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Volume XXVIII

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

SPJGK
CM 243535

17 JAN 1944

UNITED STATES v. Second Lieutenant BERNARD GORDON (0-1049501), Coast Artillery Corps.	ANTIAIRCRAFT ARTILLERY COMMAND EASTERN DEFENSE COMMAND Trial by G.C.M., convened at Norfolk, Virginia, 18 October 1943. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Bernard (NMI) Gordon, Headquarters Battery, 328th Antiaircraft Artillery Searchlight Battalion, did, without proper leave, absent himself from his organization at Newport News, Virginia, from about 1200 4 September 1943 until he returned to military control at Fort George G. Meade, Maryland, on or about 26 September 1943.

Specification 2: In that Second Lieutenant Bernard (NMI) Gordon, Headquarters Battery, 328th Antiaircraft Artillery Searchlight Battalion, at Newport News, Virginia, on or about 4 September 1943, having been duly detailed as Duty Officer, did, fail to repair at the fixed time to the properly appointed place for duty as Battalion Duty Officer, 328th Antiaircraft Artillery Searchlight Battalion.

Upon his arraignment, accused moved that Specification 2 be stricken from the charge sheet on the ground that the offense alleged in Specification 2 was the same as that alleged in Specification 1. The court denied the motion with leave to renew it at the close of the prosecution's case. Accused then pleaded not guilty to the Charge and Specifications. At the

close of the evidence for the prosecution the motion to strike Specification 2 was renewed and this motion was denied by the court. The accused was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence introduced by the prosecution showed that accused was a second lieutenant, assigned on 4 September 1943 to Headquarters Battery, 328th Antiaircraft Artillery, Searchlight Battalion (R.7,8).

First Lieutenant William H. Howard was accused's battery commander on 4 September 1943 (R.7,8). He testified that accused, as battalion adjutant, had prepared a duty officer schedule, under date of 28 August 1943, assigning duty officers for a period starting that date and assigning himself as duty officer from 12 o'clock noon on 4 September 1943 until 12 o'clock noon the following day (R.8,9; Ex. A). Accused had permission to be "away from the area for 24 hours" starting at noon on 3 September (R.8). Lieutenant Howard stated that accused did not "show up" on the 4th of September to perform his duty as duty officer; that he had noticed during the morning that accused was not around and that at 12 o'clock he missed accused "and began to look around" (R.9,10). Lieutenant Howard testified that he was commander of the Headquarters Battery during the period from 4 September until 20 September 1943, upon which latter date he was succeeded by Captain Richard H. Balzer of the same organization. While Lieutenant Howard was commander of the battery accused had no leave or pass other than the 24-hour pass, previously mentioned, which expired at noon on 4 September 1943 (R.8-11).

Captain Balzer testified that he first saw accused about a week prior to the date of the trial and that while he had been commander of Headquarters Battery accused was not granted any leave or pass, and that accused was not present with his battery when the witness assumed command on 20 September 1943. Captain Balzer identified a document marked "Prosecution's Exhibit C" as a true extract copy of the morning report of the Headquarters Battery for the month of September.

First Sergeant Thomas J. Williams, Headquarters Battery, 328th Antiaircraft Artillery Searchlight Battalion, testified that he was first sergeant of this battery on the 4th and 5th of September 1943, and that he knew accused. He identified a document handed him by the trial judge advocate as a duplicate original of the morning report of his battery for the month of September. He stated that there was an entry therein pertaining to the accused for the 5th of September, that he was present for duty at the time that particular entry was made and knew of his own knowledge that accused was not present for duty on 5 September. This witness then identified "Prosecution's Exhibit C" as a true copy of the

about the conditions that caused me to take the action that I have and am very sorry for" (R.42,43).

Accused stated that he felt that having overcome his initial mental depression he was again capable of performing "the work in the same line" that he did.

On cross-examination accused said that he did not believe that it was his personal problems which kept him away but that it was the condition he was in on his 24-hour leave. He became intoxicated on that leave and remained intoxicated in Norfolk for three or four days. He said that he sobered up in Baltimore, Maryland, the day previous to reporting to Fort George G. Meade. He also stated that he remained in "some state of intoxication" from 4 to 25 September (R.44,45).

A number of officers attached to the organization testified for the defense. First Lieutenant Lawrence A. Scott of accused's battalion, testified that accused joined his battery on 20 January 1943; that at that time accused knew nothing of searchlights; that he was placed in command of four lighting positions that had deteriorated from the standpoint of physical upkeep; and that accused did a commendable job; that accused had the knowledge and the will to do good work. Witness stated that accused's performance of duty was rated by the inspecting officer as excellent, but that witness personally would have given him a rating of superior (R.21-24). Captain Edward W. Corsetti of accused's battalion testified that as battery commander he had tactical control over the four light positions mentioned by Lieutenant Scott; that accused was in charge of the lights and displayed the same initiative as the other officers who were platoon commanders (R.24,26). Second Lieutenant Berger T. Ottosen of accused's battalion, stated that the personnel of his platoon had been under accused at one time and that they respected and admired accused above all the other officers they had ever had in that platoon (R.26-28). Lieutenant Colonel Paul G. Wright, 85th Antiaircraft Group, testified that accused had been under his command approximately 7 weeks. He rated accused's manner of performance as "very satisfactory" (R.29,30). Lieutenant Colonel John W. Miller, the commanding officer of accused's battalion, stated that at one time accused asked to speak to him on a "personal problem" and talked about chafing or ingrown hairs in his neck that caused self-consciousness (R.32-34). Captain Edward S. Hoffman, Medical Corps, attached to accused's battalion, stated that the day before accused "started on a VOCO" he saw him and sat with him at mess. The captain stated that accused had been missing some of his meals previously and that on that occasion he noticed that his eyes were red-rimmed and hd was "quiet and reclusive". Accused told him that he had not slept well the night before and reported "a facial condition that he felt was disfiguring and obnoxious and repulsive to other people". He said that accused told him that he had "a lot of other troubles" (R.38-39).

morning report of Headquarters Battery, 328th Antiaircraft Artillery Searchlight Battalion, 5 September 1943. This morning report was offered and received in evidence and the identified extract copy of the entry pertaining to accused for 5 September 1943 was filed as "Prosecution's Exhibit C" (R.11,12,14-19; Ex. C). Exhibit C showed accused recorded on the morning report of his battery for 5 September 1943 as "Dy to AWOL 1200" (Ex. C).

It was stipulated between the prosecution and the defense that on 26 September 1943 at 11 p.m., accused surrendered himself at the office of the Provost Marshal, Fort George G. Meade, Maryland, and that on order of the Post Commander at Fort George G. Meade he reported immediately to the commanding officer of his battalion at Newport News, Virginia, on 28 September 1943 (R.20; Ex. D).

4. Accused testified on his own behalf. He stated that he reported for duty on approximately 22 January and was assigned to Battery I of the 85th Coast Artillery (later, 26 August 1943, redesignated as the 328th Antiaircraft Artillery Searchlight Battalion (R.11,41; Ex. B)). He claimed that at that time he was enthusiastic about his work, realized his responsibilities, and tried to do the best that he could (R.41,42). He stated that although married, he had been separated from his wife, and that at the time of the trial she was living in California. After he had been in Norfolk for about 30 days his wife wrote and asked if she could come there to see if they could be reconciled (R.42). He did not approve because his duties would keep him out a great deal. Otherwise, he would have been agreeable to the suggestion because he had been attempting to "patch matters up". Finally, she did arrive at Norfolk. Everything was all right for a while. However, former difficulties arose again and after awhile she seemed unhappy, he was upset, and he realized that there had been a change in their relations. They had a talk and he decided in favor of a divorce. He saw his wife after that and she stated that she was not decided as to whether she desired a divorce. Accused "forced" himself to tell her that he wanted her to go to Nevada. He was sorry afterwards, and became "upset and bothered". He stated that he gave the matter too much thought and felt that he was not doing his work in the manner of which he was capable. In addition, he had a "face condition caused by ingrown hairs". Continuing he said:

> "* * * the day before my departure I had an official leave of absence of 24 hours. Being upset about everything I attempted to forget about it by indulging in drink. I became under the influence of liquor and assumed an attitude that nothing mattered and I just continued to consume alcohol for a great length of time staying under the influence. When I sobered up I realized the actions that I had taken were not becoming an officer or a soldier. I realized my error and turned myself in to the custody of Fort George G. Meade, Maryland. * * * I believe that is just

5. The evidence offered by the prosecution as supplemented by the testimony of accused shows conclusively that accused was absent from his organization without leave from about 12 o'clock noon, 4 September 1943, until he returned to military control at Fort George G. Meade, Maryland, on 26 September 1943, as alleged in Specification 1 of the Charge.

It was also shown that accused had been detailed as duty officer for his battalion to act as such officer for 24 hours commencing at 12 o'clock noon 4 September 1943. It was shown that accused knew of this detail. Not only was it proved directly by the testimony of Lieutenant Howard that accused was not present at the fixed time and properly appointed place for such duty, but the proof of Specification 2 involving accused's absence from his organization also shows that accused was at no time present for the particular duty mentioned in Specification 2 of the Charge.

6. The Board of Review is of the opinion that the court was correct in overruling the motion to strike Specification 2. Under the facts in this case Specification 2 is not an illegal multiplication of the offense alleged in Specification 1 within the meaning of paragraph 27, Manual for Courts-Martial, 1928. But even if it were the error would be harmless, as the sentence imposed is lawful under either specification.

7. Accused is 29 years of age and is married. From War Department records it appears that he attended the University of New Hampshire for one and one-half years. From 1931 to 1941 he was a salesman, earning $150 per month and from 1941 to 1942 was manager in charge of a home furnishing business, earning $200 per month. After attending Officer Candidate School he was commissioned a second lieutenant, Coast Artillery Corps, and entered on active duty on 7 January 1943. Prior enlisted service commenced with his induction on 29 June 1942 and was terminated by his discharge to accept a commission.

8. 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 of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized under Article of War 61.

Larry G. Jones, Judge Advocate.

John Hammerschmidt, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 FEB 1944 - 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 Bernard Gordon (0-1049501), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. The accused was absent without leave 23 days, during which time he was admittedly under the influence of intoxicating liquors. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O.256, 3 June 1944)

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

SPJGN
CM 243536

19 NOV 1943

UNITED STATES v. Private WILLIAM (NMI) COOKE (32418923), Detachment Medical Department, 207th Station Hospital, Annette Island Landing Field, Alaska.	ALASKA DEFENSE COMMAND Trial by G.C.M., convened at Annette Island Landing Field, 18 October 1943. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LIPSCOMB, GOLDEN and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William Cooke, Detachment Medical Department, Two Hundred-Seventh Station Hospital, Annette Island Landing Field, Alasak, did, at Ketchikan, Alaska, on or about 6 September 1943, with intent to commit a felony viz, sodomy, commit an assault upon William Rice, a minor under the age of eighteen years, by wilfully and feloniously placing his hands upon him, the said William Rice, forcing the said William Rice

> over a log, and partially disrobing the said William Rice.

He was found guilty of the Specification and the Charge. Evidence of one previous conviction for (1) drunkenness in command, in violation of Article of War 96, (2) disrespect toward his superior officer, in violation of Article of War 63, and (3) disrespect toward a non-commissioned officer in the execution of his office, in violation of Article of War 65, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct, for two years. The reviewing authority approved only so much of the findings of guilty of the Specification and the Charge as involves a finding of guilty of the commission of an assault on or about 6 September 1943 at Ketchikan, Alaska, upon William Rice, a minor under the age of eighteen years, by willfully and feloniously placing his hands upon him, the said William Rice, forcing the said William Rice over a log, and partially disrobing the said William Rice; approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Since the record of trial supports the finding of guilty of the Specification, as approved by the reviewing authority, the evidence is not discussed. The only error is in the approved finding of guilty of the Charge - violation of Article of War 93 - whereas the lesser offense included in the Specification, of which the finding of guilty was approved, constitutes a violation of Article of War 96. The sentence is not affected. Title 22, Section 901, District of Columbia Code 1940, provides that:

> "Any person who shall * * * wilfully maltreat any child under the age of 18 years * * * shall * * * when convicted * * * be subject to punishment * * * by imprisonment for a term not exceeding two years, * * *."

The Judge Advocate General has held that,

> "The maximum term of confinement for this lesser included offense is two years, the maximum fixed by the statute noted, CM 123265 (1918)". (Sec. 451 (2), p. 311, Dig. Ops. JAG, 1912-1940).

4. The accused is 31 years of age. The charge sheet shows that he was inducted 1 August 1942, with no prior service.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty in violation of Article of War 96, and the sentence. Dishonorable discharge, total forfeitures and confinement at hard labor for two years are authorized upon conviction of an assault constituting willful maltreatment of a child under 18 years of age, in violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 243536

1st Ind.
20 NOV 1943

War Department, J.A.G.O., - To the Commanding General, Alaska Defense Command, c/o Postmaster, Seattle, Washington.

1. In the case of Private William (NMI) Cooke (32418923), Detachment Medical Department, 207th Station Hospital, Annette Island Landing Field, Alaska, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of the Charge and Specification be approved as involves findings of guilty of the Specification in violation of Article of War 96. Upon compliance with the foregoing recommendation and under the provisions of Article of War 50½ and Executive Order No. 9363, dated July 23, 1943, 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 243536).

James E. Morrisette,
Colonel, J.A.G.D.,
Assistant Judge Advocate General,
Charge of Military Justice Matters.

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

SPJGN
CM 243542

19 NOV 1943

UNITED STATES v. Second Lieutenant ROBERT R. BLANK, JR. (O-1108488), Corps of Engineers.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Sutton, North Carolina, 20 October 1943. Dismissal.

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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 85th Article of War.

Specification: In that Robert R. Blank, Jr., Second Lieutenant, C.E., 1304th Engineer General Service Regiment, Camp Sutton, North Carolina, was, at Camp Sutton, North Carolina, on or about 21 September 1943, found drunk while on duty as duly appointed defense counsel for Special Court Martial of the 1304th Engineer General Service Regiment.

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

Specification: In that Robert R. Blank, Jr., Second Lieutenant, C.E., 1304th Engineer General Service Regiment, Camp Sutton, North Carolina, was, at Camp Sutton, North Carolina, on or about 23 September 1943, drunk in uniform in a public place, to wit: Gate Number One, Camp Sutton, North Carolina.

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

Specification: In that Robert R. Blank, Jr., Second Lieutenant, C.E., 1304th Engineer General Service Regiment, Camp Sutton, North Carolina, having been duly placed in arrest in quarters

on or about 21 September 1943, did, at Camp Sutton, North Carolina, on or about 23 September, 1943, break his said arrest before he was set at liberty by proper authority.

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

3. The evidence for the prosecution shows that on 21 September 1943 the accused was the duly appointed defense counsel for a special court martial convened at Camp Sutton, North Carolina. During the trial of the first case his actions were indicative of intoxication and, upon his late return into the presence of the court after a period during which the court was closed, he, at the direction of the president of the court was escorted to his tent and told to remain there. The escorting officer reported the matter to the organization's executive officer, who requested the regimental surgeon to have the accused undergo a sobriety test. The test was made about noon at the station hospital and showed an alcoholic blood content of 3mg. per cubic centimeter which according to expert medical opinion was indicative of drunkenness in at least 85% of the persons having such alcoholic blood content. Thereafter, about 1600 o'clock, upon the order of the organizations commanding officer, the executive officer went to accused's tent, aroused him from his sleep and placed him in arrest in quarters which action was, according to the executive officer, fully understood by the accused. The president of the special court, the enlisted man whom the accused was defending on the occasion, the officer who escorted him back to his tent and the medical personnel who gave him the sobriety test, were all definitely of the opinion that the accused was intoxicated to the point of drunkenness and testified at length about his manifested symptons usually indicative of such condition. The executive officer, the officer who accompanied the accused to the hospital for the test, and another member of the special court, although having smelled alcohol upon his breath, were unable to testify positively that he was intoxicated. Another officer was appointed defense counsel for the special court which proceeded to dispose of its docket (R. 5-9, 9-11, 11-14, 14-20, 20-21, 21-24, 24-27, 27-29, 29-32, 40-41; Exs. "A-1", "A-2" and "B").

At about 1500 o'clock on 23 September 1943, the accused, who had not been set at liberty from the arrest under which he had been placed on 21 September 1943, was found drunk in a civilian's automobile in the public parking lot across from the Post Headquarters, Gate Number One, by the area provost marshal who directed an enlisted military police to assist him into the sleeping quarters of the control station where he rested upon a bed until he was called for by another officer of his organization who came in response to a telephone call by the area provost marshal and accompanied the accused to his organization's area where he was placed in confinement under guard. The area provost marshal, the enlisted military police and the officer accompanying the accused to his place of confinement were experienced in the observation of drunken per-

sons and definitely were of the opinion that the accused on such occasion was intoxicated (R. 32-35, 35-37, 37-39).

4. The evidence for the defense consisted of the sworn testimony of the accused which was elicited after he had been fully advised of his rights as a witness and after the court had overruled a motion for findings of not guilty for insufficiency of evidence. He testified that on 21 September 1943 he was ill, nauseated and sick at the stomach from overwork and a couple of drinks, taken the preceding night, but that he nevertheless attempted to perform his duty as defense counsel of the special court, that after the first case was tried he was excused by the court and returned to his tent where he took a drink or so in an effort to overcome his illness and that he did not interview a physician relative to his condition because he had no confidence in Army doctors. He recalled going to the hospital for the sobriety test, attributed its results to his bilious condition and the drinks he had taken after being excused by the court and, although remembering the visit from the executive officer, denied understanding that he had been placed in arrest. Consequently, without permission or leave of any kind, on the morning of 23 September 1943 he had gone by bus to nearby Charlotte, North Carolina, where he had drunk several "beers" and started back to camp in an enlisted man's automobile which became disabled on the way. A civilian had picked him up and brought him to the parking lot where he was found by the area provost marshal who placed him in arrest. After he was placed in confinement under guard he continued to be sick and nauseated and his insignia of rank had been removed but later returned. He had remained in confinement since 23 September 1943 (R. 41-51).

5. The Specification, Charge I alleges that the accused on or about 21 September 1943 at Camp Sutton, North Carolina, was found drunk while on duty as the duly appointed defense counsel for a special court martial. The offense alleged is defined as being sufficiently intoxicated as "sensibly to impair the rational and full exercise of the mental and physical faculties" while actually engaged upon a military duty (M.C.M., 1928, par. 145).

The evidence is abundantly sufficient to establish beyond a reasonable doubt that the accused on the occasion specified was drunk while attempting to perform his duty as defense counsel for a special court martial. Numerous witnesses so testified and the sobriety test unassailably so demonstrated. The accused's weak excuse of illness is unworthy of any credibility whatsoever because stomach nausea would not account for his blood's alcoholic content or his other visible manifestations of drunkenness. His guilt of the offense alleged was conclusively established by competent evidence which amply supports the findings of guilty of Charge I and its Specification.

6. The Specification, Charge II, alleges that the accused on or about 23 September 1943 at Camp Sutton, North Carolina, was drunk in uniform in a public place, to-wit: Gate Number One, Camp Sutton, North Carolina. The offense is alleged as a violation of Article of War 96 and as alleged constitutes a well recognized offense, violative of

such Article (M.C.M., 1928, par. 152a).

The testimony of three witnesses, all experienced in the observation of drunken persons, conclusively establishes that the accused was guilty as alleged in the Specification and such testimony is corroborated by the accused's own testimony wherein he admits drinking "several beers" shortly before being found in the civilian's automobile in the public parking lot across from Gate Number One of the camp. Unquestionably, the place was a public one and he was drunk in uniform. The evidence therefore establishes beyond a reasonable doubt the accused's guilt as alleged and conclusively supports the findings of guilty of Charge II and its Specification.

7. The Specification, Charge III, alleges that the accused "having been duly placed in arrest in quarters on or about 21 September 1943," broke his said arrest at Camp Sutton, North Carolina, before he was set at liberty by proper authority. "The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders, or by A.W. 69, and the intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of inadvertence or bona fide mistake is admissible in extenuation" (M.C.M., 1928, par. 139a).

The arresting officer testified definitely that he placed the accused in arrest in quarters about 1600 o'clock on 21 September 1943 and that the accused was fully advised thereof which was impressed upon him by the arresting officer beyond question of possible mistake or accused's failure of comprehension. The arrest so made had not been lifted on 23 September 1943 when the accused was found in breach thereof in a drunken condition at Gate Number One of the post. The accused's own testimony, although weakly disavowing knowledge or understanding of his arrest, conclusively shows that he deliberately went to Charlotte, North Carolina, and that he was not acting through mistake in so going. The evidence, therefore, establishes beyond a reasonable doubt the accused's unextenuated guilt of the offense alleged and amply sustains the findings of guilty of Charge III and its Specification.

8. The accused is approximately 34 years of age. The War Department records show that he had enlisted service from 20 February 1941 until 13 November 1941 when he was placed upon inactive status in the Enlisted Reserve Corps until 22 January 1943, that upon the latter date he was recalled to active duty with further enlisted service until he was commissioned a second lieutenant on 6 January 1943 upon completion of Officers' Candidate School and that he has been on active duty as an officer since such date.

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

of guilty of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 59 or 96 and is mandatory upon a conviction of a violation in time of war of Article of War 85.

Abner E. L. Jacomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(16)
SPJGN
CM 243542

1st Ind.

War Department, J.A.G.O., 13 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 Second Lieutenant Robert R. Blank, Jr. (O-1108488), 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. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should 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. 39, 24 Jan 1944)

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

SPJGK
CM 243567

3 - DEC 1943

UNITED STATES	ANTILLES DEPARTMENT
v.	Trial by G.C.M., convened at APO 853, c/o Postmaster, New York, New York, 21 and 22 September 1943. To be hanged by the neck until dead.
Private SANTIAGO MONTALVO (30401947), Company H, 296th Infantry.	

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

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

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

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

Specification: In that Santiago Montalvo, Private Company "H", 296th Infantry, did, at Santa Barbara, near APO 853, c/o Postmaster, New York, New York, on or about April 22, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill, one Private Juan Figueroa-Hernandez, a human being, by shooting him with a pistol.

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

Specification: In that Santiago Montalvo, Private Company "H", 296th Infantry, did, at Santa Barbara, near APO 853, c/o Postmaster, New York, NY, on or about April 22, 1943, willfully, unlawfully and feloniously attempt to commit suicide by shooting himself with a pistol.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence, recommended that it be commuted to "dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life", and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

At four o'clock in the afternoon of 22 April 1943, accused and deceased engaged in an argument which terminated in a hand-to-hand fight (R.8,11,12, 15,24,29,33). The exact cause of the fight is nowhere disclosed in the record. It took place in the little town of Santa Barbara, Puerto Rico, which is near their camp (R.8,24).

During the course of the fight, a part of accused's left ear was apparently bitten off by deceased (R.8,11,24,93,95). Deceased and accused were separated by other soldiers and civilians (R.8,14,24,27,29,34).

Accused was at that time in possession of a .45 automatic pistol. Witness Jose C. Salcedo, a fellow soldier, took the pistol from accused, returned with it to camp, and gave it to another soldier living in the same barracks (R.24,25). The latter placed the pistol in accused's pistol holster, which was hanging on the wall near accused's equipment (R.69,70).

After the fight, deceased returned to camp, and later in the evening went to the home of a friend in Santa Barbara, to attend a religious celebration in the nature of a wake (R.8,9,14,18,25). He arrived between 10 and 11 p.m. (R.25).

Shortly thereafter accused arrived at this house, and either asked or called to deceased to come outside and talk with him (R.9,15,19,22). Deceased left the house, and a few minutes later was found dead in the ditch across the road from the house (R.25,29,36,75). According to Captain Abraham I. Braude, Medical Corps, A.P.O. 853, the cause of death was a bullet wound from a .45 automatic pistol fired at extremely close range (R.76,80). The wound was in deceased's chest, and punctured a major arterial blood vessel. Death was almost instantaneous (R.75,76). There were also two minor flesh wounds in the left arm (R.77,79). There were powder burns about the surface of the fatal bullet wound (R.76).

When deceased left the house after having been called by accused, he followed accused (R.13,22). Witness Salcedo and another witness, Private Antonio Figueroa Carrion, of another company, followed them a few minutes later (R.13). The shots were fired at about 10 p.m. "more or less" (R.15).

Accused was found lying near deceased, on the other side of the narrow road upon which the shooting took place. They were about two or three feet apart (R.25,34,40,41,49; Pros. Exs. A and B). Accused was leaning on something, in a half-sitting position (R.42). He was bleeding at the chest, moaning, and asking for water (R.37,41). Deceased was lying on his back, facing up, and his feet were towards accused's feet (R.42).

At accused's right hand lay a .45 automatic pistol (R.26,40,45,49). It is not quite clear whether the weapon was in accused's hand (R.45) or

lying next to it (R.26,49). Mr. Fruto Hernandez Ayala, a witness who arrived upon the scene almost immediately, pushed the pistol away with his foot (R.45).

A knife was found near deceased (R.41) with the blade open (R.49, 50,52,53). It was not more than two feet from deceased's body (R.51). Someone picked it up and gave it to witness, Second Lieutenant Juan F. Maldonado, Infantry, A.P.O. 853 (R.50,53).

No one saw accused in the act of firing the pistol. The estimates of the number of shots fired from it vary. Witness Israel Echevarria, a private in accused's company, heard four shots, about 10 minutes after accused and deceased left the wake (R.10). Witness Saturnina Marcus Arus, the woman at whose house the wake was taking place, heard two shots (R.20, 22). Witness Ayala heard "three of them close together, and then one a little later" (R.39,43,47). Witness Salcedo heard "about 5 or 6, more or less" (R.25).

One witness, Private Figueroa Carrion (R.28-38) saw deceased leave the house (R.29) and went out to look for him. This witness heard at least one shot; and then, from a distance of 25 or 30 yards away heard two more shots (R.30). He also saw the flashes from the latter two shots. When a flashlight was used a few minutes later he saw accused at the place at which he had previously seen the flashes (R.30). He had seen one human figure or "shadow", at this place, just prior to the two shots (R.31). This shadow was about a yard from deceased (R.32). At the last shot the shadow fell, and this was the place where this witness found accused (R.37, 38).

This witness saw no one else there at the time (R.33). No other witness testifies to there being any third figure or shadow at the scene of the killing. There is no indication anywhere in the record that the gun was "planted" at accused's hand, and, in fact, the defense raised no such issue.

Lieutenant Maldonado definitely identified the pistol found near accused's right hand as the one introduced upon trial (R.50). This pistol is also identified by Captain William A. Wood, 296th Infantry, accused's commanding officer, as the one which had been issued to accused (R.57,62). There is also testimony in the record that accused's pistol holster in his barracks was empty at about 11 o'clock of the night the killing occurred (R.72).

Approximately five hours' time elapsed from the quarrel in the afternoon between accused and deceased, and deceased's death in the evening. There is no evidence in the record that accused and deceased saw each other during this interim. There is no evidence of any quarrel between the two at any time during the evening.

In the opinion of Captain Braude, deceased was facing "sidewards" to the gun at the time he was shot (R.79). The fatal bullet was removed from the body (R.74,79), but apparently no ballistic tests were made.

Accused received one bullet wound in the left chest. The caliber of the bullet is not stated. There is some evidence of powder burns. The bullet which caused this wound was not found in a clinical examination. The bullet entered the chest and came out of accused's back. Captain Thompson E. Potter, Medical Corps, Station Hospital, A.P.O. 853, who examined and cared for accused during accused's recovery from this wound and complications, states that the wound could have been self-inflicted, or could have been caused by something else (R.93-96).

Accused did not take the stand, and the defense offered no testimony.

4. There is no reasonable doubt that accused killed deceased, and that there were present all the elements of murder. Accused had a motive for his act, in that during the quarrel which had taken place in the afternoon deceased apparently had bitten off part of accused's ear. But the lapse of time between the two incidents, together with the fact that accused undoubtedly returned to his barracks, obtained repossession of his pistol and sought out deceased in town later in the evening, are ample evidence of premeditation and malice aforethought.

The shots were fired at point-blank range, as evidenced by the powder burns on deceased's chest, and the position of the two bodies. Witnesses who arrived on the scene almost immediately, found the bodies, and none suggests the presence of any third person who could have shot either accused or deceased. The gun was either in, or within inches of accused's right hand.

The open knife found near deceased's body is of no significance. There is no evidence to connect deceased with the knife, by ownership or otherwise, or to indicate that he used it or threatened to use it against accused.

There is ample evidence to sustain the findings under Charge II and its Specification. The bullet which wounded accused went into his chest. There were powder burns about the wound. There is no evidence that deceased had a gun. At least one witness saw accused's shadow fall to the ground immediately after the last flash. There can be no reasonable doubt that accused, after killing Figueroa Hernandez, attempted to take his own life.

5. Three questions involving admission of evidence during the trial require mention. Defense objected to the testimony given by Mrs. Arus and Mr. Ayala on the ground that their names do not appear upon the charge sheet (R.16,43). No request was made by defense for a continuance on the ground of surprise, nor is it shown that defense was prejudiced thereby.

There was no error. (CM 228146, Menefee)

Defense objected to the identification by accused's commanding officer of the pistol found near accused's hand at the scene of the killing as the one issued to accused on accused's W.D.A.G.O. Form No. 33 (Pros. Ex. D). The ground of the objection was solely that witness himself had not made out the original document, all other objections thereto being specifically waived (R.67). The objection is met by Manual for Courts-Martial, 1928, paragraph 117a, for it was clearly the official duty of the commanding officer who first made this entry to know the facts, and it is not necessary to call that officer. Presumably the entry was based on that officer's personal knowledge. Furthermore, the pistol was sufficiently identified by Lieutenant Maldonado as that found near accused's hand at the scene.

There is also attached to the record a purported confession by accused that he shot deceased. In it accused definitely admits the killing. This confession, however, was ruled out by the court after thorough consideration of the circumstances under which it was made. There is no indication that the court was influenced in any way by it.

6. Some confusion might have arisen over the name of the deceased, as it is set forth in the Charge Sheet.

Deceased's name on the Charge Sheet is given as Juan Figueroa-Hernandez, and throughout the trial deceased is referred to as Juan Figueroa. As is pointed out in the Staff Judge Advocate's review, the surname Hernandez is that of his mother, which by Spanish custom may be coupled with that of his father. All witnesses and parties obviously knew him as Juan Figueroa. No objection was raised by defense, and it is clear that the record was such as to inform the defendant of the charge against him and to protect him against a second prosecution for the same offense (Jackson v. United States, 297 Fed. 22).

7. The record is amply sufficient to support the findings of guilty of both Charges and their Specifications.

8. There are attached to the record of trial recommendations of clemency signed by five members of the court, the Trial Judge Advocate, and the Assistant Trial Judge Advocate, recommending that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life. There are also attached to the record of trial letters from the following officials and citizens of Guanica, Puerto Rico, attesting to the previous good character and reputation of the accused: Cancio Perez, Mayor; Eduardo Perez Seda, Member of the Municipal-Asambly; Reverent Chrysostom Hoff, O.P., Oscar Padilla, Captain of Port Guanica, P.R., and Juan M. Santiago.

9. The Charge Sheet shows that accused is 24 years of age and that he was inducted into the military service on 26 March 1941.

10. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of Article of War 92.

_____, Judge Advocate.

(On Leave), Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 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 Private Santiago Montalvo (30401947), Company H, 296th Infantry.

2. The accused was found guilty of murder in violation of Article of War 92 and of attempted suicide in violation of Article of War 96. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence but recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life.

3. 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. Attached to the record of trial are recommendations of clemency signed by five members of the court, the trial judge advocate, and assistant trial judge advocate, and letters of prominent civil officials attesting to the previous good character of the accused. Under all the circumstances, I concur in the recommendation of the reviewing authority that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life. I recommend further that the sentence as thus modified be carried into execution and that the United States Penitentiary, Atlanta, Georgia, 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 designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 45, 28 Jan 1944)

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

SPJGQ
CM 243603

19 NOV 1943

UNITED STATES	CAMP ROBERTS
v.	Trial by G.C.M., convened at Camp Roberts, California, 22 October 1943. Dismissal and total forfeitures.
Second Lieutenant BOYCE E. McMULLEN (0-1323158), 84th Infantry Training Battalion.	

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

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

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

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

Specification: In that 2nd Lt. Boyce E. McMullen, Co. "B", 84th Inf. Tng. Bn., was, at Camp Roberts, California, on or about 7 October 1943, found drunk while on duty as Assistant Platoon Leader.

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

Specification: In that 2nd Lt. Boyce E. McMullen, Co. "B", 84th Inf. Tng. Bn., was, at Camp Roberts, California, on or about 8 October 1943, drunk in Camp.

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

Specification: In that 2nd Lt. Boyce E. McMullen, Co. "B", 84th Inf. Tng. Bn., did, at Camp Roberts, California, on or about 8 October 1943, behave himself with disrespect toward Major William H. Costlow, his superior officer, by saying in a defiant and contemptuous manner "The God damn Major is not going to do anything to me" or words to that effect.

The prosecution asked leave and was allowed to amend the Specification of Charge III by substituting "7 October 1943" instead of "8 October 1943." Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced at the trial. 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. Pertinent evidence for the prosecution may be summarized as follows:

Accused was a member of Company B, 84th Infantry Training Battalion stationed at Camp Roberts, California, but on 7 October 1943 had been assigned for duty with Company C. Second Lieutenant Joe Ingrasci was, on that date, leader of the second platoon and accused was attached to this platoon as a training instructor on the afternoon of that day (R. 6, 7). At 1245 P.M. Lieutenant Ingrasci saw accused just outside of the orderly room in the company area and observed that his eyes were glassy, his gait was unsteady and he smelled liquor on his breath. When asked whether he had been drinking accused said "No" and he again denied having done so at about 1:30 P.M. (R. 8, 9). During the last two hours of the afternoon training period Lieutenant Ingrasic lectured to the platoon and, although accused did not participate in the conference he was present, sitting beneath a tree at the rear of the platoon, where he fell asleep in full view of the group (R. 10). In the opinion of Lieutenant Ingrasci accused, while not so incapacitated that he did not know what he was doing, was, at the time in question, drunk (R. 13).

First Lieutenant Richard T. Rosemark was the company commander of Company C, 84th Infantry Training Battalion on 7 October 1943, and, on the afternoon of that day, at about two o'clock, he observed accused while on duty in the training area and noted that his eyes were rather glassy, his upper eyelids were drooping and sagged, his tongue was thick as he spoke and somewhat later he staggered as he walked. When asked whether he had been drinking he denied having done so but later admitted to Lieutenant Rosemark that "he had a few with the boys" (R. 13, 15). In the opinion of Lieutenant Rosemark accused was, on that afternoon, under the influence of intoxicating liquor (R. 16).

First Lieutenant Granville M. Wilde, senior instructor in the technique of light machine gun fire at Camp Roberts, California, had occasion to observe accused on the afternoon of 7 October 1943 when, at about 1 o'clock, accused approached him in Company D's training area and asked where Company C was. After being told that Company C training area was "down near the road", accused "wondered as to how

he was there" and stated he thought he was in the Company C area (R. 17, 18). At about 4:15 p.m. Lieutenant Wilde was approached by accused with the request that he be permitted to ride on the truck because he had a sore leg. Lieutenant Wilde at first refused because of lack of space but, later seeing him wobbling from side to side in the rear of his platoon, he permitted accused to get into the truck. Accused was very pale in the face, was perspiring freely, his eyes had a slightly glassy appearance and in the opinion of Lieutenant Wilde "he had overimbibed intoxicating liquor and was sick" (R. 19, 20).

Second Lieutenant Gordon E. Gullikson, an officer of Co. C, 84th Infantry Training Battalion, was present with the second platoon of that company on the afternoon of 7 October 1943. At the time when accused had fallen asleep during Lieutenant Ingrasci's lecture, Gullikson went to him and woke him up. He stated that accused's eyes were glassy, he had a distinct odor of liquor about his person and, in his opinion, accused was intoxicated (R. 22-23).

Major William H. Costlow, commanding officer of the 84th Infantry Training Battalion, saw accused at 5:45 p.m. on 7 October 1943 when Lieutenant Rosemark brought him to the Major's quarters and informed the latter that accused had been drinking on the field. This accusation was denied by McMullen but, when told by the Major that his condition showed he had been drinking, he admitted that he had taken one drink at the noon hour (R. 24, 25).

At eight thirty o'clock in the evening of the same day Major Costlow was in the lounge of the officers' quarters when accused came in and sat down. At that time "he was in very bad shape" and the Major said "Lieutenant, if you don't straighten yourself up you are going to get in serious trouble" (R. 25). After a short conversation in which the Major accused him of being then drunk accused, denying the charge, left the room and having turned into the hall, out of sight, but within the Major's hearing, said "that god-damned major will not do anything to me" (R. 25, 29, 31). Though the Major could see no one he did distinctly recognize accused's voice and he also distinguished the voice of one other person in the hall at the time (R. 29, 30). The tone of accused's voice was deep, but the Major would not say that it was either joking or disrespectful (R. 28). At the time the remark was made there were no other majors in the building and, in fact, no other majors in the battalion (R. 39). Immediately after this incident had occurred, Major Costlow went into the hall, made a telephone call to regimental headquarters and then took accused to the dispensary where, in his presence, Captain Soll, a medical officer examined accused. After the examination he took accused, who was very drunk, to his barracks in an ambulance (R. 32, 33).

On the next morning (8 October 1943) Major Costlow saw accused at 6:45 and relieved him from further duty with Company C, telling him to report back to his old company for duty. At about ten o'clock a.m. the Major saw accused again, this time at the station hospital (R. 34). His face was flushed,his eyes were red and his tongue was thick. He could hardly walk and the right leg of his trousers was all wet. In the Major's opinion he was very drunk and accordingly he took him to his barracks and placed him under arrest in quarters. While there he asked accused whether he had any whiskey in his room to which accused replied that he did not have a drop and told the Major to make a search. Thereupon the Major directed accused to open his foot-locker which he did, disclosing a quart bottle of whiskey nearly full (R. 35, 36).

Upon cross examination Major Costlow stated that, based upon accused's one week's work with his organization, he would rate him as "excellent" and that, in his opinion, "if he would stay sober and get on the ball he would be a good officer" (R. 38).

Second Lieutenant James A. Moore, 84th Infantry Training Battalion, testified that he accompanied Major Costlow to the station hospital on the morning of 8 October 1943 and that he saw accused at that place. Accused was glassy-eyed, wore neither a tie nor leggings, his pants were wet and he staggered as he walked (R. 39-41).

First Lieutenant Robert N. Lensch, Commanding Officer of Company B, 84th Infantry Training Battalion, saw accused at about twenty minutes to eight on the morning of 8 October 1943 at which time accused reported for duty. He looked a little unsteady on his feet, his face was flushed and his eyes were just a little bleary (R. 41-43). At about ten o'clock he again saw accused in the company of Major Costlow and Lieutenants Moore and Ferguson and at that time his eyes had a fixed stare. His countenance bore a look of stupidity and he seemed "like a man who didn't know where he was" (R. 43).

Captain Sidney N. Soll, Medical Corps, examined accused on the evening of 7 October 1943 and found him very definitely drunk. This opinion was corroborated by a blood-alcohol test which was made at the time and which showed a very high percentage of alcohol in accused's blood (R. 45). Another similar test was made upon accused on the morning of 8 October 1943 and this disclosed an even higher concentration of alcohol in accused's blood than on the previous evening (R. 46, 47).

4. For the defense it was shown that at about eight or eight thirty o'clock on the morning of 8 October 1943, First Lieutenant Rollin R. Shannon, Medical Corps, examined and dressed an injury on accused's left leg involving a rather extensive contusion and advised him to see Colonel Cantrell for any further treatment. He saw no evidence that accused had used alcohol or was drunk nor did he smell

any liquor on his breath. The contusion was not of such nature as to cause accused to stagger but, in his opinion it could cause him to limp (R. 55, 56).

Lieutenant Colonel William B. Cantrell, Medical Corps, saw accused at about nine o'clock on the morning of 8 October 1943, at which time he complained of a bruise on the leg. Upon examination it was determined that accused was unfit for active field duty and he was given a hospital admission slip (R. 50, 51). When accused came into the office he gave evidence of having been drinking and during the fifteen minutes he was there his condition grew worse, so that when he was ready to leave, the colonel thought he needed assistance and called his sergeant and instructed him to take charge of accused. As they left the office it was noticed that his pants were wet and urine dribbled from accused on to the floor as he went out into the hall (R. 53, 54).

Accused elected to be sworn as a witness and stated that on the evening of 6 October 1943 he had slipped on the stairs and scraped the skin from his left shin. Though the injury was painful he put iodine on it and thought it would be better in the morning. The next morning he started for the infirmary but went, instead, to the parade ground for machine gun drill where he stood all morning (R. 53, 59). At noon instead of going to mess he went to his quarters and laid down to rest his leg. When he arose to go back to drill his leg pained so much he took one drink to ease the pain and make himself feel better. He then joined his company at about 12:45 p.m. Lieutenant Ingrasci asked him whether he had been drinking to which he replied that he had not for the reason that he did not want him to know that he had a leg injury (R. 60). He moved out with the company and limped along for about three quarters of a mile. When the troops arrived at the training area and discarded their packs accused was obliged to urinate and, since there was no latrine near, he had to go over behind a hill so that the trainees would not see him. While he was gone the companies moved out to their respective areas and when he returned he did not know where his company had gone. It was for this reason that he went into the D Company area and inquired about the location of C Company. When he did join his company he took part in machine gun drill with his platoon on the side of a hill. He was obliged to limp about on account of his leg. Lieutenant Rosemark approached him and inquired whether he had been drinking. He denied drinking any in the field but did admit taking a drink at noon on account of the sore leg. Later he was sitting in the hot sun listening to Lieutenant Ingrasci and finally fell asleep. After being awakened by Lieutenant Gullikson he continued to sit on the ground so that when he finally got up, after two hours, he was stiff and was obliged to stagger around before he

could straighten out. He then asked permission to ride in to camp on the truck and when refused fell in with the platoon. Later they picked him up and allowed him to ride in the truck. As soon as he arrived at his barracks he went in to the bar and drank three bottles of beer. By that time he was summoned to Major Costlow's room where he was informed that Lieutenant Rosemark wanted him relieved from his (Rosemark's) company for the reason that accused had been drinking on the field and was unable to perform his duties. This accused denied and being angered at the accusation he and several companions went to the bar and started drinking beer. "Then after that we started drinking. We drank whiskey, gin, everything we could find and from that time on * * * I don't remember what happened" until the next morning when, at about 6:45, Major Costlow ordered him to report to B Company. He did so and was told to report to A Company which had gone out to the range. He then started for the range but his leg began to bother him and he stopped at the dispensary where, after an examination, he was told to go to the station hospital. Instead of going directly to the hospital he returned to his quarters and, while waiting for a taxi took a couple of drinks. He then went to the hospital by taxi and, although he was all right when he went in to see Lieutenant Colonel Cantrell, he began to feel bad, what with the heat of the room and his suffering with a "hangover". His kidneys were weak from the night before and he was unable to hold his urine and consequently wet his trousers. When he got to the admission office a major told him to come in after which he said "this man's drunk" and accused answered "Yes, I got an awful hangover from last night and I had a couple of drinks a while ago and it made me woozy". They then made a blood test of accused and when Major Costlow arrived he went with him to Company B headquarters where the Major directed Lieutenant Lensch to start court-martial proceedings against accused immediately. Accused admitted that he was "pretty much" drunk when Major Costlow found him in Colonel Cantrell's office on the morning of 8 October 1943.

5. Notwithstanding accused's effort to justify his limping or staggering about on the parade ground and drill fields of Camp Roberts, California, on 7 and 8 October 1943, by offering the plausible excuse of a badly bruised left leg, the testimony of four officers who observed him at his work as a training instructor on 7 October 1943 and of his battalion commander who saw accused immediately after he had returned from drill on the afternoon of that day, conclusively establishes the fact that he was drunk while on duty on that date. Whatever may have been the real cause of his unsteady appearance when he walked there is ample testimony of other evidences of his drunkenness on that occasion. His eyes were glassy and his eyelids drooped; his tongue was thick; he had a stupid countenance; he bore an unmistakable odor of alcohol on his person and he admitted having "had a few (drinks) with the boys."

Nor can there be the slightest doubt that accused was drunk in camp on 8 October 1943 as alleged in the Specification of Charge II. By his own testimony accused admitted participating in a drinking orgy on the night of 7 October 1943 at which time, after drinking beer, he and his companions resorted to whiskey, gin and anything they could find until his mind became a blank so that he remembered nothing of what occurred thereafter until 6:45 of the following morning. When, instead of reporting to his company for duty as ordered, he went instead to the station hospital where a Major, in his presence and evidently referring to him, said "This man's drunk", accused frankly said "Yes, I got an awful hangover from last night and I had a couple of drinks a while ago and it made me woozy." Nothing else is required to support the findings of guilt as to this Charge, the Specification of which was properly amended before arraignment.

There was a strenuous effort made on the part of defense counsel to minimize the effect of the words spoken by accused on the night of 7 October 1943 immediately after he had left the room in which he and his battalion commander had been having a conversation regarding accused's misconduct. The Major had just admonished him, and although accused was out of sight as he turned into the hall, he was clearly and distinctly heard by Major Costlow to say "that god damned major will not do anything to me." Inasmuch as there were no other majors in the building or, as a matter of fact, in the battalion, and coming so soon after the unpleasant interview, the reference was clearly to Major Costlow. It was urged that this incident fell within the provision of the Manual for Courts-Martial which excepts certain situations from the operation of Article of War 63. Thus:

> "It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation"(M.C.M., 1928, par. 133).

Apparently, defense counsel rested his contention upon the fact that a voice, other than accused's, was also heard in the hall by Major Costlow and that, therefore, the words used by accused must be deemed to have been "in conversation" and not "in the presence" of the major. Even though it could be said that accused was "in conversation" with the other person, it would require a strained interpretation to concede that such conversation was "private" when the words could be heard, and were heard, in another room sixty feet away; nor can it be said that the language was not used "in the presence of the superior" when the superior plainly heard them. This situation is not one of the kind contemplated by or embraced within the provision relied upon. The objectionable remarks were made in an open hallway and, having been heard by the major, were uttered "in his presence" just as certainly as though he had been able to see as well as hear the person

who spoke them. The words used by accused as alleged and proven were both defiant and contemptuous and the court properly found accused guilty of behaving with disrespect towards his superior officer.

6. Accused is 33 years and 9 months of age. The records of the War Department disclose that he was born in Bolivar, Mississippi, attended public schools, graduating from high school and attending Milsap College for one year and Louisiana State University for two years. He was inducted 10 April 1942, attended the Infantry School at Fort Benning, Georgia, was commissioned a second lieutenant, Army of the United States, on 31 July 1943 and on the same date was assigned to the Infantry Replacement Training Center, Camp Roberts, California.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 63 or 96, and is mandatory upon conviction of a violation of Article of War 85.

William A. Pounds, Judge Advocate.

Paul Stephen, Judge Advocate.

Herbert B. Dredeman, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 24 NOV 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Boyce E. McMullen (0-1323158), 84th Infantry Training 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 the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 9, 6 Jan 1944)

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

MD

(35)

SPJGH
CM 243661

11 DEC 1943

UNITED STATES v. First Lieutenant HAROLD H. STRAHLEM (0-885034), Finance Department.	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Wolters, Texas, 26 October 1943. Dismissal, total forfeitures and confinement for ten (10) years. Penitentiary.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and DRISCOLL, 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 First Lieutenant Harold H. Strahlem, Finance Department, Headquarters Eighth Service Command, did, without proper leave, absent himself from his station at Dallas, Texas, from about 26 March 1943 to about 27 September 1943.

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

Specification 1: In that First Lieutenant Harold H. Strahlem, Finance Department, Headquarters Eighth Service Command, did, at Love Field, Texas, on or about 9 July 1943, present for approval and payment a claim against the United States to Second Lieutenant M. C. Deason, Agent Finance Officer at Love Field, Texas, acting for Colonel Herbert Baldwin, an officer of the United States duly authorized to approve and pay such claims, in the amount of $621.20, for pay and allowances alleged by the said First Lieutenant Harold H. Strahlem to be due him as an officer of the United States Army for the months of May and June, 1943, which claim was false and fraudulent in that the said First Lieutenant Harold H. Strahlem was absent without leave from his station

throughout said months of May and June, 1943, and was not entitled to claim or receive any pay and allowances during said period of time, and which claim was then known by the said First Lieutenant Harold H. Strahlem to be false and fraudulent.

Specification 2: Similar to Specification 1 except as follows: at Ellington Field, Texas, about 9 August 1943, presented claim for $676 for June and July 1943 to Lieutenant Colonel Edward Robinson, Jr., Finance Officer, having previously received pay and allowances for June 1943, and having been absent without leave in June and July 1943.

Specification 3: In that First Lieutenant Harold H. Strahlem, Finance Department, Headquarters Eighth Service Command, did, at Camp Beauregard, Louisiana, on or about 1 October 1941, present for approval and payment a claim against the United States to Lieutenant Colonel David R. Nimocks, Finance Officer at Camp Beauregard, Louisiana, an officer of the United States duly authorized to pay such claims, in the amount of $404.00, for services alleged to have been rendered to the United States by Major Milton B. Thweatt, Infantry, which claim was false and fraudulent in that the said First Lieutenant Harold H. Strahlem, for the purpose of obtaining payment of said claim, did forge the signature of the said Major Milton B. Thweatt to a War Department voucher, No. 1142, for pay and allowances alleged to be due the said Major Milton B. Thweatt as an officer in the United States Army, and which said claim was then known by the said First Lieutenant Harold H. Strahlem to be false and fraudulent, and in pursuance of said false and fraudulent claim the said First Lieutenant Harold H. Strahlem did, on or about 10 October 1941, receive from the said Lieutenant Colonel David R. Nimocks a United States Treasury check, No. 59070, dated 10 October 1941, in the sum of $404.00, payable to Milton B. Thweatt, Major, Infantry.

Specification 4: Similar to Specification 3 except as follows: submitted claim about 31 October 1941 on voucher No. 4571 for $405.80 and received check No. 63571 dated 31 October 1941.

Specification 5: Similar to Specification 3 except as follows: submitted claim in the name of Captain James H. Nicholson, Medical Corps, about 31 July 1941 on voucher No. 4992 for $357.20 and received check No. 39005 dated 31 July 1941.

Specification 6: Similar to Specification 3 except as follows: submitted claim in the name of Captain James H. Nicholson, Medical Corps, about 1 September 1941 on voucher No. 183 for $357.20 and received check No. 49656 dated 4 September 1941.

Specification 7: Similar to Specification 3 except as follows: submitted claim in the name of First Lieutenant Vernon D. Boyd, Infantry, about 30 June 1941 on voucher No. 2412 for $271 and received check No. 36546 dated 23 July 1941.

Specification 8: Similar to Specification 3 except as follows: submitted claim in the name of First Lieutenant Vernon D. Boyd, Infantry, about 31 July 1941 on voucher No. 4993 for $272.20 and received check No. 39006 about 31 July 1941.

Specification 9: Similar to Specification 3 except as follows: submitted claim in the name of First Lieutenant Julian G. Parker, Medical Corps, about 12 August 1941 on voucher No. 1259 for $263.87 and received check No. 42187 dated 12 August 1941.

Specification 10: Similar to Specification 3 except as follows: submitted claim in the name of First Lieutenant Julian G. Parker, Medical Corps, about 4 September 1941 on voucher No. 181 for $263.87 and received check No. 49654 dated 4 September 1941.

Specification 11: Similar to Specification 3 except as follows: submitted claim in the name of First Lieutenant John B. Dunbar, Field Artillery, about 21 October 1941 on voucher No. 2530 for $271 and received check No. 61012 dated 21 October 1941.

Specification 12: Similar to Specification 3 except as follows: submitted claim in the name of Second Lieutenant Everett S. Dennis, Infantry, about 31 July 1941 on voucher No. 2323 for $183.60 and received check No. 43926 dated 21 August 1941.

Specification 13: Similar to Specification 3 except as follows: submitted claim in the name of Second Lieutenant Everett S. Dennis, Infantry, about 31 August 1941 on voucher No. 2073 for $183.60 and received check No. 54066 dated 18 September 1941.

He pleaded guilty to and was found guilty of all Specifications and Charges. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for twenty-five years. The reviewing authority

approved the sentence, but reduced the period of confinement to ten years, designated the Federal Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under the 48th Article of War.

3. For the prosecution it was stipulated that accused was continuously in the military service from 1 January 1941 (Ex. 1) and that each of the finance officers named in Specifications 1 to 13, Charge II, was at the time and place alleged an officer authorized to pay claims of the kind set forth (Ex. 6). As to Charge I, a copy of an order dated 14 March 1943 assigning accused to the Eighth Service Command and an extract copy of the morning report of 1801st Unit, Eighth Service Command (Exs. 12 and 13 to Ex. 2) were introduced in evidence. The morning report showed accused from detached service en route to absent without leave 26 March 1943 and from absent without leave to absent in confinement 27 September 1943 (R. 6, 13).

By stipulation (Exs. 2 and 3) in support of Specification 1 and 2, Charge II, copies of the pay voucher of accused for May and June 1943 in the amount of $621.20 (Ex. 13A to Ex. 2) and of his pay voucher for June and July 1943 in the amount of $676 (Ex. 15 to Ex. 3) were introduced in evidence. It was stipulated (Ex. 3) that accused signed and presented the original of the latter voucher. As to Specification 3, Charge II, it was shown by stipulation (Ex. 2), that Major Milton B. Thweatt would testify that he did not sign voucher No. 1142, photostatic copy of which was attached (Ex. 2 to Ex. 2); that he did not authorize anyone to sign his name thereto; that he did not indorse United States Treasury check No. 59,070, photostatic copy of which was attached (Ex. 2A to Ex. 2); that he did not authorize anyone to indorse the same for him; that he received his pay and allowances for the period of time shown on the voucher referred to, by means of another and different voucher signed and presented by him; and that he received no part of the proceeds of the check referred to. As to Specifications 4 to 13, Charge II, it was stipulated (Ex. 2) that the following persons would testify to the same effect except as noted: Major Thweatt as to voucher No. 4571 (Ex. 1 to Ex. 2) and check No. 63,571 (Ex. 1A to Ex. 2); Lieutenant Colonel (then Captain) James H. Nicholson as to voucher No. 4992 (Ex. 3 to Ex. 2) and check No. 39,005 (Ex. 3A to Ex. 2), and as to voucher No. 183 (Ex. 4 to Ex. 2) and check No. 49,656 (Ex. 4A to Ex. 2); Captain (then First Lieutenant) Vernon D. Boyd as to voucher No. 2412 (Ex. 5 to Ex. 2) and check No. 36,546 (Ex. 5A to Ex. 2), and as to voucher No. 4993 (Ex. 6 to Ex. 2) and check No. 39,006 (Ex. 6A to Ex. 2); Captain (then First Lieutenant) Julian G. Parker as to voucher No. 1259 (Ex. 7 to Ex. 2) and check No. 42,187 (Ex. 7A to Ex. 2), and as to voucher No. 181 (Ex. 8 to Ex. 2) and check No. 49,654 (Ex. 8A); First Lieutenant John B. Dunbar as to voucher No. 2530 (Ex. 9 to Ex. 2) and

check No. 61,012 (Ex. 9A to Ex. 2); and Second Lieutenant Everett S. Dennis as to voucher No. 2323 (Ex. 10 to Ex. 2) and check No. 43,926 (Ex. 10A to Ex. 2) and as to voucher No. 2073 (Ex. 11 to Ex. 2) and check No. 54,066 (Ex. 11A to Ex. 2). It was stipulated further (Ex. 3) that each of the checks referred to in Specifications 3 to 13, Charge II, was indorsed by accused and deposited by him to his account in a bank in Alexandria, Louisiana (R. 6-7).

There was also introduced in evidence by stipulation (Ex. 5) a question and answer statement (Ex. 14 to Ex. 5) made by accused, after proper warning, on 28 September 1943, to Mr. Ira I. Brought, United States Secret Service, at Toledo, Ohio, substantially as follows: accused had been in the Army since 2 November 1936; beginning in the summer of 1941, when he was chief of the officers' pay section at Camp Beauregard, Louisiana, with the duty of preparing pay vouchers, he caused about eleven vouchers to be issued in a total amount of about $3233; he caused these vouchers to go to the accounting division for issuance of checks; he received the checks; and after forging the names of the payees deposited the checks in his bank account. With the money so obtained accused bought two horses, "a lot of Scotch and Soda" and a car, and paid general living expenses on a higher plane than his rank permitted. About February or March 1942 accused went overseas, was in England until November, was appointed a first lieutenant on 1 September 1942, served in North Africa until about 15 March 1943, and while in Africa did not defraud the Government of any money. After his return to the United States he received some salary by identifying himself at certain Army posts. He is married, has a baby son, and had never been arrested before (R. 11-12).

On 12 October 1943, at Camp Wolters, accused, after proper warning, made a statement in question and answer form (Ex. 4) to Major Leon Jaworski, investigating officer, substantially as follows: accused served as an enlisted man from 2 November 1936 to about 6 July 1942, when he was appointed a second lieutenant. He married on 7 July 1941. During the period from 1 June to 31 December 1941, accused (then a technical sergeant) was chief of the officers' pay section at Camp Beauregard, Louisiana. He was shown the vouchers and checks referred to in Specifications 3 to 13, Charge II (photostatic copies attached to the statement) but declined to answer most questions with reference to them. While accused was overseas his wife received an allotment every month except the month when he was appointed a second lieutenant. When accused returned to the United States from Africa, he landed at an airfield at Miami about 23 March 1943, did not report to the commanding officer, and went without leave to his home in Toledo, Ohio. Shortly afterward he proceeded to Dallas, Texas, but did not report to the Eighth Service Command. About July and August he drew a pay and allowance voucher at Love

Field and one at Ellington Field, and identified the one submitted at Love Field (copy attached to the statement). He knew that he was not entitled to a pay and allowance check while he was absent without leave. He received the money on these vouchers in cash. About 27 September he was apprehended in Toledo, Ohio by civil authorities. As to the statement made at Toledo to Mr. Brought, he stated that he had "more or less" said "yes" to everything he was asked and that there were some things he "would like to add later" (R. 7-11).

4. For the defense accused testified that he reported for duty at Camp Beauregard in December 1940 and served in "about every section" of the finance department there. New men were constantly being trained in the department, and because of that fact and the large amount of work, accused worked about 18 hours a day and also on Sundays. He had one ten-day furlough, which he was advised to take on account of his health, to prevent a nervous breakdown. He volunteered for foreign service three times, and received orders effective in February 1942 to go overseas. Later when he received orders to return to the United States, he was relieved from duty, and knew or suspected why he was being returned. When he landed in the United States he did not report to the Eighth Service Command, because he wanted to see his wife and his son, born while he was overseas, and knew that if he went to Dallas he would not see them for a long time (R. 13-16).

On cross-examination he stated that the furlough he referred to was in June 1941 and did not help his condition. He bought two horses in August 1941 and rode them frequently for relaxation. He lived "too high" and drank too much. As to each of the vouchers in evidence he signed the name of the officer whose signature purported to appear. When he received the check that the voucher called for, accused forged the name of that officer on the check, then indorsed the check and deposited it in his bank account. When accused returned to the United States in March 1943, he went to Toledo to see his family, then came to Dallas intending to report to the Eighth Service Command, "got cold feet" and did not report. He travelled from place to place, and his family did not know where he was. Accused went to Love Field and drew a pay and allowance voucher for May and June 1943. He also drew one for June and July at Ellington Field. He knew at the time that he was not entitled to pay. He later returned to Toledo, where he was apprehended. When apprehended he had his clothes packed to return to Dallas (R. 16-25).

5. The evidence shows and the pleas of guilty admit that accused, while a noncommissioned officer in the finance department at Camp Beauregard, Louisiana, during the period from June to October 1941, presented for approval and payment eleven false and fraudulent claims

in the form of vouchers for pay and allowances claimed to be due six officers, as alleged in Specifications 3 to 13, Charge II. He forged the signatures of these officers on the vouchers, and received the checks issued on the vouchers. The evidence further shows that accused forged the names of these officers on the checks received by him, and deposited the proceeds in his personal bank account.

As to the Specification, Charge I, it is shown that accused was absent without leave from about 26 March 1943 to about 27 September 1943.

While absent without leave and for that reason not entitled to pay and allowances, accused presented for approval and payment a claim for his pay and allowances for May and June 1943 at Love Field, and a similar claim for June and July at Ellington Field, as alleged in Specifications 1 and 2, Charge II. The evidence further shows that he collected in cash the amount of the claim in each instance.

6. The accused is 32 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 2 November 1936; temporarily appointed second lieutenant, Army of the United States, and active duty 6 July 1942; temporarily promoted to first lieutenant, Army of the United States, 1 September 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 94th Article of War. Confinement in a penitentiary is authorized under the 42nd Article of War for the offense of knowingly presenting a false and fraudulent claim against the United States, by section 29 of the Criminal Code of the United States (18 U.S.C. 73).

Samuel M. Driver, Judge Advocate

H. Lotterhos, Judge Advocate

Keith F. Driscoll, Judge Advocate

1st Ind.

War Department, J.A.G.O., 15 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 First Lieutenant Harold H. Strahlem (0-885034), Finance Department.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused, while an enlisted man in 1941, knowingly presented for payment eleven false and fraudulent claims, aggregating $3,233.34, for pay and allowances in the names of six officers, whose signatures he forged on supporting vouchers, and received United States Treasury checks issued on these claims (Specs. 3-13, Chg. II); was absent without leave for about six months in 1943 (Spec., Chg. I); and, while absent without leave and not entitled to pay and allowances, presented for payment false and fraudulent claims therefor, for May and June, and for June and July 1943, in the aggregate amount of $1,297.20 (Specs. 1 and 2, Chg. II). He collected the proceeds of all the claims presented. I recommend that the approved sentence to dismissal, total forfeitures and confinement at hard labor for ten years 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

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

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

(Sentence confirmed but confinement reduced to five years. G.C.M.O. 72, 15 Feb 1944)

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

(43)

14 APR 1944

SPJGH
CM 243674

UNITED STATES v. Private HARRY R. BEVER (17045348), Headquarters and Headquarters Company, 2nd Battalion, 505th Parachute Infantry, Fort Benning, Georgia.	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sill, Oklahoma, 11-13 October 1943. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier 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 92nd Article of War.

Specification: In that Private Harry R. Bever, Headquarters and Headquarters Company, Second Battalion, 505th Parachute Infantry, did, at Amarillo, Texas, on or about 22 July 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one C. C. Wood, a human being, by shooting him with a revolver.

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

Specification: In that Private Harry R. Bever, Headquarters and Headquarters Company, Second Battalion, 505th Parachute Infantry, did, at Fort Benning, Georgia, on or about 3 August 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Amarillo, Texas, on or about 14 September 1943.

He pleaded not guilty to the Specification, Charge I and to Charge I, guilty to the Specification, Charge II, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent without leave from"

and "without leave", and not guilty to Charge II but guilty of a violation of the 61st Article of War. He was found guilty of all Specifications and Charges and was sentenced to be hanged by the neck until dead. Evidence of two prior convictions by summary court-martial, one for being absent without leave for 11 days and the other for being drunk and disorderly and failing to fall in for reveille, 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:

a. Charge II. By a written stipulation (Ex. 17) dated 2 October 1943 it was stipulated between the prosecution and the defense that accused left his organization, Headquarters Company, 2nd Battalion, 505th Parachute Infantry, Fort Benning, Georgia, on 3 August 1942 and "ever since" had been absent therefrom. An extract copy of the morning report of the same organization (Ex. 1) showed accused from duty to absent without leave on 3 August 1942 (R. 10-12).

Accused was arrested by the civil police in Amarillo, Texas, on 23 July 1943 in connection with the offense alleged in the Specification of Charge I. At the time of his arrest he stated that his name was Jack Edwards. He had in his possession a selective service registration certificate (Ex. 16), social security cards, war ration books and numerous other documents in that name (Exs. 2 and 3). The document bearing the earliest date was a statement of Victory tax withheld on wages in the amount of $156.83 by an employer in Cincinnati, Ohio on 25 March 1943. Accused had been known to his friends in Amarillo as Jack Edwards and had been wearing civilian clothes since early in July 1943. He told the police that since some time in April 1943 he had been working as a cook in cafes in Amarillo and prior to that time had worked in Phoenix, Arizona. During July 1943 there was an Army air post at Amarillo and the military police had an office in the police station in that city. Accused was held by the civilian authorities from the time of his arrest until he was turned over to the military police on 14 September 1943 (R. 56, 59, 62, 94-97).

b. Charge I. Shortly after midnight on 22 July 1943, Mr. C.C. Wood left his cafe in Amarillo with his wife and drove to his home, arriving in about 10 minutes. His dwelling house was on the east side of Alabama Street which runs north and south. After Mrs. Wood had alighted, her husband, in accordance with his usual custom, backed the car in such a way as to throw the beam from the headlights on the front porch. She unlocked the front door and he drove into the driveway on the south side of the house leading to the garage at the rear. Mrs. Wood went through the dining room to the kitchen, turned on the lights in both rooms, and was just about to open the back door to let her husband in, when she heard him call out to her in such an unnatural voice that she knew "there was something

wrong". She opened the door and called to him but he did not answer. The car was standing on the driveway with the door open and the lights on. She called her daughter, who lived near by, and the police were summoned. She did not again see her husband alive. Mrs. Wood did not hear any shots fired but the dining room and kitchen through which she passed were on the north side of the house and between them and the driveway there were intervening rooms in which all the windows were closed. Mr. Wood had about $750 on his person and none of it had been taken from him when his body was found by the police. In the conduct of his restaurant business he paid cash for everything and it was his custom to carry enough money to meet his operating expenses (R. 31-37).

