer, an electrician and a painter, regular employees of the post exchange, Fort Bliss, Texas, performed work on a house of "Mrs. Parks", located on Mountain Avenue, El Paso, Texas. In doing the work, some materials from the post exchange shop were used. Accused, post exchange officer at Fort Bliss, was present at the house at times while the work was going on, gave instructions about the work, directed the electrician to do the work, and requested the painter to keep a record of time and material. The five employees made notations of the hours worked, in separate time books kept by each (Exs. A, C, D, G and I), and received checks drawn on post exchange funds and signed by accused, dated 10 May 1943, for their compensation (on an hourly basis) for the period 26 April to 10 May (Exs. B, E, F, H and J). These checks covered all work performed during the period, including that on the Parks'house. The carpenter foreman and painter kept a record of material used. During the time the work was being done, accused called his secretary from seven to ten times and stated that he would be at the Parks'house if needed (R. 13-40).

b. Specification 2, Charge I: The post exchange council book contained a proposal dated 21 May 1943, signed by accused, for the purchase of two trailers from A. B. Poe Motor Company at a cost of \$1,925 and \$1,445 respectively (total cost \$3,370), and for equipping with refrigerators and shelving at a cost of \$400. The council book also contained the signed approval of the proposal by four council members and disapproval by one member. Although a meeting was not actually held, and action was taken only by ballots, minutes showing a meeting of the council on 21 May approving the proposal were written up. This proposal was submitted by accused as a result of a discussion at a council meeting

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on 15 May, when he was instructed to investigate the possibility of purchasing trailers (R. 40-56).

During May, Charles Graves (employed at the post exchange gasoline station), and later Graves and accused, talked to A. B. Poe, Jr., about the purchase of trailers. Poe showed them two trailers at Trailer Sales Company, and later sold the trailers to the post exchange through Graves (who could not be found as a witness at the time of trial). The price of the trailers was \$3,370. Poe received a check drawn on post exchange funds, signed by accused and dated 24 May, in that amount (Ex. K), made out an invoice (Ex. L) dated 25 May showing sale of the two trailers to the post exchange for \$3,370, and also executed two bills of sale (Exs. M and N) dated 27 May, transferring title to each trailer. Poe testified that the amount of \$3,370 included \$500 over and above the price of the trailers, which was "supposed to cover the cost of reconditioning the trucks that were to pull the trailers and to fix the trailers up with overload springs, with hitch and with shelving and remodeling the trailers". This work was not to be done by Poe's company, was not shown on the invoice, and was not under any definite plan. When Poe received the check for \$3,370, he cashed it, paid \$2,425 in cash to Trailer Sales Company for the two trailers (\$1,350 and \$1,075 respectively), took the profit of \$445 and "sent it through the office", and placed five \$100 bills in an envelope, which he put in the safe "to see what the repairs would amount to". A few days later, when Graves kept calling to find out when Poe "could start the work", Poe, who was unable to start the work because his shop was full, delivered the \$500 to Graves. The trucks were never brought to his shop and his mechanics did not examine the trucks (R. 56-73).

On 27 May, George L. Cook, operator of a garage, went to the post exchange service station in response to a telephone call from Graves and waited about an hour and a half until Graves and accused returned. He saw a carpenter working on one of the trailers. Accused told Cook what he wanted done to the trailers and that he wanted two trucks overhauled. He requested an estimate but Cook stated that he could not figure it "offhand" until he found out about truck equipment. Later Cook went to a junk yard and purchased some steel for two "trailer-hitches", at a cost of \$4.35. The next day accused went to Cook's garage, "picked up" the estimate, told Cook he "might need some money to buy these parts", pulled out his purse and laid down five \$100 bills. Cook stated "Well, just a minute, Captain", "I want to give you a receipt for this", and then made a receipt to the post exchange by accused. At Cook's request, accused signed a duplicate copy of the receipt for Cook. The estimate (Ex. R) provided for overhauling two trucks, putting on two

trailer hitches, setting up springs on trailers, and installing two "AC" controls, at an estimated cost of \$250 each, or a total of \$500. The receipt for \$500 was written on the bottom of the estimate. Cook did not see the trucks. When neither of the trucks was sent to him, Cook went to the post exchange, found that accused had been relieved, and on 2 June delivered the five \$100 bills to the new post exchange officer (R. 74-81).

c. Specification 1, Charge III: During March and April 1943, Mrs. Edith L. Uecker was employed as a stenographer at the post exchange and worked in the reception room outside the office of accused. She frequently went into the office of accused in connection with her duties. Some time in March when she was in his office, accused closed the door, put his arms around her and pulled her toward him. She tried to get away and he kept pulling her closer and closer. Some insignia in his shirt pocket hurt her. On another day about the same time, when Mrs. Uecker turned to leave the office, accused lifted her dress up to her waist "which was very embarrassing". Mrs. Frances R. Hosack, secretary to accused, was present on both occasions and observed both incidents (R. 101-102).

d. Specification 2, Charge III: At the end of October 1942 accused owed a personal account to the post exchange of \$63.04. On 28 January 1943 Mr. Samuel F. Meyers, chief accountant at the post exchange at the time, had his attention called to the account by the auditor from the Eighth Service Command, tried to locate accused, and personally paid the account. A few days later, accused refunded him the money. In the Fort Bliss Daily Bulletin of 2 October 1942 (Ex. T) notice was published that effective 1 November 1942 all purchases from exchanges would be for cash or for coupons paid for in advance (R. 116-124).

e. Specification 3, Charge III: In December 1942 accused asked Mr. Delmer V. Land, manager of Ponca Wholesale Mercantile Company, to receive some tobacco, cigarettes and cigars into his warehouse and issue a credit memorandum for this merchandise on the day preceding the inventory taken at the post exchange. On the day following the inventory the merchandise was to be returned to the post exchange and recharged at the same figure for which credit was given. Mr. Land agreed to the request. The tobacco was brought to the warehouse of the company in post exchange trucks, checked and stored in a separate room. A credit memorandum was issued. On the day after inventory the post exchange trucks "picked up" the merchandise and a recharge was made. Mr. Land placed the tobacco in a separate room because the transaction was not a resale to the mercantile company, which was to turn the merchandise back just as it had come in. It was understood with accused that issuance of the credit

memorandum would make no difference in the time for payment for the merchandise, and Mr. Land considered that the status of the tobacco, as sold to the post exchange, was not changed by the credit memorandum. Neither the mercantile company nor accused made any money on the transaction. Accused stated to Mr. Land that the purpose was so that the inventory would be reduced and a dividend could be paid. In subsequent months tobacco products were handled at inventory time in the same way, except that after January 1943, instead of receiving the merchandise in his warehouse, Mr. Land merely checked it at the post exchange warehouse and left it there, where it was placed in a vault. Mr. Land did not show the credit memoranda or recharges on his books. It was a service he gave the post exchange as requested by accused. The tobacco products handled on credit memoranda in this way were not limited to those sold to the post exchange by Ponca Wholesale Mercantile Company. Credit memoranda, supporting lists of merchandise, and recharge tickets (Exs. U-1 to U-6) showed these transactions as follows: 21 December 1942, credit, \$30,684.9-; 28 December, recharge, same amount; 23 January 1943, credit, \$20,600.47; 26 January, recharge, same amount; 24 February, credit, \$7,866.50; 25 February, recharge, same amount; 25 March, credit \$10,479.67; and 27 March, recharge, same amount. A recharge only was shown for April on 26 April, and referred to "Credit Memo #9880" (R. 124-136).

Mr. Walton H. Hale, manager of the Post Exchange warehouse until about 27 March 1943, who was familiar with these transactions, was present when inventories at the post exchange were taken by the inventory officer during the time of his employment. The vault was kept locked and the inventory officer did not know that the tobacco was there. The tobacco delivered to the mercantile company on credit memoranda included all tobacco in the warehouse. Mr. Floyd M. Bain, an accountant who had investigated the post exchange, testified that credit memoranda were issued on tobacco in December, January, February, March and April. He examined some of the financial statements signed by the post exchange officer during that period. The effect of the credit memoranda was to reduce the inventory and also accounts payable, as shown on the financial statements, but they did not change the amount of actual cash on hand. Captain Murray G. Gurentz, an auditor for the Post Exchange Service, was of the opinion that if the tobacco became the property of the mercantile company and the credit memoranda were bona fide, then there was no falsification of the financial statements, but otherwise if the transaction was a mere subterfuge and the tobacco remained in fact the property of the post exchange. In preparing the post exchange financial statements from December to April, Mr. Meyers, the exchange accountant, reduced the inventory and accounts payable to the extent of the credit memoranda issued by the mercantile

company. The transactions with the mercantile company were shown in the post exchange ledger. At meetings of the post exchange council from December to April accused presented the monthly financial statements, which were approved by the council. The council members were not advised of the practice of returning tobacco on credit memoranda at inventory time, and the action of the council in approving dividends or the expenditure of post exchange funds was based on the financial status as shown in the statements (R. 113-116, 137-156, 159-163).

4. The evidence for the defense:

a. Specification 1, Charge I: In April and May 1943, Mrs. Margaret E. Parks was employed at the post exchange. She discussed some repairs on her house at No. 3506 Mountain Avenue with accused, who suggested that as the post exchange employees were not very busy they could do the work for her. These employees did the work between 28 April and 11 May. Mrs. Parks agreed to pay the men at the same rate as the post exchange paid them. About 25 May or shortly before then, Mr. Chaney, the carpenter foreman, who had kept a record of time and material used on the job, as instructed by accused, made up a bill and gave it to accused. On 27 May an itemized statement in the amount of \$332 was rendered to Mrs. Parks by Mr. Meyers, the exchange accountant, who had received the payroll figures on 26 May, and she paid it on the same day by check (Def. Ex. 1) to the exchange. About \$99 of the statement was for material and the balance for labor (R. 175-191).

Accused testified that Mrs. Parks consulted him about a house she was buying, which she expected to remodel. A few days later he told her that she could use some of the exchange carpenters as they were not busy. He wanted to hold them for some work that was anticipated later. He instructed Mr. Chaney to do the work and made it clear that he was to keep an accurate list of labor and materials so a bill could be rendered to Mrs. Parks. When the work was completed accused had an itemized bill made up for Mrs. Parks. On examination by the court it was brought out that accused, who was commissioned from civilian life in July 1942, had no training other than a "conference" which lasted about 18 days, and that the exchange business operated by him amounted to over \$525,000 per month (R. 192-209, 252-254).

b. Specification 2, Charge I: Accused testified that he requested Graves to see what he could do with reference to purchasing trailers. Later Graves reported to him that he had a bid from Cook to do the work on the trailers, that Poe had returned "all the \$500.00", that Cook would have to buy parts for the job, and that if accused would advance Cook the

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money he would have "adequate cash to do the necessary work". Graves gave accused five \$100 bills which were received from Poe, accused went to Cook's garage, and due to the previous agreement of Graves, asked Cook for a receipt and the bid. Accused gave the \$500 to Cook because he understood from Graves that this was necessary in order to get the work done. Cook did not ask for the money (R. 220-223).

c. Specification 1, Charge III: Accused denied the alleged wrongful conduct with Mrs. Uecker (R. 210-211).

d. Specification 2, Charge III: Accused stated that he delayed paying his bill of \$63.04 for several months because he did not have the necessary funds, and made no attempt to cover up the debt on the post exchange records (R. 211, 226-227).

e. Specification 3, Charge III: Accused admitted that he submitted financial statements to the post exchange council as alleged but denied that any of the statements were false. He did not sign the statements until after he had been relieved as post exchange officer, when he did so by request. In November 1942 accused discussed with Mr. Land the matter of returning tobacco for credit. Accused agreed with Mr. Land that after inventory the post exchange would be charged with the identical amount of tobacco covered by credit memoranda. The post exchange paid for the tobacco at the same time as if it had not been returned. The purpose of returning the tobacco products was to reduce inventory and reduce accounts payable so as to make funds available for distribution to the troops, in view of regulations providing that all outstanding bills payable would be deducted from the cash balance before declaring a dividend. The council members did not understand that the tobacco was still in the vault and accused did not inform them of what he had done, as he did not feel that it was necessary. As a result of the transactions, money was distributed to the troops (R. 211-212, 214-220, 228-229).

5. The evidence for the prosecution in rebuttal showed that Major E. L. Safford, Post Inspector General at Fort Bliss, made an official investigation of certain affairs at the post exchange, beginning on 22 May 1943. At about 3:00 p.m. on 25 May he took a statement from Mr. Chaney, the carpenter foreman and from Mr. Chesher about the Parks' work. On 26 May between 8:00 and 9:00 a.m., he went to the post exchange office to examine the records, asked for accused, and told "Lieutenant Phillips", an assistant to the post exchange officer, and Mr. Meyers that he was making an investigation. He did not see accused personally until about 15 June. On the same day that Major Safford interviewed him or the next day (he thought it was the same day), Mr. Chesher talked to accused and asked him if he knew the investigation was going on. The records of the office showed that Mrs. Parks paid a bill of \$332 by check on 27 May and that the check was deposited on 29 May (R. 255-262).

6. First Lieutenant William L. Phillips, a witness for the court, told accused, on the same day that Major Safford asked to check the records (before lunch, he thought), that Major Safford was there for that purpose. Captain Lee F. Fulghum, who relieved accused as post exchange officer, was verbally appointed through Lieutenant Colonel Edgar B. Ross, post executive officer, on 27 May (confirmed by written order, 28 May), and signed a transfer from accused to himself in the council book on 27 May. Accused signed and the transfer was made on that date. Captain Fulghum afterward received \$500 from Mr. Cook, which the latter brought to him. On 1 June a further certificate of transfer in the council book was signed by accused and Captain Fulghum. On 27 May, a few minutes before he notified Captain Fulghum, Colonel Ross notified accused that he was being relieved as post exchange officer (R. 263-277).

7. a. Specification 1, Charge I: The evidence shows that in April 1943 accused, post exchange officer at Fort Bliss, instructed and permitted certain employees of the post exchange to perform work on a house owned by Mrs. Margaret E. Parks, an employee of the exchange, and to use materials from the exchange shop on this job. It was agreed that Mrs. Parks should pay the exchange for the labor and material used, and accused instructed the workmen to keep a record of the same. The work was performed between 28 April and 10 May, and on the latter date accused drew checks to the workmen for their compensation (on an hourly basis) for the period 26 April to 10 May, including the time worked on the Parks' house. The only record of the labor and material on the job was kept by the workmen, who turned it in to accused about 25 May. On 27 May, the day on which accused was relieved as exchange officer, he rendered a bill to Mrs. Parks in the amount of \$332, the cost of the work, and she promptly paid it.

Accused, as exchange officer, was not authorized to furnish labor and material for house repairs to Mrs. Parks, nor was he authorized to extend credit or make loans of exchange funds to her (pars. 10, 13a, 13d(1), 18a and 18c(7), AR 210-65, 19 March 1943). Nevertheless, he permitted materials belonging to the exchange to be used on her house and paid workmen for labor performed thereon to a total amount of \$332. Whether this transaction be viewed as a credit sale, or a loan of money (to the extent of the labor bill), to Mrs. Parks, it constituted a wrongful use of exchange funds and property, in violation of regulations, to the extent of \$332. Such conduct was, in the opinion of the Board of Review, an offense under the 96th Article of War.

b. Specification 2, Charge I: At an exchange council meeting on 15 May accused was instructed to investigate the possibility of purchasing two trailers. He and an exchange employee (Charles Graves) talked to Mr. A. B. Poe, Jr., who offered two trailers at a price of \$3,370. On

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21 May accused obtained authority from the council to purchase the two trailers at this price and to expend \$400 for equipping the trailers with refrigerators and shelving. The trailers were purchased and paid for by a check dated 24 May in the sum of \$3,370 drawn on exchange funds by accused. The price of the trailers was actually \$2,870 and Poe received \$500 extra, which was "supposed" to cover certain work on the trailers and on the trucks that were to pull the trailers. Poe was not to do the work, and he returned five \$100 bills to Graves, who in turn delivered this money to accused. On 27 May accused requested Mr. George L. Cook, operator of a garage, to submit an estimate for the work on the trucks and trailers. The next day accused went to Cook's garage, Cook submitted an estimate of \$500, accused stated that Cook might need some money to buy parts, and delivered the five \$100 bills to Cook. Accused had been relieved as exchange officer on 27 May. Cook did not do the work, and a few days later delivered the \$500 to the new exchange officer.

Although it was not shown by direct testimony that accused was a party to the transaction whereby the extra \$500 was concealed in the price of the trailers, it was circumstantially shown beyond any reasonable doubt that he was directly involved. He consulted with Poe about the purchase; when Graves received the \$500 from Poe he delivered it to accused, who did not account for it as exchange funds; on 27 May, the day accused was relieved as exchange officer, he sought a bid from Cook for doing work on the trucks and trailers; and on 28 May he voluntarily paid to Cook the same \$500 in cash which he had received from Graves, although Cook had just made his bid and in fact never did the work. It is obvious that accused was attempting to hide the transaction involving a return of \$500 to him by Poe, by getting the money out of his possession. All of the circumstances clearly show that accused was a party to the misappropriation of \$500 of exchange funds, and that this sum came into his possession pursuant to a prearranged plan.

c. Specification 1, Charge III: The evidence shows that on one occasion in his office accused put his arms around a woman employee and pulled her close to him although she tried to get away, and on another he lifted her dress up to her waist. In both instances his secretary (Mrs. Hosack) was present and observed his actions.

Although such conduct was of a nature to bring discredit upon the military service, and hence constituted an offense in violation of the 96th Article of War, it did not, under the circumstances, in the opinion of the Board of Review, amount to conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. So far as the evidence shows, the acts of accused may have been committed in a playful spirit--highly improper, but not of the serious character contemplated by the 95th Article of War. Another woman was present in each case, and the conduct did not involve circumstances showing flagrant indecency.

Winthrop states that if the act, though ungentlemanlike, be of a trifling character, involving no material prejudice to individual rights, or offense against public morals or decorum, it will not in general properly be viewed as so affecting the reputation of the officer or the credit of the service as to be made the occasion of a prosecution under the Article (Winthrop, Military Law and Precedents, Reprint, p. 712).

d. Specification 2, Charge III: At the end of October 1942 accused owed an account to the exchange in the amount of \$63.04. On and after 1 November credit sales at post exchanges were forbidden. Accused neglected to pay the indebtedness until about the end of January 1943, when he paid \$63.04 to the chief accountant at the exchange, who a few days before had paid the account for accused. Accused claimed that he had not had funds to pay the account.

Mere failure to pay a debt, in the absence of deceit, evasion, false promises, denial of indebtedness, or other circumstances showing that the failure was dishonorable or discreditable, is not an offense, either under the 95th or 96th Article of War (CM 207212, Thompson and CM 220642, Wilson). The debt of accused was incurred prior to the date when credit sales were stopped. No circumstance was shown other than that the debt was not paid prior to the end of January. When the chief accountant paid the account, accused promptly refunded him the amount he had paid. In the opinion of the Board of Review the finding of guilty of this Specification is not sustained by the evidence.

e. Specification 3, Charge III: In December 1942 accused arranged with Ponca Wholesale Mercantile Company for that company to take possession of all tobacco in the exchange warehouse just before inventory day, issue a credit memorandum therefor, then recharge the same tobacco to the exchange immediately after inventory day, and surrender possession of the tobacco back to the exchange. This arrangement was carried out in December, January, February, March and April. In the first two months, the tobacco was physically removed to the warehouse of the mercantile company, and thereafter the company took possession by checking the tobacco into a vault in the exchange warehouse. The inventory officer did not include this tobacco in his inventory each month and did not know about it. The exchange made payment for the tobacco on the due date, without regard to the date of the recharge.

This plan was entered into by accused in order to reduce the inventory and reduce accounts payable so as to make funds available for distribution to the troops, in view of regulations providing that all outstanding bills payable would be deducted from the cash balance before

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declaring a dividend. The purpose was accomplished, because the monthly financial statement submitted to the council by accused showed both inventory and accounts payable in an amount reduced to the extent of the credit memoranda issued by the mercantile company. It is obvious from the circumstances that the tobacco did not become the property of the mercantile company during the inventory period, but remained that of the exchange, and that the issuance and receipt of the credit memoranda amounted to a mere subterfuge, designed to deceive the inventory officer and the council members. Accused did not advise the council members of what he had done because he did not feel that it was necessary. The council approved the financial statements and declared dividends based on the financial status as shown therein. The amounts covered by the credit memoranda were large and in one month amounted to over \$30,000.

Although accused did not profit financially by the transaction, he willfully deceived the council members by submitting to them each month a false financial statement, and thereby induced them to declare dividends upon a false basis. Knowingly making a false official statement is included in the Manual for Courts-Martial as an instance of violation of the 95th Article of War (MCM, 1928, par. 151). In the opinion of the Board of Review the evidence supports the finding of guilty in violation of the 95th Article of War.

8. The accused is 38 years of age. The records of the Office of The Adjutant General show his service as follows: temporarily appointed captain, Army of the United States, 9 June 1942, and active duty, 15 June 1942; temporarily promoted to major, Army of the United States, 27 May 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge III, legally sufficient to support only so much of the finding of guilty of Specification 1, Charge III as involves a violation of the 96th Article of War, legally sufficient to support the findings of guilty of all other Specifications and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War, and is mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Brown, Judge Advocate
J. F. Pottelbos, Judge Advocate
(On Leave), Judge Advocate

1st Ind.

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War Department, J.A.G.O.,

21 DEC 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 Morris J. Abele (O-908400), Army of the United States.

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 2, Charge III (dishonorable failure to pay debt), legally sufficient to support only so much of the finding of guilty of Specification 1, Charge III (wrongful conduct toward a woman), as involves a violation of the 96th Article of War, legally sufficient to support the findings of guilty of all other Specifications and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused, post exchange officer at Fort Bliss, Texas, wrongfully used exchange employees to repair a house of an exchange employee and wrongfully expended \$332 of exchange funds therefor (Spec. 1, Charge I); wrongfully appropriated to his own use \$500 of exchange funds (Spec. 2, Chg. I); wrongfully took a woman employee of the exchange into his arms and pulled her skirt above her waist (Spec. 1, Chg. III); and knowingly submitted four false financial statements to the post exchange council and thereby misled the council members (Spec. 3, Chg. III). (He was found not guilty of Charges II and IV and of the Specifications thereunder.) I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for ten years be confirmed but that the period of confinement be reduced to three years, and that the sentence as thus modified be carried into execution.

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



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

3 Incls.

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to three years. G.C.M.O. 46, 1 Feb 1944)

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

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SPJGK
CM 240041

17 SEP 1943

UNITED STATES)

FORT ORD, CALIFORNIA

v.)

Trial by G.C.M., convened at
Fort Ord, California, 31 August
1943. Dishonorable discharge
and confinement for ten (10)
years. Disciplinary Barracks.

Private STEVEN HORHOZER
(15102032), Headquarters
Company, 2nd Battalion,
543rd Engineer Boat and
Shore Regiment.)

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

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

2. The offenses of which accused stands convicted are (a) absence without leave in violation of Article of War 61 (Charge I), (b) escape from confinement in violation of Article of War 69 (Charge II), (c) desertion in violation of Article of War 58 (Charge III), and (d) assault with intent to do bodily harm with a dangerous weapon, in violation of Article of War 93 (Charge IV).

Charges I, II, and III and their Specifications relate to strictly military offenses. The review of the staff judge advocate contains a fair and comprehensive statement of the evidence. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of those Charges and Specifications, and does not consider it necessary to incorporate in this review a restatement of the evidence with reference thereto.

3. Charge IV and its Specification, of which accused was found guilty, alleges that accused with intent to do bodily harm (in violation of Article of War 93) committed an assault upon Private First Class Howard Dewey "by pointing a loaded shotgun at him, the said shotgun being a dangerous weapon". The only evidence introduced in support thereof is the testimony of Private First Class Howard Dewey, Headquarters Detachment, 735th Military Police Battalion, Camp Perry, Ohio, who testified by deposition:

"I had prisoners policing the area about 100 yards west of the officer's guest house. Private Horhozer turned and reached for the butt and muzzle of my gun, turning it over my shoulder. He then pointed the gun at me and the prisoners wanted to take my clothes. * * *"

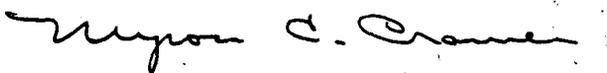
1st Ind.

War Department, J.A.G.O., **21 SEP 1943** - To the Commanding Officer,
Fort Ord, California.

1. In the case of Private Steven Horhozer (15102032), Headquarters Company, 2nd Battalion, 543rd Engineer Boat and Shore Regiment, 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 Charge IV and its Specification be approved as involves a finding that accused committed an assault with a dangerous weapon in violation of Article of War 96. In view of this holding it would not be inappropriate to make some commensurate reduction in the period of confinement. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50 $\frac{1}{2}$ 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 240041).



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

SEP 22 4 3 AM



DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY
J. A. G. O.

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

(349)

OCT 1943

SPJGH
CM 240043

UNITED STATES)

v.)

Private HENRY E. VISLAN)
(36043355), Company C,)
33rd Infantry.)

TRINIDAD SECTOR AND BASE COMMAND

Trial by G.C.M., convened
at Camp Paramaribo,
Surinam, 11 June 1943.
Dishonorable discharge
(suspended) and confinement
for two (2) years. Re-
habilitation Center.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Henry E. Vislan, Company C, 33rd Infantry, United States Army Forces in Surinam, did, at Paranam, Surinam, on or about April 26, 1943, willfully, feloniously, and unlawfully kill Leonard Sutton, by shooting him in the head with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence, ordered it executed, but suspended 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. 170, Headquarters Trinidad Sector and Base Command, 1 August 1943.

3. The evidence for the prosecution shows that at about 7:45 a.m. on 26 April 1943 accused and several other soldiers gathered near the "guard shack" at Camp Paranam, Surinam, preparatory to reporting for infantry drill at eight o'clock. While they waited, Private Leonard Sutton was at one side doing bayonet practice by himself. About five minutes before eight o'clock, four of the soldiers started up the road to assemble for drill. They proceeded in the following order: Privates First Class Seeley S. Talmadge and William A. Hilliard, accused, and then Sutton. There was a distance of about 50 yards between Hilliard and accused. Sutton had the habit of walking with his head down. According to native witnesses accused was carrying his rifle at port arms and swinging it back and forth, and as he turned around with the muzzle pointing upward, the rifle "just went off". Sutton fell to the ground, accused threw his rifle down and Corporal Hugh L. Wilcox, as well as Talmadge and Hilliard, ran to Sutton. Accused did not move, stated that it was an accident, that "he didn't know the gun went off", and kept repeating "You know I didn't mean to do it". Several officers, including First Lieutenant Edward J. Bruger, Officer of the Day, went immediately to the scene. Lieutenant Bruger picked up the rifle of accused, removed seven rounds, and asked accused whether his rifle had gone off. Accused stated that as he was walking the butt of his rifle was swinging in front of him and hit the ground and that he "didn't even know the rifle went off until he turned around and saw that some one had been hit". He also stated that it was "absolutely accidental, and he wouldn't shoot a friend". Captain Irving E. Marks, Medical Corps, examined Sutton immediately after the shot was fired, and found him dead from a bullet wound in the head. The point of entrance was in the center of the forehead between the eye orbits, and the point of exit was in the center of the back of the head at approximately the same level (R. 4-8, 13-23, 25-26).