At about 12:20 a.m. on 22 July Mrs. Rosaline Clary was standing on the west side of Alabama Street about forty-eight of her own "footsteps" north of the Wood residence, waiting for her husband when she saw a car drive up to the house and a woman get out and go in and turn on the lights. After the car had gone into the driveway Mrs. Clary heard two shots, "a scuffle and a yell", which all seemed to happen at once. When asked on cross-examination to state the "number of minutes" that had passed from the time the car drove up in front of the house until she heard the commotion and the shots she replied that it was "a very few minutes. The exact number is not known" (R. 41-44, 124).

When the chief of police of Amarillo who knew Mr. Wood, went to the Wood residence in company with the county sheriff at about 1:00 a.m. on 22 July he found the dead body of Mr. Wood lying opposite the front porch at the southwest corner of the house. The car, a coupe, was facing toward the rear, had the left door open, and was standing on the driveway at the southeast corner of the dwelling. There was a dense growth of shrubbery and weeds on both the north and south sides of the driveway. On the south side about 2 feet back of the rear end of the car there was a recess in the weeds and shrubbery as if someone recently had stood there. At the southeast corner of the house there was "quite a quantity of blood down in the weeds" and a trail of blood spots extended from that point west along the driveway to the body, where there was a large quantity of blood (R. 66-70, 149-151, 160-161; Exs. 4, 5, 7, 8, 10).

An autopsy performed by a pathologist upon the body of Mr. Wood on the afternoon of 22 July disclosed a hole through the middle of the left thumb at the first joint, some excoriation or skinned places "over his nose and eye" and a wound from a bullet which, after entering below the collar bone on the left side, had passed through the second rib, the upper lobe of the left lung, the pericardium sack, the pulmonary artery, the middle lobe of the left lung and had lodged under the skin over the fourth rib on the right side. Death resulted from a hemorrhage induced by the penetration

of the pulmonary artery. The pathologist estimated that the weight of the deceased was about 175 pounds (R. 27-29).

A .22 caliber Hamilton and Richardson revolver was found shortly after 4:00 p.m. on 23 July in a street drain at the corner of Second and Taylor Streets in Amarillo about 2 miles from the Wood home and about 2 blocks from the Amarillo Hotel where accused had been living. This revolver, which was introduced in evidence (Ex. 6) contained seven loaded cartridges. The other two chambers of the cylinder were empty. The revolver had been stolen from the residence of Mr. H. H. Ratliff, the owner, about a week or ten days prior to 21 July. Ratliff was well acquainted with accused and they had been in Mr. Wood's cafe together drinking beer "three or four or five times". Accused on one occasion had remarked to Ratliff that Mr. Wood always carried a lot of money and that he (accused) would like to have "what Mr. Wood was worth or what he carried" (R. 45-49, 73, 86-89).

Mr. Charles D. Woodall met accused in Amarillo about 7 or 8 July and several days later, at the suggestion of accused, they drove out to Ratliff's house in a taxicab to get some liquor. Accused went into the house while Woodall remained in the cab. After four or five minutes accused returned and as it "appeared" that the whiskey "was gone" they went to the hotel room where Woodall was staying. There accused removed a pistol from the inside of his shirt and stated that he had taken it from the house which they had just visited. That evening at a night club accused introduced Woodall to Ratliff, gave Woodall the gun to carry and stated that he did not want Ratliff to know that it was in his possession. Upon their return to Woodall's Hotel, the Blackstone, Woodall returned the gun to accused. At the trial when Woodall was shown the revolver found in the street drain (Ex. 6) he stated that "It appears to be the gun" (R. 51-56).

Mr. Glenn W. Wilson met accused about 15 days prior to 22 July. Wilson knew Ratliff and while on a fishing trip had fired the latter's .22 revolver. One afternoon about 12 July in Wilson's room in the Blackstone Hotel, accused stated that he had "swiped" a gun from Ratliff and took the revolver out from under the mattress on the bed. It looked to Wilson like Ratliff's gun. Wilson told accused to take it away from there as he did not want Ratliff to think that he (Wilson) had it (R. 59-62).

The Ratliff revolver and two bullets, one taken from the body of the deceased and another which fell from his clothing during the autopsy, were sent to the Washington laboratory of the Federal Bureau of Investigation where they were examined by Mr. Thomas F. Boughman, the head of the fire-arms and explosives section of the laboratory. He found that the two bullets were .22 caliber "Western Illinois" bullets similar to a number of cartridges which were submitted with the revolver. The rifling marks on the bullets were similar to the marks left by a .22 caliber Harrington and Richardson revolver. Mr. Boughman fired four test cartridges in the Ratliff

revolver and, with the aid of a special microscope, compared the test bullets with the two evidence bullets. He found a number of "individual similarities" between the two groups but they did not have enough individual characteristics or markings to positively identify the Ratliff gun as the weapon from which the evidence bullets were fired. Mr. Boughman also found some minor differences in the markings on the two groups of bullets but such differences were not irreconcilable and could have been due to changes taking place in the gun from shot to shot. It was not possible to make a positive identification of bullets fired from the Ratliff gun for the reason that its barrel markings were not sufficiently characteristic (R. 73-74, 76-85; Ex. 17).

Private A. B. (Ted) Latham, who had been in the Army only thirteen days at the time of the trial, became 19 years of age on 21 October 1943. His home was in Amarillo and he had been working as a cook for about a year and a half or two years. He met accused and they became "pretty good friends" prior to the death of Mr. Wood. Latham did not know Mr. Wood and had never been out to his house prior to 21 July 1943. On that day at about 11 p.m. Latham met accused and they went to the latter's hotel room. At the suggestion of accused they then went to a pool hall, where they arrived at about 11:30 p.m., but left in a few minutes, walked to a taxicab stand and took a cab to "Nat's" dance hall. They "stayed around" only a short time and did not go into the hall (R. 104-107).

When asked by the prosecution "where did you go from there" Latham stated that "from here on out it might incriminate myself" and asked whether he was correct in assuming that he was not "compelled to testify". After considerable discussion between the prosecution and the law member, the witness was directed to answer the question. He then stated that, at the suggestion of accused, he accompanied the latter to Mr. Wood's home to "borrow some money" which they needed to go to the dance. Mr. Wood was not there, the lights were off in the house and Latham left and went to the residence of his uncle 5 or 6 blocks away, after telling accused that he wanted to see his cousin about going to California the next morning. Accused said that he would wait there for Latham but when Latham returned about thirty minutes later accused was not in sight. Subsequently he came out of some bushes on the north side of the house, Latham asked what he was hiding from and accused replied that he intended to rob the man who lived there. Latham stated that he "was going to leave". They engaged in a discussion during which accused said that the man who lived in the house (Wood) "had a sum of money", that accused knew Latham was going to California and might want some of it and that he knew that Latham had been in some trouble before. Latham testified that this reference was to "trouble" which resulted in his being sent to a reform school when he was 15 years of age. After some further conversation, accused pulled out a pistol and said that "he had a good mind to shoot" Latham. An automobile

came down the street, accused remarked, "Here comes the car now" and Latham left. He went south about half a block, east half a block to the alley, south along the alley for about two blocks, and west to his uncle's house. Just about the time he reached the alley he heard a noise that sounded like a shot from a gun (R. 107-118).

Latham's uncle took him back to town in his car. Latham did not return to his own hotel but went to "another place". The next morning when he returned to his hotel room about 8:30 or 9:00 he found a note there which read "Come to my hotel room". He had learned by that time that Mr. Wood had been killed. The note was "printed" and not signed but as he had "a pretty good idea" who had written the note, he went to the room of accused in the Amarillo Hotel and found him in bed. Latham stated that accused had killed a man and accused said that "he wished to hell he got his money" and that he intended to leave town. Accused asked Latham not to ever say anything "about it" and Latham said that he "wouldn't" (R. 118-120).

On cross-examination Latham testified that after he had been arrested and questioned by the police he told them that he and the accused separated at the Nat dance hall, that Latham went to his uncle's house and that he did not again see the accused until the next morning. Civilian defense counsel asked Latham, whether, while in counsel's office in Amarillo, he had not told a story which, if true, would cause him to be charged with or indicted for murder in Texas. Latham replied, "I told you a story that if it was true I would be an accessory". (Under examination by the court Latham admitted that his statement to the attorney was "a different story altogether, nearly" from his testimony at the trial). After being transferred to the county jail Latham had been shown a hat which he wore on the night of 21-22 July. In the county jail he had told a "story" substantially in accord with his testimony at the trial. The hat was one which he had borrowed from his friend Tommy Tomlinson. Neither of them usually wore a hat and when he saw Tomlinson wearing one on the evening of 21 July Latham took it and decided to wear it just as a "kind of a joke". Latham had thrown the hat away after he had gone about two blocks from the Wood home. Latham stated that he had first seen "this gun" (the Ratliff revolver) in front of Mr. Wood's house. During the three months he had known accused Latham had been in the room of accused in the Amarillo Hotel two or three times. When defense counsel asked Latham to repeat his statement made in counsel's office, Latham declined to do so on the ground that it might tend to incriminate him. The law member ruled that he would not be required to answer. Latham stated that after leaving Mr. Wood's residence he walked about a quarter of a block then ran for about a block and a half or two blocks. It was about 1:00 a.m. when he returned to the Tyler Hotel where he stayed the rest of the night. Latham lived at the Milner Hotel (The Tyler Hotel is 6 or 7 blocks from the Milner Hotel and in the opposite direction from the place where the revolver was found). (R. 125-135, 142).

While Latham was in the county jail he had told Mr. W. W. Adams, the sheriff, that he would not make a statement. Subsequently, however, he asked that he be permitted to write out a statement in his own way. Mr. Adams put him in a cell, gave him a pencil and paper and in about forty or fifty minutes Latham called the sheriff and gave him a written statement. Latham had been committed to a reformatory for car theft when he was 15 or 16 years of age (R. 153-155).

At about 10:00 a.m. on the morning of 22 July accused visited Mr. Wilson at his room in the Blackstone Hotel and sold Wilson two suits of clothes for $40. Accused had tried unsuccessfully to sell the suits to Wilson the previous week. On both occasions accused stated that he was selling the suits because he wanted to leave town. Accused was arrested in a room of the Main Hotel in Amarillo about 4:00 a.m. on 23 July (R. 15-16, 20-21, 101-103).

4. For the defense, Mr. A. C. Hendrick, the uncle of Private Latham, testified that after he had gone to bed, on the night of C. C. Wood's death, Latham awakened him by "hollering" at his bedroom window. Hendrick did not know what time it was as he did not look at a clock but thought that it was after 11:00 p.m. Latham came back again, Hendrick got up and dressed without turning on a light and took Latham downtown to the Tyler Hotel in his car. It was then after twelve o'clock but how much later he could not say. On the way back when he stopped in at "the paint mill" to look for his son, he looked at a clock, and could see that it was before 1:00 a.m. He did not have his glasses and the time may have been two or three or twenty minutes to one. It is about twenty or twenty-five blocks from the residence of Mr. Hendrick to the Tyler Hotel (R. 165-173).

Mr. Charles Sherman (colored) testified that for six or seven months he had worked as night elevator operator, from 11:00 p.m. to 7:00 a.m. at the Amarillo Hotel. He ran the only elevator in operation during those hours. He remembered reading an account of Mr. Wood's death in the morning paper and that the preceding night he had taken accused up to his room in the elevator at about 11:45 p.m. Sherman "joshed" accused about going up earlier than usual. He did not see accused leave the hotel after that (R. 174-179).

On cross-examination and examination by the court Sherman stated that the newspaper in which he read an account of the killing of Mr. Wood came out about 5 or 6 a.m. It was the Amarillo News and a boy brought it to the hotel every morning. He did not know until the arrest of accused several days later that accused was involved in any way in the Wood case. He did not tell any policeman or sheriff about seeing accused in the elevator at 11:45 on 21 July. He discussed it with the porters in the hotel "after reading the paper that morning". There is a clock "right in

front of the elevator" where Sherman could see it every time he opened the door. He looked at the clock when accused entered the elevator on the evening of 21 July and it was 11:45 (R. 179-183, 185-191).

Recalled as a witness for the defense, Mr. J. L. King, testified that when Latham was arrested on 25 July he had stated that he met accused at about 11 p.m. on 21 July, that after having a drink in the hotel room of accused they went to a pool hall and rode in a taxicab to the Nat dance hall, and that Latham then went to the home of his uncle to see his cousin about accompanying him on a trip to California the next day (R. 192-194).

Mr. Charles D. Woodall who also was recalled as a witness for the defense, testified that he and accused went out to Ratliff's house, where accused took the .22 revolver, at about 6:00 or 7:00 p.m., and that they had been together since one or two o'clock in the afternoon of that day. They had been drinking "liquor" and had consumed "possibly less than a pint" prior to their visit to Ratliff's house (R. 198-200).

Accused testified that he enlisted at Jefferson Barracks, Missouri, 28 February 1942 and that in three or four days he was sent to Camp Wolters, Texas. He had enlisted for the purpose of joining a parachute battalion and when he was detailed to attend "a cook and baker's school", became discontented and without leave went to Kansas City to see his mother. After about ten days he returned to his organization, was tried by summary court-martial and sentenced to "thirty days in the guardhouse". After serving his sentence he was sent to Fort Benning where he stayed for ten days. He asked for a transfer to a parachute company but his request was denied and he "left again with that same discontent". He was arrested in Minneapolis, "due to a disturbance in a night club" and the next morning revealed his true identity, and asked that he be turned over to the military authorities. After a thorough investigation of the case he was informed, as nearly as he could remember by a police inspector and two agents of the Federal Bureau of Investigation, that "the Army" had "released" him and turned him over to the civil authorities. He was "transferred" to Cincinnati, Ohio, where he was kept in the county jail from 4 or 5 December 1942 until the latter part of February 1943, although no indictment had been returned against him so far as he knew. Accused and four other prisoners escaped from jail. A bank robbery charge was involved and accused joined in the jail break because he did not want to stand trial with the others with whom he was "caught". At the time of his arrest in Minneapolis he had been in bed in a hotel room and his Army uniform had been in the closet. He had dressed in civilian clothes and asked "them" to bring "the rest of his things" to him at the jail. After his escape from jail accused took the name of Jack Edwards. He worked at an aluminum plant in Phoenix, arrived in Amarillo in April 1943, immediately

went to work in the Club Cafe, and had been out of work not more than two weeks at the time of his arrest. Shortly after his arrival in Amarillo he met Ted Latham, who also was working as a cook and they became well acquainted. Before 22 July accused had planned to leave Amarillo. He had a younger brother in glider school at Albuquerque and he wanted to go there, "contact him and arrange to give myself up". This brother was in Albuquerque when accused, who was then in jail in Cincinnati, had last received a letter from him. While he was a fugitive accused had not communicated with his relatives but after his arrest in Amarillo he communicated with them again and learned that his brother had been transferred from Albuquerque (R. 201-215).

Accused admitted taking the gun from Ratliff's house "with no apparent reason" in his mind "whatsoever". He had been there several times, had bought whiskey from Ratliff and went for that purpose with Wilson. He took the gun "more or less to listen to Snake [Ratliff] holler" when he discovered that it was gone. He offered to give the gun to Wilson and "started" to leave it in his room. Accused put the gun in a dresser drawer in his own room. He had never examined it thoroughly and did not know whether or not it was loaded. The gun was not there when he was packing up on 22 July although he had never taken it from the room (R. 217-218).

Accused further testified that Latham came to his room with another man about 3:00 p.m. on 21 July. Accused was still in bed or just getting through bathing, they drank some ale and Latham told accused that he planned to go to California with another boy named Johnny "via a travel bureau". Accused told Latham that he was planning to go to Albuquerque. Latham and his companion left after about an hour and accused next saw Latham at the Tyler Hotel at about eleven o'clock. They went to the Amarillo Hotel together and from there to a pool hall where accused had a game of pool "lined up" for Latham. Accused intended to bet on the game and he had between $20.00 and $25.00 at that time. At the time of his arrest accused had about $13.00. After selling the suits to Wilson he had paid his hotel bill, which was about $30 and bought a ticket to Albuquerque for which he paid $6.72. As the pool hall was out of beer and "deserted" accused and Latham went in a taxicab to the Nat dance hall where they stayed only a few minutes. Latham said that he was going to his uncle's house to see his cousin Johnny about making reservations at the travel bureau for the trip to California the next day and left. Accused took a taxicab downtown, got out at 3rd and Polk or 4th and Polk and went to the Milner Hotel where he left a note informing Latham that accused would be in his hotel room. His purpose in leaving the note was to ascertain whether Latham "had made connections at the travel bureau or if they had space open" for accused to go. If so he would have tried to make connections to go to Albuquerque. From the Milner Hotel accused went to his room in the Amarillo Hotel and rode up in the elevator

with the operator Charles Sherman at some time before 12 o'clock. At about 9:30 a.m. on 22 July Latham came to the room of accused and awakened him by knocking on the door. They did not discuss the murder of Mr. Wood. Accused went to Wilson's room at about 11:30 a.m. and there, for the first time learned of Mr. Wood's death. He tried to make a bus reservation by calling from Wilson's room but was unable to do so as it was "sold out or over-crowded". At about 1:00 p.m. he checked out of the Amarillo Hotel and bought a bus ticket. At 7:00 p.m. he went to the bus depot but there was such a large crowd waiting to board the bus that he decided to postpone his departure until the next day. He accompanied some friends to their hotel, called at the Santa Fe depot to inquire about accommodations to Albuquerque, went to a cafe with a friend and had something to eat checked in at the Main Hotel at one or two o'clock in the morning of 23 July and was arrested two or three hours later. His baggage, which had been checked at the bus station, had gone on to Albuquerque. Accused stated that he did not go to the Wood home as Latham testified and that he left Latham at the Nat dance hall between eleven thirty and twelve o'clock (R. 219-228, 245-246).

On cross-examination accused testified that he last saw the .22 revolver ten or eleven days prior to Mr. Wood's death when he showed it to "Mrs. Folson". He kept it at the bottom of a bureau drawer "amongst" his clothes. He had seen Ratliff twice after taking the gun and on one of these occasions Ratliff mentioned that someone had taken his gun. He never told Ratliff that he had it. Accused had been planning to leave Amarillo for several days but admitted that he may have told Mr. Wilson that it would be better for accused to leave town as he "figured there would be a general round-up of men for this crime" (R. 236-238).

5. Recalled as a witness at the instance of the court Charles Sherman testified that he started operating the elevator at the Amarillo Hotel on the night of 21 July at 11 o'clock. There were two or three elevators in operation prior to 11:00 p.m. but only one after that time. Sherman did not see accused prior to 11:45 p.m. and did not think that he took accused up on the elevator more than the one time that night. Sherman read the account of Mr. Wood's death in a newspaper on 22 July at about 5 or 6 o'clock in the morning. He stated that it could not have been as late as 8:00 a.m. as he left the hotel at 7:00 a.m. (R. 253-256).

Recalled as a witness for the court Private Latham testified that it was about eleven o'clock when he and accused left the Tyler Hotel together on the evening of 21 July. He could not fix the time positively. He had looked at a clock shortly before accused came up to his room and it "wasn't eleven o'clock". They went up to the room of accused in the Amarillo Hotel in the elevator but Latham could not remember whether Sherman, any other colored person or a girl was operating the elevator at that time. Latham had first read an account of the death of Mr. Wood in a newspaper that came out about 10:30 or 11:00 a.m. on 22 July. However,

on his way from the Tyler Hotel to his room at the Milner Hotel, Latham stopped in at a cafe where the proprietor told him that Mr. Wood had been shot the night before (R. 260, 263, 266).

Mrs. Wood also was recalled as a witness for the court. She testified that Mr. Wood was driving the car as they approached their house on the night of his death. She did not see a man walking from her house toward the corner. Although she was on the side of the car next to the sidewalk she did not know whether she would have seen a man walking on it as "there are trees along there". Upon being asked how much time elapsed after Mr. Wood let her out of the car and she went up on the porch until he arrived "around to the driveway" she replied that it was only "a few minutes", "Just as long as it takes to walk through the house and stop and turn on the light in each room. That is all I did, turn on the light in each room as I went along". She had unlocked the front door and gone through three rooms but had not unlocked the back door when she heard her husband cry out (R. 268-270).

It was stipulated between the prosecution and the defense that on the morning of 22 July the Amarillo News did not carry any account of the "Wood homicide" and that the earliest newspaper account of such homicide in any Amarillo newspaper appeared in the Amarillo Times which reached the streets between 9:30 and 10:00 a.m. that day (R. 272).

6. Mr. George S. McCarthy of the Amarillo, Texas bar, individual counsel for the accused, made an oral argument before the Board of Review. At the suggestion of the Board he has submitted a printed map of the City of Amarillo published by the Sears Map and Blue Print Company. This map, which has been attached to the record of trial, has helped the Board to visualize the relative positions of the various places in Amarillo mentioned by the witnesses.

7. a. Charge II. According to the undisputed evidence accused absented himself without leave from his organization at Fort Benning, Georgia, on 3 August 1942, was apprehended by the civil police at Amarillo, Texas, on 23 July 1943, dressed in civilian clothes and living under an assumed name, and was returned to his organization on 14 September 1943. The circumstances are such as amply to support an inference that he did not intend to return. In the opinion of the Board of Review the evidence is legally sufficient to sustain the findings of guilty of desertion.

b. Charge I. The evidence shows that Mr. C. C. Wood, the proprietor of a cafe in Amarillo, Texas, who had driven with his wife from his place of business to his home, was shot to death shortly after midnight, 22 July 1943, on a driveway beside the house, after Mrs. Wood had gone in to turn on the lights. He customerily carried large amounts of

cash and he had on his person at the time about $750, none of which had been taken when his body was found.

According to the testimony of Ted Latham, a witness for the prosecution, he and accused had visited the Nat dance hall that night and had gone to the Wood residence to borrow some money at about midnight but had found no one at home. Latham then went to see his uncle who lived 5 or 6 blocks away and returned in about half an hour. Accused, who was not in sight, came out of some bushes beside the house and stated that he intended to rob the man who lived there. When Latham expressed an intention to leave, accused after some discussion, pulled out a pistol and said that "he had a good mind to shoot" Latham. Just then a car came down the street and Latham left. When he had gone about a block he heard what sounded like a shot from a gun. He rode to town in his uncle's car, stayed at the Tyler Hotel, and next morning when he returned to his own hotel, the Milner, found an unsigned note which read "Come to my hotel room". As he thought he knew who had left the note Latham went to the hotel room of accused and found him in bed. Latham told accused that the latter had killed a man and accused remarked that "he wished to hell he got his money", stated that he intended to leave town and asked Latham to say nothing "about it".

Accused testified that he and Latham, after being together earlier in the evening, went to the Nat dance hall in a taxicab but stayed only a few minutes and separated there. Latham told accused that he was going to his uncle's house to see his cousin about making arrangements at the travel bureau for transportation to California. Accused went back downtown in a taxicab, got out near his own hotel, walked to the Milner Hotel where he left a note for Latham, then returned to his own hotel. Accused specifically denied that he was at any time that night in the vicinity of Mr. Wood's residence or that he had anything to do with the man's death.

The testimony of accused is directly in conflict with the testimony of Latham. If the latter is accepted as a substantially accurate account of the acts and declarations of accused then the evidence is amply sufficient to show the guilt of the accused of the murder charge now under consideration. Conversely, if the testimony of Latham is rejected the evidence clearly is insufficient. In order to resolve the question thus presented it will be necessary to consider and to weigh the factors adversely affecting the credibility of Latham and the circumstances which tend to corroborate and support his testimony.

At the time of the trial Ted Latham lacked about 10 days of being 19 years of age. When he was 15 or 16 years old he had been convicted of larceny of an automobile and committed to a reformatory. After his arrest in connection with the present case he told the police that he and accused had separated at the Nat dance hall and that he had not again seen the

accused until the following morning. It was only after he had been shown a hat worn by him on the night of 21-22 July which had been found near the scene of the crime that he made a statement substantially in accord with his testimony at the trial. After his release from police custody Latham visited the office of the attorney who represented the accused as individual counsel and told the attorney a "story" which was "different altogether, nearly" from his testimony. Latham admitted that if this story were true he would be subject to prosecution as an accessory to the murder.

The foregoing factors detract from the credibility of Latham but on the other hand the attendant circumstances in many respects tend to lend support to his testimony. Accused knew the deceased from visiting and drinking beer in his cafe and, according to the witness Ratcliff, had on one occasion remarked that Mr. Wood carried "a lot of money" and that he (accused) would like to have what Mr. Wood carried. Mr. Wood's death was caused by a wound from a .22 caliber bullet which lodged in his body. Another .22 caliber bullet, no doubt the one that passed through his thumb, was found in his clothing. A woman standing at a street corner a short distance from the Wood residence heard two shots fired. A twenty-two caliber revolver was found in a street drain in Amarillo the next day. Seven of its nine chambers contained loaded cartridges and the other two were empty. Tests made by a firearms expert did not establish to a mathematical or scientific certainty that the two bullets taken from the body and the clothing of Mr. Wood were fired from that revolver, it is true, but the tests and the surrounding circumstances clearly show that in all reasonable probability such was the case. It is not disputed that the revolver had been stolen by the accused about ten days before 22 July and there is no evidence that he disposed of it or that it was taken from him prior to that date. He testified that he put it in the bottom of a dresser drawer under some clothing and he noticed that it was gone when he packed up his belongings and left his hotel room on 22 July. It does not appear that anyone else knew where accused had concealed the revolver. The street drain in which it was found was only about 2 blocks from the Amarillo Hotel where he resided.

It is not disputed that accused left at the Milner Hotel the note which Latham found when he returned to his room on the morning of 22 July. The note bore only the cryptic message "Come to my hotel room". It was hand printed and it was unsigned. According to the testimony of accused he left it only a short time before midnight and its plain import was that Latham, who would be coming back to his own room to sleep that night, so far as accused knew, was to come to the room of accused in another hotel about two blocks away at once. All of the circumstances of the leaving of the note are consistent with the testimony of Latham. If accused committed the murder and Latham had reason to believe that he had done so and had fled from the scene of the crime, accused naturally would feel a compelling urgency to see and talk with Latham at the earliest possible moment and upon leaving a note for him would fashion it in such a manner that it would not disclose

to others the identity of the writer. On the other hand, if, as he claimed, accused merely wanted to find out about the arrangements made by Latham and his cousin with reference to their contemplated trip to California, in all probability accused either would have gone with Latham from the Nat dance hall to the home of Latham's uncle only about 5 or 6 blocks away according to the map, or would have waited until morning to see Latham.

Latham testified that he went to the room of accused in the Amarillo Hotel at about 9 a.m. on 22 July, told accused that the latter had killed a man and accused stated that he intended to leave town. Accused admitted that Latham came to his room that morning but asserted that he did not learn of Mr. Wood's death until some time later when he was in Mr. Wilson's room in the Blackstone Hotel. It is not disputed that shortly after Latham's visit accused went to Wilson's room and sold two suits of clothes to Wilson, that he telephoned from Wilson's room in a vain effort to make bus reservation to Albuquerque and that later the same day he bought a bus ticket to Albuquerque, checked out of the Amarillo Hotel, and went to another hotel where he was arrested on the early morning of 23 July. Accused claimed that for several days he had been planning to leave Amarillo and that when he learned of the murder of Mr. Wood he thought that it would be advisable to go away because he did not wish to be caught in a general police "round-up". He was corroborated to some extent by Mr. Wilson who testified that accused tried to sell him the two suits about a week prior to 22 July and then stated as a reason that he (accused) intended to leave town. Nevertheless the circumstances of the attempted flight of accused, particularly his going out to sell his clothes at 10 o'clock in the morning when, according to his own testimony, he did not know that a murder had been committed the night before, definitely lend support to the testimony of Latham.

Accused and Latham appear to have been on very friendly terms and it is difficult to conceive why the latter should fabricate a story involving accused unless Latham committed the crime and falsely implicated accused to shield himself. If Latham planned and attempted to rob Mr. Wood, it seems unlikely, to say the least, that he would go to the Nat dance hall with accused and twice to the house of his uncle and thus voluntarily give two persons knowledge that he was near the scene of the crime at about the time it was committed.

The Board has considered but does not regard as convincing the testimony of Charles Sherman the elevator operator to the effect that accused rode up to his room in the elevator at 11:45 p.m. on 21 July. Sherman did not have any reason to think of accused in connection with the killing of Mr. Wood until several days after the murder when he learned of the arrest of accused. At that time Sherman could easily have mistaken the date on which accused rode with him in the elevator. That his memory was not too

accurate or reliable is indicated by his positive and insistent testimony to the effect that he read an account of the death of Mr. Wood in a newspaper at some time prior to 8:00 a.m. on 22 July, when as a matter of fact the first Amarillo newspaper to carry the story did not reach the streets until between 9:30 and 10:00 o'clock that morning.

Although in Presidential cases it is the function of the Board of Review to weigh the evidence, nevertheless on a question of the credibility of witnesses who testify in person at the trial, the findings of the trial court, whose members enjoy the opportunity to hear and observe the witnesses, while not conclusive, are entitled to considerable weight (Dig. Ops. JAG 1912-40, sec. 395 (56); CM 153479; CM 243466, Calder). In accordance with that principle the Board of Review attaches importance to the fact that the court in the present case has, by its findings, accepted the testimony of the witness Latham and rejected the conflicting testimony of accused.

In view of the foregoing considerations and accepting as substantially true the testimony of the witness Latham, the Board of Review is of the opinion that the evidence shows beyond a reasonable doubt that the accused attempted to rob C.C. Wood and in so doing shot and killed him. Murder is the unlawful killing of a human being with malice aforethought. Malice, however, does not mean personal ill-will toward the person killed nor necessarily an actual intent to take his life. Malice aforethought as an essential element of murder may consist of an intent, preceding or coexisting with the act by which death is caused, to commit a felony (MCM, 1928, par. 148a). In the instant case, the intention of accused to commit the crime of robbery supplies the requisite malice aforethought and the unlawful homicide is, therefore, murder.

8. The Charge Sheet shows that accused is 27 years of age and that he enlisted on 28 February 1942.

9. The Board has given consideration to a letter dated 27 December 1943 from Mr. McCarthy, individual counsel for the accused, inclosing two affidavits.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of a violation, in time of war, of Article of War 58, or of a violation of Article of War 92.

Samuel M. Drion, Judge Advocate

[illegible], Judge Advocate

[illegible], Judge Advocate

1st Ind.

(58)

War Department, J.A.G.O., 26 APR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Harry R. Bever (17045348), Headquarters and Headquarters Company, 2nd Battalion, 505th Parachute Infantry, Fort Benning, Georgia.

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 deserted the service of the United States on 3 August 1942 and remained absent in desertion until apprehended on 14 September 1943 (Spec., Chg. II) and on 22 July 1943 murdered a restaurant owner by shooting him with a pistol while attempting to rob him (Spec., Chg. I).

It appears from a letter dated 13 October 1943 and attached and related documents, directed to me by Mr. Tom C. Clark, Assistant Attorney General of the United States, that on 23 February 1943 accused and two other men were jointly indicted in the United States District Court for the Southern District of Ohio, Western Division, for armed robbery of a national bank and violation of the National Motor Vehicle Theft Act, on 31 October 1942 and that on 23 November 1942 accused, without provocation shot a soldier through the jaw. The record in the present case shows that accused and several other Federal prisoners escaped from jail in Cincinnati, Ohio, the latter part of February 1943.

Attention also is invited to the FBI Law Enforcement Bulletin, May-June 1943 in which there is an article beginning on page 39 describing the extensive criminal activities of the accused. I recommend that the sentence to be hanged by the neck until dead be confirmed and carried into execution.

3. Consideration has been given to the following letters directed to the President requesting clemency in behalf of the accused; one from Mrs. Olivene Ruth West of Upland, California, dated 23 October 1943 inclosing a petition and another dated 23 December 1943 from Mrs. Blanche Bever of Kansas City, Missouri, the mother of accused. A communication dated 17 January 1944 from Honorable Harry S. Truman, United States Senator, submitting to me a letter, petition and other documents bearing on the question of clemency also have been considered.

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

Myron C. Cramer

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

10 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Map of Amarillo.
Incl.5-Ltr. fr. George S.McCarthy, 27 Dec. 1943, w/2 Affidavits.
Incl.6-Ltr. fr. Tom Clark, 13 Oct.43, w/2 Inds. and 3 Incls.
Incl.7-FBI Law Enforcement Bull.,w/1 Ind.
Incl.8-Ltr. fr. Mrs. Olivene Ruth West, 23 Oct.43, w/1 Incl.
Incl.9-Ltr. fr. Mrs.Ruth Bever, 23 Dec. 1943.
Incl.10-Memo. fr. Sen. Harry S.Truman, 17 Jan. 1944, w/5 Incls.

(Sentence confirmed. G.C.M.O. 422, 21 July 1944)

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

SPJGK
CM 243683

10 DEC 1943

UNITED STATES	)	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Camp Carson, Colorado, 2 November 1943. Dismissal and total forfeitures.
Second Lieutenant WOODROW W. BOWLING (O-1578193), Quartermaster Corps.	)	

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

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

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

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

Specification 1: In that Second Lieutenant Woodrow W. Bowling, Quartermaster Corps, did at Camp Carson, Colorado, on or about 30 June 1943, present for payment a claim against the United States, by presenting to Lt. Col. E. J. Berry, Finance Officer, at Camp Carson, Colorado, an officer of the United States, duly authorized to pay such claims, in the amount of $252.90, for net balance of pay and allowances due him, the said Second Lieutenant Woodrow W. Bowling, which claim was false in that the said Second Lieutenant Woodrow W. Bowling had theretofore on or about 17 June 1943, at Cincinnati, Ohio, received partial payment in the amount of $110.00, and was then known by the said Second Lieutenant Woodrow W. Bowling to be false.

Specification 2: In that Second Lieutenant Woodrow W. Bowling, Quartermaster Corps, did at Camp Carson, Colorado, on or about 31 July 1943, present for payment a claim against the United States, by presenting to Lt. Col. E. J. Berry, Finance Officer, at Camp Carson, Colorado, an officer of the United States, duly authorized to pay such claims, in the amount of $253.60, for net balance of pay and allowances due him, the said Second Lieutenant Woodrow W. Bowling, which claim was false in that the said Second Lieutenant Woodrow W. Bowling had theretofore on or about 17 June 1943, at Cincinnati, Ohio, received partial payment in the amount of $110.00, and was then known by the said Second

Lieutenant Woodrow W. Bowling to be false.

Specification 3: In that Second Lieutenant Woodrow W. Bowling, Quartermaster Corps, did at Camp Carson, Colorado, on or about 31 August 1943, present for payment a claim against the United States, by presenting to Lt. Col. E. J. Berry, Finance Officer, at Camp Carson, Colorado, an officer of the United States, duly authorized to pay such claims, in the amount of $100.80, for net balance of pay and allowances due him, the said Second Lieutenant Woodrow W. Bowling, which claim was false in that the said Second Lieutenant Woodrow W. Bowling had theretofore on or about 17 June 1943, at Cincinnati, Ohio, received partial payment in the amount of $110.00, and was then known by the said Second Lieutenant Woodrow W. Bowling to be false.

Specification 4: In that Second Lieutenant Woodrow W. Bowling, Quartermaster Corps, did at Camp Carson, Colorado, on or about 30 September 1943, present for payment a claim against the United States, by presenting to Lt. Col. E. J. Berry, Finance Officer at Camp Carson, Colorado, an officer of the United States, duly authorized to pay such claims, in the amount of $102.90 for net balance of pay and allowances due him, the said Second Lieutenant Woodrow W. Bowling, which claim was false in that the said Second Lieutenant Woodrow W. Bowling had theretofore on or about 17 June 1943, at Cincinnati, Ohio, received partial payment of $110.00 and on or about 21 September 1943, at Cincinnati, Ohio, had received partial payment in the amount of $120.00 and on or about 24 September 1943, at Fort Thomas, Kentucky, had received partial payment in the amount of $100.00, and was then known by the said Second Lieutenant Woodrow W. Bowling to be false.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specifications, and not guilty of Charge II and its Specifications. No evidence of previous convictions was introduced. He was sentenced "to be dishonorably 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. Summary of evidence. On 15 June 1943 accused presented himself at the office of the Army Finance Officer in Cincinnati, Ohio, and by means of his identification card, W.D., A.G.O., Form 65-1, introduced himself to First Lieutenant Hunter L. Pinney, Finance Department, United States Army. Accused presented to this officer a pay voucher for partial payment in the sum of $110. There is no evidence to show who prepared the voucher, but it is clear that accused signed and presented it (R.9,10; Ex. D). He received $110 in cash (R.9,10). He was at that time on leave from his station at Camp Carson, Colorado, where he had been stationed since being commissioned a second lieutenant in September of the previous year (Ex. D).

On 30 June 1943, accused signed and presented a pay voucher at Camp Carson, Colorado, for the full amount of his pay and allowances for that month, less a deduction of $6.60 for National Service Life Insurance (R.7; Ex. A). There appears no deduction for the $110 received in Cincinnati. Check No. 139788 dated 30 June 1943 was issued to accused in the amount of $252.90. He cashed it and received the proceeds (R.7; Ex. A).

On 31 July 1943, accused signed and presented a pay voucher at Camp Carson, Colorado, for the full amount of his pay and allowances for that month, less a deduction of $6.60 for National Service Life Insurance and a further deduction for one field ration in the amount of 70 cents (R.8; Ex. B). There appears no deduction for the $110 received in Cincinnati on the previous June 15. Check No. 152541, dated 31 July 1943, was issued to accused in the amount of $253.60. He cashed it and received the proceeds (R.8; Ex. B).

On 31 August 1943, accused signed and presented a pay voucher at Camp Carson, Colorado, for the full amount of his pay and allowances for that month, less a deduction of $6.60 for National Service Life Insurance, a further deduction for five field rations in the amount of $3.50, and, appearing for the first time, a Class "E" allotment of $150 (R.8; Ex. C). There appears no deduction for the $110 received in Cincinnati on the previous June 15. Check No. 163119, dated 31 August 1943, was issued to accused in the amount of $100.80. This was the net amount after subtracting the deductions from the total pay and allowances due him for that month. He cashed this check and received the proceeds (R.8; Ex. C).

Accused personally signed the originals of all three of these vouchers (R.7,8,9). Who actually prepared them is not clearly brought out in the prosecution's testimony, although it appears to have been done for accused and other officers by the Finance Office (R.16,22).

On 21 September 1943, accused was again on leave. He presented himself at the office of the United States Army Finance Officer in

Cincinnati, Ohio, and presented to First Lieutenant Hunter A. Pinney a pay voucher for partial payment in the amount of $120 (Ex. E). He identified himself by means of his identification card, again stating that he was on official leave (R.10). This payment to accused was made by check No. 387803, dated 21 September 1943. Accused cashed the check and received the face amount thereof (R.9).

On 24 September 1943, accused presented himself at the Agent Finance Office, Fort Thomas, Kentucky, and identified himself to Master Sergeant Nick L. Kandaris, Finance Department, Cashier, by means of his officers' identification card. He stated that he was on official leave and in need of funds. A voucher was prepared for partial payment in the amount of $100, and signed by accused in Kandaris' presence. The prosecution's testimony does not show who actually prepared the voucher. Accused signed the cash receipt at the bottom of the voucher form and received $100 cash (R.9,10; Ex. F).

Some time after this last September payment the Finance Officer at Cincinnati notified the Finance Officer at Camp Carson that Lieutenant Bowling had drawn moneys in Cincinnati and at Fort Thomas in the manner previously set forth (R.12,15,16,18,19,22). Lieutenant Colonel Eugene J. Berry, Finance Department, Finance Officer at Camp Carson, a witness for the prosecution, was not certain of the date upon which it was received at Camp Carson, but it was "after the September partial payments had been made" and "sometime around the first of October" (R.12,13,16).

The Camp Carson Finance Office prepared accused's September pay voucher for him as a member of the station complement. First Lieutenant John F. Antwiller, Jr., Finance Department, Deputy Finance Officer for Camp Carson, testified that it was the practice of this office to do so, and to send the original to the officer for signature and certification, and to make any changes required (R.22). This is a courtesy to the officers, for they usually make out their own vouchers (R.22). This voucher had been prepared before the letter was received from the Finance Office at Cincinnati (R.16).

When Lieutenant Antwiller received the letter from Cincinnati, he called accused's office (apparently by telephone) and "told the girl to have him come up" (R.19). Witness testified, "I wanted to talk to him. I decided that I was going to see if he would say anything about it, and I instructed the people in the office not to mention it at all" (R.19).

Accused came in to the Finance Office on either the first Saturday or first Monday, "the 3rd or 5th" of October (R.14) (Note: October 2, 1943, fell on Saturday, but it is not material here). He went to Technician 4th Grade Warren E. Nutt, Finance Department, the assistant in charge of the Officers' Payroll Section, who was a witness for the prosecution.

Witness gave accused the pay voucher which had previously been prepared, and accused signed it. He used his initials instead of his name, as it was typewritten. Accused said that he was "used to signing stuff in my office that way". Witness got some ink eradicator and took accused's initials off, and told accused to "initial" the voucher where the initials had been removed (R.14).

Testimony does not disclose directly whether accused signed the voucher a second time with his full name, but it appears from Exhibit G that he must have done so, for at paragraph 16 thereof his full name is set forth, "/s/ Woodrow W. Bowling", immediately above the typewritten signature. Exhibit G, a copy of accused's Pay and Allowance Account for the month of September 1943, was admitted in lieu of the original without objection by defense (R.19).

Accused then asked Sergeant Nutt if Nutt could get him the money that day in cash, if possible. Witness took accused to Lieutenant Antwiller in the latter's office. Witness returned to his own desk. At no time did accused tell witness about any partial payments he had received in Cincinnati or at Ft. Thomas (R.15).

Lieutenant Antwiller asked accused what the trouble was. Accused said he wanted the balance of his September pay in cash. Thereupon Lieutenant Antwiller told accused about the letter from the Finance Department at Cincinnati, Ohio (R.18).

Accused admitted receiving the payments, but said he thought the Finance Department took care of those things (R.18,19,21).

The September pay voucher, as prepared prior to receipt of the letter from Cincinnati, and as signed and presented by accused, was for the full amount of accused's pay and allowances for that month, less deductions of $6.60 for National Service Life Insurance and a Class "E" allotment of $150 (R.18; Pros. Ex. G).

Witness told accused that before the Finance Office could pay him they would have to have either $330 in cash for the partial payments, or else the difference between $330 and $102.90, which was the balance of accused's September pay after deducting from it the $6.60 and $150. Accused said he would rather pay the difference between the $330 and $102.90, and said that he would be in in a week or ten days to straighten it up (R.18).

Witness next saw accused at approximately 5 o'clock of 2 November 1943, the day of accused's trial (R.18). At this time accused signed his pay voucher for October and requested witness to apply the October pay against the indebtedness (R.19-20). This left accused "a negative

balance" on his October pay (R.20). Accused made no cash reimbursement at any time (R.12,18,20). Accused did not at any time prior to October 3rd or 5th tell this witness of the partial payments he had received at Cincinnati or at Ft. Thomas (R.18).

Lieutenant Antwiller, a graduate of Officer Candidate School, testified that there is a universal means of reporting partial payments. They are recorded on the officer's pay data card, where there is a space for that purpose (R.20). It is not necessary for the officer to have his pay data card with him to receive payment. It carries no weight whatsoever with regard to the officer's pay, but is for his own information (R.21,22). Every partial payment of which witness had knowledge was reported by the officer himself, usually currently (R.20). When an officer has been on leave he is not questioned whether there has been a partial payment. His word is accepted. The officer certifies the voucher to be true and correct, to the best of his knowledge. Only on permanent changes of station are clerks instructed to ask officers if they have received any partial pay (R.21).

On 26 October 1943, accused made a signed statement to Second Lieutenant Richard W. Adney, Judge Advocate General's Department, the investigating officer. Lieutenant Adney explained to accused his right to make any statement he wished subject to its being used against him, and his right to remain silent. Accused made the statement introduced by the prosecution as Exhibit H. In it he says it was his intention before charges were preferred to pay the amount due the Government. He thought the Finance Officer at Cincinnati would send a copy of the partial payments to the Finance Officer at Camp Carson, showing the amount of partial payments. He did not intend to defraud the Government (R.22,23;Pros. Ex. H).

For the defense, the accused testifying in his own behalf stated that he enlisted in the Army 12 June 1939, and that he was commissioned in the Quartermaster Corps 25 September 1942.

Accused was on his first assignment as an officer at Camp Carson, where he was assigned as Assistant to the Supply Officer of the 136th General Hospital, later designated as the 36th General Hospital. In this unit it was apparently the practice for the personnel officer to make out the officers' pay vouchers and to submit them to the camp finance office (R.26,33). Accused, however, does not say who made out his pay vouchers after the 36th General Hospital left Camp Carson in the latter part of July, and he was transferred to the Station Complement (R.28,34).

Accused obtained a leave in June 1943, to visit his home in Kentucky and stopped off to visit his sister in Cincinnati (R. 27).

Here he ran short of money, so he went to the finance office in that city, presented a voucher for $110 for partial payment of salary for the

month of June, and received $110 cash (R.27; Pros. Ex. D). The record does not show who prepared this voucher, but it is clear that accused signed and presented it. He presented his pay data card and the finance officer there noted on the card the amount received. Accused stated that when he returned to Camp Carson he gave it to the personnel officer who made up the pay voucher (R.27).

Accused returned from his leave, and in the latter part of June presented a pay voucher for that month. Its contents are set forth in the stipulation introduced during the prosecution's case (R.7) and a copy thereof is found in Exhibit A. There was no $110 deduction from this pay, and accused says he spoke to the personnel officer about it. This officer told him "not to worry that it would be taken care of" (R.27). He did not go to the camp finance office (R.33).

When accused's organization was transferred, they did not return his pay card, on which, he says, the partial payment had been noted (R.27).

Likewise there was no deduction in the July pay for the $110. This time he mentioned it "to the finance officer" (R.28). He does not say who this officer was, nor what was his response. He received pay of $253.60 in July (R.31).

Later on he received another leave, going through Cincinnati to his home in Kentucky. This was apparently in September, for on the 21st of that month he drew partial pay of $120 and on the 24th the sum of $100 (R.28). The total was $220. The voucher for $120 apparently was made out for accused, for he says that "I stated to the girl * * * that made out the voucher, that I wished she would send a copy to Camp Carson so they would be notified" (R.30). Later he implies that he made this request when the other voucher was filled out (R.32).

Accused had made a Class N allotment to his wife of $150 per month of his pay, beginning probably in August. It was in effect at the time he drew the partial payments in September in Cincinnati and at Fort Thomas (R.29). He told his wife he was going to stop this allotment, but did not do so at that time, nor had he done so at the time of trial (R.29,34).

In August he presented a pay voucher for the full amount of his salary, less the deduction of $150 for his wife, and received $100.80 (R.31; Ex. C).

The first time he heard about the receipt of the letter from Cincinnati about the partial payments was about the 2nd or 5th of October when he was called into Lieutenant Antwiller's office. He "wanted to wait to see if they received a letter stating I had received those partial payments" (R.35).

Accused told Lieutenant Antwiller in October that he would repay the indebtedness "in a very short time, in a week or ten days". He "made every effort to get the money". He "could have gotten it from home, but I have always made my own way, and still wish to do so" (R.32).

Accused stated that he did not have any idea that possibly the Finance Officer would forget about the partial payments, and that he never had any intent to defraud the Government (R.35).

4. It is clear from the evidence that accused presented the four claims to the Finance Officer at Camp Carson, as alleged. It is equally clear that at the time of his presenting the June, July and August claims he knew that the Government owed him $110 less than the amount of each claim. It is clear that at the time of his presenting the September claim in early October, he knew he owed the Government $330, and knew that this indebtedness far exceeded the amount of his September pay. Accused knew that each of these claims was false.

In discussing this offense when it was set forth in identical language under the 60th Article of War, Winthrop says,

> "It is not the object or purpose of the party in transaction, but his knowledge that the claim is false or fraudulent which is made by the Article the gist of the offence. If he knew, or the circumstances of the case were such as properly to charge him with the knowledge, that the claim was a fictitious or dishonest one when made or presented, &c., he is amenable to trial under this part of the Article; * * *." (Winthrop, Military Law and Precedents, 2nd ed. rev., p. 701; see also CM 241208, Russell; MCM, 1928, par. 150 a.)

5. The sentence of the court (R.36) should not have contained the word "dishonorably" (MCM, 1928, Form 22, p. 273). The dismissal of an officer carries with it a stigma which is the equivalent in this respect of the dishonorable discharge of an enlisted man. The word may, however, be considered as mere surplusage, and no certificate in revision is necessary.

6. There is attached to the record of trial a recommendation of clemency signed by four of the eleven members of the court and by the defense counsel and assistant defense counsel, recommending that clemency be extended to the accused because of his youth and previous good character.

7. War Department records show that accused is 23-8/12 years of age. He graduated from Western Hills High School (Kentucky) in 1939

and is married. He enlisted in the Army 6 December 1939. He attended Officer Candidate School, Camp Lee, Virginia, from which he was commissioned second lieutenant, Quartermaster Corps, Army of the United States on 23 September 1942. In recommending accused for appointment to Officer Candidate School, his commanding officer, Major D. E. Bradford, Cavalry, rated his character as "Excellent".

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized under Article of War 94.

_____ Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 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 Second Lieutenant Woodrow W. Bowling (0-1578193), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures adjudged be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 68, 15 Feb 1944)

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

SPJGN
CM 243690

19 NOV 1943

UNITED STATES	)	76TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp McCoy, Wisconsin, 19 October 1943. Dismissal.
	)	
Second Lieutenant RICHARD N. MONTGOMERY (0-1285794), 417th Infantry.	)	

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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant RICHARD N. MONTGOMERY, 417th Infantry, did, without proper leave, absent himself from his organization at Camp McCoy, Wisconsin from about 26 September 1943 to about 1 October 1943.

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 Article of War 48.

3. The evidence for the prosecution shows that the accused, on 25 September 1943, was a member of an advance detail of the 417th Infantry which had arrived at Camp McCoy, Wisconsin, a few days previously from A. P. Hill Military Reservation, Virginia. The detail's commanding officer, having been advised of the accused's absence subsequent to the afternoon of Saturday, 25 September 1943, personally, but futilely, searched the organization's area for him on 27 September 1943 and daily thereafter until he returned about 0400 o'clock on 1 October 1943, as

the accused had requested no leave of absence either from the commanding officer or the adjutant. The adjutant, who knew that the accused had no leave, first learned of the accused's absence on Sunday, 26 September 1943, when the accused failed to appear at a scheduled meeting at 0730 o'clock; and did not see him until he reported at 0400 o'clock on 1 October 1943, when he offered no explanation of his absence but, in response to questions, stated that his wife and 10-day-old son were alright. The adjutant knew that accused's previous record was good (R. 6, 7-9; Ex. "A").

Before leaving on 25 September 1943, the accused told a brother officer, who knew that the accused was a good officer and that he had received a telegram from home, that his family was alright. A sergeant who worked with the accused had not seen him during the time in question (R. 9-10, 10-11).

4. The evidence for the defense shows that the accused's commanding officer rated him as "excellent" in the performances of his military duties and had had no previous occasion to discipline the accused. After explanation of his rights as a witness, the accused testified that he had been inducted on 3 January 1941 and had been commissioned on 20 June 1943 upon completion of Officers' Candidate School. He had been secretly married on 3 October 1942, because both his and his wife's families objected to the marriage; and, ever since, their matrimonial path had been made hazardous by constant interference from members of both families. On the afternoon of 25 September 1943 a telegram, sent by his aunt under his mother's name, advising that his wife, who had been delivered of their first-born about 10 days before, was desperately ill, and requesting him to come home, had been relayed to him and he had unsuccessfully attempted to telephone home. He had permission to go to the town of Sparta, nearby, and after arrival there drank several beers before deciding to go home by way of the midnight train. Reaching home he immediately went to the hospital, where he found his wife seriously ill even after having seven blood transfusions, and stayed with her three days during which she passed the crisis. His marital troubles and wife's illness had caused him great anxiety resulting in his failure to apply for leave even though he had no reason to anticipate its refusal. He had told the officers who had inquired about his family that they were alright because he saw no reason to bother them with his troubles (R. 11, 12-16).

5. The Specification alleges that the accused without proper leave absented himself from his organization at Camp McCoy, Wisconsin, from about 26 September 1943 to about 1 October 1943.

The evidence for the prosecution conclusively establishes the accused's guilt of the offense and his own testimony likewise admits it but suggests extenuating circumstances (M.C.M., 1928, par. 132). The findings of guilty of the Charge and its Specification are, therefore, amply supported by the evidence.

6. The accused is about 26 years old. The War Department records show that he had enlisted service from 23 January 1941 until 20 June 1942 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has been on active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

(72)
SPJGN
CM 243690

1st Ind.

War Department, J.A.G.O., 6 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 Second Lieutenant Richard N. Montgomery (0-1285794), 417th 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 approval.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 19, 8 Jan 1944)

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

SPJGQ
CM 243753

2 DEC 1943

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Selfridge Field, Michigan, 17, 18, 19, 20-21 September 1943. Dismissal.
Lieutenant Colonel CHARLES G. WHITE (O-318451), Air Corps.	

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

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

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

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

Specification 1: In that Lieutenant Colonel Charles G. White, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, for the purpose of procuring the unlawful transfer of Private Lester (NMI) Gruber to duty at Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about November 27, 1942, wrongfully cause to be certified as true to the Director of Personnel, The Adjutant General's Office, Washington, D. C., when he did not know it to be true, and with intent to deceive, that the said Private Lester (NMI) Gruber was qualified as a radio operator, when he was not so qualified, to the prejudice of good order and military discipline.

Specification 2: In that Lieutenant Colonel Charles G. White, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, for the purpose of fraudulently and unlawfully procuring the enlistment at Selfridge Field, Michigan, of Lester (NMI) Gruber, Detroit, Michigan, did at Selfridge Field, Michigan, on or about October 26, 1942, wrongfully cause to be certified as true to The Adjutant General, Washington, D. C., when he did not know it to be true, and with intent to deceive that the said Lester (NMI) Gruber was qualified as an automobile mechanic, when he was not so qualified, this to the prejudice of good order and military discipline.

Specification 3: (Nolle prosequi entered by permission of appointing authority.)

Specifications 4 to 6: (Findings of not guilty.)

Specification 7: (Findings of guilty disapproved by the reviewing authority.)

Specifications 8 to 11: (Findings of not guilty.)

Specification 12: In that Lieutenant Colonel Charles G. White, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, was at Selfridge Field, Michigan, on or about December 1, 1942, drunk and disorderly in the quarters of Warrant Officer (JG) Fred La Lone, conduct unbecoming an officer and a gentleman and to the prejudice of good order and military discipline.

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

Specification 1: In that Lieutenant Colonel Charles G. White, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, was at Oscoda Army Air Field, Oscoda, Michigan, on or about April 20, 1943, drunk and disorderly in quarters to the prejudice of good order and military discipline.

Specification 2: In that Lieutenant Colonel Charles G. White, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about March 1, 1943, knowingly and willfully apply to his own use and benefit, the labor and services, of the value of about $12.84, of Colin A McLeod and Jacob G. Kramer, civilian employees of the United States Government, which employees were compensated from funds of the United States furnished and intended for the military service thereof, this to the prejudice of good order and military discipline.

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Lieutenant Colonel Charles G. White, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did, at Selfridge Field, Michigan on or about July 28, 1943, attempt to procure Jacob G. Kramer to commit perjury by inducing him, the said Jacob G. Kramer, to execute a statement before a competent person that he, the said Jacob G. Kramer, would depose freely

> and wilfully, corruptly and contrary to such oath, to depose in substance that the facts as to work performed on a privately-owned automobile as had been previously testified to under oath by the said Jacob G. Kramer was in error, which deposition was false for the material matter, and was known by the said Jacob Kramer and the said Lieutenant Colonel Charles G. White to be false.

He pleaded not guilty to all of the Charges and Specifications. He was found not guilty of Specifications 4, 5, 6, 8, 9, 10, 11 of Charge I; Charge I as a violation of Article of War 95; Specification 1 of the Additional Charge; and the Additional Charge as a violation of Article of War 95. He was found guilty of Specification 1, Charge I, except the words "unlawful" and "wrongfully cause", substituting therefor the words "through gross neglect permit", also excepting the words "and with intent to deceive"; Specification 2 of Charge I except the words "fraudulently and unlawfully" and "wrongfully cause", substituting therefor the words "through gross neglect permit" and except the words "and with intent to deceive"; Specification 7, Charge I, except the words "fraudulently and unlawfully" and the word "wrongfully" substituting therefor the words "through neglect" and also except the words "and with intent to deceive"; Specification 12, Charge I except the words "and disorderly" and except the words "conduct unbecoming an officer and a gentleman and"; Charge I as a violation of Article of War 96; Specification 1, Charge II, except the words "and disorderly"; Specification 2, Charge II; Charge II; Specification 2, Additional Charge I; and of Additional Charge I as a violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specification 7 of Charge I, approved the sentence and forwarded the record for action under Article of War 48.

3. The competent evidence in support of the Specifications and Charges of which the accused was found guilty may be summarized as follows:

a. With reference to Specifications 1 and 2 of Charge I it was shown that Lester Gruber was the proprietor of the London Chop House in Detroit, Michigan, and had been classified 1-A by his draft board (R. 72). The accused from time to time dined at the London Chop House and in that manner became acquainted with Gruber, who told accused in the fall of 1942 that rather than be drafted he preferred to enlist at Selfridge Field which was adjacent to the city of Detroit (R. 76). During October 1942, Gruber called upon the accused at the Field Headquarters, Selfridge Field, Michigan, at which time accused

was acting as Base Adjutant and S-1 (R. 27), and expressed a desire to enlist. The accused referred Gruber to Master Sergeant Myron B. Collins, who at that time was Sergeant Major at Selfridge Field in charge of enlistments, and whose duty, among others, was to prepare and send telegrams requesting the authority of The Adjutant General to enlist civilians at that Base. Collins also had the authority to authenticate the sending of such messages (R. 12) and was similarly in charge of correspondence with reference to the transfer of enlisted personnel to or from that Base (R. 12). The accused and several other officers also had the authority to authenticate the sending of messages (R. 12).

Prior to the accused's assumption of duties as Adjutant at this Base Headquarters it had become a common practice under the direction of Master Sergeant Collins, acting as Sergeant Major in charge of enlistments and transfers of enlisted personnel, to represent the qualifications of the person seeking enlistment or transfer to be such as would appear to The Adjutant General to be to the benefit of the military service to permit the enlistment at, or the transfer to, Selfridge Field, regardless of whether or not the applicant had such qualifications. Collins would at times hand to one of his stenographers a name and indicate whether it was for enlistment or transfer. The stenographer would then supply from her imagination such job qualifications as were actually desired, as, for example, those of an automobile mechanic or a radio operator or other similar trade or occupation, and use such fictitious descriptions in preparing the necessary papers (R. 112, 114, 122, 363, 367). This practice continued during the time that the accused acted as Adjutant and as Executive Officer at those Headquarters. The purpose of this practice was (1) to comply with the requirement relative to enlistments at that field that the one seeking enlistment have certain desirable qualifications, and (2) to comply with the Army Regulations concerning transfers, which required cogent reasons for transfers beneficial to the military service and not for the personal convenience of the enlisted personnel involved (WD Circular 308, 1942).

There is no specific evidence in this record that the accused knew of this practice, but while he acted as Adjutant (January 1942 to 9 November 1942) the telegrams and correspondence resulting because of this practice came to his desk and were read or authenticated as official military business by the accused, and, as testified by Collins, he should have known about it (R. 363).

Sergeant Collins, upon learning of Gruber's desire to enlist, and without knowing Gruber's qualifications, caused a telegram to be prepared to The Adjutant General requesting authority to enlist Gruber at Selfridge Field, setting forth that his qualifications as an

"automobile mechanic" could be greatly utilized at that station (Pros. Ex. 13). Before sending this telegram Collins showed it to the accused, who approved of the telegram by saying "Okay", and manually signed the message with his signature in the upper right-hand corner (R. 75, 76, 81). An answering telegram from The Adjutant General authorized the enlistment of Gruber as requested (Pros. Ex. 14). The accused thereafter signed a letter that was sent to a member of Gruber's draft board confirming his telephone conversation between the two for the purpose of delaying draft action upon Gruber (Pros. Ex. 12). Gruber was not accepted in the service at Selfridge Field because he was unable to pass the physical examination given him there due to a heart condition. When the accused learned of this he requested Major Hansen, Chief of Surgery, to recheck the examination. Gruber was again examined and again rejected (R. 82). Within a day or two thereafter Gruber was inducted and sent to Fort Custer where he passed his physical examination and was accepted into the service. From Fort Custer he was transferred to Romulus, Michigan (R. 75).

Gruber visited Selfridge Field during his ten-day furlough subsequent to his induction and spoke to the accused in Sergeant Collins' office. The accused in substance told him, "When you get to Chicago call us up and we will initiate some action to get you here - call you a radio operator and get you out here" (R. 85). Gruber was in fact neither an automobile mechanic nor a radio operator. When Gruber arrived at Fort Custer he telephoned the accused and shortly thereafter, 27 November 1942, a telegram was sent to the Director of Personnel, The Adjutant General's Office, Washington, D. C., requesting that Gruber be assigned to Selfridge Field upon completion of his basic training as his services as a "radio operator" were urgently needed at that station. The telegram was authenticated by Sergeant Collins and the Acting Adjutant, Captain Valentine Jobst III, during the absence of the accused. Gruber, however, was sent to Romulus, Michigan, from which place he let it be known that he was satisfied to remain and the matter was thereafter dropped (R. 86).

b. With reference to Specification 12, Charge I, the evidence for the prosecution showed that Warrant Officer LaLone had shot a deer in the latter part of November 1942 and had invited the accused and Captain North to come to his house on 1 December to get some venison steaks (R. 181). Corporal Garnett C. Brown had just finished cleaning the deer in the cellar when the accused and Captain North arrived at about 1900 (R. 172). They had come directly from the Officers' Club, and, in the opinion of Corporal Brown, the accused was staggering as he entered the room (R. 172, 175). LaLone opened a bottle of Calvert's whiskey and the accused had several drinks therefrom. After playing with the host's child, the accused excused himself and went upstairs. As he failed to return, LaLone went after him and found him lying on his back on the carpet in the hallway between the bathroom

and the bedroom (R. 182). Corporal Brown was called to assist in carrying the accused to his car (R. 182). The testimony of Corporal Brown differed slightly as he stated that when he went upstairs he found the accused passed out in the bathroom over the toilet bowl (R. 173, 177). But they agreed that in their opinion, the accused was drunk (R. 173, 184). Corporal Brown drove the car to the accused's house and left Captain North and the accused in the car in front of the house (R. 173, 183). The accused did not say a word between the time he was discovered upstairs and the time he was taken to his home (R. 183). The Calvert's whiskey had been a full bottle when accused arrived and half of its contents were gone when the accused left (R. 187). There is conflicting testimony as to whether Corporal Brown had a drink or not, as he testified that he did not and Warrant Officer LaLone stated that he did (R. 353, 358), but in any event, he only had one and the rest of the liquor was consumed by the accused, Captain North and LaLone (R. 361).

c. With reference to Specification 1, Charge II, the evidence for the prosecution showed that Captain Clifford D. N. Davis, when summoned by telephone to Colonel William T. Colman's quarters in the VOQ at Oscoda Army Air Base at about 2300 on the night of 22 April 1943, found the accused in a chair with his head slumped over between his legs and his hands hanging to the floor. Captain Davis was directed by Colonel Colman to remove the accused to his quarters (R. 188), which were about 20 feet away in the same building (R. 191), but was only able to do so with the assistance of two other officers, First Lieutenant Norman H. Hitchcox and Major James M. Hunter. While these officers were undressing the accused, he vomited (R. 189, 196). There was an odor of alcohol about the accused, and whiskey was seen in Colonel Colman's room (R. 189, 190). The accused was definitely drunk in the opinion of Captain Davis (R. 189), and Lieutenant Hitchcox (R. 196). He did not appear for reveille the next morning, and was still in bed when Lieutenant Hitchcox took him some headache tablets about 0700 (R. 193, 194).

d. With reference to Specification 2, Charge II, the evidence for the prosecution showed that about 1 March 1943 the accused drove his private automobile, a 1936 Pontiac, to the Base Garage at Selfridge Field, and showed Technical Sergeant Earl H. Evans that the lights were not operating properly and the front fender was dented and asked that the car be fixed (R. 204-205). Sergeant Evans turned the job over to Technical Sergeant Arthur C. Wadsworth, who was instructed by First Lieutenant William J. Rice, Base Automotive and Transportation Officer, to have the car fixed (R. 201). Sergeant Wadsworth had a soldier fix it. It took the soldier all day (R. 203). The car was then driven by one of the sergeants over to the Base Ordnance Garage to have the dents taken out of the fenders (R. 201). The foreman of the shop spoke of the irregularity of such a job to First Lieutenant Peter M. Wolfe, the Ordnance Officer, who immediately telephoned the accused and asked him why his car was there. The latter said his car should be taken care of, and told Lieutenant Wolfe to call Lieutenant

Rice to find out what was to be done (R. 206). The ultimate decision was to do the job even though it was strictly against Army Regulations (R. 207). The work on the fenders was done by Jacob Kramer, a civilian Government employee; he took out the dents, welded one fender using some body lead, and applied a primer coat of paint. The job was done on Government time and necessitated approximately eighteen hours of labor. Kramer's rate of pay was $7.76 for an eight-hour day (R. 215).