Accused and Sutton were "pretty good friends", they had had a dispute about a dog at some undesignated date, accused was frequently "clowning" and playing, and immediately after the incident the reactions of accused were "natural of any one involved in an accident of that nature" (R. 6, 12, 23-24).

4. The accused testified that on 25 April he was on guard duty from noon to 6:00 p.m., that when he was relieved he unloaded his rifle and put the cartridges in the front pocket of his belt, and that he left the rifle and belt in the "guard shack" because it was raining. The next morning he did not inspect his rifle and "knew it was unloaded because I took them out the day before. I guessed no one would put any cartridges in my gun". On that morning, 26 April, accused took his gun and belt from the "guard shack", stood around a few minutes, and started

walking toward the "CP" for infantry drill. He had his gun on his shoulder, then took it off, intending to wait for some of the other soldiers, and was swinging it "a little" with his hand at the top of the stock, as he walked. The rifle was about ten inches from the ground with the butt down, when it slipped from his hand, and the butt hit the ground. Accused heard a shot, did not realize that it was from his gun, and did not know exactly how it happened. At this time he was facing toward the "CP", and immediately turned around. He had left Sutton at the "guard shack with his bayonet" and did not notice anyone behind him. Accused had been in the Army about two years, and had never pointed a rifle at a soldier or friend. He considered Sutton as a friend (R. 27-36).

5. The evidence shows that as accused walked toward the appointed place for infantry drill, just before 8:00 a.m. on 26 April 1943, he removed his rifle from his shoulder, was swinging it from side to side in a position of port arms, and as he turned around the rifle "went off" in some unexplained manner. According to accused he did not turn around, the rifle slipped from his hand as he was swinging it, and it was fired as the butt struck the ground. It is not shown that accused knew that the rifle was loaded, and he testified that he had unloaded it at six o'clock the previous evening when he was relieved from guard duty, and therefore "knew" it was not loaded. The bullet from the rifle struck and killed Private Leonard Sutton, who was walking behind accused at the time.

It is obvious that the finding of guilty was of involuntary manslaughter, based on the theory that the death of Sutton resulted from gross or criminal negligence of accused (culpable negligence as stated in the Manual for Courts-Martial), although the court did not delete the words "willfully, feloniously, and" from the Specification. Involuntary manslaughter includes homicide unintentionally caused by culpable negligence in performing a lawful act. Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range, and pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged (MCM, 1928, par. 149a). But there is a substantial difference between the instances cited, and what the evidence shows that accused did. One who fires a rifle must exercise extreme diligence to know that nobody is within the line of fire, and one who voluntarily points a rifle at someone else is under the special duty to know that it is not loaded. Accused did not

intentionally fire his rifle and did not point it; the most that can be said is that he handled it carelessly. Had it been shown that he knew the gun was loaded it is possible that careless handling in the manner proved might have amounted to criminal negligence, but not so when accused was without such knowledge. Simple negligence is not sufficient to convert a homicide into involuntary manslaughter; there must be criminal or gross (culpable) negligence.

"* * * where an unintentional homicide is occasioned by the gross or culpable negligence of defendant, although in the commission of an act lawful in itself, it is manslaughter * * *. While the kind of negligence required to impose criminal liability has been described in different terms, it is uniformly held that it must be of a higher degree than is required to establish negligence upon a mere civil issue, and it must be shown that a homicide was not improbable under the facts as they existed which should reasonably have influenced the conduct of accused. The negligence must not be so gross as to raise the presumption of malice, it must have been the negligence of defendant personally, and it must be the proximate cause of the homicide. * * * (29 C.J. 1154-1155).

"Homicide by misadventure is the accidental killing of another, where the slayer is doing a lawful act unaccompanied by any criminally careless or reckless conduct. A homicide committed by accident, misadventure, or misfortune is excusable; and, as in other cases of excusable homicide, the slayer is not criminally responsible therefor. * * * Thus it is excusable homicide if death unfortunately ensues * * *, under some circumstances, where a pistol or other firearm is accidentally and unintentionally, or even intentionally, discharged." (30 C.J. 87).

In the opinion of the Board of Review the evidence does not show criminal, gross or culpable negligence, but simple negligence only, and therefore the homicide was within the classification of accidental.

6. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Samuel M. Diver, Judge Advocate
J. J. Fetterhoss, Judge Advocate
Thomas D. Lattin, Judge Advocate

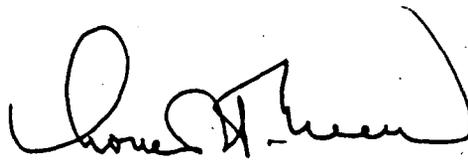
1st Ind.

War Department, J.A.G.O., NOV 5 1943 - To the Secretary of War.

1. Herewith transmitted for 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 Henry E. Vislan (36043355), Company C, 33rd Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused 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,
Acting The Judge Advocate General.

2 Incls.

Incl.1-Record of Trial.

Incl.2-Form of Action.

(Findings and sentence vacated, by order of the Under Secretary of War. G.C.M.O. 368, 15 Nov 1943)

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

SPJGN
CM 240100

24 SEP 1943

UNITED STATES)

FIRST AIR FORCE

v.)

Second Lieutenant LEROY
BOWMAN (O-798942), Air
Corps, 301st Fighter
Squadron.)

Trial by G.C.M., convened at
Selfridge Field, Michigan, 21
August 1943. Dismissal and
confinement for six (6) months.
Disciplinary Barracks.

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 64th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that 2d Lt. Leroy Bowman, 301st Fighter, 332nd Fighter Group, Air Corps, having received a lawful command from 1st Lt. Allan C. Bassett, Air Corps, his superior officer, to take off for another landing did at Oscoda Army Air Field, Oscoda, Michigan, on or about 20 July, 1943, willfully disobey the same.

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

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: In that 2d Lt. Leroy Bowman, 301st Fighter Squadron, 332nd Fighter Group, having received a lawful operations order to fly an aerial gunnery mission from Captain Vernon B. Hathorn, Jr., AC, Detachment Commander, his superior officer, the said Captain Vernon B. Hathorn, Jr., being in the execution of his office, did, at Oscoda Army Air Field, Oscoda, Michigan, on or about 17 July, 1943, fail to obey the same.

Specification 3: In that 2d Lt. Leroy Bowman, 301st Fighter Squadron, 332nd Fighter Group, having received a lawful operations order to take off in a P-40 airplane on a night transition flight, from Captain Vernon B. Hathorn, Jr., AC, Detachment Commander, his superior officer, the said Captain Vernon B. Hathorn Jr., being in the execution of his office, did, at Oscoda Army Air Field, Oscoda, Michigan, on or about 18 July, 1943, fail to obey the same.

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications; was found not guilty of Specification 1, Charge I, and Specification 4 and 5, Charge II, guilty of both Charges and all remaining 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 such place as the reviewing authority may direct for six months. The reviewing authority disapproved the finding of guilty of Specification 1, Charge II, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that about 10 July 1943, at the time the bulk of the accused's fighter group arrived at Oscoda,

Michigan, the accused and some of the other flight officers had been put on the alert; they had been notified to prepare to go overseas, and were assigned missions to bring their work up to requirements to qualify them for overseas service. According to the flight surgeon, "on the 14th or 15th they all became a little irritable". The accused, in particular, "was irritable and felt that he was flying too much. * * * I could see," testified the flight surgeon, "he was bordering on anxiety. He had no psychosis but he was anxious" (R. 6n, 6o).

On the morning of 16 July 1943, after refusing to fly a scheduled aerial gunnery mission - stating that his back hurt him, the accused reported to the flight surgeon, who examined and found nothing specifically wrong with him - no objective symptoms or injuries which would keep him from duty. The surgeon then taped his back - for psychological reasons - and ordered him back to duty. On the morning of the following day, the accused came back to the flight surgeon with the same complaint, and was taken to the hospital where he received an examination, urinalysis, and spinal X-ray, all showing no organic reasons for the alleged symptoms of complaint (R. 6m-6o, 6r).

Detachment operations orders, issued by the accused's commanding officer for 17 July 1943, included an aerial gunnery mission to be flown by the accused from 1345 to 1515 o'clock, which mission the accused refused to perform, alleging the pain in his back as the reason for his refusal (R. 6a, 6c; Exs. 1, 3, 7-8).

The accused was similarly ordered by his commanding officer to fly a night transition mission on the night of 18 July 1943. He again refused to fly, stating that he did not feel like flying that night. Although the flight surgeon reported to the accused's commanding officer, in the accused's presence, that the accused was physically in flying condition, the accused persisted in his refusal, insisting that he did not feel like night flying on that particular night (R. 6a, 6c, 6f-6g; Exs. 1, 4, 7-8).

On 20 July 1943, the accused, although scheduled to participate in a night flying mission from 2130 to 2300 o'clock, did not report to the line at the appointed hour; and only after the officer in charge of the night flight detachment had sent for him at his quarters, did he take off and fly with the rest of his mission. He had not been up forty minutes when he called the control tower for landing instructions. At that time, according to the officer directing the flight,

"we had some other airplanes for landing and we told him to stand by until he was given landing instructions. He repeated two or three times that he was coming in for a landing so in order not to jeopardize the other planes, we immediately got the other pilots in formation so that Lieutenant Bowman could come in and land. * * * After he got on the ground, I instructed the control tower operator to have him take off again and shoot another landing and Lieutenant Bowman replied 'Roger'. * * * 'Roger' means in the language of the Air Corps 'Message received OK'. I heard him answer and taxi up to the line and shut off his engine. Before he shut the radio off, we told him to take off and make one more landing. The answer again was 'Roger'".

Despite his acknowledgment of the order, the accused did not take off for another landing; but "wrote up his time and got out of his plane"; thereafter stating, in explanation of his disobedience, that "he just did not feel like flying and did not want to night fly"; also that his back was hurting him (R. 6d-6e, 6j; Exs. 1, 6-8).

In the training program at Oscoda Army Air Field, if a pilot objected to flying because of his physical condition, customarily the first thing for him to do was to report to the flight surgeon. Between 15 and 21 July 1943, pilots were required to fly between a three hour minimum and a four and one-half hour maximum daily. On the 17th, according to the operations record, the accused flew just one hour; on the 18th three and one-tenth hours; on the 19th, three hours; and on the 20th, four and two-tenths hours in the day and one and three-tenths hours at night making a total of five and five-tenths hours total flying time that day (R. 6g-6j).

4. The evidence for the defense shows that the accused has no record of accidents and has never been recommended for any type of evaluation board. When a pilot refuses to fly, stating that he has injuries, the usual procedure is to recommend his appearance before a re-evaluation board. The accused's squadron commander testified that as far as he knew, the accused was an average pilot. This rating was also ascribed to him by the operations officer, who testified that the accused has a total of 289 hours flying time, which, for a man who has been out of flying school as long as he has, is "a considerable amount

of flying". Of this, sixty hours and forty minutes was "fighter time", flying a P-40; only one and three-tenths hours, night flying. During the month of July, the accused flew twenty-two and six-tenths hours (R. 6g-6w; Ex. "A").

5. The accused at his own request, after his rights as a witness had been fully explained to him, testified under oath that he received a football injury in 1938, and ever since then had experienced intermittently the pain in his back of which he complained when he refused to fly. He loves to fly and is not afraid of flying. Asked whether he would "just as soon fly over Tokyo as Mount Clemans", he replied, "It doesn't make me any difference where I fly." (R. 6w-6x)

He admitted that after his examination at the hospital on the morning of 17 July, he did not fly the aerial gunnery mission in which he was scheduled to participate that afternoon. He refused to fly his night transition flight as ordered, on 18 July, because he was tired; although he had heard the flight surgeon report to his commanding officer that he was physically qualified to fly (R. 6x-6aa).

On the night of 20 July, after going into the air at approximately 9:20, the accused testified:

"The pain started in my back and I called in for landing instructions but failed to hear the tower tell me what to do so I asked him again and understood him that time to tell me 'to stay in my zone'. But my back was hurting and I wanted to come to the ground so he gave me landing instructions and I taxied out to the line. He then told me to take another trip around for another landing. I turned the engine off and Lieutenant Gravette came out and asked me what was wrong and I told him my back was hurting to bad to go up for another mission. * * * If a person is sick, he has the right to come in because he might crack up his ship. I wanted to protect myself as well as government property (R. 6x).

6. Specifications 2 and 3, Charge II, allege failure to obey lawful operations orders. The first directed participation in an aerial gunnery mission, the second, a night transition flight. The accused admitted

receiving and failing to obey both orders. As his excuse in the first instance, he testified he was in the hospital at the time the mission was scheduled; his own testimony shows, however, that the physical examination, which was the only occasion of his being at the hospital on the day in question, took place in the morning, whereas the mission was scheduled for the afternoon. In view of the accused's physical fitness to fly, which the examination disclosed, his established failure to obey the order can only be regarded as a wholly unmitigated offense, to the prejudice of good order and military discipline, in violation of Article of War 96. Similarly, in the second instance, his alleged weariness, in the face of the flight surgeon's statement, in the accused's presence, that he was physically qualified to fly, neither justifies nor extenuates his failure to participate in the night transition flight on which he had been ordered.

7. Specification 2, Charge I, alleges the accused's willful disobedience of his superior officer's order to take off for another landing, in violation of Article of War 64.

"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 * * * a particular thing at once and refuses or deliberately omits to do what is ordered. * * * The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused" (par. 134b, p. 148, M.C.M., 1928).

Every element of the offense alleged is established by the proof, which shows that the operations officer in charge of the accused's flight ordered him, when he had made his first landing, to take off for another. The accused signalled his acknowledgment of the order; then, in clear defiance of it, he deliberately omitted to take off for another landing, but coolly "wrote up his time and got out of his plane", stating that his back hurt, that he "just did not feel like flying and did not want to night fly". The fact that the accused had flown, on that day, the maximum requirement of four and a half hours, is no defense to the charge of failing to obey the order, but is eligible for consideration in extenuation of the offense. The record supports the findings of guilty of Specification 2, Charge I, in violation of Article of War 64.

8. War Department records show that the accused is 21 years and 10 months of age; enlisted service from 18 September 1941; appointment as second lieutenant, Air-Res., A.U.S., 25 March 1943.

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. Dismissal is authorized upon conviction of a violation of Article of War 64 or 96.

Charles L. Lessor, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(362)

SPJGN
CM 240100

1st Ind.

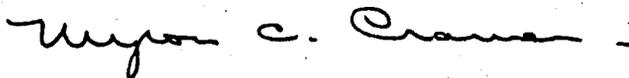
War Department, J.A.G.O., 1 - OCT 1943

- 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 Leroy Bowman (O-798942), Air Corps, 301st Fighter Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted and that as thus modified the sentence be ordered executed.

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



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

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

(Sentence confirmed but confinement and forfeitures remitted.
Execution suspended. G.C.M.O. 336, 4 Nov 1943)

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

(363)

20 SEP 1943

SPJGH
CM 240108

UNITED STATES)

v.)

Second Lieutenant LESTER)
H. LEVIN (O-1302325),)
Army of the United States.)

ARMY AIR FORCES EASTERN
FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Army Air Forces Pilot
School (Basic), Courtland
Army Air Field, Courtland,
Alabama, 25 August 1943.
Dismissal, total for-
feitures and confinement
for three (3) years.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Lester H. Levin, Infantry, Army of the United States, 65th Flying Training Detachment, Army Air Forces Contract Flying School (Primary), Decatur, Alabama, did, at 65th Flying Training Detachment, Army Air Forces Contract Flying School (Primary), Decatur, Alabama, on or about 11 August 1943, feloniously take, steal, and carry away Three Hundred and Eight Dollars (\$308.00), lawful money of the United States, the property of Second Lieutenant Alvin J. Chesser.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 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 at about 12:25 or 12:30 p.m. on 11 August 1943, Second Lieutenant Alvin J. Chesser, 65th Flying Training Detachment, Southern Aviation, went to his locker to change from flying clothes to his uniform. When he went to the washroom, he placed his wallet, containing \$308 (14 new \$20 bills, two \$10 bills, one \$5 bill, and three \$1 bills) on the top shelf of his locker. At that time accused was about an arm's length away, at his own locker nearby. Lieutenant Chesser returned from the washroom in about two minutes, put on his clothes and went outside. He then missed his wallet, returned to his locker, searched it three or four times, but did not find his wallet. Lieutenant Chesser announced to several officers present, including accused, that he had lost \$308. Some of the officers helped him search for the wallet, but it was not found. At about 12:40 p.m., he reported the loss to Captain Nathan B. Olim, Commandant of Cadets (R. 4-7, 9, 11-12, 14-15, 17-18).

Captain Olim, Second Lieutenant Jack C. Cluen and Lieutenant Chesser went to the locker room and made a further search for the wallet. A few minutes later, when nearly all of the student officers were present, Captain Olim explained the situation, asked the group if anyone objected to being searched, and, in the absence of objection, proceeded with assistance to search all student officers who were there. When accused was searched, the wallet of accused, which contained some currency, was found and also, in his watch pocket, a large amount of currency. Captain Olim, Lieutenants Cluen and Chesser, and accused went into another room. All of the money removed from the person of accused (\$536) had been placed in one pile. It was then separated into three piles, one of \$308, consisting of bills corresponding to those lost by Lieutenant Chesser, one of \$50 and one of \$178. Captain Olim placed accused under arrest and told him that anything he said would be used against him. Accused stated that he would tell the truth about it, that he had found the money by the mess hall on his way back from the flying line, that he threw the wallet down by the trash can at the mess hall, and that it was "just a moment of weakness". Accused said that \$50 belonged to him and over \$100 to a girl, a friend of his. Captain Olim, Lieutenant Chesser and accused then went to the mess hall and, at the place described by accused, found Lieutenant Chesser's wallet, which contained his American Legion card, pass, meal ticket and identification card (R. 7-10, 13-14, 16-24, 27-33).

About thirty minutes later, Major James L. Curnutt, commanding the 65th Flying Training Detachment, interviewed accused, after the

24th Article of War had been read to him. Accused stated that he found the billfold in a student officer's room on the floor between two lockers, picked it up and put it in his pocket, and, on the south side of the mess hall, removed the money and put the billfold on the ground. Accused also stated that he had intended to keep the money and not return it (R. 33-34).

On 12 August, Second Lieutenant Y. Peyton Wells, the investigating officer, interviewed accused in the presence of Second Lieutenant David D. Scherzer, who had been named defense counsel for accused. The 24th Article of War was read and discussed. Accused stated that this was the first time anything like this had happened to him or any of his family, and he was "quite emotionally upset over it all". He dictated a statement, which he read and signed after it was typed. The statement was in substance as follows:

On 11 August at about 12:30 p.m., in the officers' locker room, accused noticed a wallet on the floor about two lockers from his own. Without thinking he picked it up and placed it in his pocket. He was "probably in some kind of a fogged condition because I didn't give it a second thought". Accused heard someone say a wallet was missing and when asked if he had seen it answered in the negative. In about five minutes he left to make a telephone call and then went to mess. Near the mess hall he opened the wallet for the first time, noticed an identification card and meal ticket, removed the money, discarded the wallet, and placed the money in his watch pocket without counting it. He returned to the locker room about 1:10 p.m. and "stood around". Other student officers soon came in. He surmised that they would be searched, but made no attempt to dispose of the money. When accused was searched, the money was found in his watch pocket, but he did not know the exact amount. He had more than the average amount of money in his own wallet, and he explained that most of it belonged to a friend. Only four or five officers were searched. When "Lt. Olim", Lieutenants Cluen and Chesser, and accused went to one of the cadet rooms, all of the money was put together. Lieutenant Chesser stated that \$308 was the amount in his wallet. Accused counted the money and \$228 was his own. He told Lieutenant Chesser where his wallet was, and they walked over there and picked it up. Accused did not know what his intention was at the time he took the wallet, could not believe himself "like that" because he was brought up differently, and had never been put in such position before. He did not need the money as at the time he had \$621.37 in a checking account, over \$200 in a savings account,

1st Ind.

War Department, J.A.G.O., 1 - OCT 1943 - To the Secretary of War.

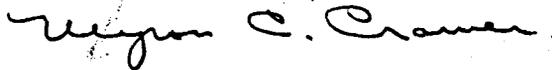
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Lester H. Levin (O-1302325), Army of the United States.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused stole \$308 from a brother officer. I recommend that the sentence to dismissal, total forfeitures and confinement for three years be confirmed and carried into execution.

Consideration has been given to a letter dated 22 September 1943 from Mr. Barnett Cohen, Philadelphia, Pennsylvania, requesting clemency.

3. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.



Myron C. Cramer,
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. fr. Mr. Cohen,
Phila., Pa.

(Sentence confirmed but confinement reduced to one year.
G.C.M.O. 333, 30 Oct 1943)



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

(369)

SPJGH
CM 240176

29 OCT 1943

UNITED STATES)

v.)

First Sergeant ELMER C.
FREIMUTH (36077687),
Company A, Detachment
Medical Department (SC),
Jefferson Barracks,
Missouri.)

ARMY AIR FORCES
CENTRAL TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened
at Jefferson Barracks,
Missouri, 20 August 1943.
Dishonorable discharge
(suspended), and confine-
ment at hard labor for
one and one-half (1½)
years. Rehabilitation
Center.)

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Sergeant Elmer C. Freimuth, Company A, Detachment Medical Department (SC), Jefferson Barracks, Missouri, did, at Jefferson Barracks, Missouri, on or about 15 March 1943, loan to Sergeant Harvey C. Ayers \$10.00, for the use of which money for a period of approximately 15 days the said 1st Sergeant Elmer C. Freimuth exacted and received the sum of \$3.00, such amount being usurious interest for said loan.

Specification 2: (Finding of Not Guilty).

Specification 3: In that 1st Sergeant Elmer C. Freimuth, Company A, Detachment Medical Department (SC), Jefferson Barracks, Missouri, did, at Jefferson Barracks, Missouri, on or about

25 December 1942, loan to Private First Class Earl J. Heavel \$5.00, under an agreement whereby he, the said 1st Sergeant Elmer C. Freimuth, was to receive for the use of said money for about six days the sum of \$1.25, thereby demanding and receiving an usurious rate of interest for said loan.

Specification 4: Similar to Specification 3 except that it charges a loan of \$20.00 on or about 1 February 1943, and an agreement to pay \$8.00 for about 28 days' use thereof.

Specification 5: Similar to Specification 3 except that it charges a loan of \$30.00 during the month of March 1943, to Corporal Bernard Yochum, and an agreement to pay \$8.50 for about two months' use thereof.

Specification 6: In that 1st Sergeant Elmer C. Freimuth, Company A, Detachment Medical Department (SC), Jefferson Barracks, Missouri, well knowing that Staff Sergeant Homer M. Frederick was junior in grade to him, did, at Jefferson Barracks, Missouri, on or about 1 May 1943, after the promotion of the said Staff Sergeant Homer M. Frederick to the grade of Staff Sergeant, wrongfully solicit from the said Staff Sergeant Homer M. Frederick, dinners for the said 1st Sergeant Elmer C. Freimuth and Warrant Officer (j.g.) Charles H. Schaefer, Master Sergeant Stanley E. Matteson and Technical Sergeant John J. Stefanowski, all senior in grade to the said Staff Sergeant Homer M. Frederick.

Specification 7: Similar to Specification 6 except that it charges the wrongful soliciting and procuring from Staff Sergeant William T. Pransky on or about 1 January 1943 of the sum of \$8.50 to be used to purchase dinners for the "Steak Club", consisting of a warrant officer and non-commissioned officers senior in grade to Sergeant Pransky.

Specification 8: Similar to Specification 6 except that it charges the wrongful soliciting of dinners from Technician Fifth Grade James F. Bycroft on or about 7 May 1943, and accepting the sum of \$11.00 from Bycroft as the cost of the dinners.

Specification 9: Similar to Specification 3 except that it charges a loan of \$10.00 on or about 7 February 1943 to Private First Class Paul Heseman and an agreement to pay \$4.00 for about 21 days' use thereof.

Specification 10: (Finding of Not Guilty).

Specification 11: Similar to Specification 1 except that it charges a loan of \$5.00 on or about 1 January 1943 to Private First Class John R. Holden, and the exacting and receipt of \$2.00 for about 30 days' use thereof.

Specification 12: Similar to Specification 3 except that it charges a loan of \$5.00 during the month of April 1943, to Private First Class Robert W. Keller, and an agreement to pay \$2.00 for about 30 days' use thereof.

Specification 13: Similar to Specification 1 except that it charges a loan of \$15.00 on or about 15 April 1943 to Private First Class Lawrence Wolfenbarger, and the exacting and receipt of \$7.00 for approximately 15 days' use thereof.

Specification 14: Similar to Specification 1 except that it charges a loan of \$10.00 on or about 20 May 1943 to Private Hersey Halsey, and the exacting and receipt of \$4.00 for approximately 11 days' use thereof.

Specification 15: Similar to Specification 1 except that it charges a loan of \$40.00 on or about 16 December 1942 to Staff Sergeant Robert C. Woodard, and the exacting and receipt of \$7.00 for approximately 15 days' use thereof.

The accused pleaded guilty to Specifications 1, 11, 13 and 14, except the words "exacted and", to Specification 9, except the words "under an agreement" and "demanding and", and to the Charge, and not guilty to all other Specifications. He was found not guilty of Specifications 2 and 10, and guilty of all other Specifications and of the Charge. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one and one-half 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. 365, Headquarters Army Air Forces Central Technical Training Command, 6 September 1943.

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

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a. Specification 1. Sergeant Harvey C. Ayers borrowed from the accused \$10 sometime during March 1943. On the first of the month he repaid the loan plus \$3 interest which had been agreed upon at the time of the loan. There was no specified time when repayment was to be made (R. 11-12).

b. Specification 3. Private First Class Earl J. Heavel borrowed \$5 from the accused on 25 December 1942. There was no agreement to pay interest and no definite time to repay the principal. At the end of the month he paid the accused \$6.25 as he "figured that was the cost". It was "what the rest of the guys were paying" (R. 15-16).

c. Specification 4. On 1 February 1943, Private Heavel also borrowed \$20, repaying this amount plus \$8 on the first of the following month. There was no previous agreement for interest, nor did the accused ask for interest. Heavel simply handed the accused the money and walked away (R. 17-18).

d. Specification 5. Private Bernard Yochum borrowed \$30 from the accused, \$15 in March and \$15 a month or two later. He repaid him the \$15 plus \$7 on the first of April and also repaid the accused \$15 plus \$7 the month following the second loan (R. 25-29).

e. Specification 6. About 1 May 1943, the day on which the promotion of Staff Sergeant Homer M. Frederick to that grade became effective, accused asked him if he was going to buy steaks for the "Steak Club". Accused asked the witness only once. The witness told accused he could not afford to do this. (R. 31-32).

f. Specification 7. Two weeks after his promotion to Staff Sergeant the accused asked Staff Sergeant William T. Pransky whether he was going to "pop"—"Pop is used more or less to buy more or less, for making my rank". Sergeant Pransky gave the accused \$8.50 and told him to buy the dinners. Because of other duties, Pransky could not accompany his friends. He was not forced to do this but did it because he wanted to (R. 34-36).

g. Specification 8. After his promotion, Technician Fourth Grade James F. Bycroft paid the accused \$11 for dinners for accused, Sergeants Stefanowski, Matteson and Schaefer and himself. The accused had paid for the dinners and Bycroft had agreed to pay him back. Bycroft was asked by Sergeant Stefanowski, not by the accused, to buy the dinners. He felt he was under an obligation because the others were superior in grade to him. Bycroft bought the steaks of his own free will because he wanted to entertain his friends, and said he thought his promotion had nothing to do with the purchase of the dinners (R. 40-42, 45-46, 48).

h. Specification 9. Private First Class Paul Heseman borrowed \$10 from the accused about 7 February 1943 and paid him back \$14 on the first of March. There was an agreement to pay \$4 interest (R. 67-68).

i. Specification 11. Private First Class John R. Holder borrowed \$5 from the accused around the first of the year (1943). The following pay day he paid it back, together with \$2. The accused upon being asked by Holder about interest said he could not charge interest but if Holder wanted to give him something it would be all right. There was no agreement as to the length of time the money was loaned. What Holder paid he paid voluntarily (R. 51-53).

j. Specification 12. "About April" Private First Class Robert W. Keller borrowed \$5 from the accused. The following pay day he repaid it plus \$2 for the loan. The accused did not request any interest. Keller "figured it was worth that much to get the loan" (R. 54-55).

k. Specification 13. Private First Class Lawrence Wolfenbarger borrowed \$15 from the accused about 1 April 1943. The last of April he paid him back \$22. The accused did not tell Wolfenbarger how much he was to pay back. The witness thought the loan was worth it. There was no agreement concerning when the money was to be repaid. Upon applying for another loan the witness was told by the accused to go to the Red Cross (R. 57-59).

l. Specification 14. Private Hersey Halsey borrowed \$10 from the accused "about three months ago". He used the money for one full month and paid the accused \$14. The accused did not ask for interest and there was no understanding that interest would be paid (R. 62).

m. Specification 15. Staff Sergeant Robert C. Woodard borrowed \$40 from the accused about 16 December 1942 and repaid the accused \$47 about 16 or 20 days later. At the time Woodard repaid the loan he asked the accused how much it would cost him. The accused replied that he might pay whatever he thought he should. Woodard then gave accused \$47. There was no agreement about interest nor was there any time specified for repayment. The accused did not state that the \$7 was for the prior use of the car of the accused (R. 64-66).