The car was driven next to the sub-depot and the four fenders were painted with a spray gun by Collin A. McLeod, another civilian employee of the Government, during his regular working hours. McLeod was paid at the rate of $1.47 an hour, and the labor involved in the paint job took half an hour (R. 220). Neither Kramer nor McLeod were paid for their services by the accused (R. 216, 220). The paint was part of a lot which had been purchased by the accused on a prior occasion when he had had his car completely repainted (R. 221). When Lieutenant Wolfe saw the accused several weeks later, the accused asked him if there was any charge for the work on the car as he realized it was an irregular job, and Wolfe replied that there could not be (R. 208).

e. With reference to Specification 2, Additional Charge, the prosecution's evidence showed that the accused, accompanied by Lieutenant Wolfe, approached Jacob Kramer, a civilian employed by the United States Government as a mechanic at the Base Garage, Selfridge Field, Michigan, in the latter part of July 1943 and complained to him that he (accused) had not been given a fair deal in regard to charges made against him concerning work alleged to have been done on his automobile. He stated that a front fender had been damaged by his wife and had been brought over for straightening. The accused read to Kramer the latter's testimony taken at an investigation. Accused and Kramer were the only ones present during this conversation. The accused then demanded that Kramer "tell the truth" and asked Kramer to come down to headquarters and tell the truth (R. 218). He also asked Kramer to go over there and swear he never worked on the car, which the accused claimed was the truth but which Kramer denied.

> "Q. Do you recall what he said or in effect what he said?
>
> "A. Well, he told me that at the time that car was there that it was just this one fender supposed to be bumped out on it and he didn't know any of the rest of the work being done on it and in fact he didn't know any work was being done on it at all, and by that he didn't think he was getting a fair deal and he wanted me to go over to headquarters and tell them I never worked on this car at any time and he said 'I would like for you to go over to headquarters and tell them the truth.'"

4. The accused took the witness stand under oath, after having been properly advised of his rights as a witness (R. 232). After briefly tracing his military career in the Officers' Reserve Corps, the accused stated that he was ordered to active duty with the Army at Selfridge Field on 15 December 1940. He was Base S-1 from 31 August 1941 to 11 May 1943, and in addition became Base Adjutant in January 1942, and then Base Executive Officer in November 1942, holding the latter duty until relieved in May 1943 (R. 233).

a. With reference to the Charges concerning the attempted enlistment and transfer of Gruber the accused testified that he had dined occasionally at Gruber's Chop House in Detroit and Gruber had told him that he was to be drafted soon but would prefer to enlist. Gruber appeared at headquarters in October 1942 and wanted to enlist. The accused and other officers at the field always tried to be tactful and diplomatic in their contacts with civilians so as to avoid complaints to Congressmen and Senators which would come back through the commanding officers (R. 257). He denied that he had anything to do with the telegram that was sent to The Adjutant General for authority to enlist him (R. 258). He recalled that Gruber was turned down because of a heart condition; that he came out to enlist like many other civilians; that he felt sorry for him because Gruber was about to be drafted and the accused felt that anyone about to be drafted should be given the privilege of enlisting, and that therefore he did ask the surgeon to give Gruber another examination (R. 258). The man meant nothing to the accused but, because of his feeling, he told him that if he were drafted in spite of his heart condition and he still wanted to come to Selfridge Field he - the accused - would then see what he could do about it. On the following day Gruber was inducted and sent to Fort Custer. Accused felt Gruber had recieved a "raw deal" and also thought it was a reflection upon the medical section of the field and, for those reasons alone, he tried to rectify the matter by having Gruber transferred to Selfridge Field. He remembered discussing the matter with Sergeant Collins but did not recall the details but, before anything was done about it, he heard that Gruber had been transferred and was satisfied where he was. so the matter was dropped completely (R. 259). He received no remuneration of any kind in connection with the matter. There was nothing wrong in enlisting civilians at Selfridge Field. The field had been given a block of enlistment serial numbers for that purpose, and if a civilian did enlist there that was no assurance that he would remain at that field. The accused had nothing to do with Gruber's enlistment. Enlistments were handled by Sergeant Major Collins (R. 260). The accused did not, and had no occasion, to check into Gruber's qualifications. Gruber was a successful business man and his services could have been utilized at Selfridge Field (R. 261). Sergeant Collins also handled the transfers of enlisted men and the accused left it to Sergeant Collins' judgment to prepare messages and correspondence pertaining thereto. The accused did not recall giving Collins any information regarding Gruber's qualifications - he left

it to Collins to find out for himself (R. 263). Accused further denied that he was aware of any practice of giving false qualifications in communications seeking authority to enlist or for transfers. He himself, although acting as Adjutant had no means of knowing the truth or falsity of the facts contained in such communications crossing his desk daily unless he himself initiated them or had given specific instructions concerning them. He initialed or signed such papers or copies to show that he had read them or to authenticate the fact that they were being sent on official business. The one responsible for the truth of the contents would be the one who prepared it (R. 264-265, 267).

b. and c. The accused did not choose to testify as to either of the alleged charges of drunkenness. However, testimony was offered that in the opinion of two officers who had seen the accused in the VOQ at Oscoda Army Air Base on the evening of 22 April 1943, he was apparently sober (R. 298, 302). First Lieutenants John E. Sterrett and Edward K. Daniels had spoken to the accused in the hallway as they left the VOQ at approximately 2000 on their way into the town of Oscoda (R. 298). Upon returning at about 2200, they saw the accused seated in a chair in Colonel Colman's room and spoke to him for two or three minutes on matters pertaining to the guard patrols in town (R. 299). Neither officer noticed anything amiss, nor saw any bottles or glasses in the room (R. 226, 350). Lieutenant Sterrett next saw the accused at 0100 in the washroom and was asked by him to take reveille in the morning (R. 338). He formed no opinion as to accused's condition of sobriety at that time (R. 300). Colonel Colman testified that the accused had enjoyed a drink with him in his quarters that night (R. 321), but he did not think that the accused had had enough liquor to be drunk (R. 322).

d. With reference to Specification 2, Charge II the accused testified that he had had considerable repairs done to his automobile during July 1942 by a mechanic who worked at the Sub-Depot including a paint job and straightening the fenders. He had paid the mechanic for this work and for all parts or materials purchased (R. 287). The receipts and checks given in payment were admitted in evidence (Def. Exs. E, F, G). About March 1943 accused's wife was pulling out of a parking space when another car struck the accused's car, dented the left front fender and pulled the bumper out at an angle so that it was dangerous to drive. Because of the difficulty existing in that locality to find a civilian mechanic to make the necessary repairs he asked Lieutenant Rice, the Base Transportation Officer, if he would take care of it. Lieutenant Rice sent over an enlisted man and procured the car. The repairs were made and the car returned in a few hours. The accused did talk to Lieutenant Wolfe and was surprised to learn that his car was at the Ordnance repair shop - he felt that the repairs were so trivial that the work could have been done

readily with a wrench at Lieutenant Rice's shop (R. 288-289). When he learned that the Ordnance shop claimed to have performed work on the car he offered to pay for it but was told that there was no charge (R. 289). The accused knew it was against Army Regulations to have work done on his private car by the Ordnance Garage. He used his car a fourth to a third of the time on Government business because of the convenience rather than send for a staff car (R. 294).

e. In defense of the charge involved in Specification 2, Additional Charge, the accused testified that in July 1943 he went to the Base Garage to see Jacob Kramer and was introduced to him by Lieutenant Wolfe. His entire conversation with Kramer was an effort on the accused's part to get him to tell the truth concerning repairs alleged to have been made on his car (R. 290).

> "First of all I told Mr. Kramer I had received some charges, that that investigating officer was here on the base and that I had had one charge about repair work on my car, which didn't seem to be true and I wanted to straighten out the matter with him. I also brought along the testimony that had been given to me by Major Brosman relating to the case and I informed Mr. Kramer that I realized that at the time Colonel Amen was in here and investigating, that in all probability he didn't have a chance to see the testimony he had given and to sign it and that I thought in all fairness to myself as well as to him and the statements he had given, I wanted him to read that testimony and see if it was true, to see if those statements he had given were true. Mr. Kramer said - he was very gruff and said, 'If I gave it to the Inspector General, it must have been true.' And I said, 'Wait a minute, if you don't want to read it, let me read it to you because I am faced with some serious charges and I want to get to the bottom of this because while the investigating officer is here if there is any untruth in this statement, I would like to respectfully request you go over and make a statement as to those things that are untrue so we can get to the bottom of this matter.' And I told him, 'I don't deny that you may have worked on my car at some time without my knowledge, because of the car going to the base garage, but I don't want you to make any statement that isn't the truth. I want you to tell the truth about this.' He read over parts of it or I read over parts of the testimony to him and I said, 'Here you say you worked on a lot of peoples' cars. How do I know that you aren't mixed up in the date or in the car that I am accused of having repaired over here?' and he said—he acted very abrupt about the matter and finally he walked away from me. I tried not to make him disgruntled or anything. I wanted him to go over and review

the statement if he so desired."

The accused also offered in evidence his efficiency ratings given him during his military service. These records showed that he performed his duties at Selfridge Field in a superior manner (Def. Ex. I, J).

5. Upon testing the sufficiency of the foregoing evidence to support the findings of guilty of the respective Specifications and Charges the following is submitted:

a. With reference to Specifications 1 and 2 of Charge I, the court in effect found the accused guilty of permitting, through gross neglect, to be certified as true, when he did not know it to be true, that Gruber was qualified as a radio operator for the purpose of procuring his transfer to Selfridge Field, and also in the same manner for the purpose of procuring the enlistment of Gruber, did permit, through gross neglect, to be certified to The Adjutant General, that Gruber was qualified as an automobile mechanic. It appears that although enlistments were permissible at Selfridge Field, yet permission had to be obtained in each case from The Adjutant General to enlist the specific personnel appearing there for enlistment. This permission was granted in the event that the qualifications of the applicant were acceptable. It was also shown that Army Regulation (AR 615-200; 1942 W.D. Circular 308) forbade the transfer of enlisted personnel for the convenience of the enlisted personnel or his family and permitted it only if such transfer was for the substantial benefit of the service. Permission to transfer therefore depended greatly upon the qualifications of the person to be transferred and the need for such a person at the station to which he was to be transferred. It was clearly shown by the evidence produced by the prosecution that Gruber was neither a radio operator nor an automobile mechanic but was the proprietor of a restaurant in Detroit. In October 1942 he expressed a desire to enlist in the Air Force rather than be inducted into service and called upon the accused at the headquarters of Selfridge Field for that purpose. The accused referred Gruber to Master Sergeant M. B. Collins who had charge of enlistments and transfers of enlisted personnel. It was shown by Collins that it was common practice for his office to send telegrams to The Adjutant General for permission to enlist individuals desiring to be enlisted at Selfridge Field or for the transfers of enlisted personnel to that Field and to set forth therein any qualifications acceptable to The Adjutant General whether the statement as to such qualifications was false or not. Collins claimed this practice was in vogue prior to the arrival of accused at Selfridge Field and continued thereafter. He claimed that the accused knew, or should have

known, of the practice and, upon the particular occasion of this transfer, instructed Collins to describe Gruber as a radio operator. This was denied by the accused. In any event, the various telegrams and correspondence dealing with Gruber carry the signature or initials of the accused and corroborate Collins' statement to the extent that if accused did not know of the misrepresentations of Gruber's qualifications in the various telegrams, he at least should have known it and was grossly careless in not observing these misrepresentations and preventing the sending of the telegrams. There was, therefore, ample evidence to support findings of the court concerning these Specifications. It was apparent that accused was merely endeavoring to do Gruber a personal favor without remuneration. None was expected. The sending of telegrams by one branch of the service to another containing false statements in order to procure authority to enlist or to procure transfers of enlisted personnel is undoubtedly prejudicial to good order and military discipline and a violation of Article of War 96. The accused was not found guilty of causing these communications to be issued but of permitting their issuance through gross neglect. Neglect and disorders are treated similarly as violations of Article of War 96 when they are prejudicial to good order and military discipline. The Article itself reads "all disorders and neglects to the prejudice of good order * * *".

b. With reference to Specification 12 of Charge I, it was shown by the uncontradicted testimony of Warrant Officer Fred LaLone and Corporal Garnett C. Brown that the accused on the evening of 1 December 1942 came to LaLone's house and shortly thereafter was found so drunk on the second floor that he had to be assisted down the steps and driven by automobile to his own quarters. His drunken condition was not displayed in public but in the home of LaLone and in the presence of one enlisted man. He was not disorderly and therefore the court excepted from its finding that part of the Charge. The accused during his testimony made no reference to this Specification. The evidence was legally sufficient to support the finding of guilty. Drunkenness alone may constitute a violation of Article of War 96. C. M. 207887; C. M. 114900; C. M. 121290.

c. The evidence is also legally sufficient to support the finding that the accused was drunk in his quarters on the evening of 22 April 1943 when two officers had to carry him bodily from a chair to his quarters, undress him and put him to bed. The accused did not testify regarding this occurrence but called in defense two officers who had observed him on different occasions during the same evening. They expressed their opinion that he was not drunk. This evidence was not contradictory, except in a circumstantial way, to the direct testimony of the two officers who actually carried him from the chair to his bed and related in detail his inebriated condition.

d. The evidence was also sufficient to support a finding of guilty of Specification 2 of Charge II. It was clearly shown that

the labor and services of a value of $12.84 was performed by civilian employees of the United States Government on the automobile of the accused. These employees were compensated from funds of the United States Government. The accused admitted that he turned his automobile over to the Government employees with the request that it be repaired. The mere fact that the quantity of the repairs actually placed upon the automobile exceeded accused's own idea as to the extent of the repairs really necessary is immaterial. Making use of Government facilities in such a manner constitutes a violation of Article of War 96. Although the accused did not misappropriate Government property in such a manner as to constitute a violation of Article of War 94, yet he accomplished the same result in consuming, for his own personal benefit, the time of Government employees paid by the Government out of funds intended for military use. The fact that he used his automobile a considerable part of the time for military purposes is no legal excuse. It may, however, be considered as an extenuating circumstance.

e. With reference to Specification 2 of Additional Charge, the Board of Review is of the opinion that the evidence is not legally sufficient to support the finding of guilty. The Specification charges the accused with attempting to procure Jacob G. Kramer to commit perjury in the manner alleged in the Specification. The only evidence pertaining to the Specification produced by the prosecution was the testimony of Kramer himself. Kramer was a civilian mechanic employed at the Base Garage. Throughout his testimony regarding the conversation he had with the accused he insisted that the accused wanted him to go to headquarters and "tell them the truth." The argument or discussion between them concerned a single issue - just what constituted the truth? Kramer claimed he had worked on accused's automobile and had spent twleve hours on it in straightening the fenders. The accused claimed that was impossible, as there had been only a bent bumper and a dent in one fender repaired. He questioned or doubted that Kramer had worked on accused's car - it might have been some one else's car. He denied that he requested or suggested that Kramer swear falsely to anything but, agreed with Kramer, that he wanted him to tell the truth. One who tells the truth under oath cannot be guilty of perjury. Nor can one who urges another to tell the truth be guilty of procuring that person to commit perjury. Perjury is defined (M.C.M. 1928, par. 149i, p. 174) as

> "the willful and corrupt giving, upon a lawful oath * * * in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. (Clark.) 'Judicial proceeding or course of justice' includes trials by courts-martial." (Underscoring supplied.)

It should be noted in this connection that the testimony of a single witness is insufficient to convict for perjury (M.C.M. 1928, par. 149i, p. 175).

In applying this definition to the facts it is apparent that there was no judicial proceeding involved. Giving the full import and meaning to Kramer's testimony unfavorable to the accused, he asked Kramer to go over to headquarters and swear he never worked on accused's car. At that time there was no judicial proceeding taking place at headquarters so it was impossible for Kramer to commit perjury if he had done as he claimed he was requested to do. However, the burden of proving an offense beyond a reasonable doubt is upon the prosecution. In arriving at a finding of this nature the court should take into consideration the entire conversation. The request made by the accused was that he (Kramer) tell the truth. The weight of the evidence was evenly balanced. It was one man's word against another's. Under such circumstances it was not shown beyond a reasonable doubt that the accused requested Kramer to swear to anything but the truth as he, the accused, understood it.

Therefore, the finding of guilty cannot be sustained because of the lack of the weight of the evidence in favor of such a finding and the fact that no perjury was involved.

6. The record shows the accused to be 35 years of age. He is a graduate of Joliet High School (Illinois 1926) and also of the University of Iowa (B.S. in Commerce 1931, M.A. in 1934). He was commissioned on 4 June 1934 second lieutenant of Infantry in the Army of the United States. He was on active service for two weeks in 1934 and 1935. From 15 June 1936 to 30 June 1938 he was on active duty with the Civilian Conservation Corps at Fort Snelling, Minnesota. He was promoted to first lieutenant 10 June 1937. In 1938 and 1939 he attended camp for a period of two weeks. On 15 December 1940 he was ordered to active duty at Selfridge Field as a first lieutenant. He was promoted to captain 11 December 1941 and to major 12 May 1942, and to lieutenant colonel 23 November 1942. He attended The Adjutant General's School in Washington, D. C. during 1941 and upon his return to Selfridge Field 31 August 1941 was appointed Base S-1, which office he held until March 1943. He was also appointed Base Adjutant in January 1942, which duties he performed until he was appointed Base Executive Officer in November 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Specification 2 of the Additional Charge and of the Additional Charge, but

is legally sufficient to support the findings of guilty of Specification 1 (as amended), Specification 2 (as amended), and Specification 12 (as amended) of Charge I; Specification 1 (as amended) and Specification 2 of Charge II; Charge I and Charge II as violations of Article of War 96; and legally sufficient to support the sentence of dismissal and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

William A. Rounds, Judge Advocate.

Earle Stephen, Judge Advocate.

Herbert B. Redman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 - JAN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel Charles G. White (0-318451), Air Corps.

2. I concur in the opinion of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Specification 2 of the Additional Charge and of the Additional Charge be disapproved, that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Findings of guilty of Specification 2 of Additional Charge and of Additional Charge disapproved. Sentence confirmed. G.C.M.O. 85, 25 Feb 1944)

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

N.D.

(89)

26 NOV 1943

SPJGH
CM 243763

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Drew Field, Tampa,
Second Lieutenant ROBERT	)	Florida, 6 and 7 October
C. TITUS (0-1640081),	)	1943. Dismissal.
Army of the United States.	)	

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

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

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

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

Specification: In that Second Lieutenant Robert C. Titus, First Reporting Company, 576th Signal Aircraft Warning Battalion, did, without proper leave absent himself from his organization at Drew Field, Tampa, Florida, from about 17 September 1943 to 18 September 1943.

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

Specification: In that Second Lieutenant Robert C. Titus, First Reporting Company, 576th Signal Aircraft Warning Battalion, having received a lawful command from Captain Henry L. Blauser, Commanding Officer, First Reporting Company, 576th Signal Aircraft Warning Battalion, his Superior Officer, to report to the S-1 Section of the Fourth Signal Aircraft Warning Battalion, did, at Drew Field, Tampa, Florida, on or about 17 September 1943, willfully disobey the same.

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

Specification 1: In that Second Lieutenant Robert C. Titus, First Reporting Company, 576th Signal Aircraft Warning

Battalion, having discovered that Private Alvin Schwartz, 690th Signal Aircraft Warning Company, a soldier subject to military law, was absent without leave from his organization, and having knowledge of the whereabouts of said Private Alvin Schwartz, did, at Tampa, Florida, on or about 22 August 1943, willfully and unlawfully fail and neglect to inform the Commanding Officer of the organization to which the said Private Alvin Schwartz belonged, of the then whereabouts of the said Private Alvin Schwartz, at Tampa, Florida.

Specification 2: In that Second Lieutenant Robert C. Titus, First Reporting Company, 576th Signal Aircraft Warning Battalion, did, at Tampa, Florida, from about 25 July, 1943, to about 11 August 1943, room together with and associate with Private Alvin Schwartz, 690th Signal Aircraft Warning Company, at the Floridan Hotel, Tampa, Florida.

Specification 3: In that Second Lieutenant Robert C. Titus, First Reporting Company, 576th Signal Aircraft Warning Battalion, did, at Tampa, Florida, from about 11 August 1943 to 23 August 1943, room together with and associate with Private Alvin Schwartz, 690th Signal Aircraft Warning Company at the Hotel Tampa Terrace.

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

Specification 1: In that Second Lieutenant Robert C. Titus, 576th Signal Aircraft Warning Battalion, did, at Tampa, Florida, with intent to defraud, wrongfully and unlawfully occupy a hotel room at the Floridan Hotel, Tampa, Florida, from about 25 July 1943 to about 11 August 1943, without registering with said hotel as a guest of said hotel, and did thereby fraudulently and unlawfully obtain lodging accommodations at said hotel without the payment of the cost of said hotel room to the owners of said hotel.

Specification 2: In that Second Lieutenant Robert C. Titus, 576th Signal Aircraft Warning Battalion, did, at Tampa, Florida, with intent to defraud, wrongfully and unlawfully occupy a hotel room at the Hotel Tampa Terrace, Tampa, Florida, from about 11 August 1943, to 23 August 1943, without registering with said hotel as a guest of said hotel, and did thereby fraudulently and unlawfully obtain lodging accommodations at said hotel without the payment of the cost of the said hotel room to the owners of said hotel.

He pleaded guilty to the Specification, Charge I and to Charge I, to Specifications 2 and 3, Charge III, except the words "and associate with", and to Charge III, and to Specifications 1 and 2, Charge IV; not guilty to Charge IV, but guilty of a violation of the 96th Article of War; and not guilty to the Specification, Charge II and to Charge II, and to Specification 1, Charge III. He was found guilty of all Specifications and Charges. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

a. Specifications 2 and 3, Charge III and Specifications 1 and 2, Charge IV: Between 25 July and 11 August 1943, Private Alvin Schwartz was registered at the Hotel Floridan in the name of Al Fields (his stage name), on 11 August he moved to the Tampa Terrace Hotel and registered as Al Fields, remained there until 23 August 1943, and in each hotel occupied a single room with one bed. He paid each hotel for his room at the rate for occupancy by one person. The charge for a single room with two occupants was greater at both hotels than the charge for one person in the room. Schwartz invited accused to share his room with him. Accused occupied the room and slept with Schwartz several times at the Hotel Floridan and nearly every night at the Tampa Terrace Hotel. Accused did not register at either hotel, but refunded to Schwartz part of the cost of the rooms. Schwartz did not notify the hotel clerk that there was another person with him. Accused and Schwartz did not go out on parties nor dine together; they did not go to the bar together for drinks except a few times when Schwartz first went to the Floridan (R. 9-14).

A statement, in question and answer form, made by accused to "Lt. Rex E. Rhine", after being given "proper warning", was substantially as follows: Prior to 25 July 1943 accused was authorized by the base commander at Drew Field to reside off the post. Not having a place to live off the post, accused asked "Lt. Morelli" whether he could share Morelli's room. Morelli replied that another officer was sharing it with him. Schwartz (known to accused as Fields) heard the conversation and offered to let accused "stay" with him in his room. Later accused accepted the offer, as his funds were low, and he agreed to pay Schwartz at the end of the month. They occupied Room 1925 at the Floridan from 25 July until 11 August, when accused entered the hospital at Drew Field. On 14 August accused went to Tampa on pass from the hospital to get some of his clothes at the Floridan. He found that Schwartz had left the Floridan, and traced him to Room 902 at the Tampa Terrace. A maid let him

in the room and he found his clothes. On 19 August accused moved into Room 902. At each hotel, accused did not register, but shared the room with Schwartz. Accused knew Schwartz only as a friend and roommate. It was just a "50-50 proposition on the room " (R. 9; Ex. C).

b. Specification 1, Charge III: During the time Schwartz was at these hotels he was "AWOL", but said nothing to accused about it until the last night, when he told accused five or six hours before Schwartz was "picked up" by the military police (R. 11-12).

From the statement of accused (Ex. C) it appeared that at about 10:00 p.m. on 22 August Schwartz called and asked accused to meet him, which accused did about twenty minutes later. Schwartz wanted to borrow $50 to go to Chicago, as he was "AWOL" and "in trouble with the MP's". Accused refused to lend him the money as he would be "assisting a deserter" if he did. Accused made no attempt to notify the military police, as he was going on leave the next day and "did not want to become involved" (Ex. C).

c. Specification, Charge I and Specification, Charge II: At about 3:30 or 4:00 p.m., on 16 September 1943, Captain Henry L. Blauser, commanding the company of accused, received a call for accused to report the next morning to Second Lieutenant Bernard J. Sevia at S-1 Section, 4th Training Battalion, and a few minutes later directed accused to report accordingly, the first thing in the morning, on 17 September, and after the interview at S-1 Section to report back to his organization. Accused remarked, possibly in a joking way, that he did not care to make a transfer. On 17 September, Lieutenant Sevia was in his office all the morning, except for intervals of five or ten minutes. To the best of his knowledge accused did not report to him. He did not see accused report, and if he had reported Lieutenant Sevia would have known it. Extract copies of the morning report of First Reporting Company, 576th Signal Aircraft Warning Battalion (Exs. A and B) showed accused from duty to absent without leave 17 September 1943 and from absent without leave to arrest in hospital 18 September (R. 6-8).

4. The evidence for the defense shows that at about 3:30 a.m. (date not shown) Second Lieutenant Michael Deleo, Provost Marshal, Drew Field, went to the room of Private Schwartz at the Tampa Terrace Hotel. Schwartz was not there, but Lieutenant Deleo found accused there and talked to him. Lieutenant Deleo did not at that time know that Schwartz was "AWOL" but was looking for him in connection with a gambling syndicate. Accused was very cooperative and identified Schwartz

for Lieutenant Deleo. Schwartz was located at the Floridan. Shortly afterward Lieutenant Deleo discovered that he was "AWOL". He did not recall whether accused told him Schwartz was "AWOL" (R. 15-17).

Accused made an unsworn statement to the effect that when he started to room with "this enlisted man" he was very much disturbed by sickness at home, but knew it was a "bad thing" to do. He thought he could pay him at the end of the month, it was a mistake on his part, and he wanted the court to take into consideration that it was a mistake and he did not intend to continue it (R. 15).

5. The evidence shows that from 25 July to 11 August accused and Private Alvin Schwartz occupied the same single room at the Hotel Floridan in Tampa, Florida. Schwartz was registered and accused was not. The rate for two persons in a room was greater than for one person. Schwartz paid the hotel for the room at the single occupant rate, and did not advise the hotel clerk that there was another person with him. Accused refunded to Schwartz part of the cost of the room.

From a date between 11 August and 19 August to 23 August they jointly occupied a room at the Tampa Terrace Hotel under the same circumstances.

At about 10:20 p.m. on 22 August Schwartz advised accused that he was absent without leave and in trouble with the military police. He wanted to borrow $50 to go to Chicago. Accused did not report Schwartz to the military police. Schwartz was taken into custody by military authorities at about 3:30 a.m., 23 August in connection with matters other than absence without leave.

On 16 September Captain Henry L. Blauser, commanding officer of accused, directed him to report the first thing the next morning to a designated officer at S-1 Section, 4th Training Battalion. Accused did not report to that officer the next morning (17 September) although the officer was present in his office. Accused was absent without leave from 17 September to 18 September 1943.

In the opinion of the Board of Review the evidence clearly sustains the findings of guilty of all Specifications and all Charges. The conduct of accused in failing to register with each of the hotels (Specs. 1 and 2, Chg. IV), whereby each hotel received a lower rate than it would have charged had it known that two persons were occupying the room, constituted a willful fraud. In the opinion of the Board it was a violation of the 95th Article of War.

6. The accused is 21 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 16 August 1940; appointed temporary second lieutenant, Army of the United States from Officer Candidate School and active duty, 30 November 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st, 64th or 96th Article of War, and is mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Driver, Judge Advocate

F. J. Fotterhos, Judge Advocate

Norman D. Lattin, Judge Advocate

1st Ind.

War Department, J.A.G.O., 13 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 Second Lieutenant Robert C. Titus (0-1640081), 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 shared a room with an enlisted man at two hotels over a period of about 29 days (Specs. 2 and 3, Chg. III); defrauded both hotels by failing to register (Specs. 1 and 2, Chg. IV); failed to report the enlisted man after learning he was absent without leave (Spec. 1, Chg. III); willfully disobeyed a lawful command of his superior officer to report to a designated office (Spec., Chg. II); and was absent without leave for one day (Spec., Chg. I). In view of all of the circumstances, I recommend that the sentence to dismissal be confirmed but commuted to a reprimand, and that the sentence as thus commuted be carried into execution.

3. Consideration has been given to a written request for clemency signed by the accused dated 23 November 1943.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4-Req. for clemency dated 23 Nov. 43 by accused.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 31, 15 Jan 1944)

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

SPJGK
CM 243794

(97)

21 DEC 1943

UNITED STATES	)	92ND INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 14 June, 20 July and 23 September, 1943. Dismissal, total forfeitures, and confinement for three (3) years.
Second Lieutenant EDWIN A. MOORE (0-1296562), Infantry.	)	

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

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

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

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

Specification 1: In that 2D LT EDWIN A MOORE, Co F, 371st Infantry, Fort Huachuca, Arizona did, at Camp Joseph T. Robinson, Arkansas, on or about January 15, 1943, feloniously embezzle by fraudulently converting to his own use a sum of money in the amount of twenty dollars and twenty cents ($20.20), the property of Pvt Willie Kidd, Co F, 371st Infantry.

Specification 2: In that 2D LT EDWIN A MOORE, Co F, 371st Infantry, Fort Huachuca, Arizona, did, at Camp Joseph T. Robinson, Arkansas, on or about January 15, 1943 feloniously embezzle by fraudulently converting to his own use a sum of money in the amount of three dollars and fifty cents ($3.50), this sum being the proceeds of a money order entrusted to him by Pvt. Albert Williams, Co F, 371st Infantry for the sole purpose of having said money order cashed and the proceeds thereof remitted to the said Pvt Albert Williams.

Specification 3: In that 2D LT EDWIN A MOORE, Co F, 371st Infantry, Fort Huachuca, Arizona, did, on or about January 15, 1943, at Camp Joseph T. Robinson, Arkansas, feloniously embezzle by fraudulently converting to his own use a sum of money in the amount of two dollars ($2.00), this

sum being the proceeds of a money order entrusted to him by Pvt George Savage, Co F, 371st Infantry, for the sole purpose of having said money order cashed and the proceeds thereof remitted to the said Pvt George Savage.

CHARGE II: (Finding of guilty disapproved by reviewing authority).

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

Accused pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority disapproved the findings of guilty of the Specification of Charge II and of Charge II, approved the sentence, and forwarded the record of trial for action under the provisions of Article of War 48.

3. Evidence for the prosecution shows that accused is a second lieutenant, Infantry. He was the Executive Officer of the company of which the four prosecuting witnesses were members (R.11,15,21,23).

Specification 1, Charge I, charges embezzlement of $20.20 from Private Willie Kidd of accused's company. Private Kidd died a few days before the trial took place (R.28). Testimony for the prosecution concerning this Specification was given by First Sergeant Anthony G. Skidmore, a member of accused's and Private Kidd's company (R.23). During the last few months of 1942 and the early part of 1943 the organization was stationed at Camp Joseph T. Robinson, Little Rock, Arkansas (R.23).

Witness was present in the company orderly room and saw Kidd give accused $20.20 to buy a money order for Kidd. Witness did not fix the date with exactitude, except to say that this delivery of money took place "a little while before the ending of the year". Witness did not state the wording of the conversation which took place between Kidd and accused. However, he remembered that Kidd wanted to send the money order to his (Kidd's) wife (R.23-25).

On several occasions Kidd asked witness about speaking to accused or the company commander "in connection with getting his money", because he "hadn't received his money back". Each time, witness suggested that Kidd talk to accused. At some subsequent time, not disclosed by the evidence, witness heard Kidd ask accused "for his money", and heard accused reply that he "had the stub in his locker". Referring to a still later occasion, witness testified "* * * I happened to be in the orderly

room at that time and the Lieutenant said he would pay him, or he would get his money order or cash a check or something like that" (R.27).

Witness was also present when the money was repaid. The repayment took place in the company commander's office, a few days after the above-mentioned conversation. Witness did not recall the conversation which took place at the time of the repayment, but saw accused hand "the money" back to Kidd. The repayment occurred after the organization had moved from Camp Robinson to Fort Huachuca (R.25-27). The date of payment does not appear anywhere in the record of trial, but, from the sequence of events, it is apparent that a substantial period of time had elapsed.

The "stub" referred to by witness was apparently intended by him, or by accused if accused actually used these words, to mean the small receipt stub commonly issued to the purchaser of a postal money order. No other explanation is found in the record.

By deposition, Lillie May Kidd, wife of Private Kidd, testified that at no time during the months of January and February, 1943, did she receive a money order for $20 from her husband, or from any other person (R.29).

The defense introduced the deposition of Fred W. Perkins, Superintendent of the Camp Robinson Branch, United States Post Office, Little Rock, Arkansas (R.30). Mr. Perkins testified that during January, 1943, his office received an application for a domestic money order for $20 from Private Willie Kidd, Company F, 371st Infantry, payable to Lillie May Kidd. A money order was prepared and delivered pursuant to the application (R.31).

Specification 2, Charge I.

Private Albert Williams, the prosecuting witness upon this Specification, had been discharged from the Army at the time of accused's trial, and his testimony was offered in the form of a deposition. The defense counsel specifically stated that he had no objection to this (R.20). Witness was an enlisted man in accused's organization at the time the incident is alleged to have occurred. A week before Christmas in 1942 witness gave accused two money orders to be cashed for him by accused. One was for $2, the other for $1.50 (R.21).

About a month later, witness was separated from his company and remained separated therefrom for about two months. Witness "contacted" accused "about six times" regarding the money. Finally witness received his money in two payments; the first about 5 May 1943, in the sum of $1.50, and the second in June, in the sum of $2 (R.21,22). The circumstances under which payment was made do not appear in the evidence.

Specification 3, Charge I.

The prosecuting witness on the third Specification under Charge I was Private George Savage, of accused's organization. In January of 1943 he gave accused a money order for two dollars and asked accused to have it cashed for him. Witness asked accused about it a month or two later. At that time accused said that he had not yet cashed it. Witness did not say anything further to accused about the matter (R.11-13). Accused paid witness in June, after the organization had arrived at Fort Huachuca (R.14).

For the defense, Second Lieutenant Oren Johnson, the Assistant Defense Counsel, testified that he had known the accused intimately for 10 months; that he knew accused to be trustworthy and loyal; that accused had upon one occasion borrowed money from witness, and that he had repaid it when due (R.31,32).

4. The Board of Review is of the opinion that the record does not sustain the conviction of accused upon Specification 1, Charge I, the embezzlement of $20.20 from Private Willie Kidd. The evidence produced in the deposition of Fred W. Perkins, postmaster at Camp Robinson, Arkansas, that a money order was issued payable to Lillie May Kidd is sufficient to create a reasonable doubt of accused's guilt. It is reasonable to believe that accused actually did purchase the money order, despite the fact that Perkins' testimony does not specifically state who purchased it. Unless accused had purchased the money order, he and his counsel presumably would not have known of its existence and would not have procured the deposition. Had Private Kidd purchased the money order, accused doubtless would not have known of it, or, if by some chance he had known, would not have dared to resort to the deposition to exculpate himself, since at the time the deposition was taken Kidd was still alive and presumably would be called as a witness by the prosecution.

The facts disclosed by the evidence, including the reimbursement of Kidd by accused, are entirely consistent with the probability that he purchased the money order and then lost it, or converted it to his own use, or negligently failed to deliver it to Kidd, - for which conduct he is not on trial.

5. There is sufficient evidence in the record to prove accused's guilt of Specifications 2 and 3 beyond a reasonable doubt. To recapitulate briefly, Private Williams was a member of accused's organization in December 1942. A week before Christmas in 1942 he delivered two money orders to accused to be cashed for him. One was for $2, the other for $1.50. He did not receive the proceeds until May and June of 1943, after "about six" requests that accused pay him.

Likewise, Private George Savage, a member of accused's organization,

gave accused a $2 money order in January, 1943, to be cashed for him. Savage did not receive payment until June, 1943, after having asked accused for it once in the interim.

These undisputed facts are sufficient to warrant the inference of embezzlement. Wharton, in his work on Criminal Law (Twelfth Edition, Vol. 2, p. 1593), quotes Sir J. F. Stephen (Dig. Criminal Law, Art. 312) as follows:

> "The inference that a prisoner has embezzled property, by fraudulently converting it to his own use, may be drawn from the fact that he has not paid the money or delivered the property in due course to the owner; or
>
> "From the fact that he has not accounted for the money or other property which he has received * * *".

In addition to this authority, the fact that accused paid Williams in two installments, a month apart, warrants the inference that he had used the proceeds for his own purposes, did not have them when demand was made, and had to wait until he could get the money with which to make restitution.

6. One minor error requires comment. Specification 2 of Charge I alleges conversion of "three dollars and fifty cents ($3.50), this sum being the proceeds of a money order entrusted to him * * *" (underscoring supplied). The proof shows that there were two money orders, one for $2 and one for $1.50. Their total is the amount alleged in the Specification. While this is a variance, it is not of a material nature.

7. Accused is 25 years of age. He graduated from high school and spent a total of three and one-half years in two colleges. He served as an enlisted man from February or March 1941 until 14 October 1942, when, upon graduation from the Infantry Officer Candidate School, Fort Benning, Georgia, he was appointed second lieutenant, Army of the United States. In recommending accused for Officer Candidate School, his commanding officer stated that he had demonstrated outstanding qualities of leadership and that his character was excellent.

8. The court was legally constituted and had jurisdiction of the person and the offense. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial.

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NAVY DEPARTMENT

01970

In the opinion of the Board of Review the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge I, legally sufficient to support the findings of guilty of Specifications 2 and 3, Charge I, and of Charge I, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Thomas M. Jolley, Judge Advocate.
Wm Wannenbiel, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 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 Second Lieutenant Edwin A. Moore (0-1296562), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge I; legally sufficient to support the findings of guilty of Specifications 2 and 3, Charge I, and of Charge I; and legally sufficient to support the sentence and to warrant confirmation thereof. In view of the small amounts of money involved, the fact that restitution has been made, and the circumstances of the case, I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted, and that the sentence as thus modified be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

(Findings of guilty of Specification 1 of Charge I disapproved. Sentence confirmed, but in view of the trivial amounts involved, which were repaid, and on all the circumstances in this case, confinement and forfeitures remitted. Execution suspended. G.C.M.O. 71, 15 Feb 1944)

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

SPJGN
CM 243802

19 NOV 1943

UNITED STATES v. First Lieutenant RICHARD L. HAWKINS (O-1584336), 865th Quartermaster Fumigation and Bath Company.	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Ellis, Illinois, 12 and 30 October 1943. Dismissal.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that 1st Lieutenant RICHARD L. HAWKINS, 865th Quartermaster Fumigation and Bath Company (Mobile), on or about 17 September 1943, at Camp Ellis, Illinois, was drunk and disorderly in camp.

He pleaded not guilty to the Charge and its Specification. He was found not guilty of the Charge but guilty of the Specification and of a violation of Article of War 96. He was sentenced to be dismissed

the service. The reviewing authority approved the sentence but recommended that it be commuted to a forfeiture of $50 of his pay per month for a period of 4 months, to restriction to the limits of the station where the accused may be serving for a period of 3 months and to a reprimand, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, about 0230 o'clock on 18 September 1943, noisily awakened the enlisted charge of quarters at the 282nd Station Hospital, Camp Ellis, Illinois, and inquired where he, the accused, was. Upon being advised of his whereabouts, he telephoned for transportation. Within a few minutes, he again requested the same information and made a similar telephone call. Then he began swearing and threw his opened knife against the wall. Recovering it and holding it, still opened, in one hand he grasped the charge of quarters by the throat with his other hand and proceeded to explain what a good soldier he was, relating that he had killed a Jap in some foreign country by stabbing him in the throat. He then demanded something to eat and was advised that the charge of quarters was without food, whereupon in profane terms the accused wanted to know what kind of a "God-damned joint" it was that didn't have a mess hall. On the way to the mess hall, he opened his knife and indicated that he intended to cut a tent rope but refrained and, upon entering the mess hall, he was furnished cheese, bread and milk by the baker then on duty. While preparing a sandwich, he threw a butcher knife into the wall but picked it up, remarking that he was sorry. On one occasion, while going to the icebox, the accused walked through several large pans of cookies which had been placed on the floor preparatory to being put into the oven, remarking that he hoped such action was not seen by the baker. The transportation requested by the accused arrived and he departed. The charge of quarters, who was not angry because of his early awakening, did not call the military police or his commanding officer because he did not believe the accused meant any harm but filed a written report of the incident the following day wherein he did not state that the accused was drunk. However, he had told the investigating officer that during the incident the accused was staggering (R. 4-9).

The officer to whom the accused had telephoned for transportation substantiated the two telephone calls; and the baker, who did not think the accused was a "bad guy" or that the cookies had been seriously disturbed, also substantiated the portion of the incident taking place in the mess hall stating that "it looked as though the Lieutenant (accused) had some drinks" (R. 9-12, 12-15).

4. The evidence for the defense was elicited after the court had overruled a motion for findings of not guilty for insufficiency of evidence, and shows that the accused was a highly efficient officer who had not been previously subjected to disciplinary action but had been selected by his former battalion commander as a company commander, because he was a tireless worker, a good man, and always "on the ball". After explanation of his rights as a witness, the accused testified that, on the night in question, as relaxation from strenuous sustained effort, he had indulged in a few drinks at the officers' club and, feeling ill, decided to get a "bit of fresh air" by walking, which he did for only a few blocks before deciding to secure transportation back to his barracks. Entering the orderly room of the 282nd Station Hospital, he awakened the charge of quarters, who appeared disgruntled and did not give him any "sirs" but permitted him to use the telephone. Rather than "bawl" him out for this dereliction, the accused "kidded" the charge of quarters with his knife. He explained that his walking over the trays of cookies was occasioned by his mistaking them for floor mats (R. 16-18, 19).

5. The Specification alleges that the accused "on or about 17 September 1943, at Camp Ellis, Illinois, was drunk and disorderly in camp". The offense alleged is manifestly violative of either Article of War 95 or 96, depending upon the degree or extent thereof (M.C.M., 1928, pars. 151-152).

The evidence shows that the accused on the occasion in question gave the appearance of having had some "drinks", he staggered and his actions were so typically those of an intoxicated person as to be unexplainable unless conceived and performed during inebriation. Furthermore, the accused by his own testimony admits that he indulged in the use of intoxicants shortly before the incident. The conclusion is therefore inescapable that on the occasion in question the accused was drunk and his actions clearly constituted disorderly conduct, in violation of Article of War 96 of which, by appropriate proceedings in revision, he was found guilty (CM 196426 (1931), Dig. Ops. JAG, 1912-1940, sec. 453 (11)).

The evidence, therefore, beyond a reasonable doubt supports the findings of guilty of the Specification in violation of Article of War 96, as found.

6. The accused is about 28 years of age. The records of the War Department show that he has had enlisted service from 22 August

1941 until 11 December 1942 when he was commissioned a second lieutenant upon completion of Officers' Candidate School, that he has been on active duty as an officer since the latter date and that he was promoted to first lieutenant on 22 April 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge, as revised, and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

SPJGN
CM 243802

1st Ind.

War Department, J.A.G.O., 20 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 First Lieutenant Richard L. Hawkins (0-1584336), 865th Quartermaster Fumigation and Bath Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend, as did the reviewing authority, that the sentence of dismissal be confirmed but commuted to a reprimand, a forfeiture of $50 of his pay per month for a period of four months, restriction to the station where he may be serving for three months, and that the sentence as thus modified 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

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, forfeiture of $50 pay per month for four months, and restriction to station for three months. G.C.M.O. 33, 15 Jan 1944)

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

SPJGQ
CM 243818

25 NOV 1943

UNITED STATES v. Second Lieutenant ADAIR M. SMITH (0-1301699), 365th Infantry.	92ND INFANTRY DIVISION Trial by G.C.M., convened at Fort Huachuca, Arizona, 23 September 1943. Dismissal and total forfeitures.

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

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

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

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

Specification 1: (Finding of not guilty.)

Specification 2: In that 2nd Lt ADAIR M. SMITH, 365th Infantry, did at Fort Huachuca, Arizona, on or about 9 August 1943, wrongfully attempt to engage in a fist fight with Corporal Ernest Butler, Company "F", 365th Infantry.

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

Specification 1: In that Adair M. Smith, 2nd Lieutenant, 365th Infantry, did, at Fort Huachuca, Arizona, on or about 9 August 1943, wrongfully strike Corporal Ernest E. Butler, Company F, 365th Infantry, on the head with a rock.

Specification 2: In that Adair M. Smith, 2nd Lieutenant, 365th Infantry, did, at Fort Huachuca, Arizona, on or about 9 August 1943, wrongfully strike Corporal Ernest E. Butler, Company F, 365th Infantry, on the mouth with his fist.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1 of Charge I, guilty of Specification 2 of Charge I and of Charge I, and of the Specifications of Charge II and of Charge II. No evidence of previous convictions was introduced at the trial. 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 testimony for the prosecution may be summarized as follows: On 9 August 1943 Corporal Ernest E. Butler, Company F, 365th Infantry, was assigned the duty of driving a jeep for Second Lieutenant William R. Stokes and a "Lieutenant Brooks", both officers of the regiment (R. 28). Lieutenant Stokes, accompanied by Corporal Butler, had driven the jeep from the drill field to the finance office at Fort Huachuca, Arizona, where they were joined by accused. They then proceeded to Guest House No. 1. Upon arrival there Lieutenant Stokes and accused got out and Butler was directed to park the jeep and wait for them, which he did. It was then about 9:00 a.m. At 11:30 a.m. Stokes came out, handed Butler a note and told him to go to accused's home and give the note to anyone who might come to the door. Butler then proceeded on this mission (R. 26).

Thereafter Stokes and accused went to the Mountain View Officers Club where Private Cleo Davis, Company C, 371st Infantry, a bartender at the Club, found them sitting at the bar when he arrived for work on the morning of 9 August 1943. They ordered, and were served, two bottles of beer (R. 16).

Meanwhile Corporal Butler had gone to accused's home, presented the note to accused's wife, who gave him a bottle of whiskey. This bottle he delivered to accused when he failed to find Stokes at the Guest House (R. 26, 27, 30). Accused then ordered Butler to return to his company but to come back to the Guest House at 1:00 p.m. Upon his return at that time he failed to find either Stokes or accused at the Guest House, so he proceeded to the Officers Club, where he found both of them drinking at the bar (R. 27). Butler's reason for being at the Club was to pick up the lieutenants in compliance with the directions given to him. He asked the bartender for "Lieutenant Smith and Lieutenant Stokes" (R. 19). Notwithstanding it was against the rules for an enlisted man to enter the Officers Club (R. 7, 8, 90) Butler went into the bar and ordered a beer. When Davis refused to serve him both accused and Stokes directed him to do so (R. 18). He did serve Butler with beer and accused paid for it (R. 19).

At about 1:00 p.m. First Lieutenant William T. Pryor, 1922 S.C.U., custodian of the Mountain View Officers Club, arrived at the Club and finding an enlisted man in the bar ordered him (Butler) to leave (R. 7). What transpired in the bar and outside of the Club thereafter, and the physical condition and actions of the participants, are variously portrayed by the witnesses.

Davis, the bartender, first stated that accused left the bar room and that Lieutenant Pryor then came in and told Corporal Butler that he would have to go out, and that "he (Pryor) took Butler outside" (R. 17). Later Davis testified that when Pryor ordered Butler to get out accused "took him and carried him out" (R. 19). At this time accused "wasn't drunk and he wasn't sober" but "intoxicated" (R. 20). He staggered "a little bit" (R. 21). Corporal Butler was also "intoxicated" - "just about drunk" and neither able to perform his military duties nor drive a jeep; in fact "he was drunker than any of the rest of them." Accused "wasn't as drunk as the corporal was "(R. 23). After the group had left the bar and gone outside, Davis, who was looking out of a window, saw Pryor, with the help of Stokes and Butler, trying to put accused in the jeep (R. 20). Just then accused stumbled over a rock and fell (R. 19). Finally, accused got into the jeep of his own accord and without assistance (R. 21). Davis saw no one hit, either with a fist or a rock on that occasion (R. 21). He had seen no drinking of liquor by anyone in the group, though there had been a bottle, containing about one and one-half inches of what appeared to be whiskey, standing on the bar when accused and Stokes were there drinking beer, but to whom it belonged or where it came from Davis could not say (R. 21, 22, 25).

Lieutenant Pryor testified that when he found Corporal Butler in the bar of the Officers Club he ordered him to leave. Accused, who was talking with Stokes, then insisted that Butler leave immediately, and, with the assistance of Stokes,"ejected him from the tap room" (R. 7, 8). There had been no disturbance in the bar, no loud talking or hilarity on the part of accused, nor had Lieutenant Pryor requested accused and Stokes to assist him in the matter (R. 90). There were two bottles of beer on the counter although Pryor saw no one drinking and saw no whiskey while he was there (R. 9). Accused was not drunk (R. 8, 93) but Butler, the enlisted man, was "under the influence of an intoxicating beverage" (R. 8), and "was pretty well loaded" and "reeling" (R. 91, 93). Pryor saw no indications of any animosity between accused and the enlisted man Butler, although Corporal Butler was "belligerent" toward Lieutenant Pryor when asked to leave the Club (R. 94).

As soon as the group was on the outside, Butler got into the jeep,whereupon Stokes told him to move over as he was not fit to drive because he was not sober (R. 12, 94). Pryor saw no signs of altercation, other than hearing an argument between Stokes and accused in the bar about leaving, and a dispute on the outside as to who should drive the jeep (R. 15, 90, 91, 96). Stokes had insisted that accused leave with him but Butler and accused had wanted to remain a while longer. Stokes then took accused by the arm and pulling him toward the jeep said "let's go". This "was the only form of what you might call scuffling" that he saw (R. 91). He saw no blows struck between

accused and Butler (R. 91); in fact he saw no blows struck at anyone (R. 12). To the question: "Did you see either one fall down, slip or stumble?" he answered "No, sir"(R. 92); and when asked "Did you see Butler fall down?" he said "No sir, I didn't see him fall." The only strong language he heard was, "why the hell don't you come and let's go, we have work to do". The whole episode on the outside lasted only three or four minutes (R. 95). Later on the same day he saw Corporal Butler when he was brought to the Club by a colonel and although he had no apparent injuries on his face at 1:00 p.m., witness then observed a swelling on his lip (R. 97). Pryor remembered that Butler had given no indication of having been hit on the mouth, had no swollen lip and seemed "whole and hearty" when he drove away from the Club shortly after noon (R. 99). Furthermore he - Pryor - was positive that if there had been any altercation in which Butler was struck and knocked down, or hit on the head with a rock, "it would have been impossible for me not to have seen it" (R. 99), as there was but a short interval of time during which Pryor did not observe the group after they left the bar (R. 90, 95, 98).

Corporal Butler testified, that when he entered the bar at the Officers Club to report to Lieutenant Stokes and accused he was offered, by both of them, and drank "two beers and a whiskey", all of which were procured from the bar (R. 29, 33, 34). Accused also drank beer and whiskey (R. 34) and, in Butler's opinion, both accused and Stokes were drunk, though he himself was not, but only "feeling pretty good" (R. 35, 39). His recollection of what happened then, as related in his own words is as follows:

> "* * * I told Lt. Stokes 'Let's go' and he said 'Wait a minute'. So Lt. Stokes decided to go and Lt. Smith pushed Lt. Stokes across one of the chairs. So all of them went out with me; they carried me out and Lt. Stokes and Lt. Smith went back in. I was sitting there in the jeep and I told them 'Let's go' and Lt. Smith started cursing me and calling me different names. I told him 'Come on let's go' and he kept cursing me. At that time he hit me on the head with a rock, and Lt. Stokes asked me if I wanted to fight it out with him and I said 'Yes'. So we go to the Old Post, about three or four miles, and him and me got to fighting there. I told him I didn't want to fight him, I respected him as an officer, and he got to calling me names * * * So we were fighting. After we got through fighting, we got into the jeep and we carries him back to his company * * * (R. 26, 27). Lt. Stokes was still driving the jeep at the time and he took us out there. Lt. Smith was still calling me names. So when we got out there he asked if I still wanted to fight it out with him, and I told him 'Yes'. And that is why we got to fighting out there" (R. 32).

When asked, however, whether he ever said he wanted to fight with accused he answered: "No, sir. It was Lt. Smith's idea. I never said I wanted to fight him" (R. 32). This inconsistency in his testimony he tried to explain but advanced no reason for it (R. 37). As they were about to

leave the Club house in the jeep, Butler testified accused hit him on the head with a rock (R. 27) after first threatening to do so (R. 28). Later, after arriving at the Old Post there was a mutual combat between accused and Butler in which accused hit Butler several times, once on the mouth (R. 33, 35) and Butler hit accused "on the head and in his face" (R. 36). Stokes took no part in the fight and when it was over all three returned to camp together in the jeep (R. 27, 36).

The blow with the rock was on top of Butler's bare head, caused a bruise which did not bleed (R. 36). Later he - Butler - was given treatment at the dispensary by First Lieutenant J. Woodruff Robinson, Medical Corps, who testified that Butler "had a small contused wound on the top of his head * * * and he had a small lacerated wound on the inner surface of the upper right lip". In his opinion, the wound on the head "* * * could have been caused by falling or some soft material or some soft instrument hitting him on the head and not any sharp instrument" (R. 41). Lieutenant Robinson recalled accused showing him a wound on his chest on the same afternoon or the following morning (R. 44).

The court called certain witnesses (R. 75) among whom was Second Lieutenant Farris (referred to at times as "Ferris" (R. 53, 59), and whose full name nowhere appears) and it was stipulated that "if Lt. Farris were present in court he would testify" that he arrived at the Officers Club at about 12:15 p.m. on 9 August 1943 and when he entered the tap room he saw accused and Lieutenant Stokes there. An enlisted man was sitting at the far end of the bar. There was nothing to indicate that the enlisted man was with the officers and he heard no altercation between him and accused. Farris got a bottle of whiskey from behind the bar and each of the officers drank "a shot" and he then left at about 12:45 or 1:00 p.m.

Another witness called by the court was Private First Class James Matthews, of the Military Police Detachment. He testified that he was on duty at the Club as bartender from 7:30 a.m. until 1:00 p.m. on 9 August 1943. He saw accused and Lieutenants Stokes and Farris in the bar on that date. Shortly after the officers had arrived an enlisted man came in and asked the officers whether they were ready to go (R. 82). Matthews served a round of beer to the officers and "set-ups" for whiskey, some of which the officers drank from a bottle which Lieutenant Farris got from his locker (R. 82, 83). While Matthews was on duty he did not see the noncommissioned officer take a drink and he was not drunk; neither was accused, though he acted like one who had been drinking (R. 84). At about 1:30 or 2:00 p.m., Matthews left the Club and later returned, after which the enlisted man was brought to the Club by a major. At that time Matthews noticed nothing unusual about him (R. 86).

4. On behalf of accused, Second Lieutenant William R. Stokes, 365th Infantry, testified that, although he had come in from the drill field in a jeep which Corporal Butler was driving, he had dismissed

Butler and told him to go and get his lunch. He had not ordered or directed Butler to return for him since he proposed to walk back to his company (R. 54, 61). Thereafter he and accused went to the Officers Club. About fifteen minutes after they had arrived Butler came into the bar of the Club. He was not served any intoxicating liquor or beer but Stokes saw a bottle of beer in front of Butler, though he did not know how he obtained it. He appeared, however, to have been drinking when he came to the Club (R. 46, 63). Within a short time Lieutenant Pryor arrived at the Club and ordered Butler to leave. Butler "made several smart remarks"and refused to leave (R. 60), became unruly and had to be forcibly ejected by Lieutenant Stokes and accused (R. 46). As they started out the door Butler turned, after leaving the porch, and cursed accused, who then pushed Butler away from him. Butler then fell down in the road and after rising started toward accused and they grappled for a while (R. 46, 47). Stokes saw no blows passed, nor did he see anything in accused's hand, but accused did later show him an oval scar on his chest which he said was the result of a bite he received in the scuffle (R. 47, 58). Lieutenant Pryor was present during the scuffle (R. 61). Thereafter Stokes, accused and Butler left in the jeep and went to the company drill area at the request of accused who wanted to join his company (R. 48). When they arrived at the area they stopped and accused and Butler got out of the jeep to urinate (R. 49). During the trip there was no quarrelling or fighting between accused and Butler and no altercation of any kind; nor was there any talk of fighting, and Stokes did not hear accused use any opprobrious words (R. 52, 62). Having failed to find the company in the drill area the three returned to camp in the jeep (R. 49, 52). Stokes could not say whether accused was drunk or sober but he knew he had been drinking (R. 54). He denied that accused had sent Butler to accused's home with a note for his wife or to get a package (R. 62).

Accused elected to be sworn as a witness in his own behalf and testified that Lieutenant Stokes and he were sitting at the bar in the Officers Club (R. 67) on 9 August 1943 after they, together with Corporal Butler, who had charge of the jeep in which they rode, had gone from the Finance Office to the Guest House, where Butler left them. Butler was then apparently sober. Later Butler came into the bar at the Officers Club under the influence of liquor. Butler had not been sent anywhere for a package either by Stokes or by accused, nor did he on that date deliver any package to either of them. (R. 69, 70). While the corporal (Butler) was in the bar at the Club, Lieutenant Pryor came in and ordered him to leave which he refused to do, stating, in effect, that he was as good as an officer. At this point accused and Lieutenant Stokes "assisted him out " (R. 67). Butler finally left the Club house willingly but, as they reached the outside and were proceeding to where the jeep was parked, he turned around and bit accused who shoved him off and Butler fell down. After getting up he struck accused once or twice in the face and then the two "wrestled around". Stokes tried to separate accused and Butler while they were

scuffling (R. 68). Eventually they all got into the jeep and, with Lieutenant Stokes driving (R. 70), they agreed to take accused to his company training area (R. 68). They did go to the area and all got out of the jeep for a few minutes, but not finding the company, returned again to camp (R. 70, 71). At no time on 9 August 1943 had he attempted to engage Butler in a fight, nor did he strike him with his fist, or any other object, on the head or any other part of his body, nor had he offered him any liquor nor drunk any with him (R. 64, 72). Stokes and he had several drinks of liquor in the bar of the Club on that day but accused did not know whose whiskey they were drinking (R. 65). On the following day he had shown the mark of the bite on his chest to Lieutenant Robinson, the medical officer (R. 74).

First Lieutenant Raymond F. Coles, 365th Infantry, Commanding Officer of Company "F" of which accused was an officer, testified that he had known accused very intimately for five months; that his character is excellent and in efficiency he would rate him in "the upper third". His record as to sobriety was unimpeachable and his treatment of enlisted men fair and consistent with sound judgment. He had never been guilty of any unauthorized absence from duty except on 9 August 1943 (R. 75-77).

5. The greater part of the record in this case, consisting of 101 pages, is devoted to proof that accused was guilty of conduct unbecoming an officer and a gentleman in drinking liquor with an enlisted man. Since he was acquitted of that Charge by the finding of the court it would not be necessary to review such of the evidence as touched on that Charge were it not for the fact that the testimony throughout, and as to all facts tending to prove the offenses alleged, is in hopeless and irreconcilable conflict and must be viewed as a whole in order to reach a just determination upon the propriety of the findings on the remaining Specifications and the Charges.

Accused stood charged with a violation of Article of War 95 (1) in drinking with an enlisted man and (2) in wrongfully attempting to engage in a fist fight with him, and with a violation of Article of War 96 (1) in wrongfully striking the enlisted man on the head with a rock and (2) wrongfully striking him on the mouth with his fist. He was acquitted of the first alleged offense and convicted of all others. Here it should be observed that the offense embraced in the Charge of attempting to engage in a fist fight, which was laid under Article of War 95, was, under all the evidence in the case, necessarily absorbed by and became merged in the offenses embraced within one, or both of the Specifications of the batteries charged under Article of War 96 and which, if they did occur, were the culmination of the attempt. It would be absurd to hold accused guilty of both the attempt and the completed act and it was improper to resort to a multiplication of charges arising out of the single transaction (MCM, 1928, par. 27). This is not a case in which the offenses constitute different aspects of the same act. An inspection of the original charge sheet discloses that the batteries were also charged under Article of War 95 but were deleted before trial and the Specification alleging an attempt to engage in a fight added

in lieu thereof. It should also be noted that under the proof adduced to support the Charge of attempting to engage in a fist fight with the enlisted man, accused could not be held guilty of such disgraceful and dishonorable conduct therein as to warrant a finding of guilty under Article of War 95, but, at best, merely a finding of guilty of conduct to the prejudice of good order and military discipline in violation of Article of War 96.

A search of the record fails to disclose any basis or motive for a quarrel between accused and Corporal Butler, whom he is charged with assaulting, other than such bad feeling as could, and may have, arisen out of their associations on 9 August 1943. Much could be supplied by speculation and unwarranted inference after reading the record; but more than that is legally required to remove the guilt of accused from the realm of reasonable doubt. Although there appear to be more cogent reasons for a finding of guilt upon the Specification charging drinking with the enlisted man than upon any of the other Specifications, the court absolved him of that offense and found him guilty of all the rest.

What reason there was for such action, other than the prerogatives of the court in the determination of the credibility of witnesses, is not apparent. The credibility of witnesses is, under the rules, determined by the consideration of many things. It is true that the court had one advantage not enjoyed by anyone confined to reading the record and that was the privilege of observing the witnesses in person as they testified; but in all other respects, the written record furnishes the reviewing authorities with all that is required to properly apply the tests by which a witness' veracity can be determined and the significance of his testimony weighed.

It is impossible for this Board to know why the court accepted the testimony of Corporal Butler and rejected the competent contradictory testimony as to which three commissioned officers and another enlisted man agreed. There was no attempt made to impeach the veracity of any witness in the trial. This being so, the Board of Review has been obliged to analyze, evaluate and weigh the testimony as it appears of record in order to determine, for themselves, what evidence is worthy of belief.

There is no evidence of any fraternizing between accused and the enlisted man, nor any course of intimate association from which a feud or quarrel might have emanated, prior to the incidents of 9 August 1943. All that the record shows is that accused, an officer of Company K, 365th Infantry, joined Lieutenant Stokes, an officer of Company F, of the same regiment, who was using a jeep driven by and in the possession of Corporal Butler, a member of Company F, at about 9 or 9:30 o'clock on the morning of 9 August 1943. Whatever Stokes and accused may have done between that time and around noon, when Butler was relieved and told to go to lunch,

is not shown; but it is apparent, and not denied by Butler, that he was not invited to go with the officers to the Officers Club where restrictions forbade the presence of enlisted men. Butler nevertheless appeared in the bar room of the Club at about 1:00 p.m. on that day, in compliance, as he said, with directions the officers had given to him, to come and pick them up. Both officers denied giving such instructions and Butler admitted that when he did not find the officers at the Guest House where he had left them he sought them, on a mere "hunch", at the Club house.

In addition to the violation of the Club restrictions, Butler became unruly, argumentative and belligerent when ordered to leave by the officer in charge of the club and it became necessary to conduct him from the premises. Whether this was done forcibly or otherwise is uncertain. Three officers corroborated one another in this testimony.

At this point Butler said accused began to call him by opprobrious epithets and, just as they left the Club and were about to get into the jeep, hit him on the head with a rock. Where the rock was obtained and how it was used does not appear; nor did Lieutenant Stokes and Lieutenant Pryor, who were present, or Private Davis, who watched the proceedings from a window, see any such act on the part of accused. Accused denied the charge and testified that when they left the Club house and walked toward the jeep Butler turned and bit him on the chest, whereupon he pushed him so that he fell down, after which there was a slight scuffling. Lieutenant Stokes corroborated accused with regard to Butler's fall and the scuffle and saw an oval mark on accused's chest the next day.

It is upon this shallow provocation that Butler claims he and accused engaged in mutual combat shortly thereafter in the training area three miles from the Club house. He said accused requested to go out to the training area to find out whether his company was still there and that on the way accused continued to revile him and Lieutenant Stokes asked him whether he wanted to fight it out with accused. Although he twice stated, under oath, that he consented to the fight he tried later to explain that he meant otherwise. Lieutenant Stokes and accused denied that any provocative language was used on the trip, that any incentives to fight were offered by anyone or that there was any fighting of any kind. Butler was treated, however, for a slight head bruise and cut lip in the afternoon following their admittedly peaceful return together from the training area, but the medical officer testified that the injuries could have been caused by a fall and were not caused by a sharp or hard instrument.