4. For the defense the accused testified as follows:

(374)

The accused had served in the Army approximately two years and three months. He had been awarded the Good Conduct Ribbon. He had been in charge of the court-martial proceedings for the hospital--wrote them all up--and was in charge of utilities. In February 1943, he was appointed supply sergeant and in addition he had been a first sergeant for the past year. He was recently recommended for warrant officer and but for this court-martial would have received the promotion. He was married in March 1943 (R. 91, 109).

As to Specification 1, accused admitted lending Sergeant Ayers \$10, did not remember the date nor did he remember whether there was an agreement to pay \$3 interest but he received that amount (R. 81).

As to Specification 3, he loaned Private First Class Heavel \$5 but did not remember the date. There was no agreement to pay interest and no agreement concerning when the loan should be repaid. He did not demand interest. Heavel came up and gave him \$6.25 and said, "That's what I owe you". There was no written agreement and it was the opinion of accused that interest could not be computed unless a repayment date was specified (R. 82).

Concerning Specification 4, he did not recall ever lending Heavel \$20 and receiving \$8 as interest (R. 82).

As to Specification 5, he did not lend Corporal Bernard Yochum \$30 in March. He did not remember lending him \$30 at all, nor did he recall receiving \$8 interest from him during March (R. 83).

His testimony with respect to Specification 6 was that he did not solicit dinners from Staff Sergeant Homer M. Frederick nor did he have any conversation with him about a dinner. There was ill-feeling between him and Frederick due to the fact that he was placed over Frederick "and it is my belief that the testimony is made with an intent, I must say, to take over my job". The accused had nothing to do with Frederick except in line of business (R. 83).

Regarding Specification 7, he never asked Staff Sergeant William F. Pransky for \$8.50 to purchase dinners with nor for any other sum of money. He did not recollect ever asking Pransky to buy anything. Pransky invited the accused and others to have steak dinners. Pransky was to attend but due to his duties could not do so and the accused paid for the dinners and Pransky repaid the accused (R. 84, 92, 97, 107).

As to Specification 8, Technician Fifth (now Fourth) Grade James F. Bycroft was not solicited by the accused. Bycroft asked the accused to pay for the dinner as he (Bycroft) was short. Just before

asking this favor Bycroft had said "Sergeant, we are going to dinner today". The statement of accused to Bycroft on the way back was, "By the way Bycroft, that was \$11.00". That was to inform him of the amount Bycroft owed him (R. 85-86, 94).

With reference to Specification 9, accused loaned Private First Class Paul Heseman \$10 on 7 February 1943 but there was no agreement to pay interest and no demand for it. Heseman repaid the loan and \$4 in addition. No time was set for the return of the loan (R. 86-87).

Concerning Specification 11, accused loaned \$5 to Private First Class John R. Holden on or about 1 January 1943, but no agreement was made for \$2 interest (R. 87). (The lendee had stated his name was Holder, not Holden (R. 52-53)).

Concerning Specification 12, accused loaned Private First Class Robert W. Keller \$5 but did not remember the date. There was no agreement or demand for interest of \$2 and no date was set for repayment (R. 87-88).

Regarding Specification 14, the accused did not recall lending Private Hersey Halsey any money nor of asking him for \$4 interest. He had never asked anyone for interest. While he had pleaded guilty to this Specification except the words "exacted and" he explained by saying there were several loans in connection with this case and that he did not remember each transaction (R. 88-89, 94, 98).

Concerning Specification 15, Staff Sergeant Robert C. Woodard was loaned \$40 by the accused around 16 December 1942 but there was no agreement to pay \$7 interest. Woodard repaid him \$40 plus \$7, which latter amount he (Woodard) owed for the use of the car of accused. This had nothing to do with interest. If it had been anyone else asking for his car the accused would have refused him its use (R. 89-90, 96).

Accused was asked whether there was any reason why the witnesses who testified against him under oath would come here and not tell the truth in the case. Accused replied that at the present time Sergeant Pransky was acting first sergeant and "He cannot make a promotion unless it would be mine". Also, Sergeant Frederick at the present time was supply sergeant in place of the accused and this position called for a master sergeant in the Table of Organization. Sergeant Bycroft ranked immediately behind Sergeant Frederick (R. 93).

Captain Paul E. Robinson, Medical Administrative Corps, Station Hospital, Jefferson Barracks, Missouri, testified that Sergeant Frederick

was on more or less unfriendly terms with the accused. Captain Robinson had always given the accused a "superior efficiency rating" in his work. He also stated that it was customary in the hospital for those who received promotions to treat their friends (R. 101-102).

5. In rebuttal, the prosecution recalled Sergeant Frederick who stated that there was no enmity or hard feelings between him and the accused. He worked in the office with the accused and was always on friendly terms with him. He had never been out with the accused. Sergeant Pransky was recalled and testified that the accused took the initiative in asking him when he was going to "pop". Pransky did not suggest this. But later Pransky did ask accused and others to go to dinner and eat steaks, saying that he would pay for them. The same day, or the next, Pransky asked the accused how much the dinners were. He then paid the accused for them (R. 104, 106-107).

6. a. The evidence shows that accused, a first sergeant, loaned to a number of enlisted men of his organization, various sums of money and, after short periods of time, received repayments considerably in excess of the amounts originally advanced. In Specifications 1 and 9 the proof shows an oral agreement to pay at a rate amounting to 30 percent per month in the former and 40 percent per month in the latter. In fact, the interest rate was probably somewhat higher in Specification 1 for it does not definitely appear when the loan was granted. In Specifications 3-5 and 11-15, payments were made to the accused of amounts which, translated into percentages, constitute from twenty-five to over forty-six percent per month for the use of the principal sum loaned to the borrowers. The proof shows no express contract to pay interest for the latter loans, but it was customary to do so and the inference is strong that the borrowers and the accused had some sort of common understanding as to the approximate sum to be paid, which amounted to an agreement to pay interest for the use of the money loaned.

The lending of money at a usurious rate of interest to military personnel is recognized as an offense under the 96th Article of War (MCM, 1928, par. 104c and App. 4, par. 149). The amounts charged and received by accused for the loan of money for short periods of time were far in excess of legal rates of interest as approved by Missouri statutes and by Congress in the District of Columbia Code (Missouri Rev. Stat., Ann., secs. 8150-8171; D.C. Code, 1940, secs. 26-601 to 26-611). Without determining the exact line of demarcation between legal and usurious interest as contemplated by the Manual for Courts-Martial,

the Board of Review is of the opinion that the amounts received by accused clearly constituted usury.

b. As to Specifications 6, 7 and 8, the proof does not show that accused wrongfully solicited dinners from enlisted men junior in grade as alleged. In the case of Sergeant Frederick (Spec. 6) accused merely asked one time whether he was going to buy steaks for the "Steak Club", and Sergeant Frederick replied that he could not afford to do so. It was not shown that any dinners were purchased. As to Sergeant Pransky (Spec. 7) accused asked whether he was going to "pop", which Sergeant Pransky understood to refer to buying dinners for some of the men. Sergeant Pransky could not go to dinner on account of his duties, but gave accused \$8.50 to purchase dinners for the men. He did so voluntarily and because he wanted to. Sergeant Bycroft (Spec. 8) took several enlisted men, including accused, to dinner, and later refunded the cost of the dinners, \$11, to accused who had paid for them. Sergeant Bycroft purchased the dinners at the suggestion of Sergeant Stefanowski, not accused, and did so voluntarily, because he wanted to entertain his friends. Although the solicitation of favors or gifts from military personnel junior in grade is condemned and may be an offense in violation of the 96th Article of War, the Board of Review is of the opinion that such violation by accused was not shown.

c. The accused thus stands legally convicted of ten Specifications of receiving usurious interest. The Table of Maximum Punishments designates forfeiture of two-thirds pay per month for three months as the maximum for this offense. The maximum penalty for ten Specifications would thus be forfeiture of two-thirds pay per month for 30 months. But such a sentence is not legally possible unless dishonorable discharge is imposed (MCM, 1928, par. 104b). And dishonorable discharge cannot legally be imposed in this case, for substitutions are not permitted for this purpose (MCM, 1928, par. 104c, at p. 102). Thus the maximum punishment that can legally be imposed is the forfeiture of two-thirds pay per month for six months and confinement at hard labor for a like period.

7. The charge sheet shows that the accused is 26 years of age and that he was inducted on 13 May 1941.

8. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 6, 7 and 8, legally sufficient to support the finding of guilty of Specification 5, except the figures "\$30.00" and "\$8.50", substituting therefor the figures "\$15" and "\$7", legally

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sufficient to support the findings of guilty of all other Specifications and of the Charge, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months.

Samuel M. Diver, Judge Advocate

J. Lottichos, Judge Advocate

(Special Concurrence), Judge Advocate

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

(379)

SPJGH
CM 240176

19 OCT 1943

UNITED STATES)

v.)

First Sergeant ELMER C.
FREIMUTH (36077687),
Company A, Detachment
Medical Department (SC),
Jefferson Barracks,
Missouri.)

ARMY AIR FORCES
CENTRAL TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened
at Jefferson Barracks,
Missouri, 20 August 1943.
Dishonorable discharge
(suspended), and confine-
ment at hard labor for
one and one-half (1½)
years. Rehabilitation
Center.)

SPECIAL CONCURRING OPINION by LATTIN, Judge Advocate.

I concur in the result reached by the majority but am not entirely satisfied with the rationalization set forth in the opinion. "The offense of usury is the act of intentionally taking or receiving by contract a greater compensation or rate of interest for the loan of money than the highest rate of interest allowed by law" (3 Brill, Cyclopaedia of Criminal Law, sec. 1545). It was an offense unknown at common law and not punishable unless made so by statute (Ibid.). The permissible rates of interest for various types of transaction differ from state to state. The Manual for Courts-Martial includes a form for a Specification charging usury and the Table of Maximum Punishments includes a definite penalty, but neither contains any suggestion of limitations of interest rates beyond which a contract becomes usurious and punishable as an offense (MCM, 1928, p. 255, Form 149; sec. 104c, at p. 101). Furthermore, there is no federal statute punishing the type of act with which the accused was charged. This being so, how is the court to determine the interest rate beyond which a legal act becomes criminal under Article of War 96, either because it emerges among "disorders and neglects to the prejudice of good order and military discipline", or may be classified as "conduct of a nature to bring discredit upon the military service", or is a crime or offense not capital, "of which persons subject to military law may be guilty"?

It is believed that the solution lies in the third type of act made punishable under Article of War 96 rather than under the others. If this were not so, the court would have to determine what is a legal rate of interest as between lender and borrower in the Army and this of necessity would involve research into the matter of risk of loss to the lender

from such loans, whether the interest rate should vary under varying circumstances, whether there is danger of impoverishing the borrower and those economically dependent upon him, and whether in fact the interest charged is so gross as to bring the act within the descriptive phrases of the first two categories set forth in the Article. The soldier himself is entitled to reasonable notice of those acts which constitute offenses for which he may be tried if he transgresses. And this is particularly true in case of acts which normally have no taint of illegality, such as the lending of money. Indeed, it would be difficult to imagine anything more undemocratic than a system of penal law which did not give reasonable notice to an offender before the commission of the act with which he is charged.

What then is the theory under which the accused may properly be convicted in the instant case? It is that he has committed a crime not capital of which persons subject to military law may be guilty. All Specifications in this case charge (and the evidence is not contrariwise) that the lendings and receipt of usurious interest occurred at Jefferson Barracks, Missouri, a federal reservation. That being so, the criminal statutes of Missouri are assimilated by federal statute and made a part of the federal criminal law just as much as if Congress had passed a distinct act making usurious lendings on federal reservations a crime (18 U.S.C. 468; M.L., Supp. II, 1942, sec. 857). And this is now so whether the federal government has exclusive or concurrent jurisdiction over the land so held by it (18 U.S.C. 451; M.L., Supp. II, 1942, sec. 855). There is no controversy over the application of the federal criminal law and its operation in connection with Article of War 96 as the Manual specifically states that "the 'public law' here in contemplation includes that enacted by Congress or under the authority of Congress" (MCM, 1928, sec. 152c).

But if it is assumed that the acts complained of occurred outside the federal reservation and in the State of Missouri, the result, it is believed, would be the same. Were it not for the quite different wording of the 1928 Manual from that of the 1921 Manual, this result could not be reached, for the 1921 Manual specifically defined "public law" as used in Article of War 96 as excluding state statutes (MCM, 1921, p. 463). The present Manual states that the "public law" here in contemplation includes that enacted by Congress or under the authority of Congress (MCM, 1928, sec. 152c). Furthermore, after stating more specifically that the term "includes (but only as to violations within their respective jurisdictions) the Code of the District of Columbia, and the laws of the several Territories and possessions of the United

States," it is asserted that "a person subject to military law cannot, however, be prosecuted under this clause of the article for an act done in a State, Territory, or possession which is not a crime in that jurisdiction, merely because the same act would have exposed him to a criminal prosecution in a civil court of the District of Columbia had he done the act within the jurisdiction of such court" (MCM, 1928, sec. 152c). Why mention "State" if there was no intent to change the 1921 text to conform more nearly to what is conceived to be included in the term "public law"? To make this interpretation even clearer is the bald statement of the Manual which follows the above: "But such act, of course, might in a proper case be made the basis of a prosecution under one of the other clauses of this article as being a disorder, a neglect, or conduct of a nature to bring discredit upon the military service" (MCM, 1928, par. 152c). That is to say, if the act committed is not one for which the actor may be punished under the criminal laws of the State, Territory, or possession, he may still be charged with an offense under Article of War 96 in a proper case. It should be noted that the Manual does not say that he may, in any case, only be charged under one of the other clauses. There is no longer any language in the Manual which confines one to the narrow interpretation of the 1921 text.

I am not unmindful of a statement in the Digest of Opinions of The Judge Advocate General that the phrase "all crimes or offenses not capital", as used in Article of War 96, does not include crimes denounced by the laws of a state (Dig. Op. JAG, 1912-1940, sec. 454 (1); C.M. 197574 (1931)). The statement was digested from an opinion expressed in a letter to Major Theodore Hall, Staff Judge Advocate, Headquarters First Corps Area, Army Base, Boston, Massachusetts, 31 December 1931, signed by Kyle Rucker, Colonel, J.A.G.D., Acting The Judge Advocate General. The letter, in part, reads:

"The Manual for Courts-Martial declares in substance that phrase to include only offenses denounced as such by Congress or under the authority of Congress. Thus it includes offenses denounced by the penal laws of Hawaii, because those laws are enacted by authority of Congress. It does not, however, include crimes denounced by the laws of a state of the United States or of a foreign nation. It is therefore not proper to charge, under the 96th Article of War, that a person subject to military law violated any specific state statute. However, it is obvious that the acts constituting a violation of a state statute might well be acts of a nature to bring discredit upon the military service."

While any opinion of The Judge Advocate General should be given great weight, in the light of careful analysis, I do not believe the limitations there expressed can be sustained.

Not only is the text clear on this point, but from the practical aspect the arguments are in favor of this interpretation. There are times when it will be necessary to reach out into the State law to ascertain what elements are necessary to constitute an offense, as in the case of usury. It is no injustice to charge the soldier with notice of what constitutes criminal acts within the state borders in which his camp is located and to punish him for the same in a military tribunal. Even transients from other states and countries are charged with this knowledge, at least to the extent of being liable for their acts which run counter to the criminal laws of the state. And barring any federal statute making the act a crime, the natural place to go is the immediate community which has set up its standards of crime for those within its bounds. If Sergeant Freimuth (accused) had gone to his company commander and had asked him what rate of interest he would be allowed to charge his soldier-borrowers, what answer could have been given him? The answer is simple if, barring a federal statute--and there is none--the local law can be brought into play. The Missouri Small Loan Laws make it a misdemeanor to contract for or receive more than 8 percent interest per annum for loans of \$300 or less unless licensed ~~to~~ under these laws when, for a loan of \$100 or less, a maximum of 3 percent per month is permitted. (Missouri Rev. Stats., Ann., secs. 8150-8171; see also sec. 4813). The sums received by the accused when translated into percentages of the amounts loaned exceed the maximum legal rate allowed. I therefore conclude that the accused was properly found guilty on those Specifications which were sustained on a different legal analysis by the majority of the Board.

Norman D. Lathin, Judge Advocate

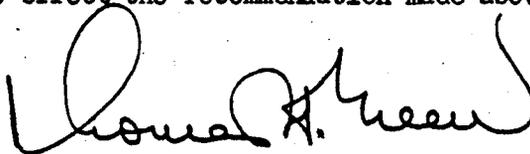
1st Ind.

War Department, J.A.G.O.,

6 NOV 1943

- To the Secretary of War.

1. Herewith transmitted for action under Article of War 50 $\frac{1}{2}$ 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 First Sergeant Elmer C. Freimuth (36077687), Company A, Detachment Medical Department (SC), Jefferson Barracks, Missouri.
2. I concur in the opinion of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Specifications 6, 7 and 8 and so much of the finding of guilty of Specification 5 of the Charge as involves a finding of guilty of an offense by accused other than the lending of \$15 during the month of March 1943 to Corporal Bernard Yochum, under an agreement whereby accused was to receive for the use thereof for about two months the sum of \$7 thereby demanding and receiving an usurious rate of interest for such loan, be vacated, and that so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months, be vacated.
3. Inclosed herewith is a form of action prepared for your signature, designed to carry into effect the recommendation made above.



T. H. Green,
Brigadier General, U. S. Army,
Acting 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 as in excess of confinement at hard labor for 6 months and forfeiture of two-thirds pay per month for 6 months vacated. By order of the Under Secretary of War. G.C.M.O. 381, 25 Nov 1943)



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

(385)

SPJGN
CM 240207

9 OCT 1943

UNITED STATES)

v.)

Second Lieutenant THOMAS L.)
BIGGS, (O-1169026), 95th)
Armored Field Artillery)
Battalion.)

5TH ARMORED DIVISION

Trial by G.C.M., convened
at Pine Camp, New York, 13
August 1943. Dismissal and
total forfeitures.

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

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

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

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

Specification 1: In that 2nd Lt. Thomas L. Biggs, Battery A, 95th Armd. F. A. Bn., having received a lawful command from Major Ernest A. H. Briggs, Jr., Hq., 5th Armd. Div., his superior officer, to remain at convoy truck, did, at Carthage, New York, on or about 14 July 1943, willfully disobey the same.

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

Specification 1: In that 2nd Lt. Thomas L. Biggs, Battery A, 95th Armd. F. A. Bn., was, at Carthage, New York, on or about 14 July 1943, found drunk while on duty as convoy commander.

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

Specification 1: In that 2nd Lt. Thomas L. Biggs, Battery A, 95th Armd. F. A. Bn., was, at Carthage, New York, on or about 14 July 1943, in a public place, to wit, the Jefferson Restaurant, Carthage, New York, was drunk and disorderly while in uniform.

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Specification 2: (Defense motion for not guilty finding sustained.)

He pleaded not guilty to all Charges and Specifications. The offenses were committed in time of war. The motion of the defense for a finding of not guilty of Specification 2, Charge III, was sustained and he was found guilty of the Specification, Charge I, except the words "willfully disobey", substituting therefor the words "failed to obey" with findings of the excepted words, not guilty; of the substituted words, guilty, and of Charge I, not guilty, but guilty of a violation of the 96th Article of War and guilty of the remaining 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 the evening of 14 July 1943 the accused's immediate commanding officer placed the accused in charge of a truck convoy which was taking some enlisted men from Pine Camp, New York, to Carthage, New York, to attend a USO dance. The accused was under the duty of loading the convoy, taking it into town, requiring observance of proper regulations and returning to the camp on time with the correct number of men. The accused was instructed how to park the convoy and not to attend the dance but was not required to remain with the convoy. About 2000 o'clock the accused accompanied by two enlisted men, entered the Jefferson Restaurant and ordered a "Coke-High", rye with a Coca-Cola chaser, which he drank and shortly departed but returned at intervals during the evening. During the evening he was served four or five intoxicating drinks by the waitress and was observed sitting in a booth with several enlisted men who had a "bottle"; at one time, as some girls walked by the booth, a glass was broken, but the waitress was unable to identify the accused as the person breaking it; later, about 2130 o'clock, he was observed in front of the restaurant in an intoxicated condition; still later, about 2230 o'clock, he was again in the restaurant in company with different enlisted men and his condition was such that the waitress, who described him as "being under the influence of liquor, but I wouldn't say he was drunk", requested him to leave because the soldiers with him were arguing. He refused to leave at her request and she asked two enlisted members of the military police, who entered the restaurant at that time, to remove him. At such time the accused was talking loudly, could not stand straight, staggered when he walked and had glassy eyes. He refused to leave when asked to do so by the two military police, who definitely were of the opinion that the accused was drunk, whereupon one of them left and returned shortly with Major Ernest A. H. Briggs of the 5th Armored Division (R. 6-12, 12-19, 19-23, 54-55).

The officer, last mentioned, had been paged at a nearby theater by one of the military police and, upon entering the restaurant, found the accused with several enlisted men in a booth around which other enlisted men and the waitress were standing. He requested the accused to accompany him to the MP station. The accused arose, staggered, shook himself free of proffered assistance and left with the officer, who was of the opinion that the accused was definitely intoxicated and in no condition to perform his

duty as convoy commander. At the MP station, the superior officer gave the accused a direct order to return to his truck and remain there until the convoy was ready to leave. The accused was asked if he understood the order and replied in the affirmative. An MP lieutenant who was present at this conversation accompanied the accused to the truck where accused acted irrational, staggered, had dilated eyes, was incoherent in his speech, and required repetition of attempted conversation. The MP lieutenant did not understand that he was being placed in charge of the convoy or that the accused was being relieved of his duty as convoy commander. However, subsequent to accused's return to the truck, but prior to the convoy's departure, the accused was seen in the lobby of a nearby hotel (R. 24-28, 28-31).

Shortly after 2300 o'clock the accused supervised the loading of the men into the trucks, quieted some disturbance among the men, called the roll, found two men absent whom he went in search for over a period of a few minutes, and returned to the convoy which left shortly thereafter for the camp. At 0430 o'clock the next morning another officer attempted twice to awaken the accused as the company was going out on the range where the accused did not appear until 1100 o'clock. On the range the accused reported to the battery commander that the convoy had had some difficulty, that there would probably be a MP report on it, and that he recommended restriction for the men involved (R. 7, 32-33, 55-56).

The court took judicial notice of the contents of a memorandum of the 5th Armored Division, dated 9 July 1943, which delineated instructions for recreational convoys. The accused denied any knowledge of the memorandum or its contents (R. 57-58).

4. The evidence for the defense shows that the enlisted men who had the "bottle" in the booth at the restaurant offered the accused a drink out of it but that the accused refused, although he did sit down with the witness and two other enlisted men for a short while during which the accused told them to send any of the men who got into trouble to the trucks and drank a Coca-Cola. The time was about 2030 o'clock, the accused was not drinking intoxicants, was not drunk, created no disturbance, and left before the witness, who saw him later sitting in a chair at the dance. The enlisted driver of one of the two trucks testified that, prior to the convoy's departure, the accused supervised the loading of the men, called the roll, was in charge of the convoy, rode back to the camp in the truck which he, the witness, was driving and was not drunk, had no odor of liquor on his breath, and spoke clearly and coherently (R. 36-39, 34-36).

The Reconnaissance Officer of the accused's organization testified that the accused, prior to becoming assistant executive officer, had served for several months as Motor Officer and Supply Officer in which capacities he performed well. The executive officer of the organization testified that the accused had been performing his present duty of assistant executive officer for several months in a good manner, that he had seen the accused take a drink but had never seen him drunk, and that after the accused had had a drink, he assumed a "happy attitude, with a slightly glassy look in his eyes" thereby having the appearance of being drunk. The accused's

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immediate commanding officer, the battery commander, testified that the accused had volunteered to go with the convoy on the night in question, had served well in every job to which he had been assigned, had been administratively reprimanded only once which was for failure promptly to pay a debt which thereafter was immediately paid, and that he would be willing to have the accused as a battery officer as he - the accused - was a credit to the service (R. 40-42, 42-43, 43-46).

The accused was informed of his rights as a witness and elected to testify. He testified that the convoy left the camp about 1915 o'clock and arrived in Carthage about 1945 o'clock where it was parked behind the bank as directed by an MP, that the men went to the USO dance while he walked around, that, about 2030 o'clock, he entered the Jefferson Restaurant where he ordered and drank a drink and talked to some of the men, that he told one of them, who was sitting in a booth, to take any man who got into trouble to the truck and keep him there until he - the accused - could be found as he did not want to leave them at the MP station, that he told two of the Military Police, who entered the restaurant then, the same thing, and that he then left the restaurant, spending the rest of the evening at various places checking on conditions and seeing that the men behaved themselves. About 2230 o'clock he returned to the restaurant where he found two of the men engaged in an argument in which one of them, in standing up, knocked over a glass resulting in the waitress requesting them to leave. He told her that he would try to keep them quiet. The two MPs, whom he had seen earlier in the evening, entered the place and one of them told the accused that he was drunk and would have to leave as the waitress had requested but the waitress then said that all could stay if they quieted down. Two of the men continued to be noisy so the accused gave instructions that they were to be taken to the truck and then sat down in another booth to observe if anything else was wrong. At this time one of the MPs, who had left in the meantime, returned with Major Briggs who told the accused that he was drunk and asked him to go to the MP station where the accused was given a direct order to go to the truck. He was accompanied to the parking place by Major Briggs and a lieutenant of the Military Police, both of whom left shortly. The men began to congregate for the return trip and, upon roll call, two were missing. The accused went to the hotel across the street from the bank to look for them, returned after a few minutes, found all present, quieted them down, and proceeded back to the camp where he ordered them all to bed with lights out in five minutes. The Military Police Lieutenant gave him no order whatsoever, did not take charge of the convoy, and remained at the truck only a few minutes. The accused understood that he was still in command of the convoy and that it was his duty to assemble the men and search for them, if necessary. The accused admitted that he had about four drinks during the evening and that he did not appear on the range the next morning until about 1100 o'clock, asserting that, when he awakened at 0530 o'clock, no transportation was available. He denied that he was drunk or disorderly and insisted that he had quelled several disturbances, had never been removed as convoy commander and that, in going from the parking place to the hotel for the purpose of locating the two missing men, he was in the performance of his duty and not in violation of orders to the contrary (R. 47-53).