In the light of the rules by which credibility is determined it is impossible to accept Butler's version of the events that transpired and reject those of Lieutenants Stokes and Pryor, accused and Private Davis, except by an arbitrary or erroneous application of the rules. True, the

power to decide whom, among the witnesses, the court will or will not believe, lies solely with the court in the first instance and that determination should not, ordinarily, be disturbed; but the process by which such a determination is reached must be a reasonable one and, if the results obtained are not consistent with reason it is the duty of the Board of Review to reject them and to weigh the evidence, judge of the credibility of witnesses and determine, for themselves, the controverted questions of fact.

Without discussing, at length, the reasons for so holding, it is sufficient to say that after a careful comparison of all the testimony in the case, viewed in the light of all the circumstances surrounding the incidents involved, and a fair and impartial weighing of the evidence, it is not shown, beyond every reasonable doubt, that accused committed any of the offenses of which he was found guilty.

6. Accused is 27 years and 5 months of age. Records of the War Department disclose that he was born in Kansas City, Missouri. He graduated from Kansas City High School and attended Kansas City Junior College for one year thereafter. While in high school (1930-1934) he was a member of Reserve Officers Training Corps and in 1932-1933 he was a member of the Citizens Military Training Corps, receiving training at Fort Riley, Kansas. He enlisted on 23 November 1936 and on 4 June 1942 applied for admission to and was accepted for training in the Infantry School at Fort Benning, Georgia. After completion of the course he was commissioned a second lieutenant, Army of the United States, and assigned to duty with the 92nd Infantry Division.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed at the trial. 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 and the sentence.

William A. Pounds, Judge Advocate.

Earle Adams, Judge Advocate.

Herbert B. Fredman, Judge Advocate.

SPJGQ
CM 243818

1st Ind.

War Department, J.A.G.O., 14 FEB 1944 To the Commanding General, 92d Infantry Division, Fort Huachuca, Arizona.

1. In the case of Second Lieutenant Adair M. Smith (0-1301699), 365th Infantry, 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 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action or rehearing 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 243818).

Myron C. Cramer

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

1 Incl.
Record of trial.

FEB 1

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

SPJGH
CM 243926

13 DEC 1943

N.D. (123)

UNITED STATES v. First Lieutenant DUDLEY W. MCKAY (0-1944523), Transportation Corps.	)	BOSTON PORT OF EMBARKATION Trial by G.C.M., convened at Boston Port of Embarkation, Boston, Massachusetts, 25 October and 10 November 1943. Dismissal, total forfeitures and confinement for five (5) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and DRISCOLL, 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 Dudley W. McKay, 1st Lieutenant, TC, 15th Mobile Port, Camp Myles Standish, Massachusetts, did, without proper leave, absent himself from his station at Camp Myles Standish, Massachusetts, from about 30 September 1943 to about 23 October 1943.

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

Specification: In that Dudley W. McKay, 1st Lieutenant, TC, 15th Mobile Port, Camp Myles Standish, Massachusetts, then Dudley W. McKay, 2nd Lieutenant, TC, Headquarters Detachment, Boston Port of Embarkation, Boston, Massachusetts, did, at Boston, Massachusetts, on or about 24 August 1943, feloniously embezzle by fraudulently converting to his own use currency of the United States of the value of eleven hundred fifty-seven dollars and five cents ($1157.05), the property of T/5 Phillip J. McCusker, Headquarters Detachment, Boston Port of Embarkation, entrusted to him by the said T/5 Phillip J. McCusker.

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

Specification 1: In that Dudley W. McKay, 1st Lieutenant, TC, 15th Mobile Port, Camp Myles Standish, Massachusetts, then Dudley W. McKay, 2nd Lieutenant, TC, Headquarters Detachment, Boston Port of Embarkation, Boston, Massachusetts, with intent to defraud T/5 William E. McKenzie, Headquarters Detachment, Boston Port of Embarkation, did, at Boston, Massachusetts, on or about 23 July 1943, unlawfully pretend to the said T/5 William E.McKenzie that the said T/5 William E. McKenzie was required to pay one hundred fifty dollars ($150.00) for the purpose of canceling an allotment, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said T/5 William E. McKenzie the said sum of one hundred fifty dollars ($150.00).

Specification 2: In that Dudley W. McKay, 1st Lieutenant, TC, 15th Mobile Port, Camp Myles Standish, Massachusetts, did, at or in the vicinity of the Hotel Vendome, Boston, Massachusetts, being a public place, on or about 18 October 1943, appear in improper uniform, and with intent to deceive, did falsely represent himself to be a captain of the Army of the United States by wearing the insignia of a captain of the Army of the United States, well knowing that he was not authorized to wear said insignia of a captain of the Army of the United States.

He pleaded guilty to and was found guilty of all Charges and Specifications with the following exceptions and substitutions: Specification, Charge II, guilty except the words "eleven hundred fifty-seven dollars and five cents ($1157.05)", substituting therefor the words "one thousand dollars ($1000.00)"; Specification 1, Charge III, guilty except the words "with intent to defraud T/5 William E.McKenzie, Headquarters Detachment, Boston Port of Embarkation" and the words "unlawfully pretend to the said T/5 William E. McKenzie that the said T/5 William E. McKenzie was required to pay one hundred fifty dollars ($150.00)" and the words "well knowing that said pretenses were false, and by means thereof did fraudulently" and the words "the said" and adding thereto the words "and did wrongfully retain said sum". He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved only so much of the finding of guilty of Specification 1, Charge III as involves a finding of guilty of a violation of the 96th Article of War, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Specification 1, Charge III: Prior to 23 July 1943, Technician Fifth Grade William E. McKenzie, had discussed with accused and "Major Stiles" the possibility of cancelling an allotment to his wife, who had married another man on 23 October 1942, without first obtaining a divorce from McKenzie. His wife obtained a divorce 3 June 1943, but McKenzie did not find out about it until September 1943. Accused stated that if McKenzie would pay back $150 to the allotment office the allotment would be cancelled. On 23 July 1943, McKenzie, while on detached service in Maine, received a telephone call from the accused, who stated that if McKenzie would send him $150, he could get the allotment cancelled "right away". In response to the call McKenzie addressed a letter (Ex. 5) to his bank authorizing accused to withdraw $150 from his account "to pay a refund on my class F allotment". Accused presented the letter to the bank on 26 August 1943 and received $150. Later accused informed McKenzie that the money was mailed to the allotment office and that McKenzie would receive a check for any back payments he might have coming and the $150. The allotment was not cancelled and the $150 was not returned to McKenzie (R. 11-19, 22-23).

b. Specification, Charge II: On 5 August 1943, Sergeant Edward J. Shea, an agent of the Provost Marshal Branch Investigation Division, turned over to accused the sum of $2,457.05, the property of Technician Fifth Grade Phillip J. McCusker, and received a receipt for that amount (Ex. 4). By stipulation it was shown that $157.05 of the money was returned to McCusker by accused, leaving a balance of $2,300, which was kept in a safe at Headquarters, Boston Port of Embarkation. In the presence of witnesses McCusker made a request of accused for the balance of the money, and was informed by accused that "Major Stiles" insisted that the money be sent to McCusker's bank, State National Bank of Denison, Texas, for deposit to his credit. When McCusker later requested his balance at the bank, he discovered that only $1,300 had been deposited, leaving the deposit $1,000 short. The records of the Boston Port of Embarkation Branch, Shawmut National Bank, showed that a draft (Ex. 7) in the sum of $1,300, payable to State National Bank, Denison, Texas, was purchased by accused on 24 August 1943. It was stipulated that this draft was deposited by accused in the payee bank to the credit of McCusker and was paid (R. 9-10, 21-23).

c. Specification, Charge I: Extract copies (Exs. 2 and 3) of the morning report, Headquarters, 15th Mobile Port, Transportation Corps, submitted at Camp Myles Standish, Massachusetts, showed accused from duty

to absent without leave 30 September 1943, and from absent without leave to confinement 23 October 1943. On 23 October 1943 Second Lieutenant Edwin C.Mason 228th Military Police Company, Boston Port of Embarkation, apprehended accused at the Copley-Plaza Hotel, Boston, Massachusetts (R. 8).

d. Specification 2, Charge III: On 18 October 1943, Captain Louis M. Gordon, met accused in the lobby of the "VenDome Hotel", a public place in Boston, Massachusetts. Captain Gordon was "surprised" to see accused wearing captain's bars, as he had just recently been promoted to first lieutenant. Accused called attention to his rank, and stated that he had been made a captain and was back from overseas, where promotions were rapid. Accused claimed to have flown to America on a special mission and that he expected to fly back in a few days. He was also wearing two rows of service ribbons (R. 20-21).

4. No evidence was offered by the defense (R. 23).

5. a. Specification 1, Charge III: The evidence shows that on 23 July 1943 in response to a telephone call from accused to Technician Fifth Grade William E. McKenzie, in which accused stated that if McKenzie would send him $150 he could get McKenzie's allotment to his wife cancelled "right away", McKenzie gave accused written authority to withdraw $150 from McKenzie's bank account. That amount was withdrawn from the account by accused on 26 July 1943. McKenzie's allotment was not cancelled nor was the $150 returned to him. Accused by his plea of guilty admits that this money was wrongfully retained by him.

b. Charge II: The evidence shows that accused executed a receipt for the sum of $2,475.05 belonging to Technician Fifth Grade Phillip J. McCusker and that the money was placed in a safe at Headquarters, Boston Port of Embarkation. Of this amount $157.05 was returned to McCusker by accused. When McCusker requested the balance he was informed by accused that at Major Stiles' request the money would be deposited to McCusker's credit at a bank specified by him. On 24 August 1943, accused purchased a draft for $1,300 payable to McCusker's bank, where it was deposited by accused. The balance of $1,000 was unaccounted for. Accused by his plea of guilty admits that the $1,000 was embezzled by him as alleged.

c. As to Charge I the evidence shows and the plea of guilty admits that accused was absent without leave from about 30 September to about 23 October 1943.

d. As to Specification 2, Charge III, the evidence is uncontradicted and accused in his plea of guilty admits that on 18 October 1943, with intent to deceive, he appeared in the lobby of the Vendome Hotel, a public place, wearing captain's bars instead of first lieutenant

bars, which his true rank entitled him to wear. On that occasion he represented to Captain Louis M. Gordon that he had been made a captain overseas and had returned to this country on a special mission.

It is a violation of the 95th Article of War for an officer to wear unauthorized insignia, with intent to deceive, for personal gain or advantage, not necessarily pecuniary, or for personal aggrandizement, social or otherwise (CM 233900, Baker).

6. The accused is 35 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 8 October 1939; temporarily appointed second lieutenant, Army of the United States, from Officer Candidate School and active duty, 6 January 1943; temporarily promoted to first lieutenant, Army of the United States, 2 September 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, 93rd or 96th Article of War and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Drucci, Judge Advocate

H. Lattuhos, Judge Advocate

[illegible], Judge Advocate

1st Ind.

War Department, J.A.G.O., 31 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 First Lieutenant Dudley W. McKay (0-1944523), 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 and the sentence, and to warrant confirmation of the sentence. The accused wrongfully retained $150 which an enlisted man had delivered to him in the course of seeking to cancel an allotment (Spec. 1, Chg. III); embezzled $1,000 from an enlisted man (Spec., Chg. II); was absent without leave for about 23 days (Spec., Chg. I);and, with intent to deceive, wore the insignia of a captain in a public place (Spec. 2, Chg. III). I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for five years be confirmed and carried into execution.

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

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 111, 10 Mar 1944)

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

SPJGN
CM 243927

3 FEB 1944

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	
Private RALPH L. STRONG (19191091), 1014th Guard Squadron.	)	Trial by G.C.M., convened at Merced Army Air Field, 23, 24. 25 and 26 August 1943. Dishonorable discharge and confinement for life. Penitentiary.

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HOLDING by the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that PRIVATE RALPH L. STRONG, 1014th Guard Squadron, Lemoore Army Air Field, Lemoore, California, did, at or near Hanford, California on or about July 22, 1943, forcibly and feloniously, against her will, have carnal knowledge of Elaine Maddox.

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

Specification: In that PRIVATE RALPH L. STRONG, 1014th Guard Squadron, Lemoore Army Air Field, Lemoore, California, did, at or near Hanford, California, on or about July 22, 1943, forcibly and feloniously, against her will, have carnal knowledge of Bairdell Lois Gunter.

He pleaded not guilty to and was found guilty of both Charges and Specifications, and 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's Island, Washington, as the place of confinement, and forwarded the record pursuant to Article of War 50½.

3. Concerning the Specification, Additional Charge, describing the first, in point of time, of the two offenses of which the accused was found guilty, the evidence for the prosecution shows that, about a month before the date of the alleged offense, the prosecutrix, 18-year-old Bairdell Gunter - 5 feet 8 inches tall and weighing 135 pounds - came to Hanford, California, from her parents' home in Ashton, Idaho, for the purpose of visiting her brother, Sergeant Gunter, who was stationed at Lemoore Army Air Field, about 30 miles from Hanford. Some three weeks after her arrival, she obtained employment in Hanford as a waitress at the Glider Inn, which she described as a "curb service", selling sandwiches and drinks, including beer. About the same time, she took a room at the Vendome Hotel, which, except for a desk lobby on the street level, occupies the upper floor only of a two story building in Hanford. Her duty hours at the Glider Inn were from 4 in the afternoon until midnight, except on Saturdays when her shift lasted until 1 a.m. (R. 20-22, 27-28).

She had been working there about 3 days when she first saw the accused. He was sitting in a gray car in the parking area at the "drive-in" where she worked. At that time, without telling her his name, he asked her for a date. She refused. A few days later - at about 6:30 on the afternoon of 21 July 1943 - the accused again visited the Glider Inn. When another waitress asked for his order, he requested her to tell the prosecutrix to come out to his car. On the prosecutrix's arrival in response to his message, he tried to make a date with her for the following night. "Laughing and talking", she again refused, whereupon he requested her to send the other girl out. The same night, at about 10:30, the accused returned to the Glider Inn with a girl in his car. Another waitress took their order but the prosecutrix removed the tray. On this occasion, she had no conversation with him (R. 22-26).

Two hours later - shortly after midnight - the prosecutrix, accompanied by a fellow waitress, left the Glider Inn, to walk to Chinatown for some Chinese food. Although they had seen and talked to them at the Glider Inn earlier in the evening, neither of the girls knew the names of the two boys - both civilians - who picked them up on the way and drove them to Chinatown. Having eaten, all four left in the boys' car shortly after one o'clock. At a quarter after one they arrived at the Vendome Hotel, which is four blocks from Chinatown (R. 26-27).

Entering alone, the prosecutrix observed that there was no one in the lobby. She then proceeded up the stairs, at the top of which a light was burning. She recognized, as the accused, the soldier standing there; of his name she was still unaware. To her inquiry as to what he was doing there, he replied that he had come up to go to the rest room. Precipitately, he put both arms around her and kissed - or tried to kiss - her.

She made no outcry, but slapped his face, admonishing him, at the same time, to leave her alone (R. 27-28).

He, however, followed her to her room; outside the door she stopped, with the key in her hand. "Well, aren't you going to go in?" he inquired. "No, not until you leave," she replied. He then took the key. Although he was not in any manner restraining her, she neither made any attempt to call for assistance nor to go to some public part of the hotel, remaining beside him while he inserted the key in the lock and opened the door. When he had done that, he pushed her into the room - which was quite small -, followed her, locked the door and put the key in his pocket (R. 29-30, 51-54).

After trying to kiss and make love to the prosecutrix, the accused lay down on her bed. The girl, seated in a chair nearby, inquired what he was going to do. He replied that he was going to stay all night. "I told him he couldn't", her testimony continued,

> "and he said he couldn't find any more rooms in town and he had to stay there. * * * I think he tried everything he could to try to make me want him to stay there and of course I didn't. * * * I had told him that he had better leave me alone or I would tell my brother and he said I wouldn't dare do that and also I told him if he wouldn't get out and leave me alone, I would call for help and he said, 'If you do, I will tell them that you wanted me to come in - you coaxed me to come in.'"

This caused her to abandon any idea of calling for help, although her cries would undoubtedly have been heard - the walls were thin and there was only a piece of wire screening covering the transom over her door - because, as she expressed it, "I haven't been staying at the Vendome Hotel very long and thought that maybe they would think I was tough and didn't care what, and so I was really scared to say anything." (R. 30-31, 58).

She continued to refrain from making any outcry when the accused rose from the bed and removed his trousers. "I was frightened," she testified, "and didn't dare yell on account of him threatening me." The threat referred to, as clearly developed on the cross-examination of the prosecutrix, was to tell whoever came up that she had coaxed him into the room. "I didn't want them to think that I had a man come into my room and try something like that. That gives a girl a bad reputation." After she had testified that <u>that</u> was what she had in mind, that she was afraid of <u>that</u>, the court sustained an objection, on the basis that it was argumentative, to the following question propounded by the defense counsel to the prosecutrix: "Did you have in mind that you would rather have the man continue with what he was doing than take the risk of having somebody think that of you?" Any answer other than an affirmative one would have been wholly inconsistent with her testimony already adduced (R. 31-32, 59-62).

After removing his trousers, the accused picked up the prosecutrix - who had told him, in the meantime, that if he was going to stay in the bed she was going to sit in the chair - and threw her down on the bed. There, for a while, she admitted they "just wrestled kinda in a playful manner without any anticipation". When, in the course of this tussle, she remarked "You God damned son of a bitch, get out of here and leave me alone", he retorted, "Don't call me those names. I wouldn't think of doing anything to you." He also told her, "If you don't quit, I'll knock the hell out of you." (R. 32-33, 60, 64-65, 79, 89).

According to her testimony, "he just kept trying to kiss me and try to get intercourse" - knowing which, she refrained from making any outcry whatsoever - until he finally succeeded, "about at the most 10 minutes" after they had entered the room. There were rooms on both sides of hers, as well as directly across the narrow hall. Asked if she knew if those rooms were occupied, she testified that she heard someone; adding that she had been informed later that one or two of them were occupied that night, but whether all of them were, she did not know (R. 33-34, 59, 61-62, 69, 71, 93; Def. Ex. 1).

Again quoting the prosecutrix, "he was holding me by the arms all the time and I was tired from working and also from wrestling with him already and he had me around the arms and he was on top of me and it was hard to do anything. With his legs he separated mine." She felt his private parts within her body. "It was smothery, and having him on me - it was hot from it." The night was warm and the windows were open. "Tell us how you felt," prompted the trial judge advocate, "Did you hurt?" "Yes, I did," asserted the prosecutrix - despite three previous admitted acts of intercourse -, "I felt this awful pain." The accused was on top of her, according to her best recollection, for about five minutes or so; during this time she lay there "suffering from it" and "trying to get him off of me. * * * it seemed like a relief or something after he had removed himself from on top of me," leaving her in what she characterized as "a semi-daze" (R. 34-35, 71-72).

She was unaware of his departure from her room, or of anything else that happened that night, promptly falling into a sound sleep from which she did not awake until one o'clock in the afternoon. Then she observed a letter under her door. It proved to be from her mother, inclosing $5. "I started to put it in my purse," she testified, "and I noticed ten dollars was gone" (R. 35).

She also noticed that the crotch of her panties was torn. She had been wearing them when the accused placed her on the bed; they had never at any time been removed; and she was still wearing them when she awoke. She could not testify how large the tear was. "I never examined them", she explained, "the next morning I threw them away and I don't know. * * * Oh, the crotch of the panties wasn't so large so it wouldn't be a very large one. But it was torn." Although her panties were fairly new, on "the morning after the night before", according to her own testimony, "I put them in the waste paper basket and I haven't an idea what went with them" (R.90-92).

She got dressed and went down town, where she "tried to eat some breakfast" at the Fountain Dairy Bar. From there she telephoned her fiance', a sergeant at the Lemoore Army Air Field, making arrangements to see him later in the day. Then she walked down to the Glider Inn where she tearfully complained to the proprietor and to a fellow waitress "relative to the affairs of that early morning". She did not work that day but returned to the Vendome Hotel, where she was visited, about 7 p.m., by her fiance', to whom she complained with reference to what had happened to her the previous night. She made no complaint to the police - either civilian or military - or to the sheriff's office, nor is there any evidence that she complained to her brother, to whom she had threatened to report the accused's conduct and whom she had come to Hanford to visit. Asked if she "ever made any complaint of what had occurred at the hotel to the hotel manager," she testified that she did "a day or two later", not to the manager, but to "one of the ladies. * * * she cleans the rooms, I don't know her name." (R. 36-37, 65-66, 93-107).

A week later, she learned, in a telephone conversation with her fiance', that a man was being held by the military authorities at Lemoore Army Air Field on another rape charge, and "that he thought he would be the guy, by the name of Strong * * *." This was the first time she had heard the accused's name mentioned. That same norming she was transported to the base in an Army staff car. There, in the office of the provost marshal, seven men were lined up with accused in the middle. All, except the accused, were non-commissioned officers wearing stripes on their sleeves. The prosecutrix promptly identified the accused as her nocturnal visitor of the week before. The provost marshal could not recall a request made by another officer, assisting in the investigation, just before the prosecutrix was admitted, that the accused, who was then at one end, be placed in the exact center of the line. Such a request could have been made, the provost marshal testified, but he could not recall it on the trial. Another private, at the same station, who bears a striking resemblance to the accused, was not included in the line up (R. 38-42, 108-110).

"A day or two over a week" after the alleged offense occurred, a medical officer at the Lemoore Army Air Field gave the prosecutrix a physical examination; no evidence was adduced to show what this examination disclosed, or anything further with reference thereto. However, the prosecutrix testified that she had menstruated subsequent to the date of the alleged offense (R. 72).

4. Concerning the Specification, Additional Charge, the defense introduced no evidence, and the accused, having been duly advised of his rights as a witness, elected to remain silent.

5. The Specification under the Additional Charge alleges that the accused had carnal knowledge of the prosecutrix, forcibly, feloniously and against her will. According to her own account - which is both uncorroborated and uncontradicted - the prosecutrix refrained from summoning available help because of the accused's threat to tell such person

or persons as might come to her assistance that she had coaxed him into her room. Even when his purpose was unmistakable, she continued to forbear raising her voice, manifesting a greater concern, at the time, for her reputation there at the hotel, than for such remnant of virtue as may have survived admitted previous acts of intercourse. Subsequently - but only after twelve hours slumber and the discovery that ten dollars was missing from her purse - she complained of her alleged abuse at the hands of the accused. "Consent, however reluctant, negatives rape." (Par. 701, p. 942, Wharton's Criminal Law). The resistance required to be shown by the prosecution to establish absence of consent must involve "all the prosecutrix' power of resistance and defense and all her power of calling others to her aid" (People vs. Dohring 59 N.Y. 374, 17 Am. Rep. 349; underscoring supplied). While the "extent of resistance which ought reasonably to be expected necessarily depends very much upon particular circumstances attending each individual case, and no general rule can be laid down on the subject, which is capable of application to all cases" (Cross v. State, 132, Ind. 65, 31 NE 473), failure to enlist assistance which the prosecutrix knew to be available, and which would have undoubtedly resulted in the thwarting of the accused's avowed purpose of having sexual intercourse with her, though it might have involved some embarrassment and even injury to the prosecutrix' reputation, can only fairly be regarded as implied consent, no matter how reluctantly it may have been given. The evidence, therefore, does not sustain the findings of guilty of the Additional Charge and the Specification thereunder. Nor is it sufficient to support the accused's conviction of the lesser included offense of assault with intent to commit rape, because there is no substantial evidence to support the inference that he intended, at the time he pushed her into the room to employ ultimate force, if necessary, to have intercourse with her against her will. On the contrary, his actions, once he was in the room, demonstrate only determination to gain her acquiesence, express or implied, before proceeding with his lecherous design. The methods successfully employed, though somewhat lacking both in scruple and finesse, fall definitely in the persuasive category. The record therefore, sustains only so much of the findings of guilty of the original Charge and its Specification as involve findings of guilty of assault and battery in violation of Article of War 96 (par. 149b, p. 165, M.C.M., 1928).

6. Concerning the Specification of the original Charge, the evidence for the prosecution, adduced from the prosecutrix on direct examination, varies so materially from her admitted prior accounts of what occurred on the occasion in question as developed on cross examination, that, for purposes of analysis and clarification, her testimony on direct and cross-examination will be presented separately.

On direct examination, she testified that she lived with her mother in Hanford, California; that she was 18 years old, 5 feet 8½ inches tall and weighed 130 pounds; had graduated from high school in 1942 and had been working at the Lemoore Army Air Base for 6 months. At 6:30 on the morning of 22 July 1943 she left her home for the bus terminal. Before she arrived there, the accused drove by in his automobile, told her the bus had already gone, and asked her if she wanted a ride to the post. She was not acquainted with the accused and did not know his name. Although she had seen him on the Lemoore Post, she was not even sure that he was stationed there. However, she got in his car and they arrived at the base

in about 40 minutes. During the ride, she testified, "He asked me when we could have a date and I didn't answer him. He asked me a few minutes later when we were going out and I still didn't answer him. I said that I didn't consider that the way a gentleman should ask a lady for a date. * * * He said, 'All right, are you going with me this evening to the movies?' and I said, 'If we could get in by ten-thirty.'" She set the time that he was to call for her at 7:30 that evening. At five that afternoon, she returned home on the bus. At seven the accused telephoned and said he would be over. At 7:30 he arrived in his car and drove her directly to the Fox Theater, approximately a mile and a half from her home. During the double feature, the accused got up three times, explaining that he was going to smoke a cigarette, absenting himself for seven or eight minutes each time. He also made several requests that she leave before the picture was over. Finally she agreed, about 5 minutes before the completion of the program (R. 111-119).

It was not quite 10:30 when they left the theater in his automobile. When they passed the street where they should have turned off to get to the prosecutrix' home, she told him "that was the street to turn." He said they were going to get water at a service station. They passed several, ultimately stopping at Murray's Auto Court, where he raised the hood on his car, and got the water hose. She "couldn't see whether he was putting water in or not. * * * He asked me if I wanted a drink", her testimony continues, "and I told him no, so he turned around there and went out on the Visalia Highway going east. * * * I told him that I had to get home, that it was nearly ten-thirty and that was the time I told my mother I would be home. * * * He said we were just going for a drive and that we would get home." After driving some 3 miles into the country on the main highway, he drove, on oiled roads, about 4 or 5 miles further, while the prosecutrix kept reminding him that they were getting further from home and that she wanted to get home, and the accused kept insisting that they were going for a drive and that they would get home later. "It wasn't very late then and wasn't past the time I should have been home," she added. In the theater he had "tried to put his arm around me * * * but I wouldn't let him. * * * There was no argument." (R. 119-124).

Finally they turned into a lane, "just a wagon track * * * turning into a pasture on the side of the road." The prosecutrix saw no houses or buildings out there. She thought he was turning the car around to go home. However, he stopped the car about 10 feet from a haystack, and turned off the lights. Then, she testified, "He just turned around without a second's hesitation. * * * He put his arms around me. * * * I tried to push him back. * * * He became very insistent and seemed to be angry. * * * I told him not to, that I had to go home, and not to do that." He kissed her, then turned her around in the seat so that she was lying down with her head under the steering wheel "and he stood up and turned around himself", whereupon he "was sitting on the side or edge of the seat * * * in the center of the automobile. He had stood up," she repeated, "and turned around. * * * His arms were around me. * * * He was lying down, or leaning forward I should say. * * * He was trying to kiss me." She was "trying to keep him from it. * * * by pushing him back. Pushing his shoulders back, and his face." In the process the accused was "becoming very angry". He kissed her and called her a God damned little fool. "I prayed to him", her testimony continues, "I begged him, I asked him to stop and let's talk and reason it, and he wouldn't stop, I told him that I wasn't that kind of a girl; that there was that kind of girl and he could find them - he probably knew where they were, but I wasn't that kind. He said I would be

after he got through with me. We fought. I prayed to him to please stop. I was crying. He sat back in the seat and laughed, and he swore. * * * He said, 'God damn it'. When I told him I hated him he said I didn't hate him; he called me a little fool and said I didn't. I tried to find the handle of the door, and I did find the handle; I opened the door and tried to get out and he pulled me back. * * * I pushed against the other door and I pushed myself part way out. I opened the door and I pushed on the other door that was closed and pushed myself part way out, and he put one arm under me and took my hand and pulled me back in. I told him I heard someone on the street. I didn't, but I said I did. He put one hand on my mouth and one on my throat and said if I screamed he would kill me. He had gotten me back in the car again. * * * He tried to choke me - he did choke me. * * * He pulled my dress up. * * * And his pants were already unbuttoned. * * * I begged him to stop and take me home, please take me home, and he said there was going to be an intercourse before we went home, and that is - that is when he * * * put his private parts inside me. * * * I was crying and I was begging him and he kissed me and I bit him. He called me a fool again and slapped me. He said if I wouldn't be still and wouldn't relax he would kill me and put me in the haystack and burn the haystack. I was afraid to do anything else. I didn't start to pull his hair, I was just pushing his face away and he said not to pull his hair. I didn't. I was afraid of him. When he put his hand over my mouth I bit his hand and he warned me then not to bite him or try to hurt him. I was so afraid of him. I told him if he would please take me home before anything happened I would give him a hundred dollars. I didn't have it but I had it in war bonds. He said no, he didn't want that. He didn't stop. * * * I couldn't describe it so that you could see, but I can remember he was a maniac, he was crazy, he was beyond reasoning. He wouldn't stop to talk to me. * * * His eyes were flashing. * * * He was mad and he was angered beyond reasoning." There was "an awful lot" of pain in connection with the intercourse, during which the accused "moved up and down"; he was breathing hard in my face. The motion continued "for about ten minutes; the pain for about two days. * * * After he done what he threatened, I told him, I begged and pleaded, 'Let's go home.' He told me he was going to stay there, I don't know how long, he said all night." They remained there for about 20 minutes after the intercourse, during which time, she testified, "he was playing * * * with my private parts and my breasts." Finally "I told him I would go to a hotel room with him, and I told him I loved him. * * * I had to get to town; I had to tell him anything to get into town. * * * He got out of the car and buttoned his trousers and I was going to get out and he pulled me back in and said I wasn't going to get out. He told me not to make any noise or he wouldn't take me into town - he never would take me if I made any noise. * * * I was so afraid I didn't expect to get home that night or any other night. I expected he would kill me. I was scared to death. * * * I told him we would go to a hotel room and we went uptown to a hotel. He didn't stop the car, he started to stop it, but he didn't stop; he went up to a corner and started to stop; I was going to get out and he started the car and he said if I would get out he would go faster and shove me out of the car. He wanted to know before we left the spot

out there what I could tell my mother. I told him I would call her and tell her I was staying with a girl friend. Although I could have done that, I had no girl friend in mind. We got to town and he said, 'All right, call your mother.' I said, 'Well, we will drive over and see if my girl friend is still up.' I led him on the road to the direction of that girl friend's house. I said I had to tell her I was going to stay with her and that was my excuse to him. We went around the block in the direction he had never gone to my house so he wouldn't recognize the surrounding houses and so on. We stopped about a half a block from the house. I was crying and he wanted me to stop crying and my hair was mussed up, and I saw my mother, then I knew everything was all right; but I don't believe he knew she was there I am not sure, but I don't believe he did from his actions. He stopped the car about a half block from the house and told me to comb my hair and quit crying. * * * He sat there about five minutes trying to get me to stop, and I don't know then whether he knew mother was there or not. I said, "There is mother in the yard." It was an hour and a half past the time I should have been in. While she was sitting there beside him, "he just turned around as if I hadn't said anything whatsoever. He said, "I will see you Monday evening. * * * No, he didn't stop the car; he just glided past by our house to the house next door. I got out of the car, but he didn't stop. * * * I went to my mother and went on in the house." She was crying at the time. "I slept with my mother", she continued, "I slept with my mother, I didn't sleep in my room; I was afraid. She wanted me to sleep with her. * * * I slept in her room." (R. 125-126, 128, 130-137).

Two days later, she "called the accused over" to the office where she was employed, "to ask him to please not come over Monday night. * * * He said, 'I think I remember one hundred dollars you offered', and I didn't answer. As I said, I didn't intend to give it to him. He said he would be over the following Monday evening to get it * * *." On the Monday following (4 days after the alleged offense), she had another conversation with the accused in the provost marshal's office. They were alone together. According to her testimony, "He was sitting in the doorway as he is now, facing each other. He got up and came over to me and he got down on his knees and he begged me to please deny what I had said. I told him I wouldn't. I told him I wouldn't deny it because I told the truth. He said, 'I will give you anything if you will please deny it." He was crying and tears were on his cheeks. * * * I asked him why he had denied he done it. He said he couldn't do anything else; if he admitted it to them it would be just a noose around his neck. He said he couldn't admit it to these people - * * * - but I knew it was true and he knew it was true. He couldn't deny it to me. We were alone then; but he denied it when they came back." She further testified that a pair of panties, introduced in evidence, were hers and that she was wearing them on the night of the alleged offense. It was stipulated that if Major Evans, a medical officer, attached to the hospital at the Lemoore Army Air Base, "was called to testify in connection with these panties he would testify that these stains that appear in the crotch of these panties are blood. * * * and that the dark portion which appears in the crotch - the dark bluish color is a place where chemical was applied and which bears a

slightly different color than the other portion of the crotch" (R. 137-142).

On cross examination, the prosecutrix testified that it was rather difficult to say how far the accused's private parts inserted in her private parts during the act of intercourse. "I could feel them inside me," she testified, admitting that she was "more or less" acquainted with the private parts of a man. During the 10 minutes or more of intercourse, his private parts were inserted in hers as far as they would go - as far as humanly possible. She did not see the accused's penis plainly and could not say "for sure" that he had the entire length of it inserted completely within her vagina, but would say that he had, as far as she knew. The pain she suffered was in the uppermost region of her private parts as well as the lower part. When she arrived home crying, following the alleged act of intercourse, she did not at that time notify the civilian police, or even make any statement to her mother with reference to it. "I didn't tell her anything definite", she testified, "I told her where we had been and what time we had gotten out of the theater." As for the act of intercourse, "I didn't even tell her he had tried - I told her that I had a pretty rough time" (R. 144-147).

The following morning she arose at the customary hour and went to her work at the Lemoore Air Base. The previous May she had worked for the provost marshal there and knew, from her work, that he handled affairs in connection with prisoners; but on Friday, although she worked all day at the base, she made no complaint to any military authority of the alleged act of intercourse of the previous night. When she completed her work at five o'clock, Friday evening, she went to the post beauty parlor for a permanent wave. She left at a quarter to eleven that night, driving two of the beauty parlor operators home with her. She was under the impression that it was during the course of that day - Friday - that she agreed to go with 1st Lieutenant John R. Bonswore to an officers' dance which was to be held the next evening at the Lemoore Army Air Field. On Saturday she made no complaint to any military authority of the act of intercourse. "I only spoke to Private Strong that day", she testified; and reiterated, in response to defense counsel's inquiry, that on Saturday the accused was the only one to whom she mentioned it. On that day, she asked a corporal in the provost marshal's office, to tell the accused to come over to the S-4 office where she then worked, that she wanted to see him. When he arrived in response to her summons, she made no complaint with reference to the alleged act of intercourse, but merely asked him not to come to her house. That evening - Saturday - she went to the officers' dance at the station with Lieutenant Bonswore. She was engaged to be married, at that time, and had been since 2 June 1943, to Private Bill Riddle, who was the only man to whom she had ever been engaged. Later, however, she admitted she had been engaged to Lieutenant Bonswore (R. 147-153, 168, 171).

During the month of July 1943, she was not sick except the first day of her monthly period which she testified was on 19 July. Her periods are not regular, and her next period started 6 August 1943. She was not in any type of difficulty or sickness on 6 July 1943. Yet she admitted receiving a telegram from Sergeant Arnold Burr, sent from West Virginia on that date, reading, "Wire your condition collect. Don't give up. I love

you. Arnold." She then explained, at that time, "I had been sick. I missed three days at work - stayed home from work." (R. 163,166-167).

After the act of intercourse was completed, the accused fondled her breasts and private parts for about five minutes. "He had his hands on my breast", she testified, "he was trying to undo my brassiere, and he had his hands under my dress working around my private parts, and that is all". After twice testifying very definitely that he had his hands in her private parts, when asked, "How far in them?" she replied, "Not anywhere in them, just around them," testifying further that at no point during the proceedings did he ever put his hands into her vagina. She did not hit, scratch or bite him, at that time. Later, however, she bit his lip. During the act of intercourse, although it was an extremely warm night, all the windows in the car were closed. Asked about her testimony on direct examination that the accused "stood up" after he had laid her down on the seat before the act of intercourse, she stated, "He didn't stand up, he stood on his feet, but he didn't stand up. He put his weight on his feet, I might say"(R.174-177, 182-187).

On Sunday morning, after she returned from the dance Saturday night, two military policemen came to her home and she talked to them in the presence of her mother and a civilian policeman. Asked if she told them, at that time, that the accused had tried to do something to her but had not accomplished his purpose, she replied, "I don't believe I told them that. * * * I believe I told them I wasn't sure, because I wasn't." She was not sure then - on Sunday morning, 25 July - and did not become sure until she went to see the doctor, that he had made any penetration. She admitted on cross examination "that it was only upon whatever statement the doctor made" that she could "now determine that there was a penetration." Answering a subsequent question, she testified, cryptically, that she based her determination that there had been a penetration on the doctor's statement "and on the material substance that was on the clothing". Asked to explain (since prosecution and defense had clearly stipulated that the stains on her panties were blood and a chemical subsequently applied), she replied, still more cryptically, "My mother is married; she knew. It isn't blood, it is just a stain." After considerable discussion by counsel and law member, in her presence, clearly exposing the contradictory character of this statement, she essayed the following explanation: "I meant the stains may be what you call blood - it may be - but it isn't the kind that is from a menstrual period." Asked then if those stains that her mother knew about were blood and no other type of stain, she replied, "No, sir, it is blood." She testified that she had finished menstruating on 16 July, although, according to the record, she had previously fixed the commencement date as 19 July. When she was examined by Doctor Rosson on Saturday, 25 July - 3 days after the alleged offense, "I didn't say I just finished. I may have said it had finished", she testified (R. 190-193).

She admitted that she had stated under oath on 12 August 1943 that after the alleged offense when she told her mother the accused had tried to have intercourse with her, "I just told her that he had tried because I wasn't sure either. I didn't know;" that when asked, "As far as your knowledge goes, you don't know if he had an act of intercourse or not?"

She testified, "If there has been, he did it. * * * I couldn't swear to it, no * * * "; that when asked what she told her mother on Friday (following the alleged attack Thursday night), she replied: "I told her what he tried to do and I was so sure he didn't. I told her not to report it. * * * " In the examination of 12 August she also admitted that she had estimated that the act of intercourse had lasted 15 or 20 minutes (R. 197-198).

On redirect examination, she reiterated that she felt the private parts of the accused in her private parts, explaining, "When I spoke of penetration I thought they meant the hymen." Asked, Do you mean by that the breaking or the rupturing of the hymen?" She answered "Yes, sir"; and "No, sir," to the ensuing question, "and there has never been any doubt in your mind but what Private Strong's private parts were in your private parts?" (R. 200).

Dr. Charles Rosson, a duly qualified physician practicing in Hanford, California, testified that the prosecutrix, accompanied by her mother, came to his office on a Sunday - the date he could not recollect - for an examination. The mother said "her daughter had been attacked and wanted to know if she was injured, and I said we could make an examination of her and that we had to go to the sanitarium. When we got down there I got a nurse or two and got her on the table and started the examination. The minute I started examining her she began to jump around. I talked to her a little while to quieten her down and started in again. I started in again and finally I did get my finger into the vagina, possibly not more than an inch, just far enough to get my finger on the hymen without going any farther." The doctor had observed no indication of nervousness in the prosecutrix before he started the examination. "The old lady was more nervous than she was." There was a "common ordinary pimple" on the outside of her vagina, which she had had before and which the doctor opened with a little sharp pointed knife, picking the top off, without cutting her at all, just "like you would with a needle." This pimple was not of a type to increase her sensitivity. However, the prosecutrix rendered the examination very difficult by "jumping around as if she was goosey". According to the doctor, "she jumped about and around. I couldn't hold her down. About the time I would get started examining her she would jump. I was afraid she would hurt herself and I had to be careful." When he got his finger into the prosecutrix' vagina, he could feel the whole circle of the hymen. When he pulled it out he could see the hymen feather out on the finger, slightly cracked on one side. There was a streak of blood, which could have been menstrual, on his finger when that digit was withdrawn. Owing to the prosecutrix' squirming, he could not ascertain the depth of the crack, but, as far as he could see, the hymen itself was intact. Although "the examination was very unsatisfactory from a medical-legal standpoint", the doctor had stated, in his report of it, that the hymen was injured rather than ruptured, because the injury was a very slight one. He testified further that he said it was an injury (rather than a rupture) "because I couldn't say it was a penetration." Asked if the prosecutrix' was "the type of hymen that you could insert a penis into and have it remain in the shape or form that you found it at the time you made the examination", he replied "I doubt it." If he had examined her under an

anesthetic he could probably have told whether or not there had been a penetration of some kind, "I couldn't say a penis." He estimated that the "slight anamolous injury", disclosed by the unsatisfactory examination which he administered, had been received within ten days. While it was that kind of an injury that could possibly have resulted from an act of intercourse, the doctor "couldn't see how there had been a complete one without more injury. There was no other injury to her at all; no other injury or bruise except she had a little follicular infection - I opened that for her - on the leg, outside. She had had that before; she told me she had that before." That was the pimple, above referred to. "Anything - a finger for instance - could have caused the injury"; the doctor had seen many hymens injured without sexual contact (R. 202-218).

Mrs. Lilly Maddox, the mother of the prosecutrix, testified that she first saw the accused when he came to her home at approximately 7:30 on the evening of the alleged offense. He stayed about 5 minutes and then left with the prosecutrix. The next time she saw her daughter was about 5 minutes after midnight, when she got out of the accused's car - which "didn't completely stop, * * *; it just slowed down almost to a stop - at the edge of the yard." The prosecutrix' "hair was all down and her face was flushed, * * * her neck was red and her arms were all red. * * * She was crying and her eyes were swollen." She slept with her mother, who testified, "I just took her in my arms until about three o'clock, and she took on until about three and then just dropped to sleep, but she didn't sleep. She didn't sleep and yet she - I don't know, she wasn't asleep the rest of the night and yet she wasn't awake either." However, she went to work Friday morning without having made any report or complaint to her mother of the offense alleged to have been committed Thursday night. Indeed it was not until the following Saturday evening - the 24th - that she complained to her mother of "the acts and occurrences of the night of July 22nd" (R. 219-222).

7. The evidence for the defense shows that on the afternoon and evening of 23 July 1943, the prosecutrix was in the Post Beauty Salon at the Lemoore Air Base continuously from 5 until around 10, getting a "permanent". She seemed very normal, dispensing only the usual run of patron's conversation to the beauty parlor operator who was giving her her "permanent", and did not cry at any time during the evening. Among other remarks, the prosecutrix announced that she was going out the following evening with a lieutenant, and wanted her hair fixed. This occasion was the witness' first meeting with the prosecutrix (R. 232-235).

First Lieutenant John Robert Bonswore, stationed at the Lemoore Army Air Field, had lunched with the prosecutrix approximately every day over the course of 2 months. He proposed marriage in January 1943, and subsequently became engaged to her. They were definitely engaged around the first of July. In the latter part of July, he was told she was engaged to "Bill". Excluding their daily lunches on the post, he had three dates with her in July. At lunch, on Friday, 23 July, the prosecutrix, without mentioning names, told Lieutenant Bonswore that she had an unpleasant encounter with a certain individual on Thursday. According to his recollection, there was then no evidence of uneasiness in her manner or demeanor.

He admitted having stated, a week before the trial, that the first time he heard any intimation that the prosecutrix had had any difficulty on the previous Thursday night, was on the following Saturday evening when he went out to dance with her (R. 236-246).

Sergeant Santo Vincent Daddino testified that he and Sergeant William Dupont, called at the prosecutrix' home about one-thirty Sunday morning, 25 July. An officer from the city police force was also present, as were the prosecutrix and her mother. As a result of the conversation there, Sergeant Daddino, the following Monday morning, made official a written report to the provost marshal, correctly reflecting the information received from the prosecutrix and her mother. This report was introduced in evidence. It recites the following:

> "Private Strong on Thursday evening, 22 July, 1943, was in the accompany of one Miss Elaine Maddox, 1030 N. White Street, Hanford, California, employed on the base at S-4 Office. Private Strong parked his car outside of town and tried to force Miss Maddox to participate in a sexual intercourse with him. Private Strong tore her clothing and even threatened to kill her if she didn't give in to him. Miss Maddox stated that her nerves were worked to such a point that she didn't know what was happening, but Private Strong did not accomplish his threat. Private Strong also threatened the girl that he would be back in town to see her on Monday evening. Miss Maddox is having a physical examination and wishes to press charges against Private Strong.
>
> "The information was given to the Military Police by Mrs. J. S. Maddox, 1030 N. White Street, Hanford, California, to S/Sgt. William Dupont; and upon return of the MP from town S/Sgt. Dupont and S/Sgt. Daddino were called to the residence again where Miss Maddox gave the complete story" (R. 247-257; Def. Ex. 4).

Private Herbert R. Timmreck, 1614 Guard Squadron, Lemoore Air Base, encountered the accused at the Hanford Hotel, around midnight on 22 July 1943. His uniform was neat, and he bore no marks of any kind on his lips, face or hands. There was nothing the matter with him. The accused asked if he could sleep with Timmreck, who "told him no, becuase I was sleeping with a civilian; and then I left" (R. 257-272).

Miss Pauline Walker, civilian employee at the Lemoore Air Base, recalled the prosecutrix inquiring, during lunch hour on 22 July 1943, "if I knew the fellow's name that I was speaking to the day before * * * and I said yes, and she asked what it was, and * * * I told her Ralph Strong" (the accused). "I asked her to tell me why she wanted to know and she said, 'No, I will tell you another time.'" At three o'clock that same afternoon, the prosecutrix telephoned Miss Walker and "asked again if I was positive his name was Ralph Strong, and I again asked her why she wanted to know and she insisted she wouldn't tell me." (R. 274-276).

8. Concerning the Specification of the original Charge, the accused, having been duly advised of his rights as a witness elected to take the stand under oath. He testified that on the morning of 22 July he saw the prosecutrix standing on a corner in Hanford, and asked her if she wanted to ride out to the base. She got into his car, and, as they drove along, asked him his name, which he declined to tell. She said, "If you don't tell me your name, how can I have a date with you?" He had not mentioned a date prior to her inquiry. Arriving early at the base, they rode around for a while and the accused asked her if she would like to go to a show. She said she would and told him where she lived. He said he would call for her at 7:30 that evening. Between 7 and 7:30 he telephoned to inquire "if the date still stood", not knowing "whether it was just a joke or a date". She said it was a date and she would be ready about seven-thirty. When he arrived, she and mother were seated on the front porch. After introducing him to her mother, and telling her mother "that she would be home when she got there", the prosecutrix accompanied the accused to his car, in which they drove to the Fox Theater. They sat in a loge where smoking was permitted, in the back of the theater. During the course of the performance he recalled smoking one cigarette, without leaving his seat, where he remained continuously until about 10:30, by which time they had seen the complete program. They then reentered his car, stopped at a "drive-in" for two "cokes", drove around the town a little, and proceeded to her home, where they arrived at about 11 o'clock. "I went past her house and made a circle", he testified, "and stopped directly in front of her house. Standing in the front of the house on the lawn was her mother, Mrs. Haddox. * * * After we arrived at her house there, instead of myself getting out, I stopped my car, I didn't turn the key off, put it in neutral, put on the emergency brake, and instead of getting out of the car, she started to open the door on the side where her mother was standing, well I was on the other side and I reached over, it is a pretty heavy door to open, all the weight goes up in the front, it is a big long door, so I reached over right across her and opened the door for her and she got out. The window was down and so she said good night and I said good night to her mother and I went. * * * From there I went down town. * * * I stopped in a parking lot. * * * I parked my car and * * * walked toward the main drag of the town. * * * I walked on by this taxi stand and as I recall I saw this Tiny Timmreck and I said hello to him and I don't know of any conversation with him. * * * From there, I might have gone down and had a sandwich. I don't know, but then later I went over to this Hanford Hotel. * * * I walked up the flight of stairs to the first landing and there * * * I saw this Tiny standing * * * and he said hello to me and asked what I was doing and * * * I asked this Tiny, this Timmreck whether he had a room where I could stay with him and he said no, that he was going to stay with some civilian he was waiting for there, and about that time this civilian did come up the stairs, the one he said he was waiting for and he walked on up another flight of stairs. * * * Private Timmreck left, and there was a sign in the hotel, 'No Vacancy' and * * * I looked on this roster to see if anybody there I knew at all to stay with until the next morning and then go out to the base, and there wasn't. * * * There was a door to this one room and the door was open and the light was on * * * and the bed was made, and I noticed that as I was looking through this roster, nobody took this room, nobody came to it. * * * The landlady came from some place and * * * I asked her if this room

was taken. She says that this room was taken * ** by a civilian * * * who had * * * tried to get his money back on it - didn't want to stay there that night, and so she told me I could take the room. * * * I told her to wake me about eight o'clock in the morning, * * * then I went to the room and went to bed" (R. 279-289).

The following day, Friday, 23 July, the accused, summoned to the S-4 office, found the prosecutrix and Major Dean, for whom she worked, seated at their respective desks. Greeting the accused with "a big smile", she asked if she could speak to him out in the hall. There she inquired "if I could possibly be over there Monday night for a date", and he agreed. (R. 289-290).

The following Monday, "about the 27th", after his arrest, the accused had another conversation with the prosecutrix in the provost marshal's office. She wished to speak to him alone, so the others withdrew, and she proceeded to tell him that he had done "these things" to her, described in the Charge Sheet, which was lying on the desk. "I told her I didn't do anything she said", he testified. "She was trying to tell me I did and I told her I didn't and she said, she says she didn't wish to press no charges against me - she wouldn't press no charges against me and that I would be released that morning. * * * The reason she didn't want to press no charges was on account of my father and mother and I said she didn't need to press any because I didn't do those things she said I did * * *" (R. 291-293).

On cross examination, he testified that he was 6 feet tall and weighed "about 185 or 90 pounds". He reiterated and elaborated his testimony elicited on direct examination and asserted that he did nothing to the prosecutrix on the evening in question that in any way would have torn her dress, or torn and bloodied her panties (R. 293-312).

In response to questions by the court, the accused testified that he never at any time told the prosecutrix his name, and that the first time he heard her use it was when she introduced him to her mother. "I don't know how she found it out", he added. Although he customarily wore a wrist watch, and was wearing one on the evening of the alleged offense, he did not notice the time when he went to bed at the hotel (R. 312-318).

9. The Specification, original Charge, alleges that the accused had carnal knowledge of Elaine Maddox forcibly, feloniously and against her will. The evidence, other than the testimony of the prosecutrix, shows that on the night in question the accused escorted the prosecutrix to a picture show, bringing her home in his car about midnight. Her mother, who was outside the house, awaiting her return, characterized her appearance as flushed and tearful. The substance of her report to her mother was merely that she had had a "rough time", without in any manner particularizing. Although she was nervous, leaving her own bed to sleep with her mother, and sleeping fitfully, she made no complaint that the accused had raped or attempted to rape her, but arose early the next morning and proceeded to the base, where she worked at her usual job all day; then spent from 5 in the afternoon until 11 that night in a beauty parlor having a permanent wave put in her hair. During the day she lunched with an officer at the

base. He was her former fiance'. Although their engagement had been recently broken, and she was then affianced to another, they still customarily lunched together. She told this officer, during the lunch hour, that she had had, on the previous evening, "an unpleasant experience with a certain individual". That was all. The following night - Saturday - the same officer escorted her to a dance. On her return, she complained to her mother, for the first time, that, on the previous Thursday, the accused had attempted to rape her. Civilian and military police were summoned, to whom it was reported, by the prosecutrix and her mother, at their home, during the early hours of Sunday morning, that on Thursday night the accused had unsuccessfully attempted to rape the prosecutrix. Later, on the same Sunday, the prosecutrix was examined by a physician who found on her no bruise or injury of any discription except a little "crack" on one side of her hymen, which, however, was not ruptured, and which was of a type that would have been ruptured and technically destroyed by the penetration involved in a single act of sexual intercourse. The prosecutrix' squirming rendered the examination highly unsatisfactory, as far as the doctor was concerned. The injury noted, while it might have been caused by an erect penis, in a thwarted attempt at sexual intercourse involving penetration of the labia only, might also have been caused by a finger, a fingernail, an instrument "or anything". The doctor could not say from the examination that there had been any penetration whatsoever.

On the trial of the case the prosecutrix testified explicitly and in detail to a complete and prolonged act of intercourse, asserting that she believed the accused's penis had been inserted into her vagina as far as it would go, describing the accompanying pain as extending from the entrance to the nethermost part of her vaginal canal, and persisting continuously for two days. She also testified that, having completed the act, the accused fondled her private parts, putting his hands on, around and in them. After reiterating that he had put his hands <u>in</u> them, she retracted this particular statement, saying he had put his hands on and around her private parts, but had not put his hands in them. (It may be significant, in the light of this particular contradiction as well as the doctor's testimony, that she did not mention fingers). She also testified that she had at first reported that the accused's attempt to rape her had been unsuccessful because she did not know, until after the doctor had examined her, that he had effected penetration. She offered the further explanation that, at the time she complained that the accused had merely attempted to rape her, she was under the impression that the crime of rape involved the penetration of the hymen, inferring that she did not then know that any penetration, however slight, constituted rape. These explanations are too inconsistent with her testimony to account for its many contradictions, particularly on the vital issue of penetration. If penetration occurred, in the manner described by the prosecutrix on the witness stand, then her testimony that she was not aware that it had occurred until after the doctor had examined her three days later is wholly incredible. Equally so is her testimony that she based her awareness of the penetration to which she testified on the doctor's report, which is utterly inconclusive on this point, except that it definitely precludes the theory of a complete penetration, such as the prosecutrix described in her testimony, since the hymen, though injured, was intact, and since it was the type of hymen which a complete penetration would have ruptured and (technically) destroyed.

(146) "The commission of the crime" [of rape] "may be proved by the testimony of the complainant alone, * * *. But there can be no conviction based upon contradictory testimony of the prosecutrix as to whether or not there was any penetration" (par. 724, pp. 973-975, Wharton's Criminal Law).

The rule above stated is reflected in innumerable decisions from courts all over the country, among them, the following:

It has been held that the uncorroborated testimony of the prosecutrix is insufficient to justify a conviction, where the contradictions therein are numerous and serious. Allen v. State (Miss.) 45 So. 833, Vickers v. U.S. (Okla.) 98 Pac. 467.

Where the uncorroborated testimony of the prosecutrix is relied on, in a case of this character, justice demands a careful scrutiny of her testimony. Brewer v. State (Tex.) 254 SW 809.

Where the prosecutrix testified without being corroborated, it has been held, to justify a conviction, her testimony must be clear and convincing. Brown v. State (Wis.) 106 N.W. 536.

Many more decisions to the same effect are cited in an exhaustive note in 60 A.L.R., pp. 1131-1134.

The Manual for Courts-Martial quotes Lord Hale's admonition concerning rape that "it must be remembered that this is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent" (par. 148b, p. 165, M.C.M., 1928). Heeding this admonition, civilian courts in the numerous jurisdictions permitting conviction (as do courts-martial) upon the uncorroborated evidence of the prosecutrix, have sensibly qualified the rule by holding that, in such cases, the appellate court will closely scrutinize the testimony upon which the conviction was obtained, and if it appears contradictory on material issues, incredible, as too unsubstantial to support the conviction, will reverse it. Applying the qualification, as well as the rule, to the evidence adduced to establish the accused's guilt, under the original Charge and its Specification, the contradictions noted in the prosecutrix' uncorroborated testimony with reference to penetration render it legally insufficient to support the conviction of rape.

Her appearance on her return home on the night of the alleged offense, her statement to her mother, that night, that she had had a "rough time", her nervous and restlessness after going to bed, her remark to her former fiance' on the following day that she had had "an unpleasant experience with a certain individual" on the preceding night, and her report to the civilian and military policemen summoned by her mother early Sunday morning, following her "date" with the accused on Thursday, are effective to corroborate only so much of the prosecutrix' testimony as tends to establish the lesser included offense of an assault and battery committed upon her by the accused. Her testimony, being inadequate to support the conviction of rape, is equally so to establish the accused's

intent to commit it. If he had intended, when he assaulted her, to employ ultimate force to acquire carnal knowledge of her, he would, according to her testimony, have certainly done so. Having failed to establish accomplishment, the prosecution has, by the same token, failed also to establish intent. In the opinion of the Board of Review, therefore, the evidence adduced concerning the original Charge and its Specification is legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of assault and battery, in violation of Article of War 96.

10. In prosecutions for rape, other similar offenses against persons other than the one against whom the offense charged was committed are inadmissible (par. 356, pp. 548-551, Wharton's Criminal Evidence). In the instant case, the accused was tried for two separate, distinct and unrelated rapes, alleged to have been committed at different times on different women. Thus, highly prejudicial evidence, otherwise inadmissible, was not only rendered admissible and exhaustively adduced on the trial of the case, but apparently strongly influenced the court in arriving at its findings of guilty, injuriously affecting what, had he been tried for the two offenses separately, would have certainly constituted the substantial rights of the accused. Were it not that authorized military practice of long standing permits the elimination - by one trial for two unrelated capital offenses of a similar nature - of this fundamental evidentiary safeguard, legally accorded the accused by military as well as civilian courts in other instances, the Board of Review would give serious consideration to recommending the disapproval of all of the findings of guilty including the lesser included offense of assault with intent to commit rape in connection with the offense described in the Specification under the original Charge.

11. The accused was, at the time the alleged offenses were committed 19 years of age. He enlisted, with no prior service, on 27 November 1942, to serve for the duration of the war plus 6 months.

12. The court was legally constituted. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of both Charges and their Specifications as involves the lesser included offenses of assault and battery, in violation of Article of War 96, and only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one year. A sentence of confinement for six months is authorized upon conviction of an assault and battery, in violation of Article of War 96.

Abner E. Lifscomb, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 19 FEB 1944 - To the Commanding General, Army Air Forces Western Flying Training Command, 1104 West Eighth Street, Santa Ana, California.

1. In the case of Private Ralph L. Strong (19191091), 1014th Guard Squadron, I concur in the holding of the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of both Charges and their Specifications be approved as involves the lesser included offenses of assault and battery, in violation of Article of War 96, and that only so much of the sentence be approved as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one year. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Since the lesser included offenses of assault and battery which have been sustained by the Board of Review were not aggravated by the use of extreme force or by the use of a dangerous weapon, and since the accused is reported to be an excellent soldier, it is recommended that the dishonorable discharge adjudged be suspended and that a rehabilitation center be designated as the place of confinement.

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

(CM 243927).

Myron C. Cramer

AM

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.

SPJGK
CM 243937

27 NOV 1943

UNITED STATES v. Private JAMES L. SHERIFF (39160610), Company B, 815 Tank Destroyer Battalion.	CALIFORNIA-ARIZONA MANEUVER AREA Trial by G.C.M., convened at Camp Young, California, 14 October 1943. Dishonorable discharge and confinement for fifteen (15) years. Disciplinary Barracks.

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

1. The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

2. With respect to Charge IV and its Specification and Additional Charge II and its Specification alleging respectively embezzlement and larceny in violation of Article of War 93, the reviewing authority approved only so much of the findings of guilty as involves findings of guilty of wrongful conversion of the described property at the time and place and in the manner alleged and of a value in each case in excess of $50. Thus, in effect, the reviewing authority declares that accused is guilty of two wrongful conversions of property in violation of Article of War 93. This action is improper, for wrongful conversion, the offense approved by the reviewing authority, is lesser than and included in the offense charged and constitutes a violation of Article of War 96 (CM 145164, CM 193315). Consideration of the staff judge advocate's review makes it manifest that the failure of the reviewing authority to so hold was due to an inadvertence.

3. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications approved by the reviewing authority except Charge IV and Additional Charge II and their Specifications, as to which the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of those Charges and the Specifications thereunder in violation of Article of War 96, and legally sufficient to support the sentence.

Percy E. Lyon, Judge Advocate.
John W. Hill, Judge Advocate.
(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 3 DEC 1943 - To the Commanding General, California-Arizona Maneuver Area, Camp Young, California.

1. In the case of Private James L. Sheriff (39160610), Company B, 815 Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications approved by the reviewing authority except Charge IV and Additional Charge II and their Specifications, as to which the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of those Charges and the Specifications thereunder in violation of Article of War 96, and legally sufficient to support the sentence, which holding is hereby approved. Upon compliance with this holding, under the provisions of Article of War 50½, and Executive Order No. 9363, dated July 23, 1943, you will have authority to order the execution of the sentence.

2. Under all the circumstances and in view of the previous good character of the accused, it is recommended that the period of confinement adjudged be substantially reduced.

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

(CM 243937).

James E. Morrisette,
Colonel, J.A.G.D.,
Assistant Judge Advocate General,
In Charge of Military Justice Matters.

DEC 4 1943 AM

DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY

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

SPJGN
CM 243938

14 JAN 1944

UNITED STATES	)	CALIFORNIA-ARIZONA MANUEVER AREA
v.	)	Trial by G.C.M., convened at Yuma, Arizona, 5-6 October 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private HARRY M. HANSEN (12008161), 211th Ordnance Medium Automotive Maintenance Company.	)	

HOLDING by the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, Judge Advocates

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

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

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

Specification: In that Private Harry M. Hansen, 211th Ordnance Medium Automotive Maintenance Company did, at Wellton, Arizona, on or about 7 September 1943 forcibly and feloniously, against her will, have carnal knowledge of Mrs. Cora Harrell Cornell.

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

Specification: In that Private Harry M. Hansen, 211th Ordnance Medium Automotive Maintenance Company, did, at Wellton, Arizona, on or about 8 September 1943, without proper authority take one Chevrolet automobile, License plate 1E 950 Arizona, value

about $1000, the property of Mrs. Cora Harrell Cornell, with the intent to temporarily convert the same to his own use and benefit.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of two prior convictions for absence without leave in violation of Article of War 61 were introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that Mrs. Cora Harrell Cornell, hereinafter called the prosecutrix, is a 34 year old married woman, weighing 124 pounds, whose husband is in the service. For several years she had worked as a waitress in a restaurant owned by Mr. and Mrs. Lawrence Spain in Wellton, Arizona, and, since her husband's absence, she had been living alone in a small dilapidated tourist cabin, which was one of several on both sides of the highway in a tourist camp, also operated by Mr. and Mrs. Spain, which was located a few hundred yards from the restaurant. The prosecutrix owned a Chevrolet automobile which she used for pleasure driving including attendance at dances at various roadhouses in the vicinity where she was accompanied on numerous occasions by Mr. H. T. Frantz, a truck driver, who resided several nights each week in one of the cabins across the highway in the camp. On the night of 4 September 1943 the prosecutrix, escorted by Mr. Frantz, drove to Tacna, Arizona, and at a roadhouse, operated by Mr. Gust A. Svennson, while drinking a highball first saw the accused who sent two drinks to her table and was thereafter introduced to her by the proprietor. A brief conversation between them ensued as also took place the next day when she again appeared at the same place (R. 7-12, 56, 119-135).

Two days later, in the afternoon, the accused with Private Frank J. Tomaszewski visited the restaurant where the prosecutrix was employed and requested her to have a drink with him which she refused as she was working, but agreed to have one with him after 2100 o'clock that night when she would be off duty. The accused, with his companion, then departed to visit Mr. Svennson's place, saying that he would return later. The prosecutrix waited for the accused's return for about thirty minutes after going off duty and, since he had not reappeared, she then told the other waitress, Jessie Castro, that if the accused returned to tell him "to skip it". She then went to her place of abode where she disrobed except for a brassiere and panties, put on "pajamarettes" and went to bed (R. 12-17, 119-135).

About 2200 o'clock Jessie Castro, who was still at Spain's restaurant, received a telephone call from the accused who asked her if the prosecutrix was still there, and was advised that she, the prosecutrix, had already departed. Shortly thereafter the accused and Private Tomaszewski appeared at Spain's restaurant whence, after a minor disturbance for which apologies were made, they proceeded to the prosecutrix' residence pursuant to directions given them by Jessie Castro (R. 78-82, 95-97, 119-135).

The accused, leaving his companion in the background, knocked on the door and the prosecutrix then slipped on a housecoat and slippers and came to the door, without turning on the lights, asking who was there. When the accused replied that Jessie wanted her, she opened the door and the accused, whom she shortly recognized by the light of a passing vehicle, stated "Jessie doesn't want you, I do" and placed his foot in the doorway to prevent its being closed. For about 10 or 15 minutes a conversation ensued during which, according to the prosecutrix, she futilely attempted to persuade him to leave as did also his companion who was unknown to the prosecutrix and who within a few minutes left. During this conversation the accused "forced" her to kiss him and told her that he was tough and took what he wanted. At this point, according to the prosecutrix, she ran toward the Spain residence across the highway but fell on the pavement, hurting her knee and elbow, where she was overtaken by the accused who placed his hand over her mouth and carried her back to the cabin which she refused to enter. The accused, thereupon, again "forced" her to kiss him, struck her twice on the jaw with his fist, shoved her inside, pushed her down on the bed and told her she might just as well make up her mind as he intended to spend the night with her and that otherwise he would kill her with his unexhibited and never seen automatic and leave her body there. The prosecutrix then told him that she was menstruating and asked him to think of his mother and sister in the unavailing hope that he would desist. The prosecutrix attempted to go into the adjoining kitchen to get a gun which she had there but was prevented from so doing by the accused. Further scuffling ensued during which the accused removed his clothing and requested her to do likewise which she refused. Shortly, the prosecutrix concluded that she was exhausted and frightened and was "forced" to remove her clothes, with his assistance, whereby "He didn't jerk them or tear them off or rip them off of me, but he helped take them off of me, and from then on * * *", as her testimony continues:

> "Well, from then on he got me down on the bed and he gets on top of me and starts in and starts kissing me and chewing around on me and he asked me if I liked it, and I said No, and he said 'What?' and he kept on, so finally I thought if I agreed

with him he probably wouldn't be so rough and get what he wanted and would get up and get out, so he got on then and he said 'Let's have a cigarette' and he turned over then and lit a cigarette and asked me if I wanted one and I said 'No, I don't care for one' and when he rolled over on his side he pulled me over and he asked me to kiss him, so I kissed him, by force, not because I wanted to. I was scared and I didn't know what to do, so he happened to notice the radio and he said to turn on the radio and let's have a little music. I said 'You don't want no music'. I said 'The radio won't play, there is no aerial.' 'Alright', he said, 'we will have a cigarette, then', so he smoked his cigarette and I said 'Aren't you ready to go home and go back to camp?'

* * *

* * * so then when he got through smoking his cigarette he crawled back on top again and started, and the same thing over again for a while. I don't know how long it was, but anyway he got on and so he said 'Let's have another cigarette.' I said 'I don't want a cigarette, I wouldn't care for a smoke', so he rolls over again and pulls me over on my side and said 'Why don't you kiss me?', so I had had just about all I could take so I was trembling so I had the bed shaking and he said 'What is the matter, are you scared?' and if I told him I was scared I didn't know what would happen, and I said 'No, I am just old and I can't take it.' I am 34 years old. I said 'Why don't you go back to camp?' He said 'No, I am going to stay here all night', so when he got through smoking he got on me and did it again. He asked me if I had had enough and I told him I had had enough before he started and I said 'Why don't you go back to camp?' He got off then and asked me what time I thought it was * * *".

Conversation was then had between them relative to the time, the accused's expressed desire for her to secure a divorce so that he could marry her, and how he was to return to camp. She refused his request that she drive him to the camp but finally in order to get "shut" of him she gave him the keys to her car in which he departed shortly, having in the meantime put on his clothes consisting of "suntan" shirt and trousers and the usual accessories. Between the acts of intercourse she had lain supinely on the bed and prior to his de-

parture she had exacted from him a promise to return her car early in the morning. Within a short time after his departure she appeared at the Spain home and announced that her car had been stolen. Upon being invited in, she reiterated the theft of her car, explained by request her disheveled condition and skinned knee and elbow, which according to Mrs. Spain were still freshly bleeding, by saying that she had been "fighting with a soldier boy" and finally, in reply to the direct question, stated that she had been raped while Mrs. Spain dressed the abrasion and prepared her a douche which she took through fear of contracting a disease rather than to prevent conception, since a prior operation had rendered her incapable of bearing children. Mr. Spain, who is a deputy sheriff among his various occupations, reported the loss of the automobile to the authorities and suggested that she remain with them for the rest of the night. The next morning the prosecutrix returned to her cabin, changed clothes and went to Yuma, Arizona, where she was examined by Doctor William A. Phillips who found her injuries to be quite minor, including a swollen jaw, abrasions on the left knee and right elbow resembling a "floor burn" and "some swelling and a few bruises on the labia" which the physician found unnecessary to treat. He found no indication of menstruation but said her period could have been ending and was unable to say that she had been forcibly attacked since her condition could have been caused in different ways not unusual in a woman who had had two children as she had told him on a prior examination (R. 17-67, 69-72, 81-84, 91-94, 97-106, 106-119, 210-237).

About 1100 o'clock on 8 September 1943, the prosecutrix' automobile was observed passing through Wellton, Arizona, and about noon it returned, driven by the accused, and stopped between the Spain restaurant and the tourist camp. Mr. Spain arrested the accused who after attempting to escape was recaptured after the firing of several shots at him as he ran across the desert. Jessie Castro and Mr. and Mrs. Spain, although admitting that the prosecutrix was accustomed to attending dances where she danced with soldiers and drank in moderation, ascribed to her an unblemished reputation for chastity and Private Tomaszewski reiterated the events of the evening before the accused knocked upon the cabin door stating that it was opened by a girl, whom he did not recognize as he was about 20 feet distant towards the highway, that she and the accused engaged in an apparently friendly conversation which he was unable to overhear, and that after about 15 minutes he called to the accused to go with him back to the camp but the accused desired to stay and so he, Tomaszewski left (R. 84-86, 88-91, 100-101, 104, 106-119, 124-135, 237-245, 246-252).

The investigating officer testified concerning the dimensions and arrangement of the cabin and presented prosecutrix' clothes claimed by her to have been worn on the night in question and described

a small spot, having the appearance of blood, on the wall along the bed and about 18 inches above it which the prosecutrix claimed to have come from her bleeding knee. The clothes were identified and admitted into evidence. The housecoat had the snaps torn off and also a torn belt and inner tie string. The pajamarettes had a small blood stain which the prosecutrix admitted probably was caused previous to the night in question by her menstruation (R. 30-34, 52, 73-78, 218-220; Ex. 1).

4. The evidence for the defense shows that Gust Svennson introduced the accused to the prosecutrix as related by her. Mr. Svennson also recalled the accused making the telephone call on the night of 7 September 1943, but denied having told the accused that, if the prosecutrix liked him well enough, he might get what he was looking for and ascribed to her a good reputation as did Mr. Frantz who denied any intimacies with her although he had escorted her on numerous occasions and she, on one occasion in response to his inquiry of whether she ever desired the attentions of a man, had replied "Sure, of course, she was normal, the same as anybody else, and at those times nobody saw her because she went directly home from her work and went to bed" (R. 147-159, 159-164).

The accused, after full explanation of his rights as a witness, testified substantially in accordance with the evidence adduced by the prosecution concerning the matters preceding his knocking on the door of the cabin except that he asserted that he had become acquainted with the prosecutrix about 1 August 1943 since which time he had frequently escorted her to dances. After taking several drinks before telephoning to the Spain restaurant, he and Tomaszewski returned to Wellton, Arizona, and were directed to prosecutrix' cabin by Jessie Castro. Tomaszewski stayed in the background while he was talking to her but soon left saying "Two is company and three is a crowd". The prosecutrix at first appeared angry because he was late but within a few minutes invited him into the cabin where they sat upon the bed with the lights out and the radio playing and kissed and embraced. Shortly she said she was no longer mad and so they lay back across the bed continuing their amorous actions which were not objected to by her. In a few minutes she removed her clothing consisting of a housecoat, brassiere and panties and he took off his shirt and then, at her suggestion they lay lengthwise in the bed and engaged in two acts of intercourse, during the first of which his penis slipped out and she replaced it for him. Since it was late, she offered to lend him her car to return to camp provided he would return it early the next morning. She then gave him the car keys, showed him how to unlock the car door and kissed him goodnight. Upon returning to camp he changed to fatigue clothing, as he was required to take the infiltration course at an early hour, and carrying his "suntans" returned to the car where he fell asleep and did not awake until it was too late to take the course. Changing back to his "suntans" in the car, he returned to Wellton, Arizona, in the middle of the morning to deliver

the car to the prosecutrix but, not finding her at her cabin, he proceeded to Mr. Svennson's place where he took several drinks before driving back to Wellton, Arizona. Upon his arrival, he was arrested by some one other than Mr. Spain from whom he did not attempt to escape and was thereafter taken to Yuma, Arizona, handcuffed. He denied knowledge of her married status and that she was wearing a sanitary pad or "pajamarettes", asserting that she was clad only in a brassiere and panties under a housecoat because she was bare between the two undergarments, and strenuously declared that the acts of intercourse were with her cooperative and voluntary consent, denying his use of force or threats and disavowing any intent of obtaining sexual favors by such means. He similarly explained his possession of her automobile. He was examined about 1350 o'clock the same day by a medical officer who found evidence of intoxicants but no evidence of external violence upon his body except a slight swelling of the right upper lip and a small abrasion of the mucous membrane of the mouth in that area. He was free from disease (R. 164-208, 208-209).

5. The Specification, Charge I, alleges that the accused did on or about 7 September 1943 at Wellton, Arizona, "forcibly and feloniously against her will, have carnal knowledge of Mrs. Cora Harrell Cornell". The offense alleged is that of rape which is defined by applicable controlling authority as follows:

> "Rape is the unlawful carnal knowledge of a woman by force without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> "The offense may be committed on a female of any age.
>
> "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" (M.C.M., 1928, par. 148b).

In order to evaluate properly the testimony in this case it must be viewed in the light of the authoritative statements, as follows:

> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances

the inference may be drawn that she did in fact consent.

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

"* * * In other cases (except where the victim is non compos mentis, asleep, or where drugs or intoxicating drinks are used), however, the well-settled general rule is that the carnal act must have been committed against the resistance of the woman. She is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in the absence of more than the usual relative disproportion of age and strength between man and woman, although no such impossibility is recognized as a rule of law. In addition to the interposition of such obstacles is the ability and tendency of reprisal, of counter physical attack.

"The importance of resistance is to establish two elements in the crime - carnal knowledge by force by one of the parties and nonconsent thereto by the other. These are essential in every case in which the complainant had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. If there is a lack of resistance, there is small occasion to use force.

"* * * Resistance or opposition by mere words is not enough; the resistance must be by acts, and must be reasonably proportionate to the strength and opportunities of the woman. She must resist the consummation of the act, and her resistance must not be a mere pretense, but must be in good faith, and must persist until the offense is consummated" (American Jurisprudence - Criminal Law - Vol. 14, p. 905).

"* * * The authorities are uniform that the sexual act must be committed against the will of the woman, and without her consent, not technically, but actually and in

fact, or it will not be rape. Consent given at any time prior to penetration deprives the subsequent intercourse of its criminal character, regardless of how reluctantly it may have been given, or how much force had theretofore been employed. The yielding to overpowering force is submission, and not consent, but if the force is short of that, there may be consent, or the act may not be against her will, and it is therefore often a vital question whether the woman ceased resistance because it was useless or dangerous, or because she ultimately consented" (Id. p. 906).

"* * * Consent may be expressed or implied. A man will be justified in assuming the existence of consent if the conduct of the prosecutrix toward him at the time of the occurrences is of such a nature as to create in his mind an honest and reasonable belief that she has consented by yielding her will freely to the commission of the act. Any resistance on the woman's part falling short of this measure is insufficient to overcome the implication of consent. * * * And the rule of law is well settled that although a woman objects verbally to the act of intercourse, yet if she by her conduct consents to it, the act is not rape in the man. So it has been held that voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, amounts to consent and removes from the act an essential element of the crime of rape" (Id. p. 909).

"* * * Evidence of failure of the female to make any outcry tends to show that she consented to the intercourse, * * *.

* * *

* * * The significance of immediate disclosure as a corroborative circumstance has been declared to be much weakened when apparently prompted by conditions rendering the concealment of the transaction difficult or impossible * * *" (Id. p. 967).

The evidence for the prosecution, elicited of necessity from the testimony of the prosecutrix alone fails to establish by any substantial evidence the commission of the offense of rape as charged. When from the evidence there is eliminated the prosecutrix' conclusions, her remaining admissible testimony gauged by the foregoing principles, affirmatively shows that rape was not in fact committed. The prosecutrix had pro-

mised to meet the accused and to have a drink with him after working hours. Although the accused was late in keeping his appointment it is clear from the fact that she kept on her brassiere and panties, covered by "pajamarettes", that she did not expect an uninterrupted night's slumber. Upon being awakened by the accused, she engaged in conversation with him during which the accused's companion, observing the friendly conversation, departed. Thereafter, without making an outcry of any kind, from which she also refrained during the entire period of time in question, notwithstanding the proximity of several other occupied cabins whose occupants most assuredly could have been aroused for her assistance, if she had raised an alarm, she attempted to evade him by flight but fell at the highway slightly lacerating her knee which injury, although described by the physician as resembling a "wood burn", inexplicably and contrary to human experience was still freshly bleeding over two hours later when she appeared at the Spain residence. She was carried back to the cabin by the accused who held his hand over her mouth and struck her twice on the jaw with his fist without causing her to cry out. This brief period was the only time during which she was prevented from calling for aid and her jaw injury was minor, wholly insufficient to prevent her from kissing the accused even though such acts were described by her as "forced". Thereafter, upon entering the cabin, according to the prosecutrix the accused threatened her with an automatic which he claimed to have but which was neither exhibited by him nor seen by her although he was clad in "suntans", which he removed and which would not conceal his possession of such weapon. Still no outcry was made by her. The accused then assisted her in removing her clothes and they engaged in further kisses and embraces, all by "force" as related by her who then concluded that "if I agreed with him he probably wouldn't be so rough and get what he wanted and would get up and get out". Three separate acts of intercourse then took place during and between which conversation and smoking of cigarettes by the accused occurred without the prosecutrix calling for help or seeking to secure her gun which she claimed to have in an adjacent room. The testimony of the prosecutrix, therefore, demonstrates that prior to and during the acts she not only made no outcry but that she ceased resistance, which she could have and was obliged to continue, and in fact consented, although possibly reluctantly.

Subsequent to the alleged acts, her actions are more consistent with consent thereto than otherwise. Conversation ensued between them concerning his return to camp. Still without making an outcry or seeking to secure her gun, she produced the keys to her car and delivered them and it into his possession after securing his promise to return both later the same morning. Certainly while producing the car keys she could have secured her gun and thereby she could have caused the accused's immediate apprehension. This she neither did nor attempted but subse-

quent to his departure she, realizing the difficulty of explaining his possession of her automobile without exposure and although exhausted, injured and thrice ravished, walked to the Spain residence where she reported not the assaults but the claimed theft of her car, her disheveled condition by saying she had been "fighting with a soldier boy" and finally the claimed criminal attacks only in response to that direct question. Such actions under the circumstances where concealment of the acts was rendered difficult, if not impossible, because of the accused's possession of her car do not carry with them any more conviction of outraged virtue than does her recitation of the events and acts preceding her surrender. Indeed, her account of the entire affair, as do all the surrounding circumstances, implicitly shows not only implied consent but also express consent upon her part albeit roughly induced by the accused but nevertheless reluctantly given by the prosecutrix.

The medical testimony describes her claimed injuries as minor and is not in the least impressive that the prosecutrix was forcibly ravished but, to the contrary, indicates that her physical condition was not inconsistent with normality. Furthermore, the prosecution's own evidence shows that the accused was attempting to return to her the automobile as agreed when he was arrested which action on his part is not only thoroughly consistent with consent on her part to both the acts of intercourse and his lawful possession of the car but also equally as thoroughly inconsistent with his having had the required "mens rea" while indulging in such acts and securing possession of the car.

The evidence for the prosecution, therefore, as a whole implicitly shows that the prosecutrix impliedly consented to the alleged acts of intercourse and that of the prosecutrix in particular, shows her consent thereto both expressly and by implication. Such consent, although possibly reluctant, beyond a reasonable doubt existed and was not secured by over-powering force, fear or brutality because no outcry was made, her resistance did not persist and report of the acts was not made except when concealment appeared difficult, if not impossible. Under such circumstances intercourse is not rape. Consent by the prosecutrix being affirmatively shown by the evidence for the prosecution, elicited from the testimony of the prosecutrix herself, there is no substantial evidence showing all of the essential elements of the alleged offense of rape and the evidence is, therefore, insufficient to support the findings of guilty of the Specification of Charge I.

6. Among the lesser offenses included in that of rape is that of assault with intent to commit rape (M.C.M., 1928, par. 148b). This offense requires the coexistence of two essential elements; "They are: (1) an assault, and (2) an intent to commit the act charged * * *"

(American Jurisprudence Supra. P. 915). The necessary intent is defined as "an intention by the defendant to gratify his passion on the person of the woman at all events and notwithstanding any resistance on her part" (Id. p. 917). The evidence for the prosecution, elicited from the prosecutrix' testimony which is corroborated in that she had "swollen jaws", shows that the accused struck her twice with his fist "around the chin"; thereafter he pushed her into the cabin and shoved her upon the bed. During this time he was avowing an intention to have carnal knowledge of her regardless of her entreaties and resistance. His expressed intention was further fortified by threats against her life. Attributing full credit to her testimony concerning his acts and statements, prior to her decision to consent, it is apparent that his assaults upon her were accompanied by a coexistent intent to gratify his passion upon her at all events. The fact that she subsequently consented and ceased her resistance does not obliterate the offense of assault with intent to commit rape, already committed as amply shown by the evidence which, therefore, supports a finding of the lesser included offense of assault with intent to commit rape in violation of Article of War 93. (Wharton's Criminal Law, Vol. 1, Sec. 751 (5))

7. The Specification, Charge II, alleges that the accused at Wellton, Arizona, on or about 8 September 1943 without proper authority took the prosecutrix' Chevrolet automobile, valued at $1000, with the intent to temporarily convert it to his own use and benefit. The unauthorized temporary conversion of a civilian's property is certainly conduct of a nature to bring discredit upon the military service.

The evidence for the prosecution, again elicited solely from the prosecutrix' testimony, fails to establish the commission of the alleged offense. Upon the issue of her consent to his use of the car she, although motivated by misgivings - unimparted to the accused - and without any further threats by him or use of force, after the completion of the acts of intercourse to which she had consented, testified as follows:

> "* * * He told me 'Get dressed, you have got to take me down to the airport.' I said 'I am not taking you to the airport' because I was afraid if I got in the car with him - he had threatened me and had threatened to kill me, and I was afraid if I got in the car with him he would kill me and throw my body out and go on. * * * He said 'Well, give me the car then'. I said 'You can't do that.' He said 'Oh, yes, I can', so after he had threatened me so many times - I was trying to get him out of the house and I thought if he got the car and got away I could get out and get away from him, and then I could

> call in a deputy sheriff and get the car back. He said 'Quit stalling, you are either going to take me down there or let me have the car' so I thought the best way to get shut of him was to give him the keys, and I figured that would be one way to get shut of him, because I couldn't run and I was all tired out, so I gave him the keys to the car and when he left I went over to Mr. Spain's" (R. 25-26).

Upon examination by the court she admitted exacting from him a promise to return it early in the morning, telling him she had an appointment with the doctor (R. 227). Eliminating her conclusions and uncommunicated thoughts from such testimony, it is obvious that the accused was temporarily in possession of the car and using it with her authorization. Furthermore, he attempted to return it as agreed which strengthens such unescapable conclusions. The evidence, therefore, is insufficient to establish the guilt of the accused of the offense alleged and does not support the findings of guilty of Charge II and its Specification.

8. The accused is about 23 years of age. He enlisted at Newark, New Jersey, on 11 July 1940. His record shows no prior service.

9. 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 of Charge II and its Specification; legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding that the accused at the time and place alleged assaulted the prosecutrix with the intent to commit rape, in violation of Article of War 93; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for a period of time not in excess of 20 years.

Abner E. Lipscomb, Judge Advocate.

(On Leave), Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 JAN 1944 - To the Commanding General, California-Arizona Maneuver Area, Camp Young, California.

1. In the case of Private Harry M. Hansen (12008161), 211th Ordnance Medium Automotive Maintenance Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge II and its Specification; legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding that the accused did at the time and place alleged assault Mrs. Cora Harrell Cornell, with the intent to commit rape upon her, in violation of Article of War 93; and 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 twenty years. I concur in the holding of the Board of Review. Under the provisions of Article of War 50½ you now have authority to order the execution of that part of the sentence approved by the Board of Review.

2. Since the lesser included offense of assault with intent to commit rape which has been sustained by the Board of Review was not aggravated by the use of extreme force or the use of a dangerous weapon and since the offense appears to have been condoned by the subsequent conduct of the prosecutrix in engaging in three acts of intercourse with the accused and in lending him her automobile, it is recommended that fifteen of the twenty years approved by the Board of Review be remitted and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

(CM 243938).

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.

(165)

SPJGQ
CM 244014

15 DEC 1943

UNITED STATES v. Chief Warrant Officer FRED LaLONE (W-2116312), 4th Base Headquarters and Air Base Squadron.	THIRD AIR FORCE Trial by G.C.M., convened at Selfridge Field, Michigan, 30 September, 1 and 2 October 1943. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Warrant Officer (JG) Fred (NMI) LaLone, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about November 1, 1942, wrongfully and unlawfully pay and deliver to Master Sergeant Myron B. Collins, Base Sergeant Major, Selfridge Field, Michigan, the sum of $50.00 with intent to influence the decision and action of the said Master Sergeant Myron B. Collins as to applications for transfer to and enlistment at Selfridge Field, Michigan, this to the prejudice of good order and military discipline.

Specification 2: In that Warrant Officer (JG) Fred (NMI) LaLone, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about April 13, 1943, wrongfully conspire with Hubert Marx and Charles Behrman, both of Detroit, Michigan, to procure the unlawful transfer of Private Donald J. Primeau to duty at Selfridge Field, Michigan, in violation of Paragraph 1, AR 615-200, in consideration of the sum of $200.00 paid by the said Private Donald J. Primeau, this to the prejudice of good order and military discipline.

Specification 3: In that Warrant Officer (JG) Fred (NMI) LaLone, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, while Assistant Base Adjutant, Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about April 10, 1943, wrongfully and unlawfully make the following statement to George K. Lutfy, Sr., the father of Private Albert L. Lutfy and Staff Sergeant George K. Lutfy, Jr: "as long as I am at Selfridge Field your boys will not be transferred from the field", or words to that effect, conduct to the prejudice of good order and military discipline and of a nature to bring discredit on the military service.

Specification 4: In that Warrant Officer (JG) Fred (NMI) LaLone, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about April 26, 1943, fraudulently and unlawfully procure the transfer of Private James (NMI) Risdon, 4th Base Headquarters and Air Base Squadron, to duty at Selfridge Field, Michigan, in violation of Paragraph 1, AR 615-200, this to the prejudice of good order and military discipline.

Specification 5: (Finding of not guilty).

Specification 6: In that Warrant Officer (JG) Fred (NMI) LaLone, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, for the purpose of procuring the unlawful transfer of Sergeant Vaughn R. Waddell, to duty at Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about June 4, 1942, wrongfully cause to be certified as true, to the Commanding General, Sixth Service Command, Chicago, Illinois, when he did not know it to be true, and with intent to deceive, that the said Sergeant Vaughn R. Waddell was qualified as a construction manager, when he was not so qualified, this to the prejudice of good order and military discipline.

Specification 7: In that Warrant Officer (JG) Fred (NMI) LaLone, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, for the purpose of fraudulently and unlawfully procuring the enlistment at Selfridge Field, Michigan, of Private Garnet C. Brown, 4th Base Headquarters and Air Base Squadron, did at Selfridge Field, Michigan, on or about August 24, 1942, wrongfully cause to be certified as true to the Adjutant General, Washington, D. C.; when he did not know it to be true, and with intent to deceive, that the said Private Garnet C. Brown was qualified as a machinist, when he was not so qualified, this to the prejudice of good order and military discipline.

Specification 8: In that Warrant Officer (JG) Fred (NMI) LaLone, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, for the purpose of procuring the unlawful transfer of Private Joseph (NMI) Burston to duty at Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about February 10, 1943, wrongfully cause to be certified as true to The Adjutant General, Washington, D. C., when he did not know it to be true, and with intent to deceive, that the said Private Joseph (NMI) Burston was qualified as a radio mechanic, when he was not so qualified, this to the prejudice of good order and military discipline.

He pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and all the Specifications thereunder except Specification 5 of which he was found not guilty. There was no evidence of previous convictions. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, recommended that accused be permitted to reenlist in the Army of the United States and forwarded the record for action pursuant to Article of War 48. For the purposes of this holding the sentence will be treated as one of dishonorable discharge instead of dismissal and the record will be considered to have been forwarded under Article of War 50½ instead of Article of War 48. The rank of the accused is that of a chief warrant officer and therefore his separation from the service by sentence of a general court-martial is effected by dishonorable discharge, not dismissal, and the record should be forwarded under Article of War 50½ (SPJGJ 1943/13066, 5 Oct 1943).

3. It appears from the evidence that there had been established at Selfridge Field by Master Sergeant Collins, acting as Sergeant Major in charge of enlistments and transfers of enlisted personnel, an irregular administrative practice whereby permission to enlist civilians at that field, or to transfer enlisted personnel to that field, was obtained from The Adjutant General of the Army by representing to him that the individual concerned had experience or possessed special skills or other qualifications making him desirable for the purpose, whether such was true or not. Thus an individual would be described in such a request as a mechanic or radio operator in order to gain the consent of The Adjutant General to the enlistment or transfer when, in fact, he might not be either but might in reality be a clerk, a stenographer or a lawyer, and the real purpose behind the transfer sought might be to favor a friend, or to have the person involved play on an athletic team at Selfridge Field. Such an irregular practice was obviously dishonest and one guilty of such conduct undoubtedly violated the 96th Article of War. The seriousness of the offense depends upon the facts and circumstances of each enlistment or transfer - its real purpose; its benefit to the service, if any; and whether the military personnel involved acted illegally for gain or profit, or innocently and legitimately.

The inference is plain that accused must have known of this practice

since he was Chief Clerk under Sergeant Collins for many months prior to 9 November 1942 and was instructed by Collins to carry out this irregular practice (R. 81). On that date accused was discharged to accept an appointment as warrant officer (JG) and transferred to Supply. About 1 February 1943, he returned to headquarters of the field as Assistant Adjutant and as such until 11 May 1943, was the superior immediately over Sergeant Collins.

With the foregoing thoughts in mind each Specification will be discussed briefly herein below in chronological order for the purpose of testing the legal sufficiency of the evidence to sustain the findings of guilty.

a. Specification 6 charges the accused with having, in June 1942, caused to be certified as true, when he did not know it to be true and with intent to deceive, that Sergeant V. R. Waddell was qualified as a construction manager when he was not so qualified, in order to secure Waddell's unlawful transfer to Selfridge Field. The accused was active in sports at the field. He managed the baseball and basketball teams. Waddell lived in Detroit nearby and had played basketball at the field as a civilian. When about to be inducted he sought the assistance of the accused to enlist at Selfridge Field. At that time no enlistments were being accepted there and the accused told Waddell to let him know where he was stationed after induction and he would try to get him transferred to Selfridge Field (R. 23). Waddell was inducted and sent to Fort Custer. He notified accused of this fact (R. 24) and shortly thereafter, visited accused at the field and told him of his qualifications which were (a) insurance salesman for six months, (b) relief man on an automobile body assembly construction line for six years, and (c) some experience in operating farm and construction machinery such as road graders and tractors on his uncle's farm sixteen years previous (R. 28). The accused was the motivating agency that brought about Waddell's transfer to Selfridge Field by causing correspondence to be issued to Waddell's commanding officer representing that Waddell was qualified as a construction manager (R. 32; Pros. Ex. 8), and that his services were needed at Selfridge Field. The transfer itself was not unlawful as averred in the Specification. The wrongful act was the misrepresentation made by the accused which brought about Waddell's lawful transfer. After his assignment to Selfridge Field, Waddell's duties included the laying out and construction of athletic fields. Whether he continued to play basketball is not disclosed.

The finding of guilty of the Specification is therefore legally supported by the evidence as outlined except the word "unlawful". While Waddell was shown to have had some knowledge of operating construction machinery and did operate them after his arrival at Selfridge Field, he had never been a construction manager as described in the basic letter seeking his transfer.

b. Specification 7 charged the accused with intent to deceive in

certifying on or about 24 August 1942 to The Adjutant General that Garnett C. Brown was a qualified machinist, when he did not know it to be true, for the purpose of "fraudulently and unlawfully" securing his enlistment at Selfridge Field. Garnett Brown and his older brother Wayne had lived in Atlanta, Michigan, the home town of the accused, during the latter's entire life. He graduated from school in 1937 when he was sixteen years old, drove a truck for a general contractor for a short time, worked as a spot welder and on various machines and machinery for the Yellow Truck and Coach Company at Pontiac, Michigan, for a short time, and for the three years prior to his enlistment, had been employed as a bartender at a bar owned by his brother-in-law in Atlanta, Michigan (R. 9, 10, 13, 15, 18). The accused left Atlanta when he enlisted in the Army in 1931 but visited there on fishing trips about three times a year (R. 20). Some two months prior to 22 October 1942, when the accused was in Atlanta, Garnett Brown accompanied him on a fishing trip and later served him drinks at a bar in his capacity as bartender (R. 13, 14, 18). On this trip, Brown asked accused how to enlist in the Air Corps, and the accused explained one would have to have some specialized qualifications such as aviation mechanic, radio operator or machinist. Shortly thereafter the two Brown brothers, Garnett and Wayne, came to Selfridge Field to see the accused for the purpose of enlisting (R. 14, 18, 20; Pros. Ex. 2). The elder Brown (Wayne) was a machinist and was subject to the draft. The younger Brown (Garnett) was under 21 years of age and was not at the time subject to the draft. A TWX (telegram) sent to The Adjutant General 24 August 1942, was introduced in evidence as Prosecution Exhibit 5 (R. 16) which requested authority to enlist Brown and his brother as they were qualified machinists and their services were urgently needed. The telegram was identified as having been dictated and initialed by the accused (R. 31). The reply of The Adjutant General introduced as Prosecution Exhibit 6 (R. 10) authorized the enlistment of Brown and his brother, and they were accordingly enlisted on 22 October 1942 as shown by the certificate of the recruiting officer, introduced as Prosecution Exhibit 7 (R. 16). After enlistment Brown was interviewed by the classification officer, and certified his main occupation as a truck driver, and his second best occupation as bartender (R. 15; Pros. Ex. 3, 4). He was assigned to the base garage and later played basketball on the team coached by the accused. Brown testified that he told the accused when he applied for enlistment that he was a machinist (R. 13, 17); that he was a trained machinist and such a machinist as would qualify him as a machinist in the Army (R. 20).

The accused's explanation was that although he knew Garnett Brown from his home town and went with him on a few fishing trips he did not know much about him. Brown was too young to be inducted. Accused explained to Brown that getting into the Air Corps was just a chance and that enlistments were closed excepting as to certain classifications, such as radio operators, machinists and mechanics. Later Brown and his brother

came down to see him at the field. He knew Brown's brother was a machinist and when Brown had told him that he also was a machinist and had worked at the Yellow Cab Company he sent a wire requesting both of them to be authorized to be enlisted as machinists (R. 131).

It is the opinion of the Board that the court could properly infer from the foregoing facts that the accused under all of the circumstances knew that Garnett Brown was not a qualified machinist when he caused it to be certified to The Adjutant General that Brown was a qualified machinist and that therefore accused intended to deceive The Adjutant General for the purpose of procuring Brown's enlistment at Selfridge Field. Brown was not yet 21 years of age. For three years accused knew he was a bartender in Atlanta, Michigan. He must have known that Brown could not be a qualified machinist at his age in spite of Brown's alleged claim that he was. The court did not accept Brown's version of his false representations to the accused. Brown tried to shoulder all of the blame. It is outside of the powers of this Board to weigh the evidence in this case. There is legally sufficient evidence to support the finding of guilty of this Specification.

c. Specification 4 charged the accused on 26 April 1943 with having "fraudulently and unlawfully" procured the transfer of Private James M. Risdon to duty at Selfridge Field in violation of paragraph 1, AR 615-200.

Specification 5 charged the accused with having certified to The Adjutant General, with intent to deceive on 5 December 1942, that Risdon was a qualified radio operator when he did not know it to be true. The accused was found not guilty of Specification 5. However, since some of the evidence concerning Risdon relates to both Specifications 4 and 5, the facts will be reviewed as to Specification 4 of which he was found guilty.

The competent testimony revealed that in the early part of December 1942 Risdon was about to be inducted into the Army and he and his father and George Lutfy, Sr., drove out to Selfridge Field where they met Lutfy's son who was stationed there. The Risdons were introduced to Sergeant Collins for the purpose of securing the enlistment of Risdon. Risdon's father recalled that Collins had sent the wire requesting his son's enlistment, but that his son changed his mind about accepting this opportunity and was subsequently inducted. Collins, on the stand, recalled that on 5 December 1942 he sent a TWX (telegram) to The Adjutant General requesting authority to enlist Risdon stating his qualifications as radio operator could be utilized to great advantage (R. 67), which was introduced as Prosecution Exhibit 15 (R. 66). The court found the accused not guilty of sending the telegram.

Upon Risdon's induction 25 January 1943, he was sent to Camp McCain, Mississippi, and there assigned to a military police company which he disliked very much. He wrote a letter to Sergeant Lutfy reciting his

qualifications as a pre-law college student and requested his assistance in getting him transferred to the Air Corps (R. 44). Sergeant Lutfy who was on duty in the same office with accused testified he gave Risdon's letter to accused and requested his assistance in getting Risdon transferred to Selfridge Field (R. 30, 36, 38). Prosecution Exhibit 16 (R. 67), a telegram to the Commanding Officer, 386th MPEG, Camp McCain, Mississippi, was introduced and the signature of the accused as assistant adjutant thereon identified. This telegram dated 30 March 1943, requested Risdon's transfer as his services were urgently needed in the Legal Claims Office at Selfridge Field and stated that a vacancy existed there. A first wrapper indorsement, dated 5 April 1943, addressed to the Commanding General, Fourth Service Command, Atlanta, Georgia, was introduced as Prosecution Exhibit 17 (R. 67) and was identified as having been signed by the accused as acting adjutant. The latter requested the transfer of Risdon for duty in the Legal Boards and Claims Office, reciting that Risdon had "had three years of College Law" which could be used to advantage "inasmuch as all personnel assigned to the Legal Boards & Claims Office have either been transferred to OCS or applications have been processed and are awaiting orders for school". Major John H. Sweburg, Legal Boards and Claims Officer at Selfridge Field, testified that between 12 February and 18 April 1943 no vacancy had existed in his office; that he had not on or prior to 30 March, requested or authorized accused to request the transfer of a man to the field for his office, and knew nothing about Risdon until after 18 April. Further, that it was not a fact that the personnel of his office had been transferred to OCS nor that their applications were processed and the men were awaiting orders for school (R. 96). He recalled that accused had called him about a prospect he said he had in mind for the office but no one was ever sent up to his office for an interview (R. 97).

The accused's version was that in the latter part of March, Sergeant Lutfy, who worked in his office, handed him a letter from Risdon requesting assistance in getting transferred to the Air Corps. The letter recited Risdon's college qualifications. The accused showed the letter to Lieutenant Colonel Charles G. White, then major, Base S-1 Officer, who authorized him to communicate with Major Sweburg, and if Major Sweburg could use him, to get Risdon transferred. Accused telephoned the major who said that he could use him. He then wired for Risdon's transfer (R. 129). It was some months later before the accused learned Risdon had never been sent over to that office for an interview (R. 140).

Shortly after Risdon was transferred to Selfridge Field, the accused was pointed out to him. He introduced himself and thanked the accused for getting him transferred. This was the first time he had ever met the accused (R. 62). The accused replied that he was glad to see him and inquired about his duties (R. 46; Pros. Ex. 11). Risdon's father

offered the accused a hunting dog as a gift in appreciation for what he understood the accused had done for his son, but the accused refused it because he had no place to keep it (R. 59, 60). He did not pay anyone anything for effecting the transfer (R. 58).

The evidence thus outlined legally supports the finding of guilty of Specification 4. Undoubtedly the accused was the motivating factor in procuring the transfer of Risdon to Selfridge Field. There was no cogent reason for the transfer. He misrepresented the need or necessity for a man of Risdon's ability. He thereby violated AR 615-200 which prohibits transfers except for cogent reasons.

d. Specification 1 charges the accused with having wrongfully and unlawfully paid to Master Sergeant M. B. Collins on or about 1 November 1942 the sum of $50 with the intent to influence the latter's decision and action as to applications for transfer to and enlistment of enlisted personnel at Selfridge Field.

The evidence shows that at the time of the occurrence, and for some appreciable period of time previous thereto, there had been considerable borrowing of money back and forth between the accused and Collins. Collins was the Base Sergeant Major in charge of enlistments and transfers. The accused at that time was a sergeant acting as Chief Clerk in that department. Collins testified that on or about 1 November the accused handed to him the sum of $50. In his testimony Collins first stated that at the time he handed him the money the accused said nothing. Shortly thereafter he changed this version and stated that the accused said, "here's the money" (R. 73). Collins "presumed" that this money was for effecting a transfer (R. 72, 73). This was a mere "supposition" on his part and Collins would not "make a definite statement" on the subject (R. 72). Again (R. 69), Collins stated that he was "under the presumption that it could have been for this transfer. I have no definite knowledge". Collins did not know just what transfer was involved but thought it concerned a "Dopp" or "Knop". It was shown that on 8 October 1942, Colonel White, Adjutant, had requested the authority to enlist a R. F. Knop at Selfridge Field (Pros. Ex. 18) but it was never shown that accused knew Knop or had anything to do with the request, his enlistment, or transfer, if any. Nor was it shown that Collins could exercise any discretion concerning applications for transfers to or enlistments at Selfridge Field. He was in charge of the mechanical part of having prepared and sending the telegrams or other correspondence concerning them.

At the time of the alleged occurrence accused was a sergeant acting as Chief Clerk under Collins. Nine days later accused was discharged to accept appointment as a warrant officer and was transferred away from

Collins' office to the supply department of that field. It is highly improbable that one sergeant would pay another sergeant $50 to influence the latter's decision or action when there was no evidence that the accused was interested in any way in anyone's enlistment or transfer during the time he was in Collins' office. When he returned to headquarters in January 1943 he was Collins' superior officer acting as Assistant Adjutant and he didn't have to pay Collins to act; he could order him to do so.

This testimony is of such vague character that it cannot be accepted as evidence establishing beyond a reasonable doubt that the accused attempted to bribe Collins in the performance of the latter's military duties and for that, and the foregoing reasons, the finding of guilty of this Specification is not legally sustained by the evidence.

e. Specification 8 charged accused with intent to deceive, in certifying as true to The Adjutant General that Joseph Burston was a radio mechanic, when he did not know it to be true, for the purpose of securing his transfer to Selfridge Field. The testimony revealed that Charles Behrman, Constable of Wayne County, who had known the accused for about a year and a half, introduced Burston to him at the noncommissioned officers' club at Selfridge Field in the early part of 1943, at about the time of Burston's induction. The accused was advised by Behrman that Burston was an attorney (R. 86, 87). The Selective Service questionnaire filled out by Burston indicated his occupation as general practice of law for twelve years with no other occupational experience. He was inducted 23 January 1943 (R. 65). On 10 February 1943, the accused handed Sergeant Collins a card with the name Joseph Burston, Attorney at Law, written on it, and stated that Colonel White had given him permission to initiate the transfer of Burston to Selfridge Field. Collins gave the card to a stenographer directing that a telegram be sent requesting such transfer. The TWX (telegram) was introduced as Prosecution Exhibit 20 (R. 79), addressed to The Adjutant General, Washington, D. C., requesting Burston, then stationed at Fort Custer, to be assigned to the Air Corps at Selfridge Field; that his qualifications as a radio mechanic could be used to great advantage and that a vacancy existed for this soldier. The TWX was initialed by Collins and identified as having been authorized and sent by him. When accused gave Collins the card nothing was said about Burston's qualifications or that he was a radio mechanic (R. 79). This was the result of the practice which had come into effect at that station, by which, when a man was wanted, a wire was sent to The Adjutant General, requesting his transfer or enlistment authorized, reciting some technical classification, regardless of what the individual's qualifications were (R. 80, 81). The accused was acquainted with this practice, in fact Collins had personally instructed him on the subject (R. 81). Prior to the time accused became warrant officer, he was Chief Clerk to Collins and handled or saw a lot of wires go out, as for illustration, baseball players were requested as radio mechanics (R. 81). Therefore, when accused handed Collins the card and

requested this individual's transfer, Collins merely handed the card to a stenographer and told her to send the wire, knowing that she would recite therein some classification such as radio mechanic (R. 81).

The accused, on the witness stand, admitted meeting Burston on 9 February 1943 when he was introduced, as a lawyer, by Behrman. Burston had explained his desire to get stationed at Selfridge Field since he knew a lot of people in Detroit and could be of service to Selfridge Field and gave accused his card which accused took into Colonel White's office, and explained Burston's transfer had been requested by Behrman who had umpired a lot of games for the field, gratis, and that this was a good way of repaying Behrman for his services. Without testifying what Colonel White's reply had been (R. 132), the accused stated that he then took the card to Sergeant Collins and told him Colonel White said it was all right to transfer this man to Selfridge Field. The accused did not establish by Colonel White, who had been on the witness stand, any corroboration of this fact. He did not tell Sergeant Collins Burston's qualifications (R. 132), and received no compensation for this transfer (R. 133). The primary reason for causing Burston's transfer was to do Behrman a favor (R. 136).

The Specification charges the accused with having "wrongfully" caused to be certified as true to The Adjutant General that Burston was qualified as a radio mechanic when he was not so qualified with the intent to deceive and for the purpose of procuring Burston's "unlawful" transfer to Selfridge Field. The proof as related in detail above falls far short of the allegation. The accused made no false statement to anyone regarding Burston. He gave Sergeant Collins Burston's name and profession. The accused was not shown to be responsible for the manner in which Sergeant Collins ran his office nor for the irregular practices that apparently were sanctioned by Collins' superior officers regarding enlistments and transfers. The mechanics regarding Burston's transfer were left to Collins. It was not shown that accused knew, or requested that Collins misrepresent Burston's qualifications. Burston's qualifications as a lawyer with 12 years' practice should in itself have been a sufficient qualification to make him of value to Selfridge Field. Even though accused knew of the irregular practice described, Sergeant Collins had charge of transfers and all the accused could do after obtaining the approval of his commanding officer to the contemplated transfer was to notify Collins. If Collins chose to effect the transfer in an improper manner when it could have been done in a proper manner, the accused may not legally be charged with the improper act unless he authorized or requested it. This was not shown and therefore the finding of guilty of this Specification cannot be sustained.

f. With reference to Specification 2 the accused is charged with conspiring with Hubert Marx and Charles Behrman to procure the unlawful

transfer of Private D. J. Primeau to Selfridge Field, in violation of paragraph 1, AR 615-200, in consideration of the sum of $200. It appears from the evidence that Primeau had been sworn in upon induction and was due to report at Fort Custer, Michigan, when on the morning of 12 April 1943, he was approached by Marx, a Wayne County, Detroit constable to ascertain whether he (Primeau) was interested in being stationed at Selfridge Field for the duration; and that such a transfer could be arranged for $200. Primeau reported the matter to his former employer, was directed to the Federal Bureau of Investigation, interviewed, and directed to go through with the deal, the Federal Bureau of Investigation to furnish the money (R. 92). On the morning of 14 April, Primeau met Marx by arrangement and informed him that he was ready to go through with the deal, exhibiting his induction papers. Marx wrote Primeau's name, address and serial number on the back of one of his "business cards", being observed by one of the FBI agents (R. 25; Pros. Ex. 23). The business card of Marx with Primeau's name and other data on it was introduced in evidence as Prosecution Exhibit 24 and identified by Primeau (R. 93). As he was directed, Primeau acted perturbed about whether the transfer would be accomplished after he paid over the money. Marx informed him that Charles Behrman, another Wayne County constable, had "connections" out at Selfridge Field and Primeau could assure himself by talking to him. Accordingly, at noon Primeau went to the constable's office in the county building where he met both Marx and Behrman. Marx gave Behrman the card and both insisted Primeau work fast, suggesting he get the money immediately and drive Behrman out to Selfridge Field. Primeau stalled for time, received marked money from the FBI office and drove out to Marx's home at 7 o'clock that evening, followed in another car by two FBI agents (R. 93). He entered Marx's house, spent a few minutes there, handed Marx the money as agreed, and upon leaving signaled the agents who entered the house immediately thereafter, arrested Marx, and recovered the $200 which was identified (R. 85, 94, 95, 99; Pros. Ex. 23).

At 8 o'clock of the same night, Behrman called upon the accused at his home and gave the accused Marx's card with Primeau's name on it. No mention was made of Primeau's qualifications. After the arrest of Marx, one of the FBI agents and the Provost Marshal arrested Behrman as he was driving out of the field (R. 100), Behrman admitting just having come from the home of the accused. The accused was then taken over to the Base S-2 office where he made a voluntary written statement which was introduced in evidence as Prosecution Exhibit 22 (R. 85). In the statement which was obtained from the accused that same evening, accused set forth that he had met Behrman the previous year while Behrman was acting as umpire of the baseball games at Selfridge Field. Accused was the baseball manager. About three months previous Behrman had asked accused if he could get a Mr. Burston assigned to Selfridge Field from Fort Custer when Burston was inducted. The accused investigated the matter and found that Burston was a qualified lawyer and that his services could be used to advantage at that field and therefore requested his assignment to that field upon his arrival at Fort Custer. Behrman visited the accused at the latter's

home that evening, 14 April 1943, apparently to discuss with him the baseball schedule for the coming baseball season. He brought with him his two young sons. Behrman testified that his purpose in calling upon the accused that evening was to discuss the baseball schedule and the players for the coming season (R. 88). As Behrman was about to leave, he handed to the accused a card containing the name and serial number of Primeau which the accused placed in his bathrobe pocket. The only evidence of record as to the conversation concerning the card was that supplied by the accused who stated that as Behrman was about to go down the steps of the porch to leave, he handed the accused the card and said, "see what you can do for this man". Because of the previous transaction regarding Burston, the accused understood that to mean a request to see whether or not the accused could get Primeau transferred to that field (R. 126-127). Nothing was said about any money nor the qualifications of the man. The accused did nothing about the matter and gave it no thought. In fact, he had no opportunity for either as almost immediately he was requested to come to headquarters and relate what had occurred, which he did voluntarily and told of the occurrence and turned over to proper authorities the card given to him by Behrman.

The evidence thus related could as readily have sustained a finding that the accused was innocent of any part of the alleged conspiracy and that Behrman and Marx alone were engaged in the enterprise but planned to use the accused as a means to gain their ends. Evidence that can be interpreted as a basis of either guilt or innocence cannot be sustained as sufficient to support a finding of guilty beyond a reasonable doubt. It necessarily follows that the finding of guilty of this Specification is not supported by the evidence.

g. With reference to Specification 3, it is the opinion of this Board that the Specification itself does not set forth a violation of the 96th Article of War. It appears from the evidence that accused and his wife were the guests of Sergeant Wasphy Mudarri at the noncommissioned officers' club at Selfridge Field in the early part of April 1943, seated at a large table with Mr. George K. Lutfy and his wife, Mr. Edmond M. Risdon and his wife and at least four other guests. The prosecution's witnesses, Mrs. Marion Reghetti and Mrs. Lenora Helwig, were seated at the adjoining table. Mrs. Reghetti testified that during the course of the conversation between Mr. Lutfy (a civilian) and the accused the subject of Mr. Lutfy's two sons, who were then stationed at Selfridge Field, arose, and the accused stated to Mr. Lutfy "as long as I am at Selfridge Field your sons will not be transferred away" (R. 75-78). This statement was denied by the accused and by three of the guests present including Mr. Lutfy. However, assuming that the statement was made, and overheard by the ladies sitting at the next table, inasmuch as the statement can be interpreted in many different ways, some of which are free of any wrong or wrongful intent, the utterance of

such words alone cannot be held to be a violation of the 96th Article of War. It appeared from the record that the two sons of George K. Lutfy were members of the same military organization as accused. All three were enlisted personnel. It was therefore probable that none would be transferred out of the organization but all would move together. The accused's prediction that the Lutfys would not be transferred away from Selfridge Field as long as he was there, which could mean until he was also transferred, would in the ordinary course of events be true. Freedom of speech of military personnel is curtailed but not to the extent that one may not utter words which are innocent and harmless in themselves because some eavesdropper might overhear them and misinterpret them in a manner that might cause discomfort to the listener and cause the listener to discredit the service. The accused was a warrant officer at the time and anyone with elementary knowledge of Army procedure and administration would know that no warrant officer would have authority to direct the transfer of military or civilian personnel. There is no evidence to show that the listeners knew Mr. Lutfy's sons or that they were then in the military service.

> "By the term 'to the prejudice,' etc., is to be understood directly prejudicial, not indirectly or remotely, merely. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing military discipline; but it is hardly to be supposed that the article contemplated such distant effects, and the same is, therefore, confined to cases in which the prejudice is reasonably direct and palpable. (Winthrop.)" (MCM, 1928, par. 152a, p. 187).

It therefore follows that the facts found by the court and set forth in the Specifications do not constitute a disorder or neglect to the prejudice of good order and military discipline.

4. The record shows that the accused is 35 years of age. He completed 13 years of enlisted service in the United States Army on 27 November 1942, having during that period served honorably. He was discharged in order to accept an appointment as warrant officer (JG) on 9 November 1942 and promoted to chief warrant officer on 1 June 1943.

5. Six of the seven members of the court recommended that such action be taken in the case as would result in this soldier's being retained in the service and reduced to the grade of private due to his long record of excellent service in the Army and the fact that the delinquencies of which he was convicted were known and condoned by the officers under whom he was serving, and that the accused himself was following an irregular practice prevalent at that station and sanctioned by his superiors.

6. 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 evidence does not legally sustain the findings of guilty of Specification 1 (alleged bribe of $50 to Collins), Specification 2 (alleged conspiracy with Messrs. Marx and Behrman), Specification 3 (alleged improper remark at Selfridge Field) and Specification 8 (falsely representing Private Joseph Burston's qualifications in order to obtain his unlawful transfer). It is, however, of the opinion that the evidence is legally sufficient to support the findings of guilty of Specification 4 (violating AR 615-200 by improperly obtaining the transfer of Private J. Risdon), Specification 6, except for the word "unlawful" (misrepresenting Sergeant V. R. Waddell's qualifications in order to procure his transfer to Selfridge Field) and Specification 7 (misrepresenting qualifications of G. C. Brown in order to procure his enlistment) and the Charge. The Board of Review is also of the opinion that the record of trial is legally sufficient to support the sentence and to warrant confirmation thereof. A dishonorable discharge is authorized upon conviction of a violation of Article of War 96.

William A. Jones, Judge Advocate.

Dale Heflin, Judge Advocate.

Herbert B. Federica, Judge Advocate.

1st Ind.

AN 1944

War Department, J.A.G.O., - To the Commanding General, Third Air Force, Tampa, Florida.

1. In the case of Chief Warrant Officer Fred LaLone (W-2116312), 4th Base Headquarters and Air Base Squadron, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty of Specifications 1, 2, 3 and 8 of the Charge be disapproved, and that only so much of the finding of guilty of Specification 6 of the Charge be approved as involves a finding of guilty of that Specification except the word "unlawful". Upon compliance with the foregoing recommendation, under the provisions of Article of War 50½ and Executive Order No. 9363, dated July 23, 1943, 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 244014).

James E. Morrisette,
Colonel, J.A.G.D.
Assistant Judge Advocate General,
In Charge of Military Justice Matters.

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

SPJGN
CM 244026

27 NOV 1943

UNITED STATES	)	NEW ENGLAND SECTOR
	)	
v.	)	Trial by G.C.M., convened at Fort Banks, Massachusetts, 4 November 1943. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant ADAM F. KIATSKIE (0-1995289), Army of the United States.	)	

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: Violation of the 61st Article of War.

Specification: In that Second Lieutenant ADAM F. KIATSKIE, Army of the United States, Eleven Naught Eighth Service Command Unit, did, without proper leave, absent himself from his organization and station at Fort Adams, Rhode Island, from about 3 October 1943 to about 11 October 1943.

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

Specification: In that Second Lieutenant ADAM F. KIATSKIE, Army of the United States, Eleven Naught Eighth Service Command Unit, did, without proper leave, while enroute from Fort Adams, Rhode Island, to Fort Banks, Massachusetts, absent himself from his organization from on or about 20 October 1943 to on or about 25 October 1943.

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

Specification: In that Second Lieutenant ADAM F. KIATSKIE, Army of the United States, Eleven Naught Eighth Service Command Unit, having received a lawful order from Colonel C. D. PEIRCE, Commanding Officer, Newport Subsector, communicated through Major W. Y. McCACHERN, Adjutant, Newport Subsector, to report without delay to the Commanding Officer at Fort Banks, Massachusetts, the said Colonel C. D. PEIRCE, being in the execution of his office, did, en route to Fort Banks, Massachusetts, on or about 20 October 1943, fail to obey the same.

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

3. The accused pleaded guilty to all Charges and Specifications and, after the nature and effect of so pleading had been explained to him twice, continued such plea and refused to change it. The prosecution, therefore, introduced no evidence (R. 7-9).

4. The evidence for the defense was documentary and shows that the accused had three honorable discharges from the Army of the United States, dated 23 November 1937, 13 July 1940 and 4 May 1943, which in each instance gave him a character rating of "excellent" and showed that he had no time to be made up under Article of War 107. On 10 November 1942 he had been commended for exceptional service in repairing all security telephone lines at Camp Stewart, Georgia. The accused remained silent (R. 9-11, Exs. "A-1", "A-2", "B-1", "B-2", "C-1", "C-2", and "D").

5. The accused's plea of guilty to all Charges and Specifications admitted the facts alleged in the Specifications which appropriately alleged violations of Articles of War 61 and 96. The nature and effect of his plea was twice explained to him by the law member of the court and he neither elected to withdraw the plea as improvidently entered nor offered evidence inconsistent therewith (Dig. Op. JAG, 1912-40, Secs. 378 (2) and (3)). The findings of guilty of all Charges and Specifications are, therefore, supported by the plea of guilty thereto.

6. The accused is about 29 years of age. The War Department records show that he has had enlisted service from 14 August 1935 until 5 May 1943 when he was commissioned a second lieutenant upon completion of Officers Candidate School and that he has been on active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96.

Abner E. Lifscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin P. Sleeper, Judge Advocate.

SPJGN
CM 244026

1st Ind.

War Department, J.A.G.O., 11 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 Second Lieutenant Adam F. Kiatskie (0-1995289), 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 and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures and confinement imposed 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

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 forfeitures and confinement remitted. Execution suspended. G.C.M.O. 30, 15 Jan 1944)

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

SPJGQ
CM 244052

24 NOV 1943

UNITED STATES v. Second Lieutenant FRANK W. RITCHEY (0-1297781), 329th Infantry.	83D INFANTRY DIVISION Trial by G.C.M., convened at Camp Breckinridge, Kentucky, 12 November 1943. Dismissal.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that 2d Lt Frank W. Ritchey, 329th Infantry, did, without proper leave, absent himself from his organization and station Camp Breckinridge, Kentucky from about 6 October 1943 to about 21 October 1943.

Accused pleaded guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures and forwarded the record of trial for action under Article of War 48.

3. In addition to the plea of guilty there was offered by the prosecution duly authenticated copies of the morning report of Company K, 329th Infantry, Camp Breckinridge, Kentucky, which show accused "15 day ord lv to AWOL 2400 5 Oct 43" (Pros. Ex. 1, p. 1), and "AWOL to ar in qrtrs 2330, 21 Oct 1943" (Pros. Ex. 1, p. 2).

His rights as a witness having been explained to him, accused elected to take the stand and testify on his own behalf as follows:

"I was granted a 15 day leave effective on or about the 18th of September. My purpose for the leave was to get married. On arriving home, I found my girl had been married a few weeks before and I knew nothing about it. It was quite a blow to take and I was quite upset. It laid me low and this thing had happened before I realized what I had done." (R. 8).

The defense also introduced a stipulation, admitted into evidence and marked as Exhibit A, which reads as follows:

"It is stipulated between the accused, his counsel, and the prosecution, that the last efficiency rating of the accused, 2nd Lt. Frank W. Ritchey, 01297781, was "Excellent" for the period of 1 January 1943, to 30 June 1943; it is further stipulated that the accused, 2nd Lt. Frank W. Ritchey, 01297781, was duly recommended for promotion by his superior officers on 27 September 1943." (R. 8).

4. War Department records disclose that accused was born on 23 October 1918 at Akron, Ohio, and was 25 years of age at the time of the commission of the offense alleged. He graduated from high school in 1937, and worked as a tube inspector for the Firestone Rubber Company from 1937 to 1938, and as a salesman with the Fondren Dust Cloth Corporation for one year and six months during 1939 and 1940. He is single. He enlisted in the Infantry and served from 20 January 1941 to 4 April 1941 in the 30th Infantry as a private at the Presidio of San Francisco, California. On 4 April 1941 he was transferred to the 32nd Infantry as a corporal and served at Camp San Luis Obispo, California, until June 1942, at which time he made application for appointment as second lieutenant in the Infantry Officers Reserve Corps. He was commissioned after graduating from Officers Candidate School at Fort Benning, Georgia, on 22 October 1942, and attached to the Second Student Training Regiment at Fort Benning. He reported for active duty on that date.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 61.

William A. Pounds, Judge Advocate.

Parle Sephen, Judge Advocate.

Herbert S. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 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 Second Lieutenant Frank W. Ritchey (0-1297781), 329th 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 as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 32, 15 Jan 1944)

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

SPJGQ
CM 244066

24 NOV 1943

UNITED STATES v. Second Lieutenant CLYDE K. SMITH (0-1036036), Chemical Warfare Service.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Santa Ana Army Air Base, Santa Ana, California, 22 October 1943. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Clyde K. Smith, 2nd Lieutenant, Chemical Warfare Service, was at Balboa, California, on or about 3 October 1943, drunk in uniform in a public place, to wit, the Bamboo Room, located in Balboa, California.

He pleaded guilty to the Charge and Specification and, after the law member fully explained the consequences of such plea, insisted that it stand (R. 4-5). He was found guilty of the Charge and Specification. Evidence of one previous conviction by a general court-martial was introduced which discloses that accused was convicted on 24 May 1943 of violation of Article of War 96, each of the two Specifications thereunder alleging him to have been drunk and disorderly in a public place on two occasions, the first at Airplane Inn, west of La Junta, Colorado, the second in the vicinity of the Arts Cafe in La Junta, Colorado, both on 16 April 1943. He was sentenced to be restricted to the limits of the La Junta Army Air Field for three months and to forfeit $75 per month for twelve months. The reviewing authority approved the sentence but reduced the forfeitures to $50 per month for six months and as thus modified ordered it executed. In the instant case, 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 prosecution offered no evidence. The defense called no witnesses but stipulated, with the consent of the prosecution that accused reported for duty at the Santa Ana Army Air Base on 8 September 1943, and has been attached to the Chemical Warfare office since that date; and that Captain Lemuel Benbary, Commanding Officer of the Chemical Warfare Service of this post, would testify accused's service had been satisfactory to the date of this charge (R. 5). His rights as a witness on his own behalf, having been previously explained to accused before trial by the defense counsel, were again explained to him in open court by the law member. Accused elected to remain silent (R. 6).

4. War Department records disclose that the accused was born on 22 October 1916 and was 26 years of age at the time of the commission of the offense here alleged. He attended the Kemper Military Academy at Boonville, Missouri, from 1929 to 1932, a high school at Torrington, Wyoming, from 1933 to 1934, and the Creighton University Pharmacy School at Omaha, Nebraska, from 1934 to 1936. From 1936 to 1939 he worked as an assistant in his father's drug store, and has worked at various times since then as a rodman with an oil company, taking care of horses, and as a drug clerk. He was married, but was divorced in 1941. He has no children. He applied for Officers Candidate School in July 1942 and was commissioned a second lieutenant, Army of the United States, at Edgewood Arsenal on 28 November 1942, having been honorably discharged as a corporal the day preceding. He reported for active duty on 28 November 1942.

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

William H. Pounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Fredman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 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 Second Lieutenant Clyde K. Smith (0-1036036), Chemical Warfare Service.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

3 Incls.
1 - Record of trial
2 - Dft. of ltr. for signature S/W
3 - Form of action

(Sentence confirmed but forfeitures remitted. G.C.M.O. 47, 1 Feb 1944)

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

SPJGN
CM 244106

30 NOV 1943
THIRD AIR FORCE

UNITED STATES	
v.	Trial by G.C.M., convened at Avon Park Bombing Range, Avon Park, Florida, 5 October 1943. Dismissal and total forfeitures.
Second Lieutenant DAVID B. LYTLE (0-672954), 478th Bombardment Squadron, 336th Bombardment Group (M).	

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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lt. David B. Lytle, 478th Bombardment Squadron, 336th Bombardment Group (M) did, on or about June 13, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Hotel George Washington, a certain check, in words and figures as follows, to wit:

West Palm Beach, Florida June 13, 1943

Pay to the order of Hotel George Washington $30.00
Thirty and No/100 DOLLARS

First National Bank
Big Spring, Texas

I hereby represent that the amount drawn for in this draft is on deposit with the drawee to my credit, free from any claim, and acknowledge that this amount has been paid to me upon presentation of such facts.

INSUFFICIENT FUNDS.

David B. Lytle
0-672954 478th Avon Park

and by means thereof, did fraudulently obtain from the Hotel George Washington, West Palm Beach, Florida, money of the value of about thirty dollars ($30.00), he, the said 2nd Lt. David B. Lytle, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Big Spring, Texas for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated July 3, 1943, payable to the order of cash made and uttered to the Hotel George Washington, West Palm Beach, Florida, and fraudulently obtaining thereby $15.

Specification 3: Same form as Specification 1, but alleging check dated July 3, 1943, payable to the order of cash made and uttered to the Hotel George Washington, West Palm Beach, Florida, and fraudulently obtaining thereby $20.

Specification 4: Same form as Specification 1, but alleging check dated July 4, 1943, payable to the order of cash made and uttered to the George Washington Hotel, West Palm Beach, Florida, and fraudulently obtaining thereby $10.

Specification 5: Same form as Specification 1, but alleging check dated July 4, 1943, payable to the order of cash made and uttered to the Hotel George Washington, West Palm Beach, Florida, and fraudulently obtaining thereby $10.

Specification 6: Same form as Specification 1, but alleging check dated July 10, 1943, payable to the order of cash made and uttered to the Hotel George Washington, West Palm Beach, Florida, and fraudulently obtaining thereby $10.

Specification 7: Same form as Specification 1, but alleging check dated July 10, 1943, payable to the order of cash made and uttered to the Hotel George Washington, West Palm Beach, Florida, and fraudulently obtaining thereby $20.

Specification 8: Same form as Specification 1, but alleging check dated July 10, 1943, payable to the order of cash made and uttered to the Hotel George Washington, West Palm Beach, Florida, and fraudulently obtaining thereby $25.

Specification 9: Same form as Specification 1, but alleging check dated July 11, 1943, payable to the order of cash made and uttered to the Hotel George Washington, West Palm Beach, Florida, and fraudulently obtaining thereby $10.

Specification 10: Same form as Specification 1, but alleging check dated July 12, 1943, payable to the order of cash made and uttered to the Hotel George Washington, West Palm Beach, Florida, and fraudulently obtaining thereby $10.

Specification 11: Same form as Specification 1, but alleging check dated July 21, 1943, payable to the order of cash made and uttered to Wert's Restaurant, Palm Beach, Florida, and fraudulently obtaining thereby $15.

Specification 12: Same form as Specification 1, but alleging check dated July 21, 1943, payable to the order of cash made and uttered to Wert's Restaurant, Palm Beach, Florida, and fraudulently obtaining thereby $10.

Specification 13: Same form as Specification 1, but alleging check dated April 27, 1943, payable to the order of cash made and uttered to MacDill Field Exchange, Tampa, Florida, and fraudulently obtaining thereby four dishonored checks in which he was the payor, in the amount of $40.

Specification 14: Same form as Specification 1, but alleging check dated July 20, 1943, payable to the order of cash made and uttered to the Surfside Hotel, Palm Beach, Florida, and fraudulently obtaining thereby money of the value of about $1.50 and services of the value of about $3.50.

Specification 15: Same form as Specification 1, but alleging check dated July 22, 1943, payable to the order of the Surfside Hotel made and uttered to the Surfside Hotel, Palm Beach, Florida, and fraudulently obtaining thereby $15.

Specification 16: Same form as Specification 1, but alleging check dated July 21, 1943, payable to the order of the Surfside Hotel made and uttered to the Surfside Hotel, Palm Beach, Florida, and fraudulently obtaining thereby $10.

Specification 17: (Finding of not guilty).

Specification 18: Same form as Specification 1, but alleging check dated July 21, 1943, payable to the order of cash made and uttered to the Surfside Hotel, Palm Beach, Florida, and fraudulently obtaining thereby money of the value of about $6.40 and services of the value of about $3.60.

Specification 19: Same form as Specification 1, but alleging check dated June 18, 1943, payable to the order of cash made and uttered to the Barringer Hotel, Columbia, South Carolina, and fraudulently obtaining thereby $10.

Specification 20: Same form as Specification 1, but alleging check dated July 21, 1943, payable to the order of Gruner's Department Store, made and uttered to Gruner's Department Store, West Palm Beach, Florida, and fraudulently obtaining thereby $30.

Specification 21: Same form as Specification 1, but alleging check dated July 15, 1943, payable to the order of cash made and uttered to the Seaboard Air Line Railway, Avon Park, Florida, and fraudulently obtaining thereby $5.

Specification 22: Same form as Specification 1, but alleging check dated July 18, 1943, payable to the order of cash made and uttered to the Seaboard Air Line Railway, Avon Park, Florida, and fraudulently obtaining thereby $5.

Specification 23: (Finding of not guilty).

His plea to the Charge and its Specifications amounted to a plea of not guilty and he was found guilty of the Charge and all its Specifications except Specifications 17 and 23 of which he was found not guilty. Evidence of one prior conviction for being drunk and disorderly in a public place in violation of Article of War 96 was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that between 13 June 1943 and 12 July 1943 the accused cashed ten checks, described in Specifications 1 through 10 inclusive, in the aggregate sum of $160 at the George Washington Hotel in West Palm Beach, Florida. One of the checks was drawn on the First National Bank of Big Spring, Texas, and the other nine on the Barnett Bank of Avon Park, Florida. When certain of them were cashed, the accused remarked that if they were "no good", he could always get money to pay them from his father and that he was changing his account from the bank at Big Spring, Texas, to the Barnett Bank, Avon Park, Florida. All ten of the checks were sent to the proper banks in regular course of business and were returned

unpaid and marked "insufficient funds" (R. 6; Pros. Exs. 1-10, 27-29).

By stipulation it was shown that the accused on 18 June 1943 cashed a $10 check which he had drawn on the First National Bank, Big Spring, Texas, at the Barringer Hotel, Columbia, South Carolina, and that the check was returned by the bank, unpaid and marked "account closed". On 15, 18 and 20 July 1943, the accused cashed $5 checks, drawn by him on the Barnett Bank, with the Seaboard Air Line Railway and received $15 therefor in cash. Two of these checks had been returned by the bank unpaid and marked "insufficient funds" and "account closed" and the third was not presented to the bank because the other two had not been paid (R. 8; Pros. Exs. 19, 21-23).

Between 20 July 1943 and 23 July 1943, the accused cashed five checks in the aggregate sum of $50 at the Surfside Hotel, Palm Beach, Florida, for which he received both money and services. He was twice heard to remark that, if he did not have on deposit sufficient funds to pay them, his father would pay them and, on one occasion, he discarded his check stubs which bore no notations whatsoever. All five of these checks were drawn by him on the Barnett Bank and four of them were duly presented to the bank but were returned unpaid and marked "account closed" while the fifth was not presented. On 21 July 1943, he cashed at Wert's Restaurant, Palm Beach, Florida, two checks aggregating $25 which he had drawn on the same bank and which were similarly returned, unpaid, with the same notation. On the latter date, he also cashed a check, drawn on the same bank, at Gruner's Department Store, West Palm Beach, Florida, in the amount of $30, for which he received $15 in cash and merchandise of like value. This check was duly presented for payment and returned unpaid and marked "account closed" (R. 7, 8; Pros. Exs. 11, 12, 14-18, 20, 30, 32-35).

Prior to the time encompassed by the above-mentioned transactions as shown by stipulated testimony, it was in evidence that the accused on 27 April 1943 delivered a check in the amount of $40, drawn by him on the First National Bank, Big Spring, Texas, to the Exchange Officer at MacDill Field Post Exchange for the surrender of four of his previously uttered and dishonored checks aggregating a like amount. The $40 check was duly presented to the bank for payment and was returned, unpaid and marked "insufficient funds" (R. 7; Pros. Ex. 13).

The accused had opened an account with the Barnett Bank on 30 June 1943 and through 14 July 1943 had deposited therein the total sum of $160 which had been withdrawn by checks other than those above-described upon such bank. Of this sum, $100 had been deposited on 12 July 1943 by allotment from his pay but no further deposit was made until 10 August 1943 when another allotted $100 was received by the bank. An officer of the bank testified that the notation "account closed" upon a dishonored check did not necessarily mean that the depositor had instructed

the bank to close the account but that such notation was usually placed on dishonored checks when all funds in the account had been withdrawn and that the accused had never specifically instructed the bank to close his account. Statements of the Big Spring bank for the period involved, admitted by stipulation, reveal that the checks, above-described, drawn upon it were not paid because the account did not contain sufficient funds to pay them (R. 9-12; Pros. Exs. 24-26).

None of the above-described 23 checks, aggregating the sum of $330, had been paid but the accused on the day before the trial had delivered that sum to the trial judge advocate for the purpose of paying them (R. 10).

4. The evidence for the defense, elicited from the testimony of the accused who, after full advice concerning his rights as a witness, elected to testify, shows that he, while admitting cashing the checks involved, kept no record of the checks except in his mind and that he, therefore, never knew whether he had sufficient funds to pay them because he had never closed either account and had not received or requested his bank statements until shortly before the trial. He had opened the account at the nearby Barnett Bank so that he could "beat" checks to the bank and make deposits to cover them but he had done this on only a few occasions. When the $40 check, which he had given to the Exchange Officer, was dishonored, he had been relieved from flying status and subjected to reclassification and for a while before trial he had been restricted, which had prevented him from "picking" up the checks. Upon cross-examination, he admitted writing some of the checks while intoxicated, resulting in his failure to remember them, and others were written when he knew he did not have sufficient funds upon deposit to pay them but with the hope that he could acquire funds with which he could eventually pay them (R. 13-26; Def. Exs. 1-2).

5. Specifications 1 through 16 inclusive, and 18 through 22 inclusive, allege that the accused on specified dates and at designated places "with intent to defraud, wrongfully and unlawfully" made and uttered to specified parties certain described checks, drawn on named banks, whereby he "fraudulently" obtained from the parties cashing them money or value therefor when he well knew that he did not have, and not intending that he should have, sufficient funds in the named banks for the payment thereof. The offenses are alleged as violations of Article of War 95 and by the following applicable authority are so condemned:

> "Instances of violation of this article (95) 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; * * *" (MCM, 1928, par. 151).

The evidence conclusively shows that the accused over a protracted period of time made and uttered checks upon banks in which he knew or should have known that he did not have upon deposit balances sufficient to pay them. The bank statements, the dishonored checks themselves and the testimony of the parties to whom the checks were given establish beyond a reasonable doubt the allegations of fact in each of the Specifications described above. Furthermore, the testimony of the accused in effect admits all the material facts and weakly indicates that the accused merely entertained a hope that he would ultimately secure funds with which to redeem the checks and nebulously suggests that he would possibly have sooner redeemed them before trial except for his restriction. The evidence portrays a reckless heedlessness and wanton disregard for the dictates of common honesty which excludes any inference except that his actions resulted from a fraudulent intent which is not purged by belated and enforced restitution. Such conduct is certainly unbecoming an officer and a gentleman (CM 202601 (1935) Dig. Op. JAG, 1912-40, Sec. 454 (24)). In truth, even though the checks described in Specifications 17 and 23 were not futilely presented to the bank for payment, the evidence was sufficient to support findings of guilty of those Specifications because the offenses therein alleged were complete even though the two checks were not actually dishonored. This is true because the evidence shows that, if they had been presented, they also would have been unpaid. The evidence establishes, therefore, the guilt of the accused beyond a reasonable doubt of the offenses alleged in Specifications 1 through 16 and 18 through 22, both inclusive, and supports the findings of guilty thereof and of the Charge.

6. The accused is about 21 years of age. The War Department records show that he has had enlisted service from 16 September 1940 until 18 February 1943 when he was commissioned a second lieutenant upon completion of Officers Candidate School and that he has had active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 through 16 and 18 through 22, both inclusive, and of the Charge and the sentence, and to warrant confirmation thereof. 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. Shafer, Judge Advocate.

SPJGN
CM 244106

1st Ind.

War Department, J.A.G.O., 29 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 Second Lieutenant David B. Lytle (0-672954), 478th Bombardment Squadron, 336th Bombardment Group (M).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be 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

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 Ex. action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 82, 25 Feb 1944)

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

SPJGQ
CM 244159

-2 DEC 1943

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant ROBERT L. CAMP (0-799731), Air Corps.	)	Trial by G.C.M., convened at Turner Field, Albany, Georgia, 2 November 1943. Dismissal, total forfeitures and confinement for three (3) years.

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

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

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

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

Specification: In that Second Lieutenant Robert L. Camp, Air Corps, 94th Two-Engine Flying Training Squadron, Turner Field, Albany, Georgia, did at Turner Field, Albany, Georgia, on or about 1 September 1943, feloniously take, steal and carry away, one .45 caliber automatic pistol, M1911, complete with magazine assembly, Number 5741, and leather pistol holster, M1916, of the value of about $29.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Second Lieutenant Robert L. Camp, Air Corps, 94th Two-Engine Flying Training Squadron, Turner Field, Albany, Georgia, did at Turner Field, Albany, Georgia, on or about 1 October 1943, feloniously take, steal, and carry away one Omega wrist watch, shock-proof silver case and crystal, silver numeral dial, with gold and silver stretchable band, value about $50.00, the property of First Lieutenant George L. Bailes, Jr., Turner Field, Albany, Georgia.

Specification 2: In that Second Lieutenant Robert L. Camp, Air Corps, 94th Two-Engine Flying Training Squadron, Turner Field, Albany, Georgia, did at Turner Field, Albany, Georgia, on or about 4 October 1943, feloniously take, steal and carry away one pair of Bausch & Lomb Ray-ban Anti-glare sun glasses and tan leather case, value about $12.00, the property of Aviation Cadet Carl W. Clader, Aviation Cadet Detachment, Turner Field, Albany, Georgia.

Specification 3: In that Second Lieutenant Robert L. Camp, Air Corps, 94th Two-Engine Flying Training Squadron, Turner Field, Albany, Georgia, did at Turner Field, Albany, Georgia, on or about 8 October 1943, feloniously take, steal, and carry away one Longine wrist watch, gold case, gold numeral dial, with tan leather strap, value about $50.00, the property of Captain John B. Milling, Turner Field, Albany, Georgia.

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

Specification 1: In that Second Lieutenant Robert L. Camp, Air Corps, 94th Two-Engine Flying Training Squadron, Turner Field, Albany, Georgia, did at Turner Field, Albany, Georgia, on or about 9 October 1943, with intent to deceive Captain John F. Moynihan, Air Corps, Provost Marshal, Turner Field, Albany, Georgia, officially state to the said Captain John F. Moynihan that he had found a .45 caliber automatic pistol, model M1911 complete with magazine assembly Number 5741 and leather pistol holster M1916 property of the United States on the banks of the Flint River while fishing, which statement was known by the said Second Lieutenant Robert L. Camp to be untrue in that he had feloniously taken, stolen and carried away the said .45 caliber automatic pistol and leather holster on or about 1 September 1943 from the quarters of First Lieutenant Richard H. Boehme, Air Corps, Turner Field, Albany, Georgia.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced at the trial. 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 might direct, for five years. The reviewing authority approved the sentence, but remitted two years of the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution may be briefly summarized as follows:

Accused, during the months of September and October, 1943, was a second lieutenant attached to the 94th Two-Engine Flying Training Squadron, stationed at Turner Field, Albany, Georgia.

On 25 August 1943 First Lieutenant Richard H. Boehme, Air Corps, while stationed at Turner Field, drew from the ordnance property officer on duty there an M1911, caliber .45, automatic pistol, serial number 5741, together with a holster, magazine and ammunition, which articles were so obtained for possible emergency use on an extended, cross-country flight which Lieutenant Boehme contemplated making. After making the trip Lieutenant Boehme was unable, because of late arrival at the field on 1 September 1943, to return the property to the ordnance property officer and he therefore placed the gun, holster and magazine in a bureau drawer in his room in the bachelor officers' quarters. Late on the evening of the next day he discovered they were missing and although he made a search he did not find them. He reported his loss to the Director of Training, Colonel Howard C. Stelling, and to the provost marshal's office (R. 6, 7, 8; Pros. Ex. A).

On 2 October 1943 First Lieutenant George L. Bailes, Air Corps, stationed at Turner Field, at about 10:30 a.m., left his watch on a table in his room while he went out to participate in athletics. The orderly, whose duty it was to make up the beds in the quarters, saw the watch lying on the table where Lieutenant Bailes had left it. Upon the lieutenant's return at about 11:30 a.m. the watch was gone and although a search was made it was not found. He had given no one permission to take the watch. Report of the loss was immediately made to the military police headquarters. The watch was an Omega wrist watch which had certain scratches upon the case caused by the rods which held the band to the watch and by which marks Lieutenant Bailes could positively identify it. The band itself was somewhat worn so that some of the springs had protruded through the metal (R. 10, 11).

On 4 October 1943 Aviation Cadet Carl W. Clader, stationed at Turner Field, was the owner of and had in his possession a pair of "Ray Ban" sunglasses which he had placed on a shelf in his room prior to Saturday inspection. When he looked for them several days later they were missing. He had given no one permission to take them. The glasses themselves had marks of identification upon them in that the left lens was chipped next to the nose clip and the left arm piece was bent. They were inclosed in a case which bore Lieutenant Clader's name (R. 16, 17).

On 8 October 1943 Captain John B. Milling, Coast Artillery Corps, stationed at Turner Field, removed from his person a Longine wrist watch of which he was the owner. He placed the watch in a dressing kit on the clothes press in his room and left to participate in athletic exercises. When he returned an hour later the watch was missing. The watch had two lugs on it for removing the back and they were slightly corroded by perspiration and the back had a slight dent in it. The wrist band was of yellow pigskin from which "the string was pulled out" next to where the stud fastened to the watch (R. 13-15).

On 9 October 1943 Captain John F. Moynihan, Provost Marshal, and Staff Sergeant Peter J. McGoldrick, 942nd Guard Squadron, went to the office of Lieutenant Colonel William S. Cook at Turner Field and reported that, upon investigation, they had discovered clues with regard to the theft of articles from the bachelor officers' quarters. Together they went to the office of Colonel Howard C. Stelling, Acting Commanding Officer, and based upon their discoveries, requested permission to search accused's quarters (R. 28, 38). Colonel Stelling granted the request and directed them to continue the investigation (R. 32). Accused was, however, preparing at that time to clear the post and had packed all of his luggage preparatory to leaving (R. 29). He was, consequently, taken to headquarters where, in his presence and with his consent (R. 22) and in the presence of Colonel Stelling and Lieutenant Colonel Cook, all of his luggage was unpacked and the articles were removed from the bags by Captain Moynihan and Sergeant McGoldrick (R. 18, 28, 38). While Captain Moynihan was unpacking the bags he asked accused whether he owned a pistol and he replied that he did not (R. 19, 22, 24, 28). Thereupon the captain took from one of the bags a towel which, when unrolled, disclosed an M1911 caliber .45 automatic pistol (R. 18, 22, 28, 38). The serial number of the pistol was immediately checked and found to agree with the serial number of the pistol which Lieutenant Boehme had reported missing (R. 18, 28, 40). Colonel Stelling then warned accused of his rights and advised him that anything he might say could be used against him (R. 34, 35, 40). When the pistol was uncovered Captain Moynihan then asked accused where he got it and he stated he had found it by a river while he was out fishing one day (R. 19, 21, 28, 34, 36, 41). After about half an hour accused admitted he had taken the pistol from Lieutenant Boehme's room in the bachelor officers' quarters (R. 21, 23, 34, 35, 41) and had tried to pawn it (R. 33). Also found in accused's luggage at the time of the search were the holster, the magazine clip, a pair of sunglasses and the band of the Longine wrist watch, all of which were missing from the rooms of officers in the bachelor officers' quarters (R. 20, 38, 39, 40). Two days later, while in the hospital, after being again warned of his rights, accused was asked about the watch band found in his luggage and he stated that the watch to which it was originally attached and which he had taken from the officers' quarters was in a shirt which was packed in his bedding roll stored in the officers' quarters, and upon going to the quarters and ob-

taining the bedding roll the watch was found in the shirt pocket by Captain Moynihan and Sergeant McGoldrick (R. 20, 40).

While accused's luggage was being searched at headquarters Lieutenant Colonel Cook moved a newspaper lying on a desk in the room and discovered an Omega watch underneath (R. 19, 26, 28, 29, 33, 39). When accused was asked whether he placed it there he admitted he had taken it from his pocket and put it on the desk (R. 33, 34, 37).

During the course of two or three hours of investigation, and after having been warned of his rights, accused admitted taking the pistol (R. 21, 34, 41), the sunglasses (R. 20), the Omega wrist watch (R. 37, 41) and the Longine watch (R. 41) from rooms in bachelor officers' quarters. The pistol holster and clip were identified as identical with the articles issued by the ordnance property officer to Lieutenant Boehme on memorandum receipt (R. 18, 28, 40; Pros. Ex. A); the Omega watch was identified by Lieutenant Bailes as his property (R. 11; Pros. Ex. C); the Longine watch was identified as his by Captain Milling (R. 15; Pros. Ex. D); and the sunglasses were identified by the owner, Cadet Clader (R. 17; Pros. Ex. E).

An expert opinion witness estimated the market value of each wrist watch to be between $40 and $50 (R. 30, 31) and of the sunglasses to be $10 (R. 31). The values of the pistol, holster and magazine assembly were shown by the ordnance price manual to be $26.42, $1.98 and $1.47, respectively (R. 9).

4. Accused, when advised of his rights at the trial, elected to remain silent and offered no testimony in his behalf.

5. It clearly appears from the uncontradicted evidence of the prosecution that a pistol, with holster and ammunition clip, and Omega wrist watch, a Longine wrist watch, and a pair of "Ray Ban" sunglasses were taken, without authority or permission of the owners thereof, from private rooms in the bachelor officers' quarters at Turner Field, Georgia, on 1 September and 1, 4 and 8 October 1943. It is equally clear from unrebutted testimony that all of these articles were found, on 9 and 11 October 1943, in personal luggage of accused at a time when he had packed all of his possessions and was about to leave the post. Even though nothing else had been shown, this, of itself, would have been legally sufficient to support a finding of guilt of the larceny of the articles, for, when found in possession of recently stolen goods it was incumbent upon accused to directly give a credible account of how the articles came into his possession. It is apparent that this the accused was unable to do without admitting his guilt and, after being warned of his rights, and evidently realizing the impossibility of refuting the plain evidence of his thefts, he admitted stealing each of the articles from rooms of the owners in the bachelor officers' quarters.

The corpus delicti of each offense having been proved, the confessions of accused, none of which appear to have been of an involuntary nature or made under any promise of favor, fear of punishment or other coercion, were admissible. The ownership of the articles and the value of each, as well as the fact that the pistol, holster and magazine assembly were property of the United States furnished and intended for military use, were properly established. The admissions and confessions, together with the evidence of the ownership, the loss and the value of each article, clearly established every element of the alleged larcenies beyond every reasonable doubt.

It is evident from the record that defense counsel misinterpreted the significance and import of the warnings given to accused regarding his rights at the time his luggage was being examined; for, by the nature of his cross-examination and remarks made by him he seemed to be of the opinion that no statement made by accused in answer to questions propounded to him during the examination could be deemed an "official" statement unless made after accused had been warned of his rights. The matter of properly warning an accused person of his rights determines the admissibility of a confession but in no way affects the competency or admissibility of admissions. Therefore, whether accused was or was not warned of his rights before he undertook to state where he had obtained the pistol found in his luggage is of no moment in the determination of whether such statement was a false, official statement. Only two matters need be considered: (1) Was the statement made in an official inquiry and (2) was it false.

Obviously it was the duty of the provost marshal to make the examination in question. It was not only peculiarly within his province to investigate thefts occurring at his station, on his own initiative, but, in this instance, he had been specifically directed by the acting commanding officer to do so. It would be specious to argue that accused did not understand, until formally warned of his rights, what was in progress at the time when he was directed to report to post headquarters where, in the presence of Colonel Stelling and Lieutenant Colonel Cook, the provost marshal made a search of his luggage. Every indication pointed to the fact that this was an official investigation of the gravest sort. The purpose was obvious and any statement made by accused in answer to any inquiry made by any of his superior officers touching the matter under investigation was an official statement the falsity of which would subject accused to prosecution for making it.

There is no doubt about the falsity of the statement made by accused to the effect that the pistol which was taken from his baggage was one which he had found on the banks of a river one day while he was fishing. It was a deliberate falsehood made for the purpose of deluding the investigators for the time being, and in the hope of evading the

implication of the theft which accused soon after confessed. Here the false statement was willfully made with the intent to deceive. That accused did later, and during the same investigation, confess the theft could not alter his responsibility for the offense thus committed nor did it absolve him from guilt. Even though accused recanted and told the truth this is a circumstance for the consideration of the confirming authority and such action did not purge or condone the offense. (CM 231445, Teixeira).

6. Accused is 23 years and 6 months of age and unmarried. Records of the War Department disclose that he was born in Newtonville, Massachusetts, was graduated from high school and attended the University of California for 1½ years, majoring in mining engineering. From 25 August 1936 to 1 June 1940 and from 25 August 1940 to 10 September 1941 he was a student in Reserve Officers Training Corps. He enlisted in the Air Corps on 6 March 1942 and after pursuing a course of training as an aviation cadet was commissioned a second lieutenant, Air-Reserve and assigned to active duty at Turner Field, Georgia on 29 April 1943.

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. 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 of the sentence. A sentence of dismissal is authorized upon conviction of a violation of either Article of War 93 or Article of War 94.

William H. Pounds, Judge Advocate

Earle Gefhum, Judge Advocate

Herbert B. Frederica, Judge Advocate

1st Ind.

War Department, J.A.G.O., 23 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 Second Lieutenant Robert L. Camp (0-799731), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution, and that the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, be designated as the place of confinement.

3. Consideration has been given to the attached copies of the communication from Senator H. C. Lodge, Jr. and its inclosure.

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

Myron C. Cramer

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

4 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of action
4 - Cys. comm. from Senator H.C.Lodge,Jr. with incl.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 43, 27 Jan 1944)

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

SPJGN
CM 244160

1 DEC 1943

UNITED STATES v. Second Lieutenant OLIVER R. POPE, Jr. (0-1580174), Quartermaster Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Tuskegee Army Air Field, Tuskegee, Alabama, 22 October 1943. Dismissal.

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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Oliver R. Pope, Jr., 66th AAFFTD, Tuskegee Institute, Alabama, did, at Tuskegee Army Air Field, Tuskegee, Alabama, on or about August 10, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Tuskegee Army Air Field Exchange, Tuskegee, Alabama, a certain check in words and figures as follows:

Columbus, Ga. August 10, 1943. No. 6

FIRST NATIONAL BANK 64-58/6

Pay to the
Order of CASH $ 40.00

FORTY DOLLARS * * - - - - & No/100 DOLLARS

For _____ Oliver R. Pope, Jr.
2nd Lt., QMC 0-1580174

and by means thereof, did fraudulently obtain from the Tuskegee Army Air Field Exchange, Tuskegee, Alabama, the

(210) sum of Forty Dollars ($40.00) in payment thereof, he the said Oliver R. Pope, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Columbus, Georgia for the payment of the said check.

Specification 2: Same form as Specification 1, but alleging check dated 2 August 1943, payable to the order of cash, made and uttered to the Tuskegee Army Air Field Exchange, Tuskegee, Alabama, and fraudulently obtaining thereby $45.

Specification 3: Same form as Specification 1, but alleging check dated 28 July 1943, payable to the order of cash, made and uttered to the Tuskegee Army Air Field Exchange, Tuskegee, Alabama, and fraudulently obtaining thereby $15.

Specification 4: Same form as Specification 1, but alleging check dated 1 August 1943, payable to the order of cash, made and uttered to Joseph C. Mills, 2nd Lt., A.C., and fraudulently obtaining thereby $30.

Specification 5: Same form as Specification 1, but alleging check dated 1 August 1943, payable to the order of cash, made and uttered to Joseph C. Mills, 2nd Lt., A.C., and fraudulently obtaining thereby $40.

Specification 6: (Finding of not guilty).

Specification 7: In that Second Lieutenant Oliver R. Pope, Jr., 66th AAFFTD, Tuskegee Institute, Alabama, being indebted to the Chancellor Company, Columbus, Ga., in the sum of Two Hundred, Thirty-Two Dollars and twenty-five cents ($232.25) for merchandise, which amount became due and payable on or about 8 May 1943, did at Fort Benning, Ga., and Tuskegee Army Air Field, Tuskegee, Alabama, and 66th AAF Flying Training Detachment, Moton Field, Tuskegee Institute, Alabama, from 8 May 1943 to 30 August 1943, dishonorably fail and neglect to pay said debt.

Specification 8: In that Second Lieutenant Oliver R. Pope, Jr., 66th AAFFTD, Tuskegee Institute, Alabama, did, at Tuskegee Army Air Field, Tuskegee, Alabama, on or about 24 August 1943, with intent to deceive Captain John G. Penn, A.C., officially state to the said John G. Penn, that he the said Oliver R. Pope, had in the preceeding week at the Tuskegee Institute U. S. Post Office at Tuskegee Institute, Alabama, purchase a U. S. Post Office money order in the sum of fifty ($50.00) dollars and had sent the sum to the Chancellor Company at Columbus, Georgia,

which statement was known by the said Oliver R. Pope, Jr. to be untrue in that he had not purchased any money order during the week preceeding the making of the said statement and he had not sent any money order to the Chancellor Company of Columbus, Georgia at or about the time claimed.

Specification 9: (Finding of not guilty).

Specification 10: (Finding of not guilty).

He pleaded not guilty to all Specifications and the Charge and was found not guilty of Specifications 6, 9 and 10, but guilty of Specifications 1 - 5 inclusive, 7 and 8 and of the Charge. 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 during the month of December 1942, the accused purchased from the Chancellor Company, Columbus, Georgia, uniforms to the extent of about $128 upon usual credit terms which, according to the creditor's records, was unpaid on 8 May 1943 when he purchased additional items of the value of about $104.25, increasing the aggregate of the account to $232.25. In reply to a request for payment for the first purchases, the accused, on 12 May 1943, wrote that in the preceding January he had given the money to pay the account to another officer, now overseas, for delivery to the creditor and that, if it had not been delivered, he suggested payment by installments with "post dated" checks. No payment whatsoever was made on the account until 2 August 1943 when the accused sent in a check for $128, which, when presented to the bank, was returned unpaid, marked "insufficient funds". Shortly prior to the trial the accused had made "satisfactory" arrangements about the account by making a partial payment and executing checks for the balance to be presented for payment at agreed future dates (R. 17-24; Pros. Exs. 14-17).

On 28 July 1943 and on 1 and 2 August 1943, the accused drew three checks on the First National Bank, Columbus, Georgia, in the sums of $15, $40 and $45 respectively, which he cashed at the Post Exchange, Tuskegee Army Air Field. On 1 August 1943, the accused also prevailed upon a brother officer to cash for him two checks, similarly drawn upon the same bank, in the aggregate sum of $70, which were endorsed by the party cashing them and the cash therefor received from the same Post Exchange. The five checks, described in Specifications 1 through 5 inclusive, were duly presented to the bank and were all returned unpaid and marked "insufficient funds". On 25 August 1943, the accused wrote the Post Exchange to present the checks to the bank again but it was not until 25 September 1943 that the accused sent the Post Exchange a $70 money order to pay two of the checks and on the day of trial the accused delivered to the Post Exchange Officer a check, which had not yet cleared the bank, to pay the other three checks. The ledger sheetsof accused's bank

account were admitted in evidence and show that his account was continuously overdrawn from 28 May 1943 until 17 September 1943 without any deposits having been made thereto (R. 7-11, 11-14, 14-17; Pros. Exs. 1-13).

On 24 August 1943, the accused, after explanation of his rights, was being questioned about his financial difficulties by a superior officer, who was told by the accused that a few days before he had forwarded the Chancellor Company a $50 money order, secured by him at the Tuskegee Institute Post Office but he did not have the receipt therefor and the records of the post office failed to reveal the issuance of it as claimed. The accused at that time when confronted with such information admitted the falsity of the statement and requested that charges be not filed and that he be given another chance (R. 28-29, 29-30, 33-34, 34-37; Pros. Ex. 20).

4. The evidence for the defense shows that one of his brother officers considers the accused to be of good reputation for paying his obligations. This opinion of him was also entertained by a civilian Red Cross employee who had known him for five years and who knew of his financial troubles and would have assisted him if he had been so requested. The accused, having been advised of his rights as a witness, testified that his embarrassed financial situation had been occasioned largely by his effort to purchase and operate an automobile, that he knew the checks above-described were issued upon his overdrawn account, that he trusted that he would secure funds which he intended to deposit prior to the banks dishonoring the checks, and that he had told his superior officer that the $50 money order was to be purchased and not that it had been purchased. Upon cross-examination, however, he admitted the falsity of his statement concerning the money order, his knowledge of the seriousness of cashing checks without having funds upon deposit sufficient to pay them and his failure to seek financial assistance from his relatives or friends (R. 37, 38-39, 39-49).

5. Specifications 1 through 5 inclusive, allege that the accused on specified dates and at designated places "with intent to defraud, wrongfully and unlawfully" made and uttered to specified parties certain described checks, drawn upon a named bank, whereby he "fraudulently" obtained from the parties cashing them money therefor when he well knew that he did not have, and not intending that he should have, sufficient funds in the named bank for the payment thereof. The offenses are alleged as violations of Article of War 95 and by the following applicable authority are so condemned:

"Instances of violation of this article (95) 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; * * *" (MCM, 1928, par. 151).

The testimony of the person cashing the checks, the checks themselves and the proven extended overdrawn condition of accused's bank account

show beyond a reasonable doubt that the accused cashed the checks when he knew that he did not have on deposit funds to pay them and the fact that no deposit whatsoever was made in the account during the period of time involved conclusively demonstrates that he did not intend to have funds on deposit to pay them, when presented. The accused's own testimony, likewise, admits these matters. The inference is, therefore, inescapable that his actions resulted from a fraudulent intent. The guilt of the accused of the offenses alleged in Specifications 1 through 5 inclusive, is conclusively established by the evidence which supports the findings of guilty thereof and of the Charge.

6. Specification 7 alleges that the accused, being indebted to the Chancellor Company in the sum of $232.25, dishonorably failed and neglected to pay it from 8 May 1943 until 30 August 1943. Dishonorable neglect to pay a debt is a violation of Article of War 95 (MCM, 1928, par. 151). Dishonorable neglect to pay a debt means such neglect as is characterized by deceit or a fraudulent design to evade payment. (CM 220760 and CM 221833 (1942) Bull.JAG (1942) Vol. I, sec. 453 (13), pp. 22 and 106).

The evidence shows that the account was created in the greater part during December 1942 and was augmented in May 1943 at which time the accused wrote the creditor a letter seeking to place the blame for the nonpayment of the original indebtedness upon the intimated dishonesty of an unnamed brother officer, then overseas. Upon the strength of his protestations of a desire to make payment and the aforementioned explanation of his nonpayment, justifiably found spurious by the court, he secured the extension of further credit. His actions relative to the increased account between 8 May 1943 and 30 August 1943 were no different than they were before and he made no payment thereon whatsoever except by a check which was dishonored. Even at the time of trial, the account was unpaid although he had "satisfied" it by making a small payment and giving checks for the balance with no assurance that they would be honored when presented to the bank. The accused's actions concerning the account for a protracted period of almost a year reflect a studied design and scheme to deceitfully and fraudulently avoid and evade the payment thereof. Consequently, the evidence supports the findings of guilty of Specification 7 and of the Charge beyond a reasonable doubt.

7. Specification 8 alleges that the accused on 24 August 1943, with intent to deceive his superior officer officialy stated to him that he, the accused, during the preceding week had purchased at a named post office a money order and had sent it to a certain creditor when the accused knew such statement was untrue. "Knowingly making a false official statement" is a violation of Article of War 95 (MCM, 1928, par. 151).

The evidence conclusively shows that the statement was made as alleged, that it was false and that it was known by the accused, when he made it, to be untrue. Its purpose was none other than to deceive the

officer to whom it was made. Furthermore, the testimony of the accused admits these facts. The evidence therefore, beyond a reasonable doubt, supports the findings of guilty of Specification 8 and of the Charge.

8. The accused is about 25 years of age. The records of the War Department show that he has had enlisted service from 6 January 1942 until 16 October 1942 when he was commissioned a second lieutenant upon completion of Officers Candidate School and that he has had 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. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 through 5 inclusive, and 7 and 8 and of the Charge and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

B R Cooper, Judge Advocate.

SPJGN
CM 244160

1st Ind.

War Department, J.A.G.O., 11 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 Second Lieutenant Oliver R. Pope, Jr. (O-1580174), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 66, 15 Feb 1944)

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

SPJGQ
CM 244212

29 NOV 1943

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NUMBER TWO
v.	)	
Second Lieutenant DAVID J. MACFARLANE (0-1305615), Infantry.	)	Trial by G.C.M., convened at Fort Ord, California, 9 November 1943. Dismissal, total forfeitures and confinement for five (5) years.

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

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

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

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

Specification: In that Second Lieutenant David J. MacFarlane, Infantry, Officers School, Army Ground Forces Replacement Depot Number Two, Fort Ord, California, did, at the Monterey Hotel, Monterey, California, on or about 31 October 1943, attempt to commit the crime of sodomy, by feloniously and against the order of nature, attempt to have carnal connection, per os, with Sergeant Wallace I. Eisner, 543rd Headquarters Company, Second Battalion, Engineer Boat and Shore Regiment, Fort Ord, California, a male person.

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

Specification: In that Second Lieutenant David J. MacFarlane, Infantry, Officers School, Army Ground Forces Replacement Depot Number Two, Fort Ord, California, did,

at the Monterey Hotel, Monterey, California, on or about 31 October 1943, in an immoral and disgraceful manner, go to bed with and fondle the private parts of Sergeant Wallace I. Eisner, 543rd Headquarters Company, Second Battalion, Engineer Boat and Shore Regiment, Fort Ord, California, a male person.

A motion of defense counsel to strike Charge II and its Specification, on the ground that it is a lesser included offense embodied within the offense alleged in the Specification of Charge I, was denied. Accused pleaded not guilty to, and was found guilty of, both Charges and Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a period of five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution it was shown, by competent evidence, that accused is a commissioned officer assigned to the Officers School, Army Ground Forces Replacement Depot No. 2, stationed at Fort Ord, California (R. 7, 8).

At about 9:30 p.m. on the evening of 31 October 1943, accused met Sergeant Wallace I. Eisner, Headquarters Company, Second Battalion, 543rd Engineer Boat and Shore Regiment, outside of the Casa Munras night club in Monterey, California (R. 10). They were total strangers but accused, without further preliminaries, suggested that the sergeant go uptown with him, get a hotel room and spend the night with him. Both had been drinking but not excessively (R. 11). The sergeant agreed and they then walked about four blocks to the Monterey Hotel where the sergeant waited until accused procured a room and motioned for him to come upstairs. The room to which they went had a double bed and a cot in it. The sergeant proceeded to undress and occupy the cot, whereupon accused told him he could not sleep there as the cot had been rented to another party, and that he should sleep with him in the double bed. Thinking nothing of it Sergeant Eisner then took off all of his clothes except his underwear. Accused did likewise and, being already in bed, invited the sergeant to get into bed, pulling the covers back for him. When in bed, the sergeant started to go to sleep but accused asked permission to put his arm around him and, receiving no answer, did put his arm around the upper part of his body and laid his head underneath the sergeant's arm in such a way that the sergeant's hand was in his hair. After lying in that position for a minute or so, accused ran his arm down to the sergeant's private parts and began to fondle his penis, taking it in his hand and squeezing it.

The sergeant then rolled over to keep away from him. Accused nevertheless persisted and threw his leg over the sergeant's body. At this point the sergeant took accused's hair in his hand, pulled accused from him, jumped out of bed, turned on the lights and started dressing. When accused asked him where he was going he stated he was going to meet someone uptown and left the room, completing his dressing in the hall. The sergeant went to the lobby and called the military police, who told him to wait there until they arrived (R. 12-14).

Both accused and Sergeant Eisner were stationed for duty at Fort Ord, California, which was only eight miles from Monterey, California (R. 8, 9).

Before charges were prepared against accused, Lieutenant Colonel Douglas V. Robinson, also an officer of the Army Ground Forces Replacement Depot No. 2, investigated the alleged offense and in an interview with accused at the Escort Station at Fort Ord on 31 October 1943 showed accused a statement which Sergeant Eisner had given to him. Accused had been warned of his rights by Lieutenant Colonel Robinson and admitted that he knew what his rights were. On this occasion he stated that he did not remember much of what had happened on the night of 31 October 1943 because he was very drunk but denied he had done any of the things alleged in Sergeant Eisner's statement.

On 6 November 1943 Lieutenant Colonel Robinson had another interview with accused and, after he had again warned him of his rights, accused wrote out a statement in his own hand which, after some change agreed to by accused, was reduced to typewriting and signed by accused. This confession admitted his going to bed with Sergeant Eisner after procuring a room at the Monterey Hotel; that he placed his hand on Eisner's penis and did so with intent to commit sodomy, per os, with him (R. 15-23; Ex. A).

4. Accused, having been advised of his rights, elected to remain silent and offered no testimony in his behalf (R. 22).

5. There is not the slightest doubt about the guilt of accused on the Charge of attempt to commit sodomy as alleged in the Specification of Charge I. The testimony of the prospective pathic and the confession of accused conclusively establish the elements of the crime.

The only question requiring determination is whether accused may also be held guilty of a violation of Article of War 95 because of misconduct which was necessarily embraced within the Charge laid under Article of War 96, and of which he was found guilty. Since the Manual for Courts-Martial provides that Article of War 95 "includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman" (par. 151, M.C.M. 1928), there can be no necessity for extended discussion of the matter.

lascivious conduct whereby an officer, with the intent to commit sodomy, per os, entices an enlisted man into a hotel room and, when in bed, embraces him and fondles his penis, is of the most disgraceful and dishonorable character and one guilty of such conduct is unfit to associate with any honorable gentlemen. There can be no clearer case of conduct "which, in dishonoring or disgracing the individual personally as a gentleman, seriously comprises his position as an officer and a gentleman and exhibits him as morally unworthy to remain a member of the honorable profession of arms."

6. Accused is 23 years and 6 months of age. Records of the War Department disclose that he was born in Glasgow, Scotland, but became a citizen of the United States upon the naturalization of his father. He was graduated from high school in 1938 and was employed as a mechanic in the manufacture of aeroplane motors prior to his entry into service. He was inducted on 11 February 1942, attended the Infantry School at Fort Benning, Georgia, was commissioned a second lieutenant, Infantry, Army of the United States, on 24 December 1942 and was assigned to the 86th Infantry Division, Camp Howze, Texas. On 15 October 1943 he was assigned to the Officers' School, Army Ground Forces Replacement Depot No. 2 at Fort Ord, California.

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96, and is mandatory upon conviction of a violation of Article of War 95.

William A. Pounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Fredericq, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 9 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 Second Lieutenant David J. MacFarlane (0-1305615), 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. 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 recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

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

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

(Resigned)

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

SPJGQ
CM 244227

27 NOV 1943

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Port Terminals, NYPE, Brooklyn, New York, 15 November 1943. Dismissal.
	)	
First Lieutenant HENRY N. M. SYLVIA (0-1288971), Transportation Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that 1st Lt. Henry N. M. Sylvia, Cargo Security Officers Detachment, N.Y. Port of Embarkation, did, without proper leave, absent himself from his proper station at N. Y. Port of Embarkation from about 10 August 1943 to about 29 September 1943.

He pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record for action under Article of War 48.

3. On or about 9 June 1943 accused, who was on duty with the Cargo Security Officers Detachment, New York Port of Embarkation, Brooklyn, New York (R. 9), received copies of orders dated 5 June and 7 June 1943 (Pros. Exs. 1 and 2) assigning him to duty as Cargo Security Officer aboard Ship NY 656 (the Pearl Harbor) (R. 12-16), which he receipted for in writing (R. 16). These orders, among other provisions, directed him, in paragraph 5 of the original, "Upon

arrival in the United States, you will report to the Commanding General, NYP/E, Brooklyn, NY, for further instructions," and in paragraph 2 of the amendment of 7 June as follows:

> "2. You will return to this Port as soon as your instructions pertaining to safeguarding army cargo have been complied with and the cargo which was loaded at NYP/E has been completely discharged from the vessel to which you are assigned."

There was introduced in evidence a copy of the list of passengers aboard the S. S. "Pearl Harbor", authenticated by the Deputy Collector of Customs of Baltimore, Maryland, which reveals that a passenger, described as "Henry G. Sylvia 1st Lt.", "U. S. Army", debarked from the S. S. "Pearl Harbor" at Baltimore, Maryland, on 9 August 1943 (R.18-19; Pros. Ex. No. 4).

Accused, after being duly warned of his rights, made an oral statement on 1 November 1943, in which he declared substantially that he was assigned to the S. S. "Pearl Harbor" in June 1943; sailed with her, observed the unloading of the cargo at her destination and on 19 July 1943 sailed aboard the same ship for the United States. On 9 August 1943, he arrived in Baltimore, Maryland, and thence went to New Bedford, Mass., to visit his wife. He engaged in bitter arguments with his wife; "he started drinking" and subsequently travelled with his wife to New York City, Boston, Baltimore, finally arriving in New Orleans, where on 29 September 1943, he surrendered to military authorities after advising them "that he was AWOL" and was hospitalized (R. 23-38).

Accused at his own request was sworn as a witness (R. 43-44). He testified in substance that he enlisted in the Army on 20 September 1938 and received a discharge on 19 September 1941 with the rank of Staff Sergeant. Upon the expiration of his enlistments, accused worked for the Engineering Department in the Panama Canal Zone, where he remained until 8 December 1941. He returned to the United States, arriving 22 December 1941, and re-enlisted at Fort Benning, Georgia, on 30 January 1942, as a private (R. 44, 45). In enlisting at Fort Benning, Georgia, he was motivated by a desire to join the Paratroop Infantry. On 28 July 1942, he received a commission upon graduation from the Infantry Officers' School at Fort Benning, Georgia and was thereupon transferred to the New York Port of Embarkation (R. 45). He served in the Postal Battalion from 25 August 1942 until 27 May 1943 as Personnel Officer. He was "not entirely satisfied" with his assignment since he was not performing functions appropriate to his training. He, therefore, requested a transfer to the Paratroop Infantry School (R. 46). His first request for a transfer met with no success.

A second request resulted in his transfer to the Cargo Security Officers' Detachment on 27 May 1943. On 5 June 1943, he was assigned as Cargo Security Officer to the S. S. "Pearl Harbor" (R. 47). Upon the arrival of his ship at her destination and after discharge of her cargo, he returned with his ship and arrived in Baltimore (R. 48) on or about 10 August 1943 (R. 49). After his arrival at Baltimore, he proceeded to New Bedford, Mass., arriving there on 11 August 1943, to visit his home (R. 49), although he had no authority to do so; he "went on (his) own volition" (R. 53). He experienced "domestic difficulty" upon his arrival in New Bedford, Mass., and thereupon started drinking intoxicating liquors (R. 50). In company with his wife, he went to New York, Boston, Baltimore, and New Orleans, arriving in the last-named city about 24 or 25 September 1943 (R. 49-50). At New Orleans, he telephoned the Provost Marshal on 28 or 29 September and asked to be picked up (R. 50). He is "interested in remaining in the military service of the United States", his "training has been in Infantry" and he is in no way "physically incapacitated or disqualified for full, active combat duty", the type of duty he desires (R. 51).

Major Olin M. Fuller, Investigating Officer, appointed to investigate the subject charges against accused, was permitted to testify over objection by the prosecution, that during the course of his investigation, he examined "the classification records of the accused" and learned that the character of accused's service in the Postal Battalion was "excellent" (R. 30-32). Upon accused's return to the New York Port of Embarkation on 20 October 1943, he was assigned to "deliver secret documents", which duty he performed up to the time of his confinement on 1 November 1943 (R. 35).

4. The competent legal evidence of record establishes beyond a reasonable doubt that accused, having arrived in Baltimore, Maryland, on 9 August 1943, and being under the obligation of an order to report to the Commanding General, New York Port of Embarkation, deliberately disregarded his orders and absented himself without authority for a period extending from 10 August until 29 September 1943. As a witness in his own behalf accused admits the truth of these facts and attempts to excuse them on the grounds that he encountered domestic difficulties upon his arrival in New Bedford, Mass., and thereupon started drinking intoxicating liquor. Neither of these facts may be considered as a defense, and may only be considered, if at all, as matters of extenuation.

5. War Department records disclose that accused is 28 years of age, married and has no children. His last permanent civilian address is 1225 Second Avenue, Columbus, Georgia. He graduated from high school at Fairhaven, Mass., in 1932 and after six months' attendance at the Maine School of Commerce graduated in 1939. He has had three

years' experience as an accountant with the State Forestry Department of New Hampshire. He has served one enlistment in the Regular Army in the period 1938-1941, during which he rose to the grade of staff sergeant. His service was chiefly of a clerical nature with a parachute Infantry battalion. Following that he was employed in a civilian capacity as a project accountant for the Panama Canal Department for four months, 9 September to 12 December 1941. He graduated from the Officers Candidate School at Fort Benning, Georgia, on 28 July 1942 in the grade of second lieutenant, Army of the United States, and entered on active duty that same date. He was promoted to first lieutenant on 17 February 1943 while serving with the Postal Battalion, New York Port of Embarkation. On 28 May 1943 he was assigned to the Cargo Security Officers Detachment, New York Port of Embarkation.

6. Attached to the record of trial is a recommendation for clemency signed by ten of the eleven members who sat upon the trial of this case, in which each signer individually recommends that Lieutenant Sylvia be not dismissed the service by reason of the length and character of his service and previous excellent record.

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

William A. Pounds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Fredman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 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 First Lieutenant Henry N. M. Sylvia (0-1288971), 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 and the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 50, 1 Feb 1944)

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

SPJGQ
CM 244263

4 DEC 1943

UNITED STATES	)	75TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 4 November 1943. Dismissal, total forfeitures and confinement for ten (10) years.
Second Lieutenant BYRON L. BEDWELL (0-1307643), Infantry.	)	

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

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

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

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

Specification 1: In that Second Lieutenant Byron L. Bedwell, 289th Infantry, did, at Fort Leonard Wood, Missouri, on or about 14 August 1943, borrow the sum of Ten and no/100 Dollars ($10.00) from Sergeant Eugene S. Blaser, Company H, 289th Infantry, then Corporal, Company H, 289th Infantry, an enlisted man, this to the prejudice of good order and military discipline.

Specification 2: In that Second Lieutenant Byron L. Bedwell, 289th Infantry, did, at St. Louis, Missouri, on or about 4 September 1943, borrow the sum of Five and no/100 Dollars ($5.00) from Sergeant Douglas J. Pierson, Company H, 289th Infantry, an enlisted man, this to the prejudice of good order and military discipline.

Specification 3: In that Second Lieutenant Byron L. Bedwell, 289th Infantry, did, at Fort Leonard Wood, Missouri, on or about 14 September 1943, borrow the sum of Twenty and no/100 Dollars ($20.00) from Staff Sergeant Paul S. Sweeney, Company H, 289th Infantry, an enlisted man, this to the prejudice of good order and military discipline.

Specification 4: In that Second Lieutenant Byron L. Bedwell, 289th Infantry, did, at Fort Leonard Wood, Missouri, on or about 14 September 1943, attempt to borrow an indefinite sum of money from Staff Sergeant Ira F. Pfeifer, Company H, 289th Infantry, then Sergeant, Company H, 289th Infantry, an enlisted man, this to the prejudice of good order and military discipline.

Specification 5: In that Second Lieutenant Byron L. Bedwell, 289th Infantry, did, at Waynesville, Missouri, on or about 9 September 1943, with intent to deceive, wrongfully and unlawfully make and utter to Burson's Cafe, Waynesville, Missouri, a certain check, in words and figures as follows, to wit:

4-3

Saint Louis, Sept 9 1943 No. 5
THE BOATMEN'S NATIONAL BANK
of Saint Louis
Pay to the
order of Burson's Cafe $5.00

Five & no/100 ---------- Dollars

Byron L. Bedwell
0-1307643

and by means thereof did fraudulently obtain from said Burson's Cafe, Waynesville, Missouri, the value of Five and no/100 Dollars ($5.00), he the said Second Lieutenant Byron L. Bedwell, then well knowing that he did not have, and did not use due diligence to ascertain that he should have sufficient funds in The Boatmen's National Bank of Saint Louis for the payment of said check.

Specification 6: Same form as Specification 5, but alleging check dated 10 September 1943, payable to the order of cash, made and uttered to the Gregory Tobacco Store, Barclays Place, Waynesville, Missouri, and fraudulently obtaining thereby $20.

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

Specification: In that Second Lieutenant Byron L. Bedwell, 289th Infantry, did, at Waynesville, Missouri, on or about 20 September 1943, with intent to defraud, wrongfully and unlawfully make and utter to Lloyd Masters, Waynesville, Missouri, a certain check, in words and

figures as follows, to wit:

4-3

Saint Louis, Sept. 20 1943 No. 8
THE BOATMEN'S NATIONAL BANK
of Saint Louis
Pay to the
order of Lloyd Masters $ 5 00

Five and no/100 ---------- Dollars

Byron L. Bedwell
0-1307643

and by means thereof did fraudulently obtain from said Lloyd Masters, Waynesville, Missouri, the value of Five and no/100 Dollars ($5.00), he the said Second Lieutenant Byron L. Bedwell, then well knowing that he did not have and not intending that he should have any account with or sufficient funds in The Boatmen's National Bank of Saint Louis for the payment of said check.

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

Specification 1: In that Second Lieutenant Byron L Bedwell, 289th Infantry, did, at Waynesville, Missouri on or about 20 September 1943, with intent to defraud, wrongfully and unlawfully make and utter to O. Prewitt, Waynesville, Missouri, a certain check, in words and figures as follows, to wit:

4-3

Saint Louis, Sept 20 1943 No. 8
THE BOATMEN'S NATIONAL BANK
of Saint Louis
Pay to the
order of O. Prewitt $10.00

Ten and no/100---------- Dollars

Byron L. Bedwell
0-1307643

and by means thereof did fraudulently obtain from said O. Prewitt, Waynesville, Missouri, the value of Ten and no/100 Dollars ($10.00), he the said Second Lieutenant Byron L Bedwell, then well knowing that he did not have and not intending that he should have any account with or sufficient funds in The Boatmen's National Bank of Saint Louis for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 28 September 1943, payable to the order of the Gem Jewelry, made and uttered to the Gem Jewelry, Waynesville, Missouri, and fraudulently obtaining thereby the value of $20.

Specification 3: Same form as Specification 1, but alleging check dated 21 September 1943, payable to the order of Arch Cohn, made and uttered to Arch Cohn, Waynesville, Missouri, and fraudulently obtaining thereby the value of $5.

Accused entered "a special plea to strike specification 4, 5 and 6 of Charge I on the grounds that they allege no offense" which was overruled. He pleaded not guilty to, and was found guilty of, all the Charges and Specifications. No evidence of previous convictions was introduced at the trial. 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 ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For convenience, a summary of the competent and material evidence for the prosecution is set forth in relation to the numerical sequence of the Charges and Specifications.

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

(1) Sergeant Eugene S. Blaser, Company H, 289th Infantry, was requested by accused, an officer of Company H, to lend him $10 which amount the sergeant did, on 14 August 1943, lend to accused without any specific date being set for repayment. Five dollars thereof was repaid on the next ensuing payday and the balance was repaid on or about 4 October 1943 (R. 11-15).

(2) Sergeant Douglas J. Pierson, Company H, 289th Infantry, was requested by accused to lend him $5 which amount he did, on 5 September 1943, lend to accused without a date being set for repayment. The loan was repaid on 4 October 1943 (R. 15, 16).

(3) By deposition it was shown that Staff Sergeant Paul S. Sweeney, Company H, 289th Infantry, was requested by accused to lend him $20 which amount he did, on 14 September 1943, lend to accused without any agreement as to repayment other than that it would be repaid at some future time (R. 17, 18, 20, 21; Ex. 1).

(4) On 14 September 1943, accused while on bivouac, approached Staff Sergeant Ira P. Pfeifer, Company H, 289th Infantry, and, without

specifying any particular amount, requested the sergeant to lend him some money. When told by the sergeant that he had only small change on his person, and that the rest of his money was under lock in barracks, accused wanted to know whether anyone back in barracks had access to it. When told that Sergeant Sweeney was the only one back in barracks accused then requested Pfeifer to help out Sweeney in case he (Sweeney) was financially embarrassed as accused had borrowed money from him. No loan was made by Sergeant Pfeifer to accused (R. 18-21).

In none of the cases were the transfers of money from the enlisted men to accused in payment of any debt to accused nor were they intended as gifts (R. 12, 16; Ex. 1).

(5) Raymond S. Gooderl, manager of Burson's Cafe in Waynesville, Missouri, cashed a check in the amount of $5 for accused, by giving him $5 in cash on 9 September 1943. He identified Exhibit 6 as one of the checks which he had cashed for accused on that date and as the check which was subsequently returned to him, by the bank, with the notation "closed" written upon it. He paid $5 to the bank and the check was returned to him. During the month of November 1943, accused reimbursed Gooderl for the loss he had sustained (R. 35-38; Ex. 6).

(6) Miss Ruth Calvert, clerk in the Gregory Tobacco Store, Waynesville, Missouri, cashed a check in the amount of $20 for accused on 10 September 1943. Accused had made out the check in her presence and received merchandise and cash totaling $20 in value in return for it. The check was deposited in the bank and was returned on about 20 September 1943 marked "account closed". The amount of the check had been deducted by the bank from the Gregory Tobacco Store account but the store was reimbursed by accused on 1 November 1943 (R. 38-41; Ex. 7).

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

Lloyd Masters, a cook at the "Owl Cafe", Waynesville, Missouri, personally cashed a check for accused in the amount of $5 on 20 September 1943, at which time accused came out into the kitchen of the "Normandy" an establishment near Waynesville where Masters was then employed, and requested him to do so. He gave accused $5 in cash from his personal billfold. Masters subsequently cashed the check at Waynesville Security Bank and it was later returned to him upon the payment of $5 when the Boatmen's National Bank, upon which it was drawn, dishonored it. Masters was reimbursed by accused on 1 November 1943 (R. 32-34; Ex. 5).

Additional Charge: Violation of the 95th Article of War.

(1) Ottber Prewitt operated Prewitt's Tobacco Store, a retail liquor establishment in Waynesville, Missouri. On 20 September 1943, a clerk in his store, with Prewitt's permission and consent, cashed a check

for accused in the amount of $10 by giving accused $10 in cash. The check was drawn on Boatmen's National Bank and when Prewitt deposited it to his account in Waynesville Security Bank it was subsequently returned to him unpaid, with the notation "closed" written upon it and his account was charged with the sum of $10. On 3 November 1943, he was reimbursed for his loss (R. 29-31; Ex. 4).

(2) On 28 September 1943, accused requested Mrs. A. W. Hillmond, manager and part owner of Gem Jewelry in Waynesville, Missouri, to cash a check for him in the amount of $20 drawn upon Boatmen's National Bank. This she did, giving him merchandise in the amount of $8.11 and the balance in cash. Her husband, A. W. Hillmond, the other owner of the business, deposited the check in the Waynesville Security Bank. It was subsequently returned to him unpaid, with the notation "account closed" attached thereto, and charged the account of Gem Jewelry with the sum of $20. On 1 November 1943 accused reimbursed the store by the payment of $20 (R. 21-25, Ex. 2).

(3) Mr. and Mrs. Arch Cohn, jointly owned and operated Arch Cohn Jewelry Store in Waynesville, Missouri. On 21 September 1943, accused requested Mrs. Cohn to cash for him a check in the sum of $5 drawn on Boatmen's National Bank. She cashed the check by crediting him with $1 upon his account with the store and giving him $4 in cash. After the check was indorsed by her husband she deposited it in the ordinary course of business and it was subsequently returned with the notation "account closed" attached to it and the account of the store was debited in the sum of $5. This loss was reimbursed on or about 1 November 1943 (R. 26-28; Ex. 3).

Wilson P. Jeannelle, manager of Boatmen's National Bank Facility, Fort Leonard Wood, Missouri, identified accused and stated that on or about 1 September 1943, accused opened an account with said bank which account was closed on or shortly after, 13 September 1943. After qualifying as an expert opinion witness on handwriting and producing accused's original signature card on file at the bank which accused had signed in his presence, he identified Exhibits 2 to 7 inclusive, as bearing the signature of accused (R. 41-45; Ex. 8).

Julius Schwaig, assistant cashier of Boatmen's National Bank, St. Louis, Missouri, testified that he had personal knowledge and control of the operations in the Auditing Department of said bank in September 1943. He produced a certified copy of accused's account with the bank and it was introduced in evidence (Ex. 9). This showed the account was opened on 2 September 1943 in the amount of $200 and was closed on 13 September 1943 because of withdrawals. He further testified that no funds were on deposit in the bank to the credit of accused for the payment of the checks marked Exhibits 2 to 5 inclusive, when they were presented for payment, and that checks marked Exhibits 6 and 7 were presented for payment on the day the account was closed and were not paid because, after other checks

presented for payment on that day had been honored, no funds to the credit of accused remained (R. 48, 52).

Private First Class William George, Company H, 289th Infantry, testified that accused gave him $5 to deposit in Boatmen's National Bank Facility at some time within the week following 9 September 1943; that he took the money to the bank but the deposit was refused and that he returned the $5 to accused with the information that his "account was closed" and that the bank would not accept the deposit (R. 52-53).

4. Accused elected to remain silent and he offered no testimony in his behalf.

5. It clearly appears that accused did, on three occasions, borrow money from enlisted men of his company (Specifications 1, 2 and 3, Charge I) and that on another occasion he made an effort to do so but failed in his purpose only because the enlisted man had no funds at hand when the loan was requested (Specification 4, Charge I).

While the loans so made, or attempted to be made,were of minor sums and the offenses, therefore, not of an aggravated nature, the situations created were to the prejudice of good order and military discipline and tended to bring discredit upon the military service. It is against general policy to permit officers to borrow money from enlisted men. In CM 230736, Delbrook, it was said:

> "The obligation that flows from indebtedness to a subordinate tends to weaken authority. It can become the cause of improper favor. It impairs the integrity of required relationships. Where there is an actual or a possible duty relationship between an officer and an enlisted man, arising from membership in the same command or from duty in the same station, camp or post, the negotiating of a loan by an officer from an enlisted man is prejudicial to good order and military discipline."

In the instant case the accused and the enlisted men were of the same command, had known one another for only a short period of time and only in the course of official intercourse between the officer and the men and the loans were contracted without any circumstances of an exceptional character. It would be subversive of military discipline to allow such a course of conduct to go unpunished (Dig. Op. JAG, 1912-40, sec. 453 (5)). See also Bull. JAG, July 1942, sec. 454 (19).

With respect to the Specifications regarding the issuance by accused of worthless checks, some "with intent to deceive" (Specifications 5 and 6, Charge I) and some "with intent to defraud" (Specification, Charge II and Specifications 1, 2 and 3, Additional Charge), it was shown

with equal clarity that he knew, or should have known, that in no instance would there be sufficient funds in the bank upon which he drew to honor the checks when presented for payment.

Accused opened an account in the amount of $200 on 2 September 1943 at the Boatmen's National Bank Facility, Fort Leonard Wood, Missouri, and within eleven days had completely exhausted the fund by withdrawals, so that on 13 September 1943 his account stood closed on the books of the bank.

That he knew of these conditions is apparent from the testimony of the enlisted man whom he sent to the bank in the middle of September for the purpose of tendering a deposit of a $5 bill. The proposed deposit was refused by the bank and accused was informed by the enlisted man at the time when he returned the money to him, that accused's account at the bank was closed. This was positive notice to accused of the status of his account at the bank and his actions subsequent thereto show conclusively that he could not possibly have believed there would be funds on hand at the bank for the payment of checks drawn by him on 20 September (Exs. 4 and 5) on 21 September (Ex. 3) and on 28 September (Ex. 2). Checks drawn on 9 September (Ex. 6) and on 10 September (Ex. 7) were presented for payment on the day the account was closed and were dishonored because all funds on hand to accused's credit were already withdrawn. Since the statement of accused's account showed only $10 to his credit on 7 September after withdrawals of $190 within five days after opening the account, an intent to either deceive or defraud when he drew checks in the total amount of $25 on 9 and 10 September may properly be inferred from these circumstances. That accused reimbursed those who had suffered losses through his wrongful acts constitutes no defense. This is especially so where, as in the instant case, the payments were made after charges of offenses involved in the transactions had already been served upon accused. Such actions are neither excusing nor mitigating.

6. Accused is 22 years and 4 months of age. Records of the War Department show that he was born in Holdenville, Oklahoma, was graduated from Hugo, Oklahoma, High School in 1938 and then attended Harding College for one year. He was inducted on 24 September 1940 and, after receiving his basic training, served as a musician with the bands of the 9th Infantry, the 338th Infantry, and the 339th Infantry, until he applied for and was accepted for Officer Candidate School on 24 August 1942. Upon completion of the course at the Infantry School, Fort Benning, Georgia, he was commissioned a second lieutenant, Army of the United States, on 11 January 1943, and called to active duty as such and assigned to the 290th Infantry. While serving with that organization he was subjected to disciplinary action by his commanding officer for writing checks without sufficient funds to provide for payment, spending money beyond his means and failure to cooperate with a Board of Officers appointed to assist him to handle his financial

affairs and liquidate his debts. On 18 June 1943, upon the recommendation of the commanding officer of the 290th Infantry, and for the reason that accused did not possess the qualifications necessary for a leader, reclassification proceedings were instituted. Under these proceedings he was released from assignment to the 290th Infantry and transferred to the 289th Infantry on 5 July 1943.

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

William A. Pounds, Judge Advocate.

Carl Schlum, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 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 Second Lieutenant Byron L. Bedwell (0-1307643), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the period of confinement be reduced to one year, and that the sentence as thus modified be carried into execution. I also recommend 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 recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed but confinement reduced to one year. G.C.M.O. 56, 5 Feb 1944)

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

SPJGK
CM 244269

10 DEC 1943

UNITED STATES v. Private JOSE (NMI) ORTIZ (38030613), Battery A, 383rd Antiaircraft Artillery - Automatic Weapons Battalion.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sam Houston, Texas, 26 October 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 92d Article of War.

Specification: In that Private Jose Ortiz, Battery "A", 383d AAA-AW Battalion, did, at Falfurrias, Texas, on or about September 24, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Horacio Quintanilla, a human being, by cutting him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Summary of evidence:

The incident took place on a street in the Mexican Quarter of the town of Falfurrias, Texas, at approximately 5 o'clock in the afternoon of September 24, 1943. (R. 14) Accused was on furlough from his organ-

ization at Camp Polk, Louisiana and was visiting his home (Ex. B). Eulalio Lopez, a civilian unconnected with any of the participants by friendship or relationship, testified that he was sitting in the Rosita Cafe at about 5:00 p.m. (R. 14). He observed that across the street from where he sat, four men were standing together, talking. They stood in the rear of a tent theater, to the west of which were Barrera's Grocery Shop and the Black Cat Cafe. These four men were Ramon Quintanilla, Noe Cavazos, Vicente Ortiz, and the accused, Jose Ortiz (R. 14, 15).

As witness was watching, there arrived on the scene one Narciso Ortiz, accused's father (R. 15, 22). He came from the Black Cat Cafe (R. 17).

Accused and Ramon Quintanilla were talking to each other (R. 15). Their manner was apparently such as to make Narciso Ortiz think they were quarreling (R. 36). There is no testimony about what they were saying, or what their actions were that led Narciso to this belief, although it is brought out later in testimony for the defense that there had been bad feeling between Narciso Ortiz and Ramon Quintanilla in times past, and at one time Quintanilla had cut Narciso (R. 51).

Narciso grabbed Ramon Quintanilla by the neck (R. 16) and, according to the testimony of Lopez and of Ramon Quintanilla, Narciso put his hand in his own pocket (R. 16, 27). Although witness Lopez did not see anything in Ortiz' hand, Ramon Quintanilla and witness Noe Cavazos say that Narciso Ortiz had a knife in his hand (R. 23, 27, 36), and there is testimony that he "made a gesture" at Ramon with it (R. 38).

Other than the fact that he thought that accused and Ramon Quintanilla were going to fight, and the previous bad blood between Ramon and Narciso (R. 51), no reason appears for Narciso to have done this (R. 38).

Noe Cavazos broke up this potential affray by seizing Ramon Quintanilla and taking him away in Cavazos' car (R. 16, 23, 27, 36, 37). They had no further part in the incident and did not witness the killing.

Jose Rodriguez, Narciso Ortiz' brother-in-law, who had arrived on the scene, grabbed Narciso by the hands and held him. At that time they were standing in the road, about 50 feet from the Black Cat Cafe (R. 27, 28).

At this point Horacio Quintanilla, the deceased, came along (R. 16, 23). Horacio was the cousin of Ramon Quintanilla (R. 23).

Here there is some conflict in the evidence. Witness Lopez says that Horacio put his hands on Narciso Ortiz, although he does not say whether this was done threateningly or roughly (R. 16). Another witness, Mencheca, says that it was not (R. 33). He goes on to say that accused stepped up

and "the dead one pushed his hand away to get him (deceased) away from him (accused or Narciso Ortiz?) and just about that time Jose cut him" (R. 17, 19). Witness was sure that Horacio Quintanilla did not at any time use his fist or strike Narciso and was apparently not armed with any weapon (R. 20).

While they were thus pushing each other, accused stabbed deceased (R. 17, 18). Deceased's back was turned to accused at the time this first blow was struck with the knife (R. 19). The blow landed on the right side of deceased's neck (R. 32).

Deceased ran, followed by accused (R. 17). Accused caught up to him in pursuit from the store as far as an adjoining fruit stand (R. 30). The exact distance is not stated. By this time the wound in deceased's neck was bleeding, enough for witness Mencheca to see it as the two ran (R. 30, 32).

Accused got close enough to cut Quintanilla two more times (R. 18, 30). Deceased was not offering any resistance to accused, but was only running, trying to get away (R. 30). When deceased was cut the second time, he fell to the ground. Then he got up and started running again. After a little while, accused came back and struck Rodriguez, knocking him to the ground (R. 18). It does not appear, however, that any serious injury was done to Rodriguez.

Dr. Glenn Bartlett, a civilian physician, who examined deceased, testified for the prosecution upon the nature of the fatal wounds. In all, deceased received three stab wounds. Two were up and down the back of his neck, running to the shoulder on the right side. They were about one inch apart, and quite deep. The third was on the left side, at the base of the neck. Although not as large as the others, it alone could easily have caused deceased's death, as it would likely have cut some large arteries. All wounds were caused by a sharp instrument. Deceased was dead when the witness examined him (R. 9, 11).

Accused made a statement to witness Sam G. Reams, County Attorney of Brooks County, Texas, three days after the incident. It was later transcribed, read to accused in Spanish, and accused signed it in front of two witnesses. Witness Reams' testimony and a reading of the statement itself show that accused was apprised of his rights both to make a statement and to remain silent, and the consequences to him of either course. It is clear that the statement by him was voluntary (R. 39, 40, 41; Pros. Ex. "B") The defense did not object to its admission. In it he admits the killing, and says that although he had had seven or eight bottles of beer since one o'clock in the afternoon, he was "just about sober" at the time. Accused was sitting in a back room at the Black Cat Cafe with Vicente Ortiz, his father, Narciso Ortiz, Jesus Rodriguez, and one Adam Ramirez.

Noe Cavazos called Vicente Ortiz outside to talk, and accused followed him to shake hands with Cavazos. The three stood there talking, and were shortly joined by Ramon Quintanilla. About five or ten minutes later, Narciso Ortiz and Horacio Quintanilla joined them. Narciso suggested that they all come in and have another beer.

"Without any warning at all," Horacio Quintanilla caught accused's father by the collar and started hitting him. Accused separated them, and told Quintanilla to let Narciso alone, but Quintanilla came back and seized Narciso by the collar again. Accused separated them once more.

Quintanilla "reached down like he was going to get his knife out of his pocket," so accused got his knife out of his pocket "and started after Horacio Quintanilla". When Quintanilla saw accused's knife he turned around and started to run, "and when he did I cut him down the back with my knife."

Accused's confession goes on to say that deceased "ran and I ran after him and cut him one more time in the back with my knife about in front of Barrera's Grocery Store, and then ran after him until he got to the Fruit Stand at the corner, when I got close enough to grab him and I grabbed him and we both fell down." Deceased fell on top, got up quickly and ran on into the fruit stand. Accused left off pursuit. (Pros. Ex. B)

Testimony for the defense throws a little more light upon some of the less clear aspects of the incident. Accused, his father, and Vicente Ortiz testified for the defense.

Narciso Ortiz had been in the Zorro Cafe on the afternoon of September 24, 1943. About 5:00 p.m. he left there and went into the Black Cat Cafe. He remained there about two minutes, - "just went in and came out." When he came outside he met deceased and Jose Rodriguez (R. 44). He had not had any argument with them, although at one time Narciso Ortiz had been cut by Ramon Quintanilla, deceased's cousin (R. 44, 51).

This witness does not say so directly, but the three of them must have approached the group composed of Jose Ortiz, Vicente Ortiz, Noe Cavazos and Ramon Quintanilla (R. 47, 48). Witness claims that when they got outside the cafe, Jose Rodriguez grabbed him by the hands (R. 45, 46, 47, 48, 49, 50, 53). There is no doubt from this witness' testimony that it was not deceased who grabbed or held him (R. 47). Witness says he does not know why Rodriguez grabbed him. Witness tried to jump out of the way and kept asking Rodriguez to turn him loose. Rodriguez said nothing, but held on to witness' hands (R. 48, 49, 50, 53). Witness was so held that his back was to the road, and he did not see the incident between accused and deceased (R. 46).

Witness claims that while he was being so held, deceased passed by and struck at witness, at the same time asking, "Where is your son?" (R. 45, 50, 51). Accused stepped up, hit Rodriguez, and Rodriguez fell to the ground (R. 46). When this happened Rodriguez let go of witness (R. 47, 53). Witness denies he had a knife in his hand at the time, or that he used it during that day (R. 49).

Vicente Ortiz agrees that it was Jose Rodriguez who seized Narciso by the hands, and that Rodriguez said nothing when he did so (R. 53).

Accused testified at his own request. He claims that as he was standing in the street with Vicente Ortiz, Noe Cavazos and Ramon Quintanilla, Horacio Quintanilla seized his father by the collar (R. 59, 60, 63, 64, 65). He is emphatic about this, but is the only witness who makes this particular assertion. He says his father had nothing in his hands (R. 64). Accused twice separated them by jumping in between them (R. 60, 64, 65, 66). He says that after the second time deceased "acted like he get a knife out of his pocket and I get mine and I jumped after him and when I jumped he run" (R. 66).

Deceased's back was to accused at the time accused struck the first blow (R. 55, 66). The blow landed on the right side of the back of deceased's neck (R. 66). Deceased let go of Narciso and ran (R. 60). Accused took off after him and pursued him (R. 61, 68). He caught up to him in front of the fruit stand. Here they both slipped and fell, and accused cut deceased twice more with the knife (R. 61, 68, 74, 75).

Deceased got up and ran through the fruit stand. Accused left off pursuit.

4. The undisputed evidence shows and the accused admits that he killed the deceased. There is no evidence in the record that the accused acted in self-defense. The only question for determination is, does the record contain any substantial evidence to support the findings of the court that the accused is guilty of murder in violation of Article of War 92. Murder is the unlawful killing of a human being with malice aforethought. Malice may be implied when, as in this case, there is the intentional use of a deadly weapon. Any intentional killing of a human being without justification, excuse or provocation is murder. The very nature of the assault in this case, the fact that the accused followed the deceased some distance and stabbed him two or three times when his back was turned and while deceased was vainly attempting to escape - clearly shows that there was no legal justification, excuse or provocation for the fatal assault, and that the court was fully warranted in finding accused guilty of murder as charged.

5. The charge sheet shows that accused is 26 years of age, and that he was inducted into the service on 2 April 1941. He completed 3 years of grammar school and is classed as an illiterate.

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 of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Title 18, Sections 452 and 454, United States Code.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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

SPJGQ
CM 244291

-1 DEC 1943

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Kellogg Field, Battle Creek, Michigan, 18 October 1943. Dismissal.
First Lieutenant ROBERT E. FINNMAN (O-1552665), Ordnance Department.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant, then Second Lieutenant, Robert E. Finnman, 321st Base Headquarters and Air Base Squadron, did, at Kalamazoo, Michigan, on or about 21 April 1943, wrongfully and unlawfully solicit of one Neil W. Peters the sum of fifty dollars ($50.00) as a bribe, or "cut back", in exchange for the said First Lieutenant, then Second Lieutenant, Robert E. Finnman causing an order for certain equipment for the Ordnance Garage at Kellogg Field, Michigan, in the approximate sum of four hundred and sixty dollars ($460.00), to be placed with Neil's Automotive Services, Inc., of which the said Neil W. Peters was president.

Specification 2: In that First Lieutenant, then Second Lieutenant, Robert E. Finnman, 321st Base Headquarters and Air Base Squadron, did, at Army Air Base, Kellogg Field, Michigan, on or about 1 May 1943, wrongfully and unlawfully solicit of one W. A. Teutsch a bribe, or "cut back", to wit: ten per cent (10%) of the value of orders for equipment to be furnished the Ordnance Garage at Kellogg Field, Michigan, in exchange for the said First Lieutenant, then Second Lieutenant, Robert E. Finnman causing the M & T Battery Company, of which the said W. A. Teutsch was president, to be the recipient of said orders.

Specification 3: In that First Lieutenant, then Second Lieutenant, Robert E. Finnman, 321st Base Headquarters and Air Base Squadron, did, at Army Air Base, Kellogg Field, Michigan, on or about 3 May 1943, wrongfully and unlawfully solicit of one W. A. Teutsch a bribe, or "cut back", to wit: ten per cent (10%) of the value of orders for equipment to be furnished the Ordnance Garage at Kellogg Field, Michigan, in exchange for the said First Lieutenant, then Second Lieutenant, Robert E. Finnman causing the M & T Battery Company, of which the said W. A. Teutsch was president, to be the recipient of said orders.

Specification 4: In that First Lieutenant, then Second Lieutenant, Robert E. Finnman, 321st Base Headquarters and Air Base Squadron, did, at Army Air Base, Kellogg Field, Michigan, on or about 2 April 1943, wrongfully and unlawfully accept and receive from one Remmel Rathwick a thing of value, to wit: five dollars ($5.00) lawful currency of the United States, in exchange for the said First Lieutenant, then Second Lieutenant, Robert E. Finnman causing the purchase on behalf of the Ordnance Garage of Kellogg Field, Michigan, certain automotive parts from Neil's Automotive Services, Inc., for which firm the said Remmel Rathwick was a salesman.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of any 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 competent evidence for the prosecution showed that the accused was Automotive and Maintenance Officer at the Base Garage of Kellogg Field, Michigan (R. 8). In this capacity he carried on negotiations for the purchase of automotive equipment and parts for the base garage with local dealers. If the needed parts were not available through an Army supply depot, accused was authorized to purchase from local dealers. The accused would in such cases negotiate with the dealer, secure estimates or bids, and purchase the items needed. A formal purchase order would be made out upon delivery of the goods (R. 9). There was employed at the Base Automotive Garage a civilian, James W. Pritchard, to assist in the operation of the garage and the purchase of material and equipment.

In support of Specification 1 it was shown that a Mr. Neil W. Peters of Neil's Automotive Service, Kalamazoo, Michigan became acquainted with the accused through one of his salesmen, R. M. Rathwick, who had procured an order through the accused for the purchase of certain automotive parts and equipment. Peters visited Kellogg Field about 17 April 1943 to deliver part of this merchandise. During a conversation with the accused outside of the base garage on this occasion, the accused informed him that his salesman, Rathwick, had promised to pay him (accused) $50 for the order and that the civilian employee, Pritchard, was to be taken care of (R. 26-27). Mr. Peters stated that this was all news to him and he would have to find out something about it. The accused made an ap-

pointment with him for a meeting within the next three or five days (R. 28). On or about 24 April 1943, at his office in Kalamazoo, Peters told accused that he did not do business that way, but, in order to back up his salesman, he would pay the accused something(R. 29). The accused said that that was "just chicken feed" (R. 36). When the salesman, Rathwick, delivered part of the merchandise, the accused said to him, "You are taking care of us on this, aren't you?" Rathwick replied that he was, and that the next time the accused was in town to come out to his house and he would buy him a couple of drinks (R. 48). About a week after 24 April 1943, the accused again called at Peters' office regarding a delivery of merchandise, and, before he could say anything, Peters told him that the deal was off and that he was definitely not paying anything (R. 32). There was offered in evidence two purchase orders for automotive equipment parts given to Neil's Automotive Service, one dated 13 April 1943 for $403.95 and the other dated 26 April 1943 for $61.26 (Pros. Exs. 1, 2).

In support of Specifications 2 and 3 it was shown that one William A. Teutsch, President of the M and T Battery Company, Kalamazoo, Michigan, on or about 20 April 1943, visited Kellogg Field in order to determine why his concern was not getting a share of the automotive equipment and parts business. On that occasion he met the accused (R. 17). Business was not discussed to any extent. The meeting was simply for the purpose of getting acquainted. About 10 days later Teutsch again visited the field and met the accused. He inquired of the accused what to do in order to get some business. The accused told him that "ten per cent would get some business", and that he had just given Neil's Automotive Service an order for $500 (R. 19). This conversation took place outside of the accused's office. Teutsch did not do any business on that occasion but returned on 3 May 1943 in order to make sure what the accused meant when he said it would take 10 per cent to get the business. On that occasion he again met the accused and told him that he could not do any business that way as he had been in business for 23 years. The accused said that he had nothing to fear, that no one would know how much money, if any, was put in the accused's desk drawer. Teutsch understood from the circumstances that in order to get business there would have to be a "kick back" of 10 per cent paid to the accused (R. 21).

In support of Specification 4 it was shown that Rathwick had recently been discharged from the Army and had been employed as a salesman for Neil's Automotive Service. On or about 20 March 1943 he visited Kellogg Field for the purpose of trying to obtain an order for automotive equipment or material through Mr. Pritchard whom he had known some years previous. Mr. Pritchard introduced him to the accused. He was at that time informed of the nature of the material and merchandise needed at Kellogg Field and requested to submit prices. Between that time and the time that he actually procured the order on 13 April 1943 he saw the accused three or four times. On each occasion the accused reminded Rathwick that he and Pritchard were to be "taken care of" (R. 44, 46). On one occasion (2 April 1943) Pritchard requested Rathwick to give them something that day. Rathwick had $12 with him and as he shook hands with the accused he held in his hand a $5 bill which he left in the hand of the accused,

stating, "Here is a little present". The accused thanked him (R. 47). This took place at the field (R. 47-48). The accused told Pritchard on the following day that he had received $5 from Rathwick. The transaction took place on 2 April 1943 (R. 62, 65).

4. The defense introduced three witnesses who testified that they had done business with Kellogg Field through the accused for eight or ten months and that during that time they had never been approached by him on the matter of giving the accused any compensation for procuring the business (R. 72, 74, 77).

The accused, after having been fully advised of his rights as a witness, elected to testify under oath (R. 81). In regard to the transaction with Mr. Teutsch, he testified that Teutsch asked him why he was not getting any business at the field and wanted to know what it took to get the business, and that the accused jokingly remarked "Perhaps it takes ten per cent." The accused testified that he was in the lumber business in civilian life and this was a very normal phrase that was made by carpenters and contractors to those in the lumber business as to whether or not they would get their ten per cent. "Once in a while it was a joking remark" (R. 84). As to the transaction with Peters, he testified that the only time he made a statement to him was when he visited the place of business and asked Peters just what the profit was on the sale. Peters figured out the profit and showed it to the accused, whereupon the accused said "I suppose that ten per cent is in that that your drunken salesman, Rathwick, mentioned" (R 84). The accused did not testify in defense of the Charge concerning the payment of $5 to him by Rathwick.

5. Accused was found guilty of using his official position for soliciting and receiving money from civilians for War Department purchases of material and supplies. Such conduct is commonly known as "graft". The evidence is clear that he did use his official capacity as Automotive and Maintenance Officer to place an order for the purchase of automotive parts for Kellogg Field with Neil's Automotive Service, Inc., and did thereafter solicit a "cut back" of $50 from the proprietor of that business as averred in Specification 1. It was also clear from the evidence that prior to obtaining this purchase order for Neil's Automotive Service, Inc., the accused did accept $5 from the salesman who was soliciting the order at the time and place as averred in Specification 4.

It was equally clear from the evidence that when W. A. Teutsch sought to do business with Kellogg Field through the accused, the accused solicited compensation to the extent of 10 per cent of the value of the prospective order at the time and place alleged in Specification 2. With reference, however, to Specification 3, according to the evidence, Mr. Teutsch returned to Kellogg Field on 3 May 1943 for the purpose of obtaining a more detailed explanation of the requirement that he would have to pay 10 per cent in order to procure business. At this second meeting with the accused, the accused explained in more detail what he meant at their first meeting by the 10 per cent charge, namely, that it was a payment to be made to him personally and for safety's sake to be deposited in his desk drawer. There were not, therefore, two different acts of solicitation as averred in the two Specifications. The original solicitation was properly charged in Specification 2. The incident of 3 May 1943 was simply

an explanation of what had taken place on 1 May and therefore did not in itself constitute a solicitation. For that reason the finding of guilty of Specification 3 cannot be sustained.

The acceptance or solicitation of remuneration by an officer under the circumstances set forth is not only dishonorable and improper but also conduct of a nature to bring discredit upon the service, in violation of the 96th Article of War (CM 234644).

The accused's defense consisted principally of a claim that his alleged solicitations were made as a joke and misunderstood. There was no apparent motive for two business men to separately, falsely charge the accused with soliciting improper payment. The accused's contention that his soliciting was a joke does not ring true when coupled with the clear uncontradicted evidence of two witnesses that he actually accepted money from a salesman for procuring an order. The court was, therefore, justified in finding the accused guilty of the Specification and its finding is amply supported by the evidence.

6. The accused is 28 years of age. He graduated from high school in 1936 and attended Creighton University for one year. He was employed as a salesman and purchasing agent for an organization dealing in lumber, coal, and builders materials from 1938 to June 1942. He attended OCS, Aberdeen, Maryland and was commissioned 2nd Lt. 9 January 1943. He was promoted to 1st Lt. 13 August 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 not legally sufficient to support the finding of guilty of Specification 3 but is legally sufficient to support the findings of guilty of the remaining Specifications and of the Charge, and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

William H. Parmele, Judge Advocate.

Earle Shepburn, Judge Advocate.

Herbert R. Friedman, Judge Advocate.

1st Ind.

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 First Lieutenant Robert E. Finnman (0-1552665), Ordnance Department.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding of guilty of Specification 3 of the Charge, legally sufficient to support the findings of guilty of the remaining Specifications and of the Charge, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the finding of guilty of Specification 3 of the Charge be disapproved and that the sentence be confirmed and carried into execution.

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

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

3 Incls.
1 - Record of trial
2 - Dft. of ltr. for sig. S/W
3 - Form of Ex. action

(Finding of guilty of Specification 3 of the Charge disapproved. Sentence confirmed. G.C.M.O. 62, 9 Feb 1944)

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

(251)

SPJGK
CM 244292

18 DEC 1943

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Selfridge Field, Michigan, 27-29
Major GEORGE A. HARTFORD	)	September 1943. Dismissal.
(O-398271), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, 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: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Major George A. Hartford, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan on or about February 3, 1943, present for approval and payment a claim against the United States by presenting to the Director, Intelligence Division, Headquarters Sixth Service Command, ASF, Chicago, Illinois, an officer of the United States duly authorized to approve such claims, in the amount of $75.85 for reimbursement for expenditures for transportation and telephone tolls, which claim was false and fraudulent in that all expenditures for which reimbursement was claimed were not in fact made, and was then known by the said Major George A. Hartford to be false and fraudulent.

Specification 2: In that Major George A. Hartford, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan on or about September 29, 1942, present for approval and payment a claim against the United

States by presenting to the Director, Intelligence Division, Headquarters Sixth Service Command, ASF, Chicago, Illinois, an officer of the United States duly authorized to approve such claims, in the amount of $91.62 for reimbursement for expenditures for motor transportation and telephone tolls, which claim was false and fraudulent in that all expenditures for which reimbursement was claimed were not in fact made, and was then known by the said Major George A. Hartford to be false and fraudulent.

Specification 3: In that Major George A. Hartford, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did, at Selfridge Field, Michigan on or about November 30, 1942 present for approval and payment a claim against the United States by presenting to the Director, Intelligence Division, Headquarters Sixth Service Command, ASF, Chicago, Illinois, an officer of the United States duly authorized to approve such claims in the amount of $70.42 for reimbursement for expenditures for motor transportation and telephone tolls, which claim was false and fraudulent in that all expenditures for which reimbursement was claimed were not in fact made, and was then known by the said Major George A. Hartford to be false and fraudulent.

Specification 4: In that Major George A. Hartford, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about the 27th day of June 1942, present for approval and payment a claim against the United States by presenting to the Director, Intelligence Division, Headquarters Sixth Service Command, ASF, Chicago, Illinois, an officer of the United States duly authorized to approve such claims, in the amount of $61.10 for reimbursement for expenditures for transportation and telephone tolls, which claim was false and fraudulent in that all expenditures for which reimbursement was claimed were not in fact made, and was then known by the said Major George A. Hartford to be false and fraudulent.

Specification 5: In that Major George A. Hartford, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about August 1, 1942, present for approval and payment a claim against the United States by presenting to the Director, Intelligence Division, Headquarters Sixth Service Command, ASF, Chicago, Illinois, an officer of the United States duly authorized to approve such claims, in the amount of $74.30 for reimbursement for expenditures for transportation and telephone tolls, which claim was false and fraudulent in that all expenditures for which reimbursement was claimed were not in fact made, and

was then known by the said Major George A. Hartford to be false and fraudulent.

Specification 6: In that Major George A. Hartford, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did at Selfridge Field, Michigan, on or about October 31, 1942, present for approval and payment a claim against the United States by presenting to the Director, Intelligence Division, Headquarters Sixth Service Command, ASF, Chicago, Illinois, an officer of the United States duly authorized to approve such claims, in the amount of $60.35 for reimbursement for expenditures for transportation and telephone tolls, which claim was false and fraudulent in that all expenditures for which reimbursement was claimed were not in fact made, and was then known by the said Major George A. Hartford to be false and fraudulent.

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

Specification 1: In that Major George A. Hartford, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did, at Selfridge Field, Michigan, on or about 9 July 1943, fraudulently procure eleven (11) false statements from the following individuals: Berkley C. Harris, Charles Woolard, Robert H. Mielke, Walter Ostrom, Edmund C. Rein, Colin Archie McLeod, D. K. Vore, Albert Clark, Malond A. Mott, Kenneth Harwood, James Fernandez, with the intent to use said statements in connection with a pending official military investigation.

Specification 2: In that Major George A. Hartford, 4th Base Headquarters and Air Base Squadron, Selfridge Field, Michigan, did, at Selfridge Field, Michigan, on or about 11 July 1943, with intent to deceive, present to Major Paul W. Brosman, an investigating officer appointed pursuant to the 70th Article of War, eleven (11) false statements dated 11 July 1943 and signed by the following named individuals: Berkley C. Harris, Charles Woolard, Robert H. Mielke, Walter Ostrom, Edmund C. Rein, Colin Archie McLeod, D. K. Vore, Albert Clark, Malond A. Mott, Kenneth Harwood, James Fernandez, which said statements were untrue and were known to be untrue by said Major Hartford.

The accused pleaded not guilty to the Charges and Specifications. He was found not guilty of Charge I and its Specification, and guilty of the remaining Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved the finding of guilty of Specification 2 of the Additional Charge

except the words "dated 11 July 1943 and", approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Summary of Evidence.

a. The accused having been found not guilty of Charge I and its Specification: feloniously embezzling and converting to his own use the sum of $403.62, no summary of the evidence thereof is deemed necessary.

b. Charge II and its Specifications. The prosecution showed that on 27 November 1940 accused was assigned to Selfridge Field where he subsequently assumed the duties of Base Intelligence Officer, Provost Marshal, and Commanding Officer of the 830th Guard Squadron. On 27 June 1942 the accused submitted to the Director of Military Intelligence, 6th Service Command, Army Service Forces, Chicago, Illinois, for approval and payment, a voucher in the amount of $61.10, which voucher itemized various phone calls and travel expenses to which the accused certified that the travel and expenses listed thereon were accomplished in performance of official duty and were correct and just and that payment thereof had not been received for the same (R.12;Ex.4). Payment was made in the amount of $61.10 on said voucher, which amount was received by the accused from the 6th Service Command, the proper disbursing agency on vouchers of this kind (R.12;Ex. 4). Subsequently, the accused, in a like manner, submitted and received payment on five more similar vouchers in the amounts of $74.30 on 1 August 1942, $91.62 on 29 September 1942, $60.35 on 31 October 1942, $70.42 on 30 November 1942 and $75.85 on 3 February 1943 (R.12; Exs. 1,2,3,5 and 6). These six vouchers, wherein there was itemized the statement of travel and phone calls, contained the names of some sixty Civil Service employees working at Selfridge Field, Michigan, who were shown as having been investigated by the accused on certain named dates in the course of official Civil Service employee investigations, as a basis of computing the mileage traveled and expenses incurred (R.20,35; Exs. 1 through 6, 7 through 67 inclusive). The names of the sixty persons listed on the six vouchers are the same persons whose names appear individually on Exhibits 7 through 67 (R.35). Exhibits 7 through 67 represent individual investigations of each of the persons named, made by three Michigan state police detectives who were assigned to Selfridge Field for the purpose of investigating and reporting on each new Civil Service employee who went to work at Selfridge Field, Michigan (R.20,24, 29,33,35; Exs. 7 through 67 inclusive). The system developed for making such investigations was as follows: When a new employee reported to Selfridge Field, Michigan, he was required to fill out an information form at the registration bureau. This form was turned over to the S-2 office, where it was then given to either Mr. Frieberg, Mr. Gaboury, or Mr. Ritter, three Michigan state police detectives assigned to Selfridge Field for the purpose of making civilian investigations. Detective Frieberg acted as the supervisor and prorated the investigations among the three. An investigation was then made by making a neighborhood check as to loyal or subversive activities, checking for police records,

and checking credit bureaus and banks, etc. After the investigation was completed, a report was made by the detective making the same on Michigan State Police Form UD6. The reports were then turned in by the detectives to the accused or to someone in his office for delivery to the accused as S-2 officer. Technical Sergeant Walter G. Martin, Air Corps, unassigned, Selfridge Field, working in the S-2 office, took the reports as they came in, attached the history papers to the reports and placed them on the accused's desk (R.13,19,25,30,33,37,38,46,48). When these investigations were completed by the detectives and a finding "no complaint" was made thereon there was no need for any additional investigation to be made by the accused or anyone else on these particular investigations. Several witnesses testified that the investigations made were complete, that the accused did not incur any expenses in connection with these investigations, and that no additional investigation or expense was necessary on them (R.25,26,30,32,35,37,38,43,44,47,53). All of the persons investigated by the three detectives were found to be loyal Americans and no complaints were made by the accused to the detectives about any of the investigations being incomplete (R.19,20,25,33,44). There were no other separate files in the S-2 office which indicated there had been any separate investigations made concerning the same individuals named in Exhibits 7 through 67, and there were separate files made of all investigations concerning subversive activities and the like (R.21,47). The detectives testified as to several specific instances where they investigated individuals named in Exhibits 6 through 67 in which they traveled an average of 25 to 30 miles on each case and in no case was it necessary for them to travel as many miles as were indicated on the accused's vouchers for those same particular investigations (R.31,32 and 34). In preparing the six vouchers, the accused got information from the investigation reports which had been placed on his desk and wrote out in pencil the information to be placed on the vouchers and these were turned over to Miss Margaret A. Billingsley who acted as secretary for accused (R.11). She wrote the vouchers up. In some cases Miss Billingsley signed the accused's name, at his instructions, to the voucher when he was out of the office, and the voucher would be mailed to the Sixth Service Command for payment (R.16,22,50). The accused, on one occasion, told Miss Billingsley that he had made some official trips for which he could not be reimbursed and that he was putting down the civilian investigations listed in the vouchers in order that he could be reimbursed for these other official trips that he had actually made, jokingly referring to these vouchers which he was submitting as "swindle sheets" and saying that "everyone else was doing it" (R.15). Sergeant Martin testified that he had had a conversation with the accused in April 1943 in which the accused said he was making expense vouchers to cover mileage driven in his private automobile in connection with other official business for which he kept no record and was using the civilian investigations to cover the expenses of these trips (R.47,48). At the investigation of the charges, the accused, after being warned of his rights (R.55), stated to the investigating officer that as regards the number of official trips for which he put in claims for mileage, he

in fact did not make those trips, but that he had made a number of official trips for which he was entitled to mileage and that in a sense these vouchers which he filed with the Sixth Service Command constituted drafts upon a mileage bank account, which mileage bank account had been made up for the other official trips for which he had not received reimbursement, and at the time was overdrawn, but these vouchers constituted drafts upon that pool (R.53).

c. Additional Charge and its Specifications. In regard to the Additional Charge for procuring and presenting to the investigating officer eleven false statements with the intent to deceive, the following evidence was introduced: Around the 6th or 7th of July 1943 the accused contacted Mr. Kenneth L. Harwood, Superintendent of the Air Corps Shops, sub-depot Selfridge Field, about securing names from the civilian personnel (R.56). The accused asked him for names of older men at scattered points of residence and went down the list of civilian employees, getting the names and addresses of the men whose statements appear as Exhibits 70 through 80, Mr. Harwood not knowing what the accused wanted the names for (R.56). Several days later, the accused brought Mr. Harwood a set of statements, telling him to pass them out to the men for whom they were made out as soon as possible (R.56). Mr. Harwood passed the statements over to the foreman, Mr. Woolard, telling him to pass them out and tell the men that they need not sign them, it being entirely up to them (R.57). The statements were signed by the individuals and returned to Mr. Harwood, after which they were turned over to the accused (R.58). Mr. Harwood testified that he signed one of these statements (Ex. 70), and that the statement was not true wherein it stated "this contact was made at my home at least twice a month", as the accused had not done so, although he had contacted Mr. Harwood at his home on about two different occasions (R.57). Mr. Charles Woolard of Mt. Clemons, Michigan, testified that he signed Exhibit 71, but that that portion setting out "contact occurred at least twice a month" was false, as the accused had never come to his home to his knowledge and that no notary was present when he signed the statement, nor was any notary's signature present on any of the statements which he collected from the other men (R.58,59). Mr. Walter Ostrom, also of Mt. Clemens, testified that he signed Exhibit 72 without reading it thoroughly and that he did not know at the time whether the statements contained therein were true, but that that portion of the statement which says he was a member of the CS System (Counter-Subversive) and that he was contacted at home by the accused was not true, and that he signed the statement at the request of Mr. Woolard in the presence of a notary (R.60). Mr. Albert Clarke, of Mt. Clemons, testified that he signed Exhibit 78 at Mr. Woolard's request without reading it after Mr. Woolard told him that the accused and Mr. Freiberg wanted the statement in order to get more gasoline, and that he was a member of the CS System, but that the accused had only come to see him at his home one time in the fall of 1942 (R.61,62). Exhibit 74 was signed by Mr. Berkley C. Harris, of Mt. Clemons, at Mr. Woolard's request, he being told that the purpose was to help the accused get more gasoline, although Mr. Harris was not a member

of the CS System and the accused never came to contact him at his home, Mr. Moran, a notary, and the accused being present when he signed the statement (R.63). Mr. Edmund L. Rein, of New Baltimore, Michigan, testified that he signed Exhibit 76; that he was a member of the CS System, but that he never did anything in connection therewith and the accused never came to his house; that a notary was present when he signed the statement and five or six other men were signing similar statements in a group at the same time (R.64,65). It was stipulated that Mr. Robert H. Mielke, of Detroit, Michigan, would testify that some time in July 1943 the accused came to him and told him that he was in some trouble because of his claims for mileage and asked him if he would sign the statement that he had visited his home on frequent occasions, that he was a member of a civilian CS System at the Selfridge Field sub-depot, and that in order to accommodate the accused, he made and signed the statement, dated 10 July 1943 (Ex. 73), no notary being present and no oath being given, and that this statement was entirely false as he had never been a member of any such system and was never personally contacted by the accused (R.61). It was further stipulated that the signers of Exhibits 75,77,79 and 80 would testify that the statements were false in their material aspects, that they were asked to sign the statements, and that they did so (R.65). The accused gave the investigating officer, Major Brosman, eight of these statements (Exs. 70 through 77 inclusive) at Selfridge Field, to be used in connection with the investigation of the charges, and these statements were attached as allied papers to the original charges against the accused and were processed at Headquarters Third Air Force, and were made a part of the report of the investigating officer (R.53 and 54). The other three sworn statements (Exs. 78,79,80) were mailed by air mail to the investigating officer by the accused from Selfridge Field and were received by the investigating officer at his office at Headquarters Third Air Force where they were attached to his investigation report by means of a letter from the investigating officer to the Commanding General, Third Air Force, dates 17 July 1943 (R.54, Ex. 81).

c. The accused, after his rights had been explained to him, elected to take the stand as a sworn witness, and, in regard to the six false vouchers, testified that he made numerous intelligence reports requiring trips in his own automobile to obtain information, such as the trip made around November 1942 concerning the colored situation in Detroit (R.133, 134); that he left the phone numbers at his office of the Detroit City Police Headquarters, who would contact him by two-way radio in his personal car if he was needed (R.136); that he was paid for mileage in collecting this information by means of vouchers submitted (R.136,137); that at first no set form for submitting mileage vouchers was used and rebate for such mileage was made by means of writing letters, but that, later, vouchers setting out the specific case traveled on were required (R.138); that rather than submit a six-page voucher for all of the itemized trips which he was actually working on, he took a "short-cut" in preparing the vouchers

by putting the mileage actually traveled on official investigations of subversive activities, obtaining information for intelligence summaries, etc., on 3" x 5" cards, and then by taking a number of civilian employee investigations, grouping the general mileage to be put on the voucher, and by preparing a summarized voucher, which voucher he submitted to the Sixth Service Command and upon which he was paid (R.139); that this "Short-cut" was an inaccurate itemization of the vouchers, but the mileage was exact in all cases (R.139); that this procedure was followed in all those instances where similar items were entered in the vouchers and applied to each of the six vouchers (Ex. 1 through 6) and that he did not actually make the investigations on the civilians named (R.137,139); that he did not attempt to conceal the fact that the vouchers were inaccurate as to the itemization to the investigating officer or anyone else; that he actually had nothing to do with any of the civilian employee investigations listed on the six vouchers and did not make telephone calls in connection with those named investigations and that he was not telling the truth on the vouchers as to those phone calls (R.141,142); that he kept a list of the amounts of phone calls made by him on 3" x 5" cards, but did not put down the name of the person called as that was not necessary (R.142); that he does not claim that he drove the seventy miles set opposite Mr. McGill's name (Ex. 1) on the day set out on that specific investigation (R.143); that he did make the trip to the CS (Counter-Subversive) meeting, Michigan police, on 2 January 1942 which appears as item 2 of Exhibit 1 (R.143); that he received by first indorsement instructions concerning these vouchers from the Sixth Service Command, dated 5 October 1942, which stated that in the column marked "Time of Departure and Arrival" the case number or names should be indicated in the column marked "Speedometer" and that that column should be used for that purpose and that in the future the number of phone calls and cost of each should be indicated on the sub-voucher (R.143,144); that he put itemized expenses on the June 1942 (Ex. 4) vouchers and collected for expenses of travel made with Major McDonald to Detroit to make a survey of the negro situation on 18,19 and 20 June 1942 (R.144); that in addition to the vouchers shown as Exhibits 1 through 6 he made out other vouchers once a month and collected for travel performed in making trips on the political and psychological situation in the vicinity (R.144); that in making such investigations he would go to various taverns, the Chamber of Commerce, the sheriff's office, etc., to get information (R.146).

With regard to the false sworn statements the accused testified that the investigating officer, Major Brosman, did not remain at Selfridge Field long enough for the accused to complete the investigation that he wanted in connection with the mileage issue, only two or three days being devoted to the investigation of charges against him (R.140,141); that when Major Brosman told him he was going to have to leave and "consequently cut short the investigation into my charges * * * and as a result of this investigation and the suspicions and the manner in which we were handled", all that he, accused, could see was the fact that he was going to have to face a court-martial for something that he had not done and knew nothing about,

with the result that he, not being himself subsequently secured those eleven statements and gave them to Major Brosman so that the charges against him would be dropped (R.141,152); that he gave the eleven statements to the investigating officer to wash out the charges; that he wanted the investigating officer to believe that the statements were true (R.148); that when he found out that Major Brosman was not going to have time to go through the files in the S-2 office, in a panic he got the statements and gave them to Major Brosman with the hope that they would kill the charges on the vouchers (R.148); that the eleven civilians who signed the statements were not people listed in any of the vouchers (Exs. 1 through 6) as persons whom he had gone to see (R.151); that no one was then present on the field who could definitely say that the accused made the trips he claimed to have actually made (R.152); that he was given a leave for seven days beginning 28 June 1942 and another leave for four days beginning 19 June 1942, and that items were listed, during those dates on which he was on leave, in the vouchers submitted as Exhibits 4 and 5 (R.155).

Charles V. Titus, plant chief, Michigan Bell Telephone Company, and chairman of the United Services Organization council; Mr. Leslie V. Maycock, member of the Michigan state police; Colonel Walter L. Furbershaw, Director of Intelligence, Sixth Service Command; Lieutenant Colonel P. F. Boyer, Military Intelligence Division, Sixth Service Command; and Mr. Harold Mulbar, Chief of Michigan Detectives, all testified on behalf of accused and bore witness to his good reputation and his efficiency in the discharge of his duties (R.110-113,122,123; Def. Ex. B).

4. The mass of testimony, exhibits, and even the accused's own admissions unquestionably established that he prepared, presented, and received payment on the six vouchers, which vouchers falsely stated that the accused had performed itemized travel and made itemized phone calls in the performance of official duties in connection with official investigations of some sixty named civilian employees, when in fact the accused actually had nothing to do with any of the said investigations and did not incur any expense in connection therewith. It was the contention of the accused that he had actually performed all of the travel listed and made phone calls in the amounts listed in connection with other official investigations not shown on the vouchers, but he was unable to produce any witnesses or evidence to bear him out in this contention (R.152). As a matter of fact, the efforts of the accused to obtain proof that he had performed other investigations and travel, led to the preferring of the Additional Charge against him, for procuring and presenting to the investigating officer the eleven false statements from civilian employees. The proof of this Additional Charge was thorough and complete, and no evidence whatsoever was introduced to disprove the Additional Charge. It is the opinion of the Board of Review that the findings of guilty by the court as to Charge II and its Specifications and as to the Additional

Charge and its Specifications were amply supported by the evidence and were proper.

5. Specification 2 of the Additional Charge alleged that the eleven false statements were dated 11 July 1943, whereas the proof established that the statement of Robert H. Mielke was dated 10 July 1943, and that the other ten statements were dated 9 July 1943. This was not a fatal variance and was not an essential element of the offense. The Specifications alleged that the offense of presenting the false statements was committed on or about 11 July 1943. This allegation was sustained by the proof. The reviewing authority, as noted, struck out "11 July 1943" as the date of the eleven false statements. The absence of the date of the statements from the Specifications in no way affects the validity of the findings. The statements themselves were sufficiently identified without reference to this date.

6. War Department records show that accused is 30 years of age. There is no record of his educational background. In civilian life he operated a printing plant and published two weekly newspapers. He enlisted in the National Guard, Michigan, 1 December 1933 and served until 21 September 1936. He was commissioned second lieutenant, Cavalry Reserve, effective 18 September 1940. He was ordered to active duty effective 25 November 1940 for 28 days. He was reordered to active duty for one year effective 27 December 1940, extended to 26 December 1942. He was promoted to first lieutenant, Cavalry Reserve, Army of the United States, on 20 May 1942. He was transferred to the Air Corps Reserve, 22 August 1942. He was promoted to captain, Air Corps, 16 November 1942, and to Major, Air Corps, 10 April 1943.

7. The court was legally constituted and had jurisdiction over the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Dismissal is authorized upon conviction of violation of Article of War 94 and is mandatory upon conviction of violation of Article of War 95.

Thomas N. Tappy, Judge Advocate.

Wm Hammerhill, Judge Advocate.

Fletcher R. Richards, Judge Advocate.

1st Ind.

War Department, J. A.G.O., 29 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 George A. Hartford (0-398271), 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. I recommend that the sentence be confirmed and carried into execution.

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

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

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

(Sentence confirmed. G.C.M.O. 101, 10 Mar 1944)

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

SPJGN
CM 244366

30 NOV 1943

UNITED STATES	)	NINETY THIRD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Clipper, California, 5 November 1943. Dismissal, and total forfeitures.
	)	
First Lieutenant JAMES E. HARDEN, JR. (0-1289419), 25th Infantry.	)	

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 61st Article of War.

Specification: In that 1st Lt James E. Harden Jr., 25th Infantry, did, without proper authority absent himself from his organization and station at Camp Clipper, California, from about September 27, 1943, to about September 29, 1943.

He pleaded guilty to and was found guilty of the Charge and the Specification 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 at such place as the reviewing authority might direct, for a period of five years. The reviewing authority approved only so much of the sentence as provides for dismissal and forfeitures, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 27 September 1943, while a member of Company "I", 25th Infantry, the accused was absent without leave from his organization and station at Camp Clipper, California, remaining absent without leave therefrom until about 2200 o'clock on 29 September 1943 (R. 3).

4. The defense offered no evidence. The rights of the accused having been explained to him, he elected to remain silent (R. 4).

5. The Specification alleges absence without leave from organization and station from 27 September 1943 to 29 September 1943. Not only the accused's pleas of guilty but the evidence adduced, as well, support the findings of the court.

6. War Department records show that the accused is 24 years of age with enlisted service from 25 January 1941 until temporarily commissioned second lieutenant, AUS, 5 August 1942; and that he was temporarily promoted to first lieutenant 27 July 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 244366

1st Ind.

War Department, J.A.G.O., 20 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 First Lieutenant James E. Harden Jr. (0-1289419), 25th 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 as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be 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

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

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

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 55, 5 Feb 1944)

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

(267)

-4 DEC 1943

SPJGQ
CM 244396

UNITED STATES	)	30TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at A.P.O. #30, % Postmaster, Nashville (2), Tennessee, 6 November 1943. Dismissal, total forfeitures and confinement for ten (10) years.
Major MARTIN L. SEBASTIAN (0-302318), Medical Corps.	)	

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

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

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

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

Specification 1: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Jacksonville, Florida, on or about the first part of May, 1943, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection by mouth with Private Lacey Eury, a male person.

Specification 2: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Bivouac Area, near Camp Forrest, Tennessee, on or about 6 June 1943, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection by mouth with Corporal Loy T. Heavner, a male person.

Specification 3: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Bivouac Area, near Camp Forrest, Tennessee, on or about 21 August 1943, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection by mouth with Corporal Loy T. Heavner, a male person.

Specification 4: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Bivouac Area, near Camp Forrest Tennessee, on or about 16 August 1943, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection by mouth with Private First Class Paul McNeely, a male person.

Specification 5: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Bivouac Area, near Camp Forrest, Tennessee, on or about 26 August 1943, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection by mouth with Private First Class Paul McNeely, a male person.

Specification 6: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Bivouac Area, near Woodbury Tennessee, on or about 6 September 1943, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection by mouth with Private First Class Paul McNeely, a male person.

Specification 7: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Murfreesboro, Tennessee, on or about 29 September 1943, commit the crime of Sodomy, by feloniously and against the order of nature having carnal connection by mouth with Private First Class Paul McNeely, a male person.

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

Specification 1: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Bivouac Area, near Camp Forrest, Tennessee, on or about the first week in August 1943, wrongfully attempt to induce Private Jay C. Bryant, an enlisted man under his command, to engage in the act of Sodomy by plying the said Private Jay C. Bryant with liquor and toying with his genitals.

Specification 2: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Camp Blanding, Florida, on or about 24 May 1943, wrongfully attempt to induce Sergeant Garnett W. Rosson, an enlisted man under his command, to engage in the act of Sodomy by plying the said Sergeant Garnett W. Rosson with liquor and toying with his genitals.

Specification 3: In that Major Martin L. Sebastian, M.C., 120th Infantry, did, at Columbia, South Carolina, on or about 1 April 1942, wrongfully attempt to induce Staff Sergeant Charles W. Watkins, an enlisted man under his command, to engage in the act of Sodomy by plying the said Staff Sergeant Charles W. Watkins with liquor and toying with genitals.

He pleaded "nollo contendere" to all Charges and Specifications. The court deemed this equivalent to a plea of "not guilty" and proceeded "as though the accused had entered a plea of not guilty". He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced at the trial. 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 ten 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 may be briefly summarized as follows:

As to Charge I:

Specification 1: Sometime in the middle of May, 1943, accused, a major of the Medical Corps attached to the 120th Infantry, and Private Lacey W. Eury, a member of the Medical Detachment, 120th Infantry, went swimming together in the lake at Camp Blanding, Florida. During the course of conversation accused stated he was going to Jacksonville, Florida, that night and asked Eury to go along with him, which he did, both going in accused's private automobile (R. 20). They proceeded to a hotel where, after three drinks in a bar downstairs, they went to a room upstairs where the enlisted man had another drink. Meanwhile accused had taken off his trousers and laid down on the bed, and he shortly asked Eury to lie down with him. Eury hesitated but eventually took off his trousers and, clad only in shorts, joined accused on the bed, whereupon accused commenced to play with Eury's penis and then, taking it in his mouth, brought about an emission for Eury by sucking on it (R. 21). Thereafter they went out to supper and upon returning went to bed, accused occupying one bed and Eury another. They went back to Camp Blanding together in the morning. He did not report the incident to anyone until about the middle of October 1943 (R. 22).

Specifications 2 and 3: On or about 6 June 1943 shortly after the 120th arrived at Tent City, near Camp Forrest, Tennessee, after moving from Camp Blanding, accused asked Corporal Loy T. Heavner, a member

of the Medical Detachment of the 120th Infantry, who was unloading accused's baggage from his automobile, to come to his hut that night (R. 23). When Heavner arrived at the hut accused gave him a couple of drinks after which accused took off his clothes and laid down on the bed asking the Corporal to undress and get into bed with him. At the time he also said, "If you want to use my car I will give it to you and you can have a lot of privileges in the company." The corporal then undressed and got into bed with accused who immediately began to fondle Heavner's penis. After a few minutes accused turned around, took the corporal's penis in his mouth and produced an emission for Heavner while accused at the same time masturbated himself. When accused had finished the corporal dressed and went back to the company street.

On 21 August 1943 the corporal had occasion to bring accused home from a party at about 10:30 or 11 o'clock at night. Accused had been drinking and did not appear sober (R. 24, 25). The corporal had also been drinking (R. 27). On the way home, while the corporal was driving accused's car, accused reached over, unbuttoned the corporal's pants and played with his penis. When they arrived at accused's quarters he directed his orderly to leave and requested Heavner to stay. Again he took off his clothes and asked Heavner to take off his and get into bed. He did so and after accused had played with the corporal's penis for a while, he asked him to get into the same position he had taken before. He then took Heavner's penis in his mouth and sucked it until there was an emission. The corporal then got up and went to his hut. Heavner made no complaint about the incident to anyone until he reported it to Captain Gesell sometime in the middle of October, 1943 (R. 20, 27). This he had done because, when accused and he had returned from Murfreesboro and arrived in the bivouac area, accused approached him in the first aid tent and started feeling his penis. The corporal jumped away and went to bed and reported the incidents immediately after that because he feared "it would lead on" and he "didn't want any part of it" (R. 27).

Specifications 4, 5, 6 and 7: At some time during the middle of August 1943, Private First Class Paul McNeely, a member of the Medical Detachment, 120th Infantry, together with Corporal Heavner and Sergeant Hileman, accompanied accused to a show. On the return trip accused asked McNeely to sit in the back seat with him and when they were so seated accused started feeling McNeely's leg, "playing around" with him, and asked him to stay at accused's tent until the sergeant and corporal had left. This McNeely did and when they were alone accused turned on the radio and they had a couple of drinks of gin. He then laid down on the bed and asked McNeely to sit beside him. When McNeely did so accused started feeling his legs and told him to lie down. He did so and accused went to the foot end of the bed, took McNeely's penis in his mouth and, while he masturbated himself, sucked McNeely's penis until he caused McNeely to have an emission in accused's mouth (R. 28, 29).

A week and a half later accused took McNeely to his tent in the officers row at Camp Forrest, Tennessee. There after drinking scotch and soda, McNeely took off his trousers and laid down on the bed at accused's request whereupon accused took McNeely's penis in his mouth and, while masturbating himself, caused McNeely to have an emission in accused's mouth (R. 29, 30).

Again, on or about 6 September 1943, while the troops were in bivouac near Woodbury, Tennessee, accused came to McNeely's pup tent at about 2:30 or 3 o'clock a.m. Accused laid down in the dark beside McNeely and after playing with McNeely's penis, took it in his mouth and sucked it until McNeely had an emission (R. 30).

On 29 September 1943, McNeely was in accused's room in Murfreesboro, Tennessee, in company with Corporal Heavner. While McNeely was taking a bath accused told Heavner to go and get a room for (Sergeant) Hileman and himself as McNeely was going to stay with accused. After Heavner returned Hileman arrived and accused, after all had some drinks of scotch whiskey, told Heavner and Hileman to go to their room as McNeely would stay with him. At 11:30 o'clock p.m. accused played with McNeely's penis and "sucked it off" while he masturbated himself (R. 30, 31).

McNeely first reported these incidents to Corporal Heavner who told him he was "going to tell" and wanted to know whether McNeely "wanted to". When Captain Gesell asked McNeely whether he "wanted to testify" he said "yes" (R. 31).

As to Charge II:

Specification 1: On about 1 September 1943 the Medical detachment was on maneuvers with the 120th Infantry. During the problem, which lasted from breakfast to supper, Private Jay C. Bryant sat on the rear seat of a jeep in which accused was riding on the front seat. Repeatedly, all day long, accused would reach over from the front seat and play with Jay's legs. After Jay had gone to bed that night he was informed that accused wanted him to bring a pitcher of hot water to his quarters. This he did not believe but, taking the hot water, he proceeded to accused's tent, passing accused's orderly on the way and taking him along. Arriving at accused's quarters he set the water on a table outside and was then invited by accused to come in. He went in, had a seat and accused opened a quart of Irish whiskey and together they had a couple of drinks. Accused then went outside to wash and change his underwear after which he returned and sat on the bed asking Jay to sit close to him. They then had another drink. As Jay sat down on the bed accused seized Jay's penis, through his clothes and asked him "how big it was" and "if it would get hard". Accused then asked Jay to take

his penis out and suggested that he (Jay) "could go places in that detachment" but Jay told him he did not want to. Accused then said he "could have a lot of privileges" but Jay said he did not want any. Jay prepared to leave and as he opened the door accused cautioned him not to tell any of the men accused had given him whiskey or tried to feel his penis (R. 6-8).

Specification 2: On 24 May 1943 Sergeant Garnett W. Rosson, a member of the Medical Detachment of 120th Infantry, was sitting with accused in the front seat of accused's car which was parked in the rear of the dispensary at Camp Blanding, Florida. Both were drinking, and Rosson had taken about 10 or 12 drinks and accused 3 or 4. As they were sitting there, alone and at night, accused unbuttoned Rosson's trousers, took out his penis and began to fondle it and Rosson's testicles. After a while Rosson became sick at his stomach and he left the car. Accused tried to induce him to return but he refused and went to his quarters (R. 10-13). Rosson reported the incident to Colonel Treherne (R. 13).

Specification 3: On or about 1 April 1943 Staff Sergeant Charles W. Watkins, Medical Detachment, 119th Infantry, had occasion to go with accused to Columbia, South Carolina. Accused was a Captain at the time. They made the trip in accused's private automobile in company with Staff Sergeant Davis. When they arrived at Columbia they went to the Wade Hampton Hotel and, at accused's suggestion went to a room upstairs where the three consumed 2 quarts of whiskey. When it was all gone accused sent Sergeant Davis back to the Officers Club for more. Davis returned with 3 quarts of whiskey but, having met a girl in the elevator, left to join her. Watkins and accused then continued to drink until Watkins had to go to the bath room. Accused followed him. Just as Watkins got into the bath room he "passed out" and remembered nothing that transpired until the next morning when he awoke and found that he was completely naked and that accused was playing with his (Watkin's) private parts. Watkins was covered with perfumed powder though he had brought none into the room; and, although he did not remember undressing, he found his clothes neatly folded and placed in a pile on a chair. Accused grabbed Watkins as he woke up, said something about kissing him and thereupon kissed him. He said something about "sucking me (Watkins) off" and Watkins then got up and said he was ready to go. After they had a couple of drinks accused and Watkins returned to Fort Jackson (R. 13-17). Watkins did not report the incident to anyone until Colonel Treherne called him about the matter around the middle of October 1943 (R. 18).

4. Accused elected to remain silent and offered only character witnesses in his behalf, among whom were Colonel Hammond D. Birks, Commanding Officer of the 120th Infantry, the accuser; Lieutenant Colonel Garvin B. Farris, Executive Officer of the 120th Infantry; Lieutenant Colonel Alfred J. Treherne, Division Surgeon; Major Alonzo

N. Baker and Major Vivion F. Lowell. Also filed in evidence were various letters of commendation to the accused all of which disclosed that he is an officer of great capabilities and was considered by his fellow officers as a man of good moral character. Colonel Birks said: "I gave him a superior efficiency report on every occasion and also recommended him for promotion twice, and in the last recommendation I made I considered him the best medical field soldier I had come in contact with" (R. 33). Lieutenant Colonel Farris stated: "I consider him an excellent soldier and a superior medical officer in the field" (R. 35). Lieutenant Colonel Treherne testified that "He was considered an excellent officer and I certainly considered him one of the best in the division" (R. 36).

5. Medical testimony of a psychiatric nature was introduced by both the defense and prosecution.

Major Alonzo Baker, Medical Corps, 105th Medical Battalion, a witness for the defense, after being qualified as a general practitioner, but not an expert opinion witness on psychiatry, testified that he was acquainted with accused socially and officially, having roomed with him at Camp Blanding, Florida, from March 1941 until accused was transferred to the 120th Infantry and that during all of that time accused and his work were "very well thought of in the 105th (Infantry)". He had never seen anything unusual about accused in all the while he lived with him (R. 39). With regard to homosexuality he stated that it was not the act of a normal man to insert another man's penis in his mouth but that such a man might be normal in every other respect; that homosexuals are born with this abnormal desire and cannot help it and there is no cure or treatment for it, but they are fully conscious of what they are doing. Such persons are usually brilliant and excel in their lines of endeavor (R. 38).

Major Vivion F. Lowell, Medical Corps, 30th Infantry Division, qualified as an expert opinion witness in psychiatry and testified on behalf of the defense that he had known accused for a period of $2\frac{1}{2}$ years, but that any opinion he might express was not based upon observation of accused. In his opinion a homosexual is a sex pervert and a psycopathic personality. Such a person is not an insane individual and is not mentally ill but, at the same time, is not perfectly normal. He has an abnormal desire for homosexuality which, however, he can control probably as much as a normal individual can control sex desire and that while he cannot get rid of the desire he can satisfy it, or not, as he chooses. In his opinion a homo-sexual would be able to conceal his abnormality from his friends for a considerable length of time (R. 39-41).

For the prosecution Major Max Levin, Medical Corps, Thayer General Hospital, Nashville, Tennessee, a member of the medical board appointed under the provisions of par. 35c, M.C.M., 1928, testified that he is rated as a specialist by the American Board of Psychology and Neurology and had written over forty papers on psychology and neurology for medical

journals. On 24 October 1943 the board made an examination of accused and thereafter prepared a report thereon which was admitted in evidence (Pros. Ex. 1). The board found no evidence of mental disease in accused though he falls into a class of abnormals known as homosexuals. These individuals can resist the abnormal appetite just as others can resist a normal appetite and, in doing so, can resist temptation so well that they are able to conceal it. In his opinion the homosexual characteristic is inherent but the fact that in prisons there is a large increase in homosexuality indicates that a certain portion of homosexuality is influenced (R. 47-49).

5. At the outset of the trial the court was confronted with the anomalous plea of "nollo contendere" entered by the accused. What was evidently intended was a plea of nolo contendere. This so called plea is not a plea in the strict sense of that term in the criminal law but a formal declaration by accused that he will not contend with the prosecution under the charge. It is not one of the pleas, general or special, open to accused in all criminal prosecutions, and is allowable only under leave and acceptance by the court.

Since under the common law rule which governs in the federal courts, to authorize the court to entertain the plea of nolo contendere, the case must be within the class of misdemeanors for which punishment may be imposed by fine alone although the offense may be punishable as well by imprisonment, at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce the payment thereof, such plea cannot be accepted either in cases of felony requiring infamous punishment to be imposed on conviction, or in cases of misdemeanors for which the punishment must be imprisonment for any time, with or without fine (Tucker v. U.S., 196 Fed. 260, 116 C.C.A. 62, 41 LRAUS 70).

The Manual for Courts-Martial nowhere provides for such a plea, but impliedly prohibits it. Certainly it is not a special plea nor a plea in bar and as to pleas to the general issue it is provided that these "shall include the following: guilty, not guilty; and pleas corresponding to permissible findings . . . Should an accused enter a contradictory plea, such as guilty without criminality, . . . such contradictory plea will be regarded as a plea of not guilty" (par. 70, MCM 1928).

Evidently the court considered the plea of nolo contendere as one which comes within the class of contradictory pleas and properly ruled that it would proceed as though a plea of not guilty had been tendered.

6. The record of this case discloses a sordid tale of a course of conduct on the part of a high ranking and apparently efficient officer who, over a period of five months, had homosexual relations with three

enlisted members of his medical detachment and, during the same period, made overt efforts to seduce three other members to the commission of the same offense.

Nothing would be gained by commenting upon the details of the crimes alleged. Every element of the respective offenses charged was proved by the prosecution while accused offered nothing in rebuttal but character evidence and the opinions of two medical officers regarding homosexuality. Consequently, there remained but one duty for the court to perform in arriving at its findings and that was to determine the credibility of the witnesses who testified during the trial. The record shows that the defense made an effort to impeach the veracity of certain witnesses on the grounds of bias and prejudice but the facts elicited are not persuasive and do not tend to accomplish their purpose. The Board has carefully reviewed the record and judged for themselves the credibility of the witnesses and they find nothing which would justify disturbing the findings of the court.

Ordinarily an attempt to commit a crime is chargeable under Article of War 96 unless such attempt is denounced by some specific Article of War. (MCM, 1928, sec. 152, c). However, Article of War 95 includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman (par. 151, MCM 1928). It was, therefore, entirely appropriate to charge the attempts to commit sodomy under Article of War 95, the conduct alleged in the specifications and proved at the trial being, beyond question, unbecoming an officer and a gentleman.

7. Accused is thirty eight years of age. Records of the War Department disclose that he was born in Moody, Texas. After graduation from high school in Grand Rapids, Michigan he attended Baylor University for four years and Baylor Medical College for four years, graduating with the degrees A.B. and M.D., respectively, after which he did post-graduate work in surgery at Mayo Clinic and at the University of Vienna for two years. While at Baylor University and The Medical College he was a member of the Reserve Officers Training Corps, specializing in basic and advanced medical work and on 29 May 1933 he was commissioned a first lieutenant, Medical Corps. This commission was renewed on 29 May 1938. On 10 March 1941 he was ordered to active duty with the 30th Division. On 24 December 1941 he was promoted to captain, Medical Corps and on 30 October 1942 he was promoted to major, Medical Corps.

8. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally suffi-

cient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

William A. Pounds, Judge Advocate

Dale Stephens, Judge Advocate

Herbert B. Fredman, Judge Advocate

1st Ind.

War Department, J.A.G.O., 15 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 Martin L. Sebastian (0-302318), Medical Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that five years of the confinement imposed be remitted, that the sentence as thus modified be carried into execution, and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. While court-martial charges were pending against him and he was in arrest at Camp Forrest, Tennessee, Major Sebastian, on 19 October 1943, voluntarily submitted his resignation "for the good of the service." Based not only on the facts disclosed by the investigation of the charges, but also on the War Department policy announced in paragraph 2, WD Memo. W615-4-43, dated 10 January 1943, the Commanding General of the Second Army forwarded the resignation "not favorably considered", to the Commanding General, Army Ground Forces, Washington, D. C., which latter office recommended to The Adjutant General that action on the resignation be withheld pending result of trial. On 16 November 1943 The Adjutant General forwarded this resignation to this office "for recommendation." In view of the unconscionable and shameless manner in which accused used the power and influence of his official position as a medical officer to seduce the enlisted men under his command the extension of this form of clemency is not recommended.

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

Myron C. Cramer

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

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

(Resigned)

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

(279)

SPJGK
CM 244425

23 DEC 1943

UNITED STATES	)	90TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Granite, California, 12 November 1943. Dismissal, total forfeitures and confinement for one (1) year.
	)	
Second Lieutenant GORDON L. GUSTAFSON (0-1319382), Company H, 358th Infantry.	)	

OPINION of the BOARD OF REVIEW
TAPPY, 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 Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Gordon L. Gustafson, 358th Infantry, did, without proper leave, absent himself from his organization at Camp Granite, California, from about 17 October 1943, to about 24 October 1943.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

There was introduced in evidence a duly authenticated extract copy of the morning report of accused's organization, showing accused absent without leave from 0001 17 October 1943 to 2330 24 October 1943, at which time he reported for duty to his organization.

Captain James S. Spivey testified that he was the Commanding Officer of Company H, 358th Infantry, and that accused had been a member of his company since August of 1943. He identified the morning report of Company H, 358th Infantry, for the month of October 1943, which showed accused absent without leave as of 0001 17 October 1943, and from absence without

leave to duty as of 2330 24 October 1943. He further testified that he was the custodian of the morning reports of that company and identified his signature on the October morning report.

This report was received in evidence without objection by defense and an extract copy thereof attached to the record of trial as prosecution's Exhibit A. The witness pointed out accused to the court and stated that accused had not been present with his organization at any time, between the 17th and 24th of October 1943. He thought all of the officers knew the areas in Arizona to which the organization was to move for maneuvers.

4. The evidence for the defense was confined to the testimony of accused and was substantially as follows:

Accused testified that he was given a weekend pass on Saturday 9 October and went to Banning, California, and met his wife. They stayed at the Del Paso Hotel. His wife was pregnant and in the afternoon of 10 October she became ill and started to hemorrhage. He was due back at Camp Granite and had intended to leave Banning Sunday night, but about midnight his wife's illness was worse and he stayed with her all night.

Early Monday morning, 11 October, he sent a telegram to Colonel Thompson explaining his unavoidable delay because of his wife's illness (Def. Ex. A). He then returned to his room and as his wife's condition seemed to him to be serious he hired a cab; took her to Los Angeles, and called a doctor. The doctor told him his wife should be taken care of at once as she was in danger of having a miscarriage. Her condition became serious, necessitating an operation. Following the operation she was in a very weakened condition. There was no one except a neighbor to care for his three children whose ages were 4 years 11 months, 2 years 6 months, and 1 year 2 months, respectively. He tried to hire help but was unsuccessful.

Accused sent a second telegram to Colonel Thompson 17 October and a third to Lieutenant Paul McNutt 22 October. These telegrams were introduced in evidence and attached to the record of trial (Def. Exs. A,B,C). Each of them referred to his wife's illness and accused's intention to return to his proper station.

As he could not leave his wife, the Red Cross telephoned him on Saturday (date not specified) and informed him that he had been granted 7 days leave (R.10). A telegram dated 6 November from Los Angeles Chapter, American Red Cross, to American Red Cross Field Director, 90th Division, was received in evidence and attached to the record as Defense Exhibit D.

A signed statement of Dr. C. R. Davis, Osteopathic physician of Los Angeles, California, who had attended accused's wife during her illness, was received in evidence and attached to the record as Defense Exhibit E.

Upon cross-examination by prosecution, accused stated that on or about 17 October a Mrs. Cahill with the American Red Cross in Los Angeles telephoned him to come to her office, at which time she told him his leave had been extended to seven days, but did not show him or give him any written authorization. Through Mrs. Cahill of American Red Cross he made a request for a further extension of leave beyond the 7 days which had been granted, and Mrs. Cahill told him she would contact the 358th Infantry if possible. He did not receive any reply to this request. He realized he had made a mistake in not contacting the 358th Infantry himself. Upon reflection, he remembered sending a fourth telegram requesting an extension of leave and thought it was sent on 18 October. His wife was trying to obtain that telegram. He returned to his organization 24 October as his wife and children had improved. Except for an allotment of $250 per month, it was lack of foresight on his part, in failing to make arrangements in case of illness in his family. Accused's father lives in Los Angeles and his wife's widowed mother lives in Hollywood. They constituted the only living relatives of both him and his wife. His wife's mother works and was of little or no assistance during his wife's illness.

5. To recapitulate briefly, the evidence shows that accused departed from his organization, then stationed at Camp Granite, California, 9 October 1943, on an authorized three-day pass, and proceeded to Banning, California, where he met his wife. They stayed the night of the 9th at the Del Paso Hotel. His wife was pregnant, and in the afternoon of 10 October she became ill and started to hemorrhage. By midnight of the 10th her condition was worse and he felt impelled to remain with her throughout the night. Early Monday morning of the 11th he sent a telegram to Colonel J. V. Thompson, his regimental commander, reading as follows:

"Unavoidably detained wife very ill report back Tuesday a.m.
Lt. Gustafson."

Upon returning to his room, his wife's condition appeared to be serious, whereupon he hired a cab, took her to their home in Los Angeles and called a doctor. When the doctor arrived he told accused that his wife should receive immediate attention as she was in danger of having a miscarriage. Her condition became sufficiently serious to necessitate an operation (R.9) (Def. Ex. D and E). Dr. G. R. Davis, Osteopathic physician, Los Angeles, California, treated her from 11 October to 22 October when he made his last call and found her improved to the extent that he deemed no further treatment necessary and discharged her. He had recommended to accused that he remain with his wife until she was out of danger (Ex. E). On 17 October the American Red Cross informed him that his authorized leave had been extended to seven days. On that same day (Sunday) accused again wired Colonel Thompson that his wife was greatly improved and that he would report to his station on Thursday (21st) (Ex. B). A third wire was sent to Lieutenant Paul McNutt, 357th Infantry, Camp Granite, California, 22 October, in which accused stated his wife had improved and that he would return on Saturday (23rd) (Ex. C). Dr.

Davis did not disclose that he had performed an operation upon accused's wife, but the telegram from Los Angeles Chapter, American Red Cross to Red Cross Field Director, 90th Division, dated November 6 (Ex. D) implies that such an operation was performed by him. This telegram also indicates that accused's children had been ill from colds.

6. In addition to accused's plea of guilty, the consequences of which were fully explained, sufficient independent competent evidence was adduced at the trial to prove that accused was absent without proper leave as alleged in the Specification of the Charge upon which he was tried.

It is also clear that accused's wife was ill between 11 October and 22 October to such an extent as to require an operation and continued medical attention; that she was not discharged from the attending physician's care until 22 October; that accused's children were ill with colds during this period; that neither he nor his wife had any relatives who could assist in caring for his wife and children; and that he was unable to find anyone whom he might employ for this purpose.

The whole course of accused's conduct from the time he first discovered his wife's condition indicates a lack of judgment, first, in failing to deal directly with his commanding officer, and secondly, in not requesting sufficient extension of leave, instead of informing the military authorities at Camp Granite of the time he contemplated returning to his station.

He left Los Angeles on Saturday, 23 October, and on 24 October caught up with his organization near Salome, Arizona, where it had moved for maneuvers.

It is true that accused by virtue of his apparent affection and devotion to his wife and children placed his personal interest in their welfare above that of public service. In this he erred, as he well knew or should have known. Yet the facts and circumstances which prompted his action in this respect, from a purely humanitarian point of view, are extremely extenuating.

Accused's prior record of service consisting of approximately six years as an enlisted man is excellent.

Accompanying the record of trial is a petition signed by defense counsel and five of the eleven members of the court before which accused was tried, requesting that the sentence to dismissal be suspended during the pleasure of the President. The petition is premised upon accused's

previous exemplary military record and the hardships which will be imposed upon his wife and children who are entirely dependent upon his Army pay for support.

7. War Department records show that accused is 33 years of age. He graduated from high school and pursued a commercial course for one year at Minneapolis Business College. He enlisted in the regular Army 29 January 1936, and attained the grade of private first class. He attended Infantry Officer Candidate School, Fort Benning, Georgia, from which he was commissioned a temporary second lieutenant, Infantry, Army of the United States, 8 May 1943. In recommending accused for Officer Candidate School, his commanding officer stated that his character was excellent and that he had demonstrated outstanding qualities of leadership.

8. The court was legally consituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

Thomas N. Jaffey, Judge Advocate.
John Wannemacher, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 1 JAN 1944 - 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 Gordon L. Gustafson (0-1319382), 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. In view of the extenuating circumstances in this case, the previous good record of the accused, and the recommendation of clemency on the part of five members of the court, 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

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

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 76, 9 Feb 1944)

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

SPJGN
CM 244426

30 NOV 1943

UNITED STATES	)	93RD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Clipper, California,
Second Lieutenant DONALD	)	5 November 1943. Dismissal.
F. MACLEOD (0-1633381),	)	
Signal Corps.	)	

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 61st Article of War.

Specification: In that 2d Lt Donald F. MacLeod, 93rd Signal Company, did, without proper leave, absent himself from his station at Camp Clipper, California, from about 0600, 9 October 1943 to about 1630, 14 October 1943.

He pleaded guilty to and was found guilty of the Charge and the Specification 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 at such place as the reviewing authority might direct for a period of five years. The reviewing authority approved only so much of the sentence as provides for dismissal and forfeitures, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was missing from his organization at reveille 9 October 1943; that he did not return for duty until the afternoon of 14 October 1943; and that his absence was unauthorized (R. 3-4).

4. The defense offered no evidence. The rights of the accused having been explained to him, he elected to remain silent (R. 5).

5. Not only the accused's pleas of guilty, but the evidence adduced, as well, sustain the findings of the court.

6. War Department records show that the accused is 24 years of age with enlisted service from 3 May 1941, terminated by honorable discharge 2 June 1942; and that he was temporarily appointed second lieutenant, A.U.S., 3 June 1943.

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

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin R. Cooper, Judge Advocate

SPJGN
CM 244426

1st Ind.

War Department, J.A.G.O., 10 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 Second Lieutenant Donald F. MacLeod (O-1633381), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 22, 11 Jan 1944)

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

SPJGQ
CM 244427

29 NOV 1943

UNITED STATES	)	10TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Hale, Colorado, 8 November 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant NEAL J. MCCARTHY (O-1297067), Infantry.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that 2ND LT. NEAL J. McCARTHY, Company "I", 85th Infantry, did without proper leave, absent himself from his station at Camp Hale, Colorado from about 6 October 1943 to about 22 October 1943.

He pleaded not guilty to and was found guilty of the Charge and its Specification. There was evidence of one previous conviction of a violation of the 61st Article of War for being absent without proper leave from 8 January 1943 to 22 January 1943. For this offense the reviewing authority approved a sentence that he be restricted to the limits of this Post for three months and forfeit $50 per month of his pay for a like period. He was sentenced to be dismissed the service and forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The competent evidence for the prosecution showed that the accused was a member of Company I, 85th Infantry, stationed at Camp Hale, Colorado, and on 6 October 1943 became absent from that

station without proper leave by failing to return upon the expiration of a 15 day leave at 2400 5 October 1943 (R. 7). An entry to that effect was made on the morning report by the first sergeant of the Company (R. 8), and initialed by the commanding officer (R. 9). The accused remained absent without proper leave until 22 October 1943 when he returned to military control at Camp Atterbury, Indiana, and rejoined his organization 28 October 1943 (R. 9).

4. The accused after having had explained to him his rights regarding giving testimony elected to remain silent.

5. The accused is charged with having been absent from his station at Camp Hale, Colorado, without proper leave from about 6 October 1943 to about 22 October 1943. It was clearly shown by the evidence that he was absent during that period of time and that he had no authority for being so absent and the conclusion is, therefore, inevitable that the evidence was legally sufficient to sustain the finding of guilty of the Charge and Specification.

6. The record shows the accused to be 22½ years of age. He graduated from elementary school and attended high school for three and one-half years at Bedford, Indiana. He had no civilian occupation, enlisting in the Army 1 July 1940 before completing high school. He served two years and three months as an enlisted man, most of that time as a Sergeant-Instructor in the use and firing of the rifle. He was commissioned a second lieutenant 17 October 1942.

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

William A. Lounds, Judge Advocate

Carle Shelburn, Judge Advocate

Herbert B. Fedeman, Judge Advocate

1st Ind.

9 DEC 1943

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Neal J. McCarthy (0-1297067), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specification thereunder, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be 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-Dft. ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 48, 1 Feb 1944)

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

SPJGN
CM 244434

4 DEC 1943

UNITED STATES v. First Lieutenant FREEMAN H. BOKENKAMP (O-1291771), 38th Infantry Training Battalion.	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Camp Croft, South Carolina, 10 November 1943. Dismissal, total forfeitures and confinement for one (1) year.

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 95th Article of War.

Specification 1: In that First Lieutenant Freeman H. Bokenkamp, Company "B", 38th Infantry Training Battalion, Camp Croft, South Carolina, did, at Spartanburg, South Carolina, on or about 22 September 1943, with intent to defraud, wrongfully make and utter to the Pecan Grove Night Club, Spartanburg, South Carolina, a certain check, in words and figures as follows, to wit:

THE CITIZENS BANK AND TRUST COMPANY
Southern Pines, N. C. Sept 22 1943 No. ____

Pay to the
Order of Cash $22.00

Twenty two & no/100 Dollars

/s/ Freeman H. Bokenkamp
1st Lt 01291771

and by means thereof, did fraudulently obtain from the said Pecan Grove Night Club, currency of the United States of the value of about $22.00, he, the said First Lieutenant Freeman H. Bokenkamp, then well knowing that he did not have, and not intending that he should have, sufficient funds in the said CITIZENS BANK AND TRUST COMPANY of Southern Pines, North Carolina, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated September 1943, payable to the order of Cash, made and uttered to the Pecan Grove Night Club, Spartanburg, South Carolina, and fraudulently obtaining thereby $10.00.

Specification 3: Same form as Specification 1, but alleging check dated 11 October 1943, payable to the order of Cash, made and uttered to The Elite, Inc., Spartanburg, South Carolina, and fraudulently obtaining thereby $10.00.

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

Specification: In that First Lieutenant Freeman H. Bokenkamp, Company "B", 38th Infantry Training Battalion, Camp Croft, South Carolina, being indebted to THE CITIZENS BANK AND TRUST COMPANY of Southern Pines, North Carolina, in the sum of $275.00 for a loan in that amount, which amount became due and payable on or about 3 October 1943, did, at Camp Croft, South Carolina, from about 3 October 1943 to about 27 October 1943, dishonorably fail and neglect to pay said debt.

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

Specification: In that First Lieutenant Freeman H. Bokenkamp, Company "B", 38th Infantry Training Battalion, Camp Croft, South Carolina, did, without proper leave, absent himself from his organization at Camp Croft, South Carolina, from about 30 October 1943 to about 1 November 1943.

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

Specification: In that First Lieutenant Freeman H. Bokenkamp, Company "B", 38th Infantry Training Battalion, Camp Croft, South Carolina, having been duly placed in arrest in quarters in Officers Quarters, 38th Infantry Training Battalion, Camp Croft, South Carolina, on or about 1000, 30 October 1943, did, at Camp Croft, South Carolina on or about 1630, 30 October 1943, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that First Lieutenant Freeman H. Bokenkamp, Company "B", 38th Infantry Training Battalion, Camp Croft, South Carolina, did, without proper leave, absent himself from his organization at Camp Croft, South Carolina, from about 6 November 1943 to about 7 November 1943.

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

Specification: In that First Lieutenant Freeman H. Bokenkamp, Company "B", 38th Infantry Training Battalion, Camp Croft, South Carolina, having been duly placed in arrest in quarters, in Officers Quarters, 38th Infantry Training Battalion, Camp Croft, South Carolina, on or about 1 November 1943, did, at Camp Croft, South Carolina, on or about 2300, 6 November 1943, break his said arrest before he was set at liberty by proper authority.

The accused pleaded not guilty to Charge I and its Specifications but guilty to all other Charges and Specifications and was found guilty of all Charges and Specifications. Evidence of one previous conviction for wrongfully borrowing from an enlisted man and dishonorably failing and neglecting to pay said debts in violation of Article of War 96 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, at such place as the reviewing authority may direct for a period of one (1) year. 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 22 September 1943 the accused drew a $22.00 check on the Citizens Bank and Trust Company, Southern Pines, North Carolina, and cashed it at the Pecan Grove Night Club, Spartanburg, South Carolina, for which he received services and cash in undisclosed amounts but aggregating in value the amount of the check. About a week later he similarly cashed a $10.00 check for similar items at the same place. Both of these checks were dishonored for "insufficient funds" when they were presented to the bank for payment but the accused had redeemed them with cash several weeks before trial and prior to such time the accused had offered to redeem them by giving a check upon his father's account in a bank at Houston, Texas, which had been refused. On 11 October 1943 the accused cashed a $10.00 check drawn by him on the same bank at The Elite Restaurant, Spartanburg, South Carolina, for which he received the money and which was also dishonored by the bank for "insufficient funds." This check had not been redeemed at the time of trial (R. 9-12, 12-14, 14-15; Exs. "P-1 through 3").

The testimony of the president of the bank upon which the checks were drawn identified and established the veracity of the ledger sheets of the accused's account, which were admitted into evidence, and show numerous service charges made thereto during August through October 1943, for checks dishonored for "insufficient funds". The account on 22 September 1943 showed a balance of only $3.57, which without other deposit was depleted by

6 October 1943 by the service charges. The account had been created on 8 July 1943 when the accused secured a loan of $250.00 from the bank of which he deposited $80.00 and thereafter authorized the deposit of his pay therein as partial security for the loan. However, the pay checks for July and August only were so deposited before the accused discontinued the deposit thereof in the bank. The loan was renewed on 3 August 1943 and on 31 August 1943 it was again renewed in an increased amount of $275.00 payable in three monthly installments commencing on 3 October 1943. The first installment was not paid as agreed and the bank, in accordance with the provisions of the note, declared the entire amount due. The accused by telephone advised the bank that he was attempting to secure a loan from his father to liquidate the debt but the bank, hearing nothing further from him, called the matter to the attention of his commanding officer. The loan was still unpaid on the day of trial (R. 16-23; Exs. "P-4 - 13" inclusive).

On 30 October 1943, the accused was placed in arrest in quarters from which he was permitted to absent himself only for necessary exercise. At about 1630 o'clock on the same day the organization's adjutant was unable to find him in his quarters and shortly before the accused had told another officer that he was "taking off". He was not seen in his quarters thereafter until 1 November 1943. Subsequent to his return his arrest was continued with the officers of the guard being ordered to check upon him every six hours and on 6 November 1943 about 2230 o'clock his absence was ascertained by the officer of the guard then on duty and the succeeding officer of the guard found that he had returned before 0400 o'clock on 7 November 1943. A similar absence was so ascertained by like officers from about 2100 o'clock on 7 November 1943 until about 0700 o'clock on 8 November 1943 (R. 23-24, 24-25, 25, 26, 27, 28-29).

4. The evidence for the defense shows from the testimony of the accused, elicited after full explanation of his rights as a witness, that the accused, notwithstanding his disavowal of a fraudulent intent in cashing the checks, knew that he had written them upon an inadequate account in the unmaterialized hope of securing funds from his father or friends with which to redeem them. He kept no record of withdrawals except in his mind and suggested without further proof that he and his father had a joint bank account in a bank at Houston, Texas, upon which he was authorized to draw, but did not. He asserted that he had originally borrowed $175.00 from the bank in the preceding May which he had promptly repaid and that he did not discontinue depositing his pay checks in the bank until he was fined $100.00 per month by a prior court-martial sentence. However, upon cross-examination the accused admitted that he was unauthorized to draw checks upon the bank in Houston, Texas, unless he advised his father in advance, that some of his unpaid checks had been paid by him from funds acquired by cashing other checks which were subsequently dishonored and that he had written checks aggregating about $300.00 which were unpaid and which he was attempting to pay by securing a loan from his father. He admitted being absent without leave and breach of his arrest as shown by the evidence for the prosecution, explaining that on two of the occasions he had gone to a hotel in a nearby town to secure privacy while making long distance telephone calls in an effort to secure funds to liquidate his indebtedness and pay the unredeemed checks (R. 29-35).

5. Specifications 1 through 3, Charge I, allege that the accused at designated places and specified times with intent to defraud wrongfully made and uttered three checks in specified amounts upon a named bank and fraudulently received therefor currency when he then well knew that he did not have, and not intending that he should have, sufficient funds on deposit at said bank to pay the checks. The offenses are alleged as violations of Article of War 95 and by the following applicable authority are so condemmed:

"Instances of violation of this article (95) 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 evidence is conclusive that the checks, among others, were written and cashed by the accused upon a bank account in which he knew the funds were insufficient to pay them. The period of time over which they were written, the unreplenished and protractedly depleted condition of the account impel the conclusion that the accused intended that funds would not be available to pay them as do, also, his asserted attempts to belatedly redeem them. These facts are in effect also admitted by the accused. Consequently, the findings of guilty of Charge I and its Specifications are fully warranted.

6. The Specification, Charge II, alleges that the accused from about 3 October 1943 to about 27 October 1943 dishonorably failed and neglected to pay a described debt to a named creditor. The offense is alleged as a violation of Article of War 96 and to it the accused pled guilty. To be guilty of the offense as alleged, the accused must be shown to have had a deceitful or a fraudulent design to evade payment (CM 220760 and CM 221833 (1942) Bull. JAG (1942) Vol. 1, sec. 453 (13) pp. 22 and 106).

The testimony of the president of the creditor bank, the evidence shown by accused's bank statements and his discontinuance of the creditor bank as the depository of his monthly pay checks support the accused's plea of guilty and supplies the necessary deceitful and fraudulent design on the part of the accused to evade payment. The evidence is, therefore, sufficient beyond a reasonable doubt to support the findings of guilty of Charge II and its Specification.

7. The Specifications, Charges III, IV and Additional Charges I and II, allege that the accused on two different specified occasions absented himself without leave for certain periods and in so doing also broke his arrest. Such alleged offenses are defined in paragraphs 132 and 139a of the Manual for Courts-Martial, 1928.

The evidence, from the testimony of officers fully acquainted with the facts, is conclusive that the accused was placed in arrest and while unrelieved therefrom broke the same and absented himself without leave as alleged. Such evidence supports the accused's pleas of guilty

and warrants the findings of guilty of Charges III, IV and Additional Charges I and II and their respective Specifications.

8. The accused is about 26 years old. The War Department records show that he has had enlisted service from 26 January 1942 until 28 August 1942 when he was commissioned a second lieutenant upon completion of Officers Candidate School, that he has had active duty as an officer since the latter date and that he was promoted to first lieutenant on 26 March 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61, 69 or 96 and 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.

SPJGN
CM 244434

1st Ind.

War Department, J.A.G.O., 20 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 First Lieutenant Freeman H. Bokenkamp (0-1291771), 38th Infantry Training Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified 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.

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 forfeitures and confinement remitted. G.C.M.O. 42, 27 Jan 1944)

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

23 DEC 1943

SPJGH
CM 244486

UNITED STATES	)	MOBILE AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Municipal Airport, Nashville, Tennessee, 1 and 2 November 1943. Dismissal.
Second Lieutenant HAL B. GAMBLE (0-670877), Air Corps.	)	

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

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

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

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

Specifications 1-13: (Findings of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Hal B. Gamble, Air Corps, 70th Ferrying Squadron, Municipal Airport, Nashville, Tennessee, with intent to defraud, did, at or near, Municipal Airport, Nashville, Tennessee, on or about 22 September 1943, unlawfully pretend to Second Lieutenant Louis H. McKenzie, Air Corps, that he had an account with the Commerce Union Bank, Nashville, Tennessee, to satisfy, in full, his check drawn on said Bank in the sum of $10.00, well knowing that said pretenses were false, and by means thereof, did fraudulently obtain from the said Lieutenant McKenzie the sum of $10.00, lawful money of the United States.

Specification 3: Same as Specification 2 except that it alleges the date as 23 September 1943 and the amount as $20.

Specification 4: In that Second Lieutenant Hal B. Gamble, Air Corps, 70th Ferrying Squadron, Municipal Airport, Nashville, Tennessee, with intent to defraud, did, at or near Nashville, Tennessee, on or about 25 August 1943, unlawfully pretend to the Dixie Drive It Yourself System, Nashville, Tennessee, that he had sufficient funds in his account with the First National Bank of Dallas, Texas to satisfy, in full, his check drawn on said bank in the sum of $18.56, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Dixie Drive It Yourself System about $10.66 in services and about $7.90, lawful money of the United States.

Specification 5: Same as Specification 4 except that it alleges that accused fraudulently obtained merchandise of the value of $10.95 from Joseph Frank and Son on 25 August 1943.

Specification 6: Same as Specification 4 except that it alleges that accused fraudulently obtained merchandise of the value of $6.10 from Joseph Frank and Son on 25 August 1943.

Specification 7: Same as Specification 4 except that it alleges that accused fraudulently obtained services of the value of $3 from Clarkston Hotel on 24 August 1943.

Specification 8: Same as Specification 4 except that it alleges that accused fraudulently obtained $10 from Clarkston Hotel on 24 August 1943.

Specification 9: Same as Specification 4 except that it alleges that accused fraudulently obtained $10 from Clarkston Hotel on 21 August 1943.

Specification 10: Same as Specification 4 except that it alleges that accused fraudulently obtained $10 from Clarkston Hotel on 25 August 1943.

Specification 11: In that Second Lieutenant Hal B. Gamble, Air Corps, 70th Ferrying Squadron, Municipal Airport, Nashville, Tennessee, being indebted to Dixie Drive It Yourself System, Nashville, Tennessee, in the sum of $18.56 for money furnished, and for services rendered, which amount became due and payable on or about 25 August 1943, did, at or near Nashville, Tennessee from about 25 August 1943 to 9 October 1943, dishonorably fail and neglect to pay said debt.

Specification 12: Same as Specification 11 except that it alleges a debt of $10.95 to Joseph Frank and Son for merchandise.

Specification 13: Same as Specification 11 except that it alleges a debt of $6.10 to Joseph Frank and Son for merchandise.

He pleaded not guilty to Charge I and all Specifications thereunder, and guilty to Charge II and all Specifications thereunder. He was found not guilty of Charge I, of all Specifications thereunder, and of Specification 1, Charge II, and guilty of all other Specifications, Charge II and of Charge II. 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 pertinent part is as follows:

a. Specifications 4-10, Charge II: It was stipulated (Ex. A) that a representative of the First National Bank of Dallas, Texas, would testify that the account of accused in that bank was closed on 8 July 1943 by applying the balance of $2.50 to a past due note; that no deposits were made by accused thereafter; that the checks referred to in Specifications 4-10, Charge II were promptly returned to the payees thereof marked "Account Closed"; and that the signatures on the seven checks were compared with the authorized signature on file for payment of items against the account of accused and found identical. It was also stipulated (Ex. G) that these checks were made and uttered by accused, whose genuine signature appears thereon. It was stipulated (Ex. C) that Mr. O. F. Frye, secretary of the "Dixie System, Nashville Branch", would testify that the records showed that accused presented a check for $18.56 dated 25 August 1943 drawn on First National Bank of Dallas; that the check was presented in payment for rental of an automobile on 22 August; that after the check was deposited to the credit of the Dixie System it was returned marked "Account Closed"; and that about 28 August accused notified the Dixie System that his bank account had been closed.. Mr. L. L. Wright, credit manager of "Joseph Frank & Sons, Inc.", identified photostatic copies (Ex. I) of the checks referred to in Specifications 5 and 6, Charge II. About the latter part of August this company received a letter (Ex. H) from accused, stating that he had closed his bank account since issuing the two checks and that he was not sure whether the checks had cleared. Mr. Wright next saw the checks when they were returned by the bank marked "Account Closed". It was stipulated (Ex. D) that Mr. Charles H. Cunningham, co-owner of Clarkston Hotel, would testify that the records showed that accused presented to the hotel

four checks as referred to in Specifications 7-10, Charge II; that the $3 check was issued in payment for occupancy of a room; that the three $10 checks were issued for cash; that the four checks were returned to the hotel in due course marked "Account Closed"; and that the debts represented by the checks remained unpaid (R. 6-1 to 6-1C, 6-3 to 6-3B, 6-4 to 6-4C, 6-7 to 6-7A, and 6-8 to 6-10).

b. Specifications 2 and 3, Charge II: It was stipulated (Ex. B) that Mr. J. R. Kellam, Jr., vice-president and cashier of Commerce Union Bank, Nashville, Tennessee, would testify that the records showed that accused had never made a deposit in that bank; that no account had ever been opened in the name of accused; and that the checks referred to in these Specifications were promptly returned to the payee marked "No Such Account". It was also stipulated (Ex. G) that these checks were made and uttered by accused, whose genuine signature appears thereon. Second Lieutenant Louis H. McKenzie identified two checks (Ex. J) which he received from accused, one for $10 dated 22 September and one for $20 dated 23 September, both payable to cash and drawn on Commerce Union Bank. Lieutenant McKenzie acquired both checks in a poker game in which he and accused were playing. The checks "came back" and the debts they represented were not paid by accused (R. 6-2 to 6-2B, 6-7 to 6-7A and 6-10 to 6-16).

c. Specifications 11-13, Charge II: It was stipulated (Ex. C) that Mr. Frye of the "Dixie System" would testify that he personally telephoned accused about 10 September and notified him that the check referred to in Specification 4, Charge II had been returned marked "Account Closed"; that accused thereupon promised to come in and pay the check; and that accused had not thereafter communicated with the Dixie System nor paid the debt. In his letter to Joseph Frank and Son (Ex. H) accused stated that if the checks issued to that company should be returned he would "take care of them at once". Mr. Wright, the credit manager, called accused about these checks and accused stated that he would come in on 3 September and take them up. Accused did not come in to pay the checks. On 10 September, Mr. Wright wrote to accused and called attention to the promise to pay the checks, but received no answer to his letter (R. 6-3A to 6-3B and 6-9 to 6-10).

d. Beginning about the middle of June 1943 Lieutenant Colonel Maurice A. Marrs, commanding officer of the organization of accused, and Captain Bernard E. Mevers, executive officer, warned accused repeatedly about issuing worthless checks and not paying them (R. 6-16 to 6-23).

4. Accused testified that he had been in the Army since March 1942, went in voluntarily and likes Army life. In the past, when his checks were "disregarded by the bank for some reason or other", he had been able to raise funds to cover them. He is not married and his only obligations other than these checks are his personal living expenses. He realizes that he has done the "wrong thing altogether", and does not want to be "dishonorably discharged". He stated that in drawing these checks he did not intend to defraud, thought he had enough money in the bank and thought his mother would lend him the money. He contacted her but she was not able to advance him any money. As to the checks lost in a poker game, he testified that he lost his available cash (about $50), was "a little bit upset", and thought that if he could get a "loan or a stake" he could win back the cash he had lost (R. 6-23 to 6-26).

On cross-examination accused testified that when he drew the checks referred to in Specifications 4-10, he knew that he had insufficient funds to pay them, but did not know that his account had been closed on 8 July. He had not received a bank statement for the month of July, but kept stubs of his checks. As to the checks referred to in Specifications 2 and 3, he stated that he had never opened an account in the Commerce Union Bank, and was aware of that fact when he drew the checks. He had intended to open an account in that bank, and acquired a check book, but did not make a deposit because he had no funds available. He drew worthless checks after Colonel Marrs had warned him of the consequences. Accused did not pay any of the debts set forth in the Specifications, nor any part of them, although he had drawn pay for July, August and September. He had paid some other debts, and did not continue any gambling activities. He lost most of his Army pay in gambling. He promised "something" to Mr. Wright of "Joseph Frank & Sons" but had not yet fulfilled the promise (R. 6-28 to 6-31).

5. The evidence shows and the pleas of guilty admit that accused fraudulently obtained money, merchandise and services, as alleged in Specifications 2-10, Charge II, by issuing and uttering checks which he drew on banks in which he either had no account or insufficient funds, and that at the time he knew that the funds were not on deposit to pay the checks. Although accused testified on direct examination that in drawing these checks he did not intend to defraud and thought that he had money in the bank, yet he freely and clearly testified on cross-examination that he knew when he drew the checks that he either had no account or had insufficient funds. His testimony, taken as a whole, is not in conflict with the pleas of guilty. The intent to defraud is inferred from his acts and his admitted knowledge of the status of his bank account.

The evidence further shows and the pleas of guilty admit that accused, after having issued three worthless checks on 25 August, dishonorably failed to pay them, as alleged in Specifications 11-13, Charge II, although he had promised so to do after being advised that the checks had been returned.

6. The court permitted Colonel Marrs and Captain Mevers to testify that after accused reported to their organization in June 1943, they received many letters and complaints about worthless checks drawn by him (R. 6-16 to 6-23). This evidence was clearly inadmissible because of its hearsay character and because it related to offenses other than those alleged in the Specifications. However, in view of the uncontradicted and clear competent evidence in support of the findings of guilty, and in view of the pleas of guilty, the Board of Review is of the opinion that the admission of this incompetent evidence did not injuriously affect the substantial rights of accused.

7. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 12 May 1942; appointed second lieutenant, Army of the United States, and active duty, 14 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 96th Article of War.

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

Judson S. Clements, Judge Advocate

1st Ind.

War Department, J.A.G.O., 5 JAN 1944 - 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 Hal B. Gamble (0-670877), 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 fraudulently obtained money, merchandise and services of a total value of $98.61 by drawing nine checks on banks in which he knew he either had no account or insufficient funds (Specs. 2-10, Chg. II), and dishonorably failed to pay three of the checks aggregating $35.61 (Specs. 11-13, Chg. II). He was found not guilty of Charge I and all Specifications thereunder and of Specification 1, Charge II. Accused had been repeatedly warned by superior officers about issuing worthless checks and not paying them. Although he promised the holders of the three checks aggregating $35.61 that he would come in and pay them, he failed to do so. 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

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

3 Incls.
Incl. 1-Record of trial.
Incl. 2-Drft. of ltr. for sig. S/W.
Incl. 3-Form of action.

(Sentence confirmed. G.C.M.O. 99, 10 Mar 1944)

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

(309)

SPJGK
CM 244490

3 APR 1944

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Maxwell Field, Alabama, 16,17, 18,20,21 September 1943. Dishonorable discharge and confinement for thirty (30) years. Disciplinary Barracks.
Aviation Cadet ROGER C. PEACE, JR. (14105155), Squadron M-6, Class 43-J, Maxwell Field, Alabama.	)	

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

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

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

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

Specification 1: In that Aviation Cadet Charles Roger Peace, Squadron M-6, Class 43-J, Maxwell Field, Alabama, did, at the Jefferson Davis Hotel, Montgomery, Alabama, on or about April 4th, 1943, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Gladys Louise Talley.

Upon motion by the defense counsel, the court inquired into the mental responsibility of accused and received evidence on that issue (R. 4-152; Exs. 1-13). By majority vote the court found that accused was sane at the time of the commission of the offense and was "in the proper mental condition * * * to undergo trial" (R.152,251), and the court rejected the plea of insanity (R.152). Further reference is made hereinafter to the issue of insanity. After announcement by the court of its action upon the plea of insanity and after arraignment, accused pleaded not guilty to the Charge and Specification. Three-fourths of the members present concurring, he was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members present concurring, accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due,

and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, reduced the period of confinement to 30 years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. Summary of the evidence.

(a) For the prosecution.

The prosecuting witness was Mrs. Joel D. Talley. The substance of her testimony is as follows: From 2 to 4 April 1943 she was temporarily in Montgomery, Alabama. Her husband was in training at Maxwell Field. On Saturday, 3 April, he came to Montgomery and stayed overnight with his wife, whom he had not seen for a month, in room 803 of the Jefferson Davis Hotel. On both Saturday and Sunday some of her husband's friends dropped into the room and had some drinks. Mrs. Talley had nothing to drink (R.182-186).

Talley left for the field at about 5:50 p.m., 4 April, after which his wife began packing, as she was taking a 6:45 p.m. train out of Montgomery. About six o'clock there was a knock at the door. She opened the door, and accused, who was a stranger to her and who she thought had come to the wrong room, walked in and bolted the door (R. 187-188, 205-206). Mrs. Talley asked him to unbolt the door and to leave; in fact she "begged him to get out" (R.188,197,206,208). Accused said that he was a cadet and wanted a drink. So far as Mrs. Talley could tell, he appeared sober. She told him that she had no liquor (R.188).

Accused then put his arms around Mrs. Talley. She pushed him away, saying that she was busy and did not feel like entertaining him (R.188,197). Again he put his arms around her. She told him to leave and tried unsuccessfully to get out of his grasp (R.189,208). He said that he just wanted to hold her close (R.189). He dragged her to the bed and pushed her onto it so that she was on her back. He lay beside her, put an arm around her, and tried to kiss and hug her (R.189-191,197). She asked him to let her go and told him that she was a cadet's wife and that if he had any honor he would "get out now" (R.189,190). He said that he did not want to hurt her, and he repeated, "'Damn it, darling, I just want to hold you close'" (R.190,198).

Mrs. Talley struggled against accused's advances. She screamed and kicked and bit him, but could not get away from his embrace (R.190,191, 198,205). When she tried to turn her head back and forth to keep him from kissing her, he held her head with one hand (R.190).

Accused pulled up Mrs. Talley's skirt above her waist, tore off her "panties", and dropped them on the floor (R.190,191,198,199). During the struggle her hose were torn and a necklace and bracelet which she

wore were broken (R.191,192,200).

Accused removed his trousers and shorts and put his hands on Mrs. Talley's legs and body (R.191,198). Hoping to get away from him and "outwit" him, Mrs. Talley asked him to let her get "some protection" out of her suitcase, but he said that she need not "worry about that", as he would "withdraw" (R.192,203,209). Also in her attempt to get away from him she asked him to get her a drink and offered him a drink (R.209).

At length she was able to reach over and pick up the telephone, located on a writing desk near the bed; but accused jumped up, wrested the telephone from her, put it down, threw her back on the bed, and placed himself beside her (R.158,159,191,192; Exs. A,E). She held her legs together and continued to struggle. He rolled over on top of her and placed his erect "male organ" against her organ (R.192). In the course of her resistance she succeeded in getting "around the end of the bed to the door", which she unbolted. He was "right in back" of her and told her that she would "ruin him with the Air Corps" if she made a disturbance, to which she replied that she did not care (R.193).

Accused grabbed Mrs. Talley, placed his hand over her mouth, bolted the door, and dragged her back toward the bed. She grasped the end of the bed and another struggle ensued during which the bed was moved out of place. Eventually, accused broke her hold on the bed, pulled her around, and threw her down on the bed, her legs apart. He got on top of her, and as she kept moving around to keep him off, he told her that he would make her lie still. His erect "male organ" was against her, and she grabbed it in order to prevent it from "getting into" her. She tried to "hold him away" from her. He pulled her hand away. This form of resistance recurred several times. She also attempted to slide off the end of the bed (R.193,194,203). She used "every means at her disposal" to prevent entry (R.208). Despite this there was a penetration and entry of her sexual organ by accused's male organ, although the entry was not "complete" (R.194,203,207,208). She did not know whether accused had an emission (R.203).

In response to a knock, accused jumped up and opened the door. The house detective appeared and asked what was going on. Mrs. Talley exclaimed, "'Oh, help'", and asked him to come in (R.194,204).

Edward O. Ryals, the house detective, testified that shortly after 6 p.m. he heard a "disturbance" in room 803 (R.165,166). He listened at the door for a few minutes. He heard voices and sounds like fighting or scuffling. It sounded as though something cut off the woman's voice when she tried to speak. He also heard "a curse word or so" (R.166,171). Then he went downstairs to the office (R.166).

Mrs. Alice O'Neal, the telephone operator at the Jefferson Davis Hotel, testified that shortly before the arrival of Ryals at the office, the signal flashed from room 803. The operator made the connection and heard a woman scream. Then the connection was broken (R.163,164). When Ryals arrived, Mrs. O'Neal told him what had occurred (R.164,166).

After Ryals had seen Mrs. O'Neal and the assistant manager, he returned to room 803, where he heard similar noises (R.166,174,178,179). He also heard the doorknob rattle and heard a sound "like a lady's rasping breathing through the door - like someone was exhausted or something like that" (R.166). He also heard someone say "Help" in a weak voice (R.166,175). Then he knocked on the door and announced who he was. Accused partially opened the door. Ryals pushed it open further, and Mrs. Talley, so exhausted that she could hardly stand up, came out of the room, and went across the hall to another room for a few moments (R.166,167,176,177,194).

In response to a question from Ryals, accused refused to make a statement. Accused "didn't have on his pants or shoes or his hat or anything" (R.167). He dressed, picked up a drink, and seated himself in a chair (R.167,180,214).

Summoned by Ryals, the assistant manager and two members of the Military Police soon arrived (R.167,168,179,211,212,213,214). Mrs. Talley told them that accused had "attacked her" (R.212), and that she intended to prefer charges (R.168,180). Accused asked her not to prefer charges, as it would ruin him with the Air Corps (R.168).

The witnesses described the condition of the room as follows: The room was in a state of disorder (R.180,214). The telephone table was out of place and the bed had been pulled away from the wall (R.167,181). The bed was "mussed up" (R.167,212,214). The beads of a string of pearls were scattered all over the floor and a broken bracelet lay on the bed (R.167, 180).

Mrs. Talley was crying and appeared very nervous and upset (R.168, 180,212,214). Her clothes were disheveled (R.180,214) and her hair mussed (R.167,212). Her skirt was wrinkled, her blouse torn and ripped, and her hose torn and "hanging down from her legs" (R.167,212). One of the straps to her slip was torn (R.212).

Accused suggested that some onions be procured for Mrs. Talley in order to help her crying (R.168,212,214). He again refused to tell what had happened (R.181). The witnesses all testified that accused was not drunk (R.167,180,213,214).

Mrs. Talley testified that she asked for a doctor and changed her clothes before his arrival (R.180,200,202). She testified further as

follows: She asked the doctor to paint an abrasion on her leg and asked him to determine, if possible, whether she would become pregnant. She did not ask him to make an examination for any other purpose and he did not make any examination. Not knowing the legal definition of rape, she told the doctor that she did not know whether accused had raped her. About two days later her arms and legs were bruised (R.202,203,206).

(b) Evidence for the defense.

At the request of accused, an unsworn statement previously made by accused was admitted in evidence as his statement (R.242,243; Ex. BB). Subsequently accused took the stand as a witness. It seems preferable to give the gist of his testimony, referring to the unsworn statement only insofar as it differs from or adds to his testimony in important aspects of the case. According to accused, he had been drinking during the day, and between 5:30 and 6 p.m. went to the room of a friend on the eighth floor of the hotel. His friend being out, he wandered down the hall, a drink in his hand. As he passed one of the rooms (undoubtedly room 803), he noticed a girl packing a suitcase. He greeted her "in a hilarious sort of way" and she seemed to return the greeting, although she suggested that he return to his post. Nevertheless, he entered the room, bolted the door, and helped her close the suitcase (R.244,248). They talked and he "had in mind persuading her to have intercourse" with him. They stood by the dresser and she held his hand. He sat on the bed and pulled her down with him (R.244). She said that he "shouldn't do that", but she was "passively agreeable" (R.248), "didn't seem to resist", and allowed him to kiss her. Gradually he leaned back on the bed and she lay beside him. He was "fondling her and playing around". He put his hand on her legs and kept kissing her, at the same time removing her step-ins. He arose, took off his trousers, shoes, and underwear, and returned to the bed. She grabbed his penis and told him that he could not have intercourse because she would become pregnant (R.244). He told her that he would withdraw in time. They began arguing and then he commenced tussling with her. She said she had a "rubber" in her suitcase, and when he arose to get it, she jumped up and told him to leave. Since she had permitted him to remove her step-ins and "play around", he did not think her serious about his leaving, and he told her there was no point in doing so (R.245,246).

He pulled her down on the bed again. She became angry and picked up the telephone. He put his hand over it and asked her whether she wanted to ruin him in the Air Corps. He tussled with her some more and "wrestled" with her (R.245,246). He did not recall being bitten by her (R.249). He tried to insert his penis in her (R.246). She did not want him to do so (R.247). There was a knock on the door. Accused opened it, and the house detective entered while Mrs. Talley went out (R.245).

Accused stated that he did not penetrate Mrs. Talley with his penis

(R.245) and did not intend to force her to have intercourse with him against her will, but merely tried to persuade her (R.249). He did not know that she was married (R.250).

In his unsworn statement, accused said that the bed was mussed when he arrived at the room. He did not bolt the door until after he saw that she liked him. She appeared to have had quite a bit to drink. Accused had been drinking "very much", but knew what he was doing. During the course of their struggles she screamed, and she also screamed at the time of her attempt to use the telephone. He admitted struggling with her, but denied tearing her clothing (Ex. BB).

Dr. Marion E. Irby, a witness for the defense, saw a uniformed man at the door of room 803 around 6 or 7 p.m. The door was open and the man was talking with a woman who was in the room. Dr. Irby had been drinking and was "feeling pretty good" (R.218-223). He spent the balance of the evening alone in room 801, next to 803, and heard no scream or call. However, he did hear conversation, but could not tell whether it was in the hall or the next room, and could not distinguish the words (R.219, 220,224,225).

Hiawatha H. Hamilton, a bellboy, saw accused at the door of room 803 at about 6 p.m., talking to a lady who was in the room. The door was partly open and accused was not pushing it (R.225,226,228,229,234). Hamilton entered room 801 with Dr. Irby and remained there a few moments, during which time he heard no noise, commotion, or cry (R.227,230). When he left Dr. Irby's room, he saw no one in the hall, and the door to room 803 was closed (R.227,230).

Dr. Carney G. Laslie, the house physician for the hotel, was summoned to room 803 (he was not certain of the number) at about 7 p.m., where he attended a woman of about twenty-five years of age. The woman was not drunk, appeared rational, was not excited, was not crying, and did not appear to have been crying (R.235-239). On cross-examination Dr. Laslie admitted having stated to the investigating officer that the woman was nervous (R.240).

Dr. Laslie was not certain whether the woman told him that a soldier had raped her or said that a soldier had attempted to rape her (R.235,237, 239). In any event, she told him that the man had pushed her around and taken off her "panties" and that she had begged him not to hurt her (R. 235,236,239). She told the doctor that she did not scream (R.239). Asked whether the boy had harmed her, she replied that there was "a little skinned place on her shin". Dr. Laslie painted this with iodine (R.235). He saw no other scratches, bruises, or indications of violence on her, but did not make a complete examination of her since she did not ask for one (R.235,236,238). She asked the doctor whether she might become pregnant, to which he answered, "'I don't know, I don't think so'" (R.236).

At her request he prescribed something for her nerves (R.239).

Called by the defense, the assistant manager of the hotel, who had testified for the prosecution, stated that Mrs. Talley told him that accused had tried to rape her (R.217).

A witness who saw accused at the guardhouse at about 8:30 or 9 p.m. testified that there were no scratches on him.

4. The record contains evidence sufficient to support the court's findings of guilty of rape in violation of Article of War 92. Without recapitulating the testimony, it is apparent that Mrs. Talley did not consent to intercourse and that throughout the whole proceeding she resisted and struggled against it. Had she been willing to engage in intercourse, she would not have picked up the telephone and screamed, nor would she have put up the continuous effort to thwart the accused's design. The torn clothing and the broken necklace and bracelet are not consistent with acquiescence. Even accused admitted that after what he considered a receptive mood, she refused to have intercourse and resisted, whereupon he tussled and wrestled with her.

Mrs. Talley testified that there was penetration, although the entry was not "complete". Any penetration, however slight, is sufficient, and emission is not necessary (M.C.M.,1928, par. 148 b). Efforts were made by the defense to impeach Mrs. Talley's testimony on the issue of penetration, by the introduction of statements made by her prior to the trial (R.209-211,242; Def. Exs. AA,CC). The statements were not necessarily inconsistent with her testimony, and even if they had been the court was privileged to believe what she said on the witness stand. It is not the function of the Board of Review to weigh the evidence except in a case where the President is the reviewing or confirming authority (M.C.M., 1928, p. 216).

5. As noted, the court heard evidence on the issue of insanity. The evidence discloses the following history: Accused was born on 20 September 1921 (Ex. 2). His mother and his maternal uncle spent a substantial period of time in a psychopathic hospital. Some first cousins of his mother's were neurotic and one of them died from chronic alcoholism (R.48). Accused's father is a business man of substance, who served an interim appointment in the United States Senate (R.104,105,112).

During his grammar school years, accused was headstrong and was insolent and insubordinate toward his teachers, resenting authority and discipline (R.105; Ex. 2). At about the age of 15, he began to drink to excess and to engage in promiscuous sexual activity (Ex. 1). In high school he became "somewhat uncontrollable", and his father sent him to a military school, from which, during his senior year, he was sent home

by the headmaster for reasons not disclosed to his father. Returning home one evening, his parents found a note from the boy saying that he had left home because they were too cruel. Eventually he was located in Chattanooga, returned to the school, and graduated (R.105,106). During the summer he worked as a reporter, and in the autumn of 1938 entered Washington and Lee University (R.106,110). There he was in trouble due to alcoholic sprees and inability to get along with his fellow students, and in February 1939 he wired his father that he had left college and was "going to make his own way" (R.106;Ex. 2). Apparently in the wire, he stated that he knew more than the professors and was wasting his father's money in going to school and learning nothing (R.106).

Subsequently, accused telegraphed his father from Mexico and finally turned up in Florida, where he was earning a pittance selling classified advertising for a newspaper (R.106). His father then sent accused to the University of South Carolina, from which after a few weeks he was temporarily suspended for throwing rocks at the windows in the girls' dormitory to arouse some girl (R.106,110). At home, accused became "very much depressed" and subject to mood swings, and his father became convinced that the boy was "abnormal to say the least" (R.106).

In June 1939 accused attended the summer session at Duke University. He continued there for the fall term and soon was in trouble again for having "made a spectacle" of himself and having behaved in a "very abusive" manner at an eating place in Durham. He had not been drinking at the time (R.106,110).

Shortly thereafter, accused disappeared again, and during the course of his wanderings he left a suicide note in his hotel room at Charleston, South Carolina, under circumstances leading the Coast Guard to drag the river for his body. However, a day or two later he wired his father from Florida (R.106,109; Exs. 12,13). Next his father received a telephone call from a friend in West Palm Beach, informing him that accused had attempted suicide off a pier and was "wild and raving" (R.106).

The boy was brought home again, and at the insistence of Dr. Jordan, the family physician, in whose opinion accused was "a mental case", he was taken to the Tucker Sanatorium, a psychopathic institution in Richmond, Virginia (R.48,49,106). He remained there from 28 July to 5 August 1940, when, contrary to the advice of Dr. Tucker, the father removed him and permitted him to enter the School of Journalism at the University of Missouri (R.57,106,110).

In April 1941, accused left the university and went to Ontario, where he attempted without success to enlist in the Canadian Air Force. On 25 April he re-entered the Tucker Sanatorium voluntarily (R.57,66,107).

Apparently during this second incarceration accused attempted suicide by taking a dozen sleeping powders and turning on the gas, but after awhile he gave up the idea and presumably turned off the gas (Ex. 4, Letter dated 10 April 1943 from Dr. Masters to Dr. Jordan).

Despite Dr. Tucker's admonition that accused should be "institutionalized over a long period of time", Mr. Peace had his son released on 11 May 1941 (R.57,61,107). He tried in vain to make accused work, but instead, accused spent his time writing poetry (R.107), the peculiar nature of which may be seen by a perusal of some samples (R.108; Ex. 11). Mr. Peace testified that accused's mind seemed to "ramble off in fields totally unreal" to witness (R.107).

In July 1941 Mr. Peace, accused, and Lieutenant Colonel Kilgore, an old friend of the family, were at a cottage owned by Mr. Peace and located at Cedar Mountain, North Carolina (R.91,107). During their sojourn at the cottage, accused "jumped" a high, barbed wire fence encircling the property, "ran off through the woods", and was returned by force (R.91, 92,107). He was violent and threatened to kill himself, wherefore Mr. Peace locked him in a room and removed all articles with which he might injure himself. After spending a day in a futile attempt to calm accused, Mr. Peace gave him enough whiskey to make him "pass out", and then, with the aid of a deputy sheriff, took him to the Henry Phipps Psychiatric Clinic in Baltimore (R.49,92,107). That institution reported that accused was "a wild young psychopathic whom it would take a long time to cure" (R.107).

Pursuant to the recommendation of the Phipps Clinic, accused was committed to the Sheppard and Enoch Pratt Hospital, Towson, Maryland, where he arrived on 14 August 1941 (R.49,75,107; Exs. 4,5,6). On 19 April 1942, while a parolee, accused left the hospital without permission, and went to Washington, D.C., where he obtained work in a department store (R.49,75,76,107,112; Ex. 4, letter from Sheppard and Pratt Hospital, dated 20 April 1942). Mrs. Peace, accused's mother, visited accused in Washington, and found that he "had gone all to pieces again" (R.107). In fact, during her visit, he disappeared again and turned up in Florida, from where he wrote to his father, saying that the parents need not worry about him any more, as he contemplated writing a novel "greater than Thomas Wolfe's". Mr. Peace furnished him with a small allowance, and accused forwarded an outline of the material for his book, which in Mr. Peace's opinion was "entirely wild" (R.107). Next, accused wired for his birth certificate, stating that he wanted to obtain employment in the Bahamas (R.107,108).

In July 1942, accused came home, desirous of joining the "Army Air Corps". He told his father that this was the only thing which could redeem his past mistakes and that he would never forgive his father if the latter refused his consent (R.108). After seeking the advice of Lieutenant

Colonel Kilgore, Mr. Peace consented, and on 9 July 1942, accused enlisted, evidently as an aviation cadet (R.93,108,112; Ex. 2). While awaiting the call to active duty, accused decided to finish his "masterpiece of a poem", and he "secured himself" in the garage and "stayed aloof" (R.108). However, on 20 July 1942, he voluntarily returned to the Sheppard and Pratt Hospital, although he had repeatedly threatened to kill himself rather than return there (R.49,75,108). On 6 November 1942, his parents brought him home against the advice of the hospital authorities (R.49,75,76,108).

During the ensuing period, accused began to drink again, and, in the opinion of his father, was "restless" and "dispirited". The father "didn't know what to make of him" (R.108). According to Dr. Jordan, accused's behavior was "very peculiar". His conversation was rambling and disconnected and he would vary in mood from a sense of superiority to a deep depression. He said that he might as well be dead, and threatened to kill himself. In Dr. Jordan's opinion, he "seemed to have deteriorated mentally very much" and showed "definite signs of depression" (R.49,50).

On one occasion accused ran all the customers out of a drug store, and the druggist was scared and wondered whether something could not be done about him (R.51,108).

On another occasion accused tried to climb in a second story window of a neighbor's house late at night and was brought home early in the morning by a policeman (R.50,108). Mr. Peace called Dr. Jordan (R.108). Accused was foaming at the mouth and his eyes were "almost indescribable" (R.51,108). He was abusive, used foul language, threatened the people present, and attempted to strike them. Dr. Jordan described him as a "raving maniac". So far as Dr. Jordan observed, accused had not been drinking to excess. It took two or three hours to get him to bed, and Mr. Peace locked him in a room (R.50,51,108). By late afternoon he had not improved, and, the door apparently having been unlocked, he went away before his father could stop him, and was brought back during the evening by Mr. Peace's brother (R.50,108). Since accused was still uncontrollable, his father administered a quantity of whiskey, and, pursuant to Dr. Jordan's orders, took him to Highland Hospital, Asheville, North Carolina. Over the objection of Dr. Billings of that institution, accused was removed on 3 February 1943, and reported for induction into the "Air Corps" (R.50,86, 108). He was sent to Nashville and soon absented himself without leave for a few days and attempted suicide by slashing his wrists (R.97,98; Exs. 1,2).

After the alleged rape, accused was confined at the Station Hospital, Maxwell Field, Alabama, where he has remained except for a twelve-day period at Lawson General Hospital, Atlanta, Georgia, commencing on 1 June 1943 (R. 18,35; Ex. 1).

Passing to the medical testimony, Dr. Jordan, the family physician,

a witness for the defense, testified that in his opinion accused was insane and should be confined in an institution (R.51,55). Dr. Jordan believed that accused was insane on 4 April 1943. Although he did not see accused on that date, he based his opinion upon his observation of accused over a long period (R.52). When Dr. Jordan saw accused during the trial, accused remained "perfectly blank" and did not appear to recognize him (R.54,55). The doctor testified also that at times accused "goes along very well" (R.56).

The following psychiatrists, all of whom had observed accused during his confinement in their respective institutions, testified for the defense: Dr. Tucker and Dr. Masters, both of the Tucker Sanatorium (R.57,63); Dr. Murdock and Dr. Cohen, both of the Sheppard and Enoch Pratt Hospital (R.74, 75,81); and Dr. Billings of the Highland Hospital (R.85,86).

Dr. Tucker and Dr. Masters have not examined accused since his departure from the Tucker Sanatorium on 11 May 1941 (R.58,65). They agreed that while accused was at the sanatorium he was psychotic; and each also used the word "insane" to describe his condition (R.58,59,61, 64,65,67,70). In the opinion of Dr. Masters, although accused could distinguish between right and wrong, he could not adhere to the right or to the moral code (R.64,67). He was not responsible during his illness, and, so far as Dr. Masters knows, has not recovered from that illness (R.65). Dr. Tucker also testified that accused is a "constitutional psychopathic personality" (R.58). In his opinion, accused would not have been responsible for a rape or attempted rape on 4 April 1943, because people in his condition have a compelling impulse and lack the ability to stop themselves "at any period in an episode" (R.58).

The final diagnosis of accused's condition made by the Sheppard and Enoch Pratt Hospital on 17 November 1942 was as follows: "with psychosis, psychopathic personality with chronic alcoholism" (R.76,79,82; Ex. 12). To this diagnosis, Dr. Murdock and Dr. Cohen subscribed (R.76,82). Each testified that accused was insane and that although he could distinguish between right and wrong, he was incapable of adhering to the right (R.79, 80,82-84). Each believed that accused should be committed to an institution (R.77,85). Dr. Murdock added that accused was unimproved at the time of his discharge from the hospital and carried "a poor prognosis" (R.76).

As noted, the last hospital in which accused was confined was Highland Hospital, and he left there on 3 February 1943. Dr. Billings of that hospital testified that accused had a psychopathic personality and a psychosis; that he was "mentally ill"; and that although he could understand right from wrong, he did not have the mental capacity to adhere to the right and to keep from doing wrong. In the opinion of the witness, accused should be committed to an institution for the mentally ill (R.87-89).

The board of medical officers convened on 26 April 1943 at Station

Hospital, Maxwell Field, Alabama, pursuant to paragraph 35 c, Manual for Courts-Martial (1928), consisted of Major William R. Bishop, a general practitioner, and Major Walter O. Klingman and First Lieutenant Arthur L. White, psychiatrists (R.18; Ex. 2). Certain extracts from the report of the board (Ex. 2) are deemed necessary to an understanding of its findings and are quoted herewith:

> "He has manifested emotional immaturity and instability. * * * he has been unable to control his activities and has continually been in difficulty because of his lack of initiative and perseverance; irresponsibility and undeveloped moral and ethical sense. At times his behavior has been so abnormal as to be classed as psychotic."

> "At the present time his mental examination shows no evidence of a psychosis. It is our impression that he is suffering from a mental disturbance termed psychopathic personality. The nature of his psychopathic personality has manifested itself in the past in the form of social inadequacy and in the form of deviations of sex impulse. * * * His defect of judgment has been great and is coupled with an inability to learn by experience."

> "He has shown disturbances in the sexual impulse, not only in the degree of the sexual impulse but also in the nature of the sexual impulse. In this respect and on the occasion of the supposed crime, the individual gives a history of imbibing a fair amount of alcohol. As is well known, alcohol blunts reality, provides a desired release, repression is weakened and the abnormal and repressed sexual impulses gain expression. On this occasion they reached a strength beyond control and in this respect, the individual cannot be considered as being able to adhere to the right."

The board found that accused "is now sane but is suffering from a mental disturbance associated with a psychopathic personality." The board also found that accused

> "* * * was sane at the time of commission of the alleged offense, and able to distinguish right from wrong but was unable to adhere to the right because of his abnormal sexual psychopathic state."

The board recommended that accused be confined in an institution for the mentally ill. The members of the board testified as witnesses for the court, and their testimony accords with their report as a board (R.18-33, Bishop; R. 34-45, Klingman; R. 45-47, White). Major Bishop stated also

that there was no "deterioration" of accused's mind (R.24), and that accused's emotions "more or less overrule or guide his activities in that his inhibitions do not counteract his desires to do a certain act" (R.26). Major Klingman stated that when psychopathic personalities are drinking, their emotional state is unpredictable (R.40).

The board of medical officers convened on 12 June 1943 at Lawson General Hospital, Atlanta, Georgia, consisted of three psychiatrists: Lieutenant Colonel Joseph K. Skobba, Captain Andrew R. Anderson, and First Lieutenant Jules V. Coleman (R.5,127,140; Ex. 1).

The board concluded that from the standpoint of personality, accused was "immature and impulsive", and that although he was "well-endowed intellectually, he has consistently shown poor judgment in his behavior". The board's diagnosis was "constitutional psychopathic state", and the board found that accused "was sane at the time of the alleged offense on or about April 4, 1943, and at the time of this examination" (Ex. 1).

On 24 August 1943 the board reconvened to hear additional testimony. At the conclusion of its deliberations, the board confirmed its previous findings (Ex. 3).

Called as witnesses for the court, the members of the board confirmed individually the findings made as a board (R.5-17, Skobba; R. 127-140, Anderson; R.140-147, Coleman). Lieutenant Colonel Skobba testified that the physical examination showed no deterioration of accused's brain and that the "machinery of the mind of" accused was not defective (R.9,10). He testified further that the board did not believe that accused's "mood swings" extended to a degree which would be considered psychotic (R.17); that accused can distinguish between right and wrong and adhere to the right; and that on or about 4 April 1943, he knew the difference between right and wrong and could adhere to the right (R.8-10).

The medical testimony indicates that psychopathic personality without psychosis does not constitute insanity, but that psychosis denotes insanity (R.10,12,15,64,76,134,135; Ex. 1). However, a psychotic person is not necessarily in that condition continuously and may have lucid intervals (R.42,71,135; Ex. 2).

The defense brought out the fact that the Lawson General Hospital Board did not have before it the final report of the Sheppard and Enoch Pratt Hospital showing a psychosis, but had only a preliminary diagnosis showing "reactive behavior" (R.142). Captain Anderson and Lieutenant Coleman testified that even if the final diagnosis of the Sheppard and Pratt institution had been before the board, they would have adhered to their findings (R.132,142). Captain Anderson pointed out that the diagnosis in question related to the period during which accused was confined at Sheppard and Pratt (R.132) and that from his observation of

accused, he formed the opinion that accused was not psychotic (R.133).

The defense also developed the fact that several of the affidavits of the civilian psychiatrists did not specifically include the term "psychosis" and that reference was made thereto in the report of the Board (Exs. 1,3). As already noted, the same psychiatrists testified at the trial that accused was psychotic. Referring to this matter, Lieutenant Colonel Skobba testified, "We would have agreed with that statement he had psychosis if they said so" (R.14). He testified further that the affidavits referred "to the time they saw him then and not the present" (R.15). Thereafter he stated again that accused was not insane (R.16).

Mr. Peace and Lieutenant Colonel Kilgore, as laymen, testified that they believed accused insane, although the former stated that during certain periods accused was normal (R.92,94,109; Ex. 3).

Private First Class William G. Espy, 809th "T.S.S.", a witness for the defense, occupied the same room as accused at Nashville and Maxwell Field (R.96,97). His testimony was as follows: Accused seemed to be "under a strain or tension" and did not appear to be happy. At times he seemed to feel fine and at other times was "moody" (R.97). He was interested in poetry and would quote it at length. He claimed that the French poets were sexual perverts and he wanted to do some research to discover what lay back of it. He read Nietsche and Schopenhauer and professed to be an artist (R.98). He was very cynical (R.98), and did not "believe in God or in the sanctity of the home or anything else" (R.103). Accused was not a normal human being and obviously was mentally sick (R.98). Although in the opinion of witness, accused was able to recognize right from wrong, there seemed to be impulses "stronger than reason" pulling on him (R.104). Witness thought of him as either a genius or a maniac (R.103). On Sunday, 4 April 1943, accused was in town with witness and seemed under pressure. Witness took him to room 821 at the Jefferson Davis Hotel, which was occupied by witness and his wife. Accused and witness had a drink. Accused left them at one o'clock and was not intoxicated (R.99-101).

Testifying for the prosecution in rebuttal, First Lieutenant Joseph E. Burkart, Pilot Detachment, Reserve Squadron, Aviation Cadet Detachment, stated that he talked with accused on the night of 4 April 1943. He told accused that anything the latter said could be used against him. Referring to his advances to the girl, accused said he had been drinking, but knew what he was doing. He was calmer than the ordinary individual might be expected to be under the circumstances (R.150-151).

Major Mark C. Bane, Commandant of Student Officers, Headquarters and Headquarters Squadron, Maxwell Field, testified that he talked with accused on 5 April 1943. Accused said he had been drinking but knew what he was doing. He was "very calm and direct" and his conduct did not appear abnormal (R.147-150).

6. Paragraph 78a, Manual for Courts-Martial (1928), contains the following language:

> "Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right."

The witnesses for the defense testified to the insanity of accused at the respective periods when he was under their observation. Some of them believed that accused was insane on 4 April 1943, basing this conclusion on the nature of his earlier mental condition. On the other hand, the six officers constituting the medical boards were of the opinion that accused was sane on the date of the offense. It is noteworthy that the medical evidence disclosed that even a psychotic person is not necessarily insane at all times. Thus, the evidence of accused's psychotic condition in the past does not necessarily conflict with the evidence of the medical officers that he was sane on 4 April 1943.

The finding of the Maxwell Field Board that accused was unable to adhere to the right was not based upon the theory that accused was insane, for, as noted, the board found him sane. Rather, it was based upon an abnormal sexual psychopathic state aggravated by the consumption of liquor.

Despite the incomplete nature of the diagnoses by the civilian psychiatrists, placed before the Lawson General Hospital Board, it appears that the members of that board adhered on the witness stand to the view that accused was sane. Although the testimony of Lieutenant Colonel Skobba is somewhat confusing, a careful study of it warrants this conclusion. On redirect examination he reiterated that accused was not insane.

Thus the record presents competent and substantial evidence justifying the court's finding of sanity. This not being a case requiring the approval or confirmation of the President, it is not for us to resolve a conflict in the evidence. That function belonged solely to the court (M.C.M.,1928, p. 216), and its finding should not be disturbed.

7. Certain questions of procedure require comment. Most of them have been raised in a brief filed with the Board of Review by the individual defense counsel.

a. The defense argued that it was error to decide by majority vote that accused was sane, and that such a decision required the same number of affirmative votes as the finding of guilty. In view of the express provisions of Article of War 31, the objection is untenable.

b. The defense argued that the court compelled the accused to take the witness stand against his wishes. The record of trial does not support the argument (R.243-244).

c. It was contended by the defense that the trial judge advocate cross-examined accused upon his unsworn statement, contrary to the provisions of paragraph 75, Manual for Courts-Martial (1928). It is true that the trial judge advocate committed error in the respect referred to (R.246, 249). However, part of his cross-examination concerned a matter about which accused testified on direct examination (R. 245,246), and the other part concerned the length of time during which he was in the room. No prejudicial error resulted (A.W. 37).

d. After Mrs. Talley had testified, the court was closed and directed the court reporter, trial judge advocate, and defense counsel to remain while the reporter read from his notes. The purpose of this procedure was to determine whether Mrs. Talley should be recalled. In response to a question by the trial judge advocate, the defense counsel stated that he had no objection to the reading of the reporter's notes in the absence of accused. The reporter then read some questions and answers concerning penetration, after which the court was opened and Mrs. Talley recalled (R.207). Article of War 30 requires the trial judge advocate to withdraw whenever the court sits in closed session. It also requires that when his assistance in referring to recorded evidence is desired, it shall be obtained in open court and in the presence of accused and his counsel. Although there was a technical violation of the Article of War, it is impossible to discover any prejudicial error (A.W. 37). The sole purpose of the session was to hear the reading of the testimony and thereby determine whether to recall Mrs. Talley.

e. In connection with the foregoing session, the individual defense counsel addressed a letter, dated 19 October 1943, to the president of the court, claiming that the record did not accurately record the proceedings in the closed session. Under date of 2 November 1943, the trial judge advocate addressed a letter to the president of the court contending that the transcript of the proceedings recorded them correctly. The letters were submitted to the reviewing authority and are attached to the record. The variation between the proceedings as recorded and as recalled by the defense counsel presents no difference sufficiently material to injure the

substantial rights of accused.

f. Other contentions made by the defense counsel in his brief have been carefully considered and, in the opinion of the Board of Review, are untenable and do not require comment. There are some minor irregularities in the record, but they do not merit discussion.

8. Consideration has been given to two letters from Honorable Roger C. Peace, father of the accused, to The Judge Advocate General, dated respectively 4 December 1943 and 20 January 1944, and to the inclosures contained in the second letter. These letters and the inclosures accompany the record of trial. Consideration has also been given to the oral statement made by Mr. Peace to the Board of Review.

9. The Charge Sheet shows that accused is now 22 years of age and enlisted in the military service on 9 July 1942.

10. 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 of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGN
CM 244498

4 DEC 1943

UNITED STATES v. Second Lieutenant THOMAS E. HATCHETT (0-1170771), Field Artillery.	ARMY AIR FORCES CENTRAL TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at St. Louis, Missouri, 2 November 1943. Dismissal and confinement for five (5) years.

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

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

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

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

Specification: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, while enroute from Springfield, Missouri, to Fort Sill, Oklahoma, on or about 26 January 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at St. Louis, Missouri, on or about 19 August 1943.

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

Specification 1: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, on or about 2 June 1943, feloniously take, steal and carry away one (1) brown leather traveling bag, value about $15.00, the property of Staff Sergeant Solon E. Burgess, Jr.

Specification 2: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, on or about 16 June 1943, feloniously take, steal and carry away one (1) tan cowhide Gladstone traveling bag, value about $25.00, and one (1) United States Army M1911A1 Colt .45 automatic pistol therein contained, value about $26.97, the property of Captain A. B. Cain, of the aggregate value of $51.97.

Specification 3: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, on or about 6 July 1943, feloniously take, steal and carry away one (1) brown leather Gladstone traveling bag, value about $10.00, the property of 1st Lieutenant Carlos L. Faulkner.

Specification 4: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, on or about 14 July 1943, feloniously take, steal and carry away one (1) black leather traveling grip, value about $5.00, the property of Otto Wulfert.

Specification 5: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, on or about 3 August 1943, feloniously take, steal and carry away one (1) brown cowhide suitcase, value about $10.00, the property of E. C. Bromiley.

Specification 6: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, on or about 11 August 1943, feloniously take, steal and carry away one (1) brown leather traveling grip, value about $15.00, the property of 2nd Lieutenant Homer B. Matlock.

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

Specification 1: Finding of not guilty.

Specification 2: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 3 April 1943 and 13 April 1943, wrongfully obtain lodging and telephone service from the New Hotel Jefferson of St. Louis, Missouri, of the value of about $37.02, with intent to defraud the owner thereof, namely, Jefferson Hotel Company, a corporation of the State of Missouri.

Specification 3: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 2 June 1943 and 9 June 1943, wrongfully obtain lodging from the Hotel Mark Twain of St. Louis