5. The Specification, Charge I, alleges that the accused, having received a lawful command from his superior officer to remain at the convoy truck during the time in question, willfully disobeyed the same. The court by exceptions and substitutions found the accused not guilty of willful disobedience in violation of Article of War 64 but guilty of mere failure to obey in violation of Article of War 96. Since there is no evidence whatsoever of an intentional defiance of authority by the accused, there could be no guilty finding of willful disobedience in violation of Article of War 64 (MCM, 1923, par. 134b). Mere failure to obey the orders of a superior officer is an offense chargeable in violation of Article of War 96, whether the disobedience is the result of neglect, heedlessness, remissness or forgetfulness, when the element of intentional defiance is absent (Idem., pars. 134b and 152a).

The evidence is uncontradicted that the order given to the accused to go to the truck and remain there was under the circumstances a lawful order and, if the accused had been relieved from his duties of convoy commander, no difficulty would be presented because then no conflict between the order and the duties of the convoy commander could arise. The evidence is clear that neither the accused nor the Military Police Lieutenant understood that the order given involved the accused's removal as the convoy commander, although the officer giving the accused the order to return and remain at the convoy may have so intended, because the Military Police Lieutenant did not assume command of the convoy. The accused, therefore, was confronted with the conflicting obligations of complying with the order and of performing the duties of convoy commander, which entailed the assemblage of the men at the convoy and returning them to their camp. In performing these latter duties, the accused left the immediate vicinity of the convoy for a few minutes, but did not go any great distance away. Furthermore, the precise limits of the restriction were not given in the order. The evidence, is, therefore, under the circumstances shown, insufficient to establish beyond a reasonable doubt that the slight departure of the accused from the convoy constituted a failure to obey an order of a superior officer or that it was a disorder or a neglect to the prejudice of good order and military discipline or conduct to bring discredit on the military service. The findings of guilty of the Specification, Charge I, and of Charge I, as amended by exceptions and substitutions, are, therefore, without the support of sufficient competent evidence to be sustained.

6. The Specification, Charge II, alleges that the accused was at a specified time and place found drunk "while on duty as convoy commander". The elements of the offense in brief are drunkenness while on military duty. Military duty is that duty which is legally required of an officer by superior military authority for the proper execution of which he is answerable to such authority. Drunkenness within the meaning of the offense charged is any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties (MCM, 1928, par. 145).

Within the foregoing applicable principles the evidence is uncontroverted that the accused was, during the time involved, engaged upon a

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military duty, to-wit that of convoy commander. The evidence also establishes beyond a reasonable doubt that, while in the performance of this duty he had become intoxicated to the extent of drunkenness. The accused himself admits taking four drinks and the testimony of several witnesses shows that on the occasion in question the accused staggered, was glassy eyed and incoherent in his speech and exuded the odor of alcohol. The prosecution, therefore, adduced competent evidence to establish beyond a reasonable doubt that the accused was drunk and justified the findings of guilty of the Specification, Charge II, and of Charge II.

7. Specification 1, Charge III, alleges that the accused at a specified time and place was "drunk and disorderly while in uniform" in a public place. Among the offenses in violation of Article of War 95 is that of "being grossly drunk and conspicuously disorderly in a public place" (MCM, 1928, par. 151). The evidence mentioned in the preceding paragraph amply establishes the fact of the accused's drunkenness in the Jefferson Restaurant on the occasion in question while he was in uniform. The evidence also shows that the accused became noisy and conspicuous and was so observed by enlisted personnel and civilians. The proof adduced established the offense alleged beyond a reasonable doubt and is sufficient to support the findings of guilty of Specification 1, Charge III, and of Charge III.

8. The accused is about 21 years of age. The War Department records show that he enlisted in the Missouri National Guard on 11 December 1939, that he was inducted into Federal Service on 25 November 1940, that he was commissioned a second lieutenant on 3 September 1942 upon completion of OCS and that he has been on active duty as an officer since the latter date.

9. The court was legally constituted. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification as amended by exceptions and substitutions, legally sufficient to support the findings of guilty of Charge II and its Specification, Charge III and its Specification, legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory at any time upon conviction of a violation of Article of War 95, and, in time of war, is mandatory upon conviction of Article of War 85.

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin D. Sleeper, Judge Advocate

SPJGN
CM 240207

1st Ind.

War Department, J.A.G.O., 16 OCT 1943

- To the Secretary of War.

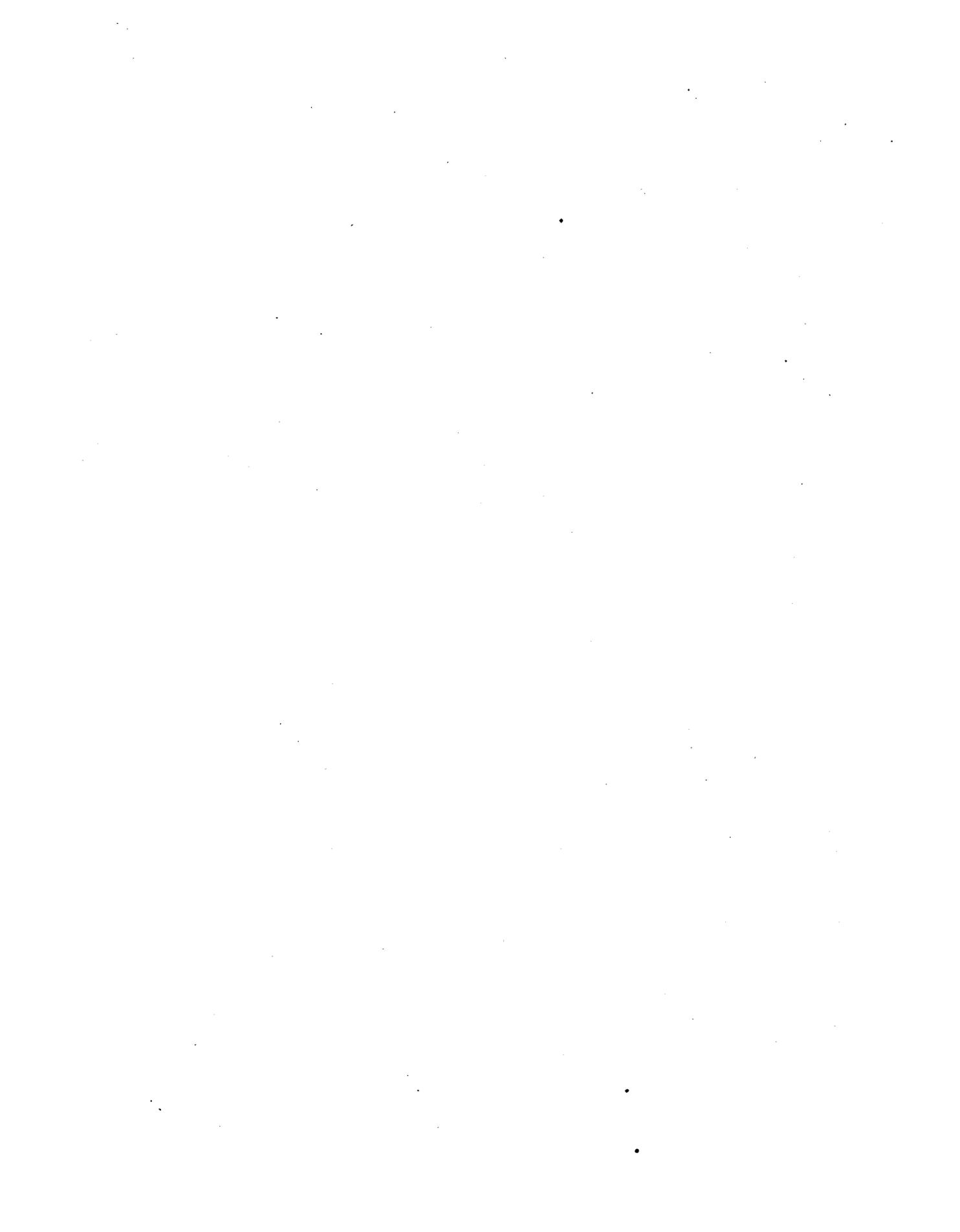
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas L. Biggs (O-1169026), 95th Armored Field Artillery Battalion.
2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding that the accused failed to obey the lawful order of a superior officer to remain at a convoy truck, in violation of Article of War 96 (Chg. I and its Spec.), legally sufficient to support the other Charges and Specifications thereunder, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the findings of guilty of the Specification, Charge I, and Charge I be disapproved, that the sentence be confirmed, that the forfeitures be remitted, and that the sentence as thus modified be suspended during the pleasure of the President.
3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.



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.

(Findings of guilty of Charge I and its Specification, as amended by exceptions and substitutions, disapproved. Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 346, 9 Nov 1943)



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

(393)

SPJGN
CM 240216

24 SEP 1943

UNITED STATES)

V.)

First Lieutenant CLARENCE)
(NMI) FORWARD (O-219378),)
Medical Administrative Corps,)
Detachment Medical Department)

ARMY AIR FORCES CENTRAL TECHNICAL
TRAINING COMMAND

Trial by G.C.M., convened at Truax
Field, Madison, Wisconsin, 27 August
1943. Dismissal, total forfeitures,
and confinement for one (1) year.

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

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

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

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

Specification: In that 1st Lt. Clarence (NMI) Forward, MAC, Detachment Medical Department, Truax Field, Madison, Wisconsin, did, at Madison, Wisconsin, on or about 4 May 1943, feloniously embezzle by fraudulently converting to his own use one check in words and figures as follows, to-wit:

"The First Capital National Bank of Iowa City
Iowa City, Iowa, April 29, 1943 No.
Pay to the order of Treasurer of the United States \$75⁰⁰
Seventy five and no/100 Dollars

Dr D W Lovett
Major D.C. Truax Field Madison Wis

of the value of \$75.00, the property of Major D. W. Lovett entrusted to him by the said Major D. W. Lovett for use in purchasing a United States War Savings Bond.

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

Specification: In that 1st Lieut. Clarence (NMI) Forward, MAC, Detachment Medical Department, Truax Field, Madison, Wisconsin, having been entrusted by Major Bernard B. Larsen, MC, with a check in the amount of Seven Hundred Fifty Dollars (\$750.00), payable to bearer, the property of said Major Bernard B. Larsen, MC, with instructions to procure therewith and immediately to deliver to the said Major Bernard B. Larsen, MC, a United States War Savings Bond or Bonds of the face value or amount of One Thousand Dollars (\$1,000.00), did, at Madison, Wisconsin, on or about 15 July 1943, deposit the said check to his personal bank account with Bank of Madison, Madison, Wisconsin, and, on 15 July 1943, did wrongfully draw against the credit thereby established in a sum and value in excess of Fifty Dollars (\$50.00), which sum he thereupon did wrongfully, and without the consent of the owner, convert to his own use.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for $3\frac{1}{2}$ years. The reviewing authority approved the sentence but remitted $2\frac{1}{2}$ years of the confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was the Unit Personnel Officer for the Station Hospital, Truax Field, Madison, Wisconsin, and in addition to his duties as personnel officer he acted as War Bond Officer for the medical personnel at the hospital during the months of April through July 1943. On 29 April 1943, Major Duane W. Lovett, Dental Corps, delivered his check in the amount of \$75 payable to the order of "Treasurer of the United States" to the accused to be used to purchase a \$100 bond in the name of the person designated in the application delivered with the check. The accused cashed the check at the Loraine Hotel on 4 May 1943 upon his personal indorsement, which was authorized by the hotel manager, and the check was paid on 7 May 1943. Thereafter, on 11 May 1943 the accused delivered a \$100 bond to Major Lovett, who had called the accused about it some five times demanding its delivery and had been given several reasons by the accused for his delay in the delivery of the bond such as the press of other business and the lack of transportation. Employees of the hotel testified concerning the cashing of the check but were unable to testify that it had been used to apply upon accused's hotel account. The check was identified and admitted into evidence and does not bear the notation "Ac" which was the usual notation made on checks received in payment of hotel accounts. The hotel, which made a general practice of cashing checks upon an officer's indorsement, had cashed many checks for the accused, and at the time it cashed the check in question, the accused stated that he intended to use the money to buy bonds (R. 6-12, 12-15, 15-17 and Pros. Ex. 1).

On 9 June 1943 the accused opened an account at the Bank of Madison,

Madison, Wisconsin, by depositing \$300 which he had borrowed from the bank and which he was repaying at the rate of \$50 per month. To this account the accused on 29 June 1943 deposited the check of Captain Morton L. Goldhamer, Medical Corps, in the sum of \$375 which had been given him to buy a \$500 bond. The accused had bought some thirteen bonds for Captain Goldhamer and delivered the \$500 bond to him on 15 July 1943 or shortly thereafter. At the close of business on 14 July 1943, the accused's balance in this account was \$143.13 and the next day he deposited a check dated 14 July 1943 in the sum of \$750, which had been given him by Major Bernard B. Larsen, Medical Corps, for the sole purpose of buying a \$1000 bond for him, and withdrew the sum of \$375 leaving a balance of \$518.07 at the close of business on that day, 15 July 1943. The night of 14 July 1943 Major Larsen decided not to buy the bond but to use the money to prepay his life insurance premiums and on the next day notified the accused of his desire to have his \$750 check returned. The accused told him that his check had been deposited but that he would send him his (accused's) personal check for \$750. That afternoon, 15 July 1943, the accused was off duty but sent his check dated 15 July 1943 to Major Larsen between 10 and 11 o'clock on the morning of 16 July 1943 and Major Larsen immediately presented it to his own bank for deposit. Before depositing it, however, the accused's bank was called by telephone; information was received that accused's account did not contain sufficient funds to pay the check; and Major Larsen, therefore, in person presented the check to accused's bank and demanded payment, which was refused. Major Larsen promptly telephoned the accused, telling him that, unless the check was made good by 1 o'clock, charges would be preferred. The accused told him not to worry as there would be sufficient funds at the bank at 1 o'clock to cover the check and when it was presented about that time it was paid. Major Larsen has bought other bonds through the accused and understood that the check involved was to be cashed before the bond was bought. It was his opinion that the accused was "blundering, inefficient and a very poor manager" but had never found him "openly dishonest". A few days later Major Larsen had told several officers that he was going to "scare hell" out of the accused. The two checks for \$750 were identified and admitted in evidence. In a subsequent conversation the accused contended that the Finance Office did not cash personal checks and this contention was confirmed to Major Larsen by telephone conversation with an officer of the Finance Office. The evidence of the bank employees fails to establish the exact minute when the accused made a deposit of \$350 to his account on 16 July 1943, at what window it was accepted or by which employee. It appears that, if it were made prior to the presentation of the check on the first time, it had not been posted to accused's account, and the employee who refused payment was unable to locate it, but did not check with all tellers. Also, the accused had called the bank about the check, and the accused's deposit was made about noon (R. 18-22, 24-25, 28, 31, 34, 39-41, 42-43 and Pros. Exs. 3, 4 and 6).

The evidence further shows that at no time did the accused have on deposit with the Madison Bank as much as \$375 between 30 June 1943 and

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14 July 1943. It was stipulated that the Superintendent of the Air Corps Branch, United States Post Office, Madison, Wisconsin, would testify that the Post Office since 11 February 1943 accepted personal checks for War Bonds but would not accept checks made payable to the Treasurer of the United States therefor, that the Post Office was the only place where War Savings Stamps could be used as part or all of the purchase price of War Bonds, and that the Post Office made a monthly report to Captain John Kocinski, War Bond and Insurance Officer at Truax Field, of the bonds sold through the Air Corps Branch Post Office so that Truax Field could receive credit therefor. In rebuttal, Captain Kocinski testified that he had never told the accused that the only place bonds could be bought and the Field receive credit was at the Finance Office, and that he gave the accused no instructions relative thereto whatsoever, but that no one was advised to buy bonds anywhere except at the Finance Office and the Post Office or the Field because there alone were ample facilities (R. 36, 57-58; Pros. Exs. 5 and 7).

4. The evidence for the defense shows that the accused about noon on 16 July 1943 made a deposit of \$350, consisting of a check and cash, which was accepted by an employee of the bank who had not been asked about it when Major Larsen's check had first been refused. Another employee of the bank testified that about 11:30 o'clock on 16 July 1943 she had a telephone conversation with the accused, who advised her that the \$750 check would be presented by Major Larsen and that he had made a deposit of \$350 and she thereupon looked up his account and found it was over \$800 which she showed to several of the other employees but not to the one who first refused payment of the check (R. 45-48, 48-50; Def. Exs. 1 and 2).

An employee of the Finance Office at the Field testified that the accused had handled the purchase of some 108 bonds in the aggregate sum of approximately \$5000 with the Finance Office and that the Finance Office would occasionally not have on hand bonds of certain denominations. The accused's commanding officer testified that he had not actually appointed the accused "War Bond Officer" but that he had served as such and had purchased a bond for him in a satisfactory manner (R. 52-54, 54-56).

The accused was properly advised of his rights and elected to make an unsworn statement which was admitted in the form of a written statement in which the accused related his World War I service and stated that from about March through July, 1943 he served as Medical Detachment War Bond Officer in addition to his other duties, that during this time he handled some 109 transactions involving approximately \$6156.25 in bonds which were all purchased through the Finance Office at Truax Field and of which the largest was a \$1000 bond purchased for Major Larsen in April 1943; that he originally understood from Captain Kocinski, War Bond and Insurance Officer at Truax Field, that the bonds had to be purchased at the Finance Office for the Field to get credit for them, although in going to the Finance Office he passed the Post Office; that in making purchases for the officers he was given war saving stamps, cash and checks, which often were on out of town banks, which he originally cashed at the

post exchange or at the hotel where he resided; that the post exchange ultimately discontinued cashing checks in excess of \$50 and thereafter it became an imposition upon the hotel and an embarrassment to him to cash all of them at the hotel; that during none of the time was he aware of the fact that purchase through the post office would be credited to the Field and so he bought bonds at the post office only when he had been given war savings stamps, since that was the only place he could use such stamps; that he did not know the post office would take personal checks for bonds during the time involved, and that, although throughout his entire Army career he had maintained only one bank account at The Army National Bank, Fort Leavenworth, Kansas, he opened an account with the Madison Bank on 9 June 1943 by borrowing \$300, which was being repaid at the rate of \$50 per month, in order to facilitate handling the war bond purchases and to avoid exchange charges which he had theretofore personally paid, amounting to 80 cents on the \$1000 bond he had bought for Major Larsen in April 1943. The statement further recited that delays in procuring and delivering bonds were caused by his other duties, lack of transportation, delays in checks clearing, and occasionally the Finance Office not having bonds of certain denominations; that on one occasion the Finance Office contended he had not given enough money by \$12.50 to complete a purchase but to keep his name clear he had given his personal check for \$18.75, which was the amount, if any, due by him rather than \$12.50 and this check was attached to his statement, and that he had this check delivered in response to a telephone call from the Finance Office upon his return from leave. Relative to Major Lovett's check for \$75, the statement explains that it was cashed at the hotel by the accused, who held the money for a few days pending clearance of the check after fully explaining it to Major Lovett, who received his bond a few days later when the Finance Office received a new supply of \$100 bonds, and that during such period of time he had ample funds in the Fort Leavenworth Bank, where his salary check was always mailed, and in the Madison Bank to pay all his obligations. Relative to Major Larsen's check for \$750, the statement recites that he told Major Larsen it would have to be cashed and admitted the substantial facts of the prosecution's evidence about it but stated that between the time of his first notice that the check had been refused and 11 o'clock he deposited \$350, consisting of a \$200 check and \$150 in cash, having immediately called the bank to tell all employees about the deposit and to honor the check when presented, and that he heard nothing further from Major Larsen until in a conversation a few days later he was told that the Finance Office would accept personal checks for bonds which information was shown to be erroneous by contacting the Finance Office. The statement admits the issuance of the check for \$375 on 15 July 1943 to purchase a \$500 bond for another officer but strenuously asserts that the accused had no intention whatsoever to convert to his own use at any time any of the funds given him to buy bonds, that he did not convert any of them to his own use, and that he at all times in his two bank accounts had sufficient funds to purchase all bonds that he had been directed to purchase and in addition had other personal funds in his possession. The bank statements of the two banks for the period involved were attached to the statement (Def. Ex. A).

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5. The Specification, Charge I, alleges that the accused on or about 4 May 1943 at Madison, Wisconsin, feloniously embezzled by fraudulently converting to his own use the check of Major Lovett in the sum of \$75 which had been intrusted to him for the purpose of purchasing a War Bond for the maker of the check. The offense charged is that of embezzlement which is defined by the Manual for Courts-Martial as follows:

"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" (M.C.M., 1928, par. 149h).

The felonious intent required for a fraudulent conversion, as alleged in the Specification, must, of necessity, be inferred from the facts proved. Concerning facts from which such inference is warranted, the following excerpt from pertinent authority is applicable:

"* * * Since embezzlement necessarily involves secrecy and stealth, if the defendant, in rendering his account, instead of denying the appropriation of property, admits the appropriation, alleging a right in himself, no matter how unfounded, his offense in taking and keeping is no embezzlement. * * * The fraudulent appropriation is to be inferred from facts, among which is the denial of the reception or the suppression of the fact of such reception. And it is usual to require in addition to proof of reception, some proof of attempted concealment, flight, or other facts inferring fraud; among which facts the falsification of accounts is to be noticed as peculiarly significant * * *.

* * * * *

"Insolvency, flight, falsification of accounts, or refusal to pay, are the usual and most effective evidences of conversion* * *" (Wharton's Criminal Law, 12th ed., vol. 2, secs. 1279 and 1302).

The evidence, when analyzed within the principles announced in the foregoing authorities, wholly fails to show any felonious intent whatsoever on the part of the accused in indorsing and cashing Major Lovett's \$75 check or that after it had been cashed, the funds were utilized for any other than authorized purposes. In truth the evidence, even of the prosecution, is conclusively to the contrary. Major Lovett himself testified that the accused told him the check had been cashed at the hotel about 4 or 5 May 1943 and wanted to know whether it would clear. At the time the check was cashed, the accused told the hotel employee that the proceeds

were to purchase bonds. The check was paid by the bank upon which it was drawn on 7 May 1943 and the bond was delivered on 11 May 1943. The expressed intent of the accused, his communication with Major Lovett, and the sequence of events prohibit any inference of felonious intent from the acts of the accused, who was neither insolvent, in flight or guilty of falsification of accounts or refusal to pay. The facts clearly show that the accused did not have a felonious intent, that he did not fraudulently convert to his own use the check or the proceeds thereof, but, on the contrary, that the accused did no more than faithfully execute his trust and properly apply the funds, even though in so doing he indorsed the check, which indorsement by the acts of Major Lovett, after full disclosure thereof, was fully ratified. For such reasons the evidence for the prosecution was not sufficient to establish the essential elements of embezzlement, the crime charged in the Specification, Charge I, and, therefore, the findings of guilty to the Specification, Charge I, and Charge I are not sustained.

6. The Specification, Charge II, asserts that the accused at Madison, Wisconsin, on or about 15 July 1943 deposited a check in the amount of \$750, which had been intrusted to him by Major Larsen for the purchase of a War Bond, to his own personal account and wrongfully drew against the credit thereby established a sum in excess of \$50 which he wrongfully converted to his own use. The Specification is alleged in violation of Article of War 96. The offense described in essence is that of embezzlement and the authorities hereinabove cited are equally applicable and controlling here as the guiding legal principles by which the evidence must be gauged.

The evidence is conclusive that Major Larsen was aware of the fact that the accused intended to cash the check and the fact that the accused undertook to do so by depositing it in his account used primarily for his service in purchasing War Bonds, instead of securing the cash on it immediately, indicates that the accused was not possessed of a felonious intent. The bank statements attached to the accused's unsworn statement may be considered by the court since the objection thereto of the defense was not pursued and they are co-related to the accused's admission therein that he withdrew \$375 from the Madison Bank on 15 July 1943 to purchase a bond for another officer (M.C.M., 1928, par. 76). The bank statements show that the accused was not insolvent but that at all material times he was possessed of sufficient funds to liquidate his obligations. The accounts of the accused have not been falsified and he never refused to pay. In fact the record reveals that he promptly made payment and that possibly the bank erred in failing to pay the check upon its first presentation. Furthermore, Major Larsen's testimony manifests prejudice, particularly in describing the accused as a "blundering, inefficient and a very poor manager". The utilization of two bank accounts without reserving one exclusively for the War Bond purchases, keeping part of the funds in cash, and commingling the funds are certainly evidence of laxity in business methods but without other evidence are insufficient as a basis for an inference of felonious and fraudulent intent in view of the other evidence from which a contrary intent is manifested. Laxity in business methods

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is not in itself conclusively indicative of fraudulent intent. On the very day repayment was requested the accused issued his check for the amount due and it was delivered the next day when the accused also deposited funds sufficient to pay it in usual course of business if it had been deposited rather than presented for payment. The accused called the bank on that very day in an effort to make sure of its prompt payment and payment was made before 1 o'clock. Such acts are not those of an embezzler. Such acts do not reflect discredit upon the military service but on the contrary manifest a sincere desire and an earnest endeavor to make prompt payment upon an unexpected and sudden demand when neither of the two accounts alone were sufficiently large to make payment but together were ample.

Furthermore, Major Larsen's check was not actually paid by his bank until 21 July 1943 or some 5 days after he had received full payment in cash. During such five day period he was in possession of his money by reason of the credit of the accused, who was obligated to his bank upon his indorsement of the original check.

The evidence is, therefore, insufficient to establish beyond a reasonable doubt the essential elements of the offense alleged in the Specification, Charge II, and the court's findings of guilty of the Specification, Charge II, and of the Charge are not sustained.

7. The accused is about 48 years of age. The War Department records show enlisted service during World War I from 4 June 1917 to 21 May 1919 when he was honorably discharged, appointed First Lieutenant M.A. Res. 15 May 1925, reappointed 2 April 1930, 29 March 1935, and 27 March 1940, and active duty since 14 April 1942.

8. The court was legally constituted. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

Charles C. Branson, Judge Advocate

Abner E. Lipscomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 240216

1st Ind.

War Department, J.A.G.O., 1 - OCT 1943 - To the Commanding General,
Army Air Forces Central Technical Training Command, 455 Lake Avenue,
St. Louis 8, Missouri.

1. In the case of First Lieutenant Clarence (NMI) Forward, (O-219378), Medical Administrative Corps, Detachment Medical Department, I concur in the foregoing opinion of the Board of Review holding that the record of trial is not legally sufficient to support the findings of guilty and the sentence, and for the reasons stated therein, I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50 $\frac{1}{2}$, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p.216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 240216).

Myron C. Cramer

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

1 Incl.
Record of trial.

OCT 2 - 43 AM



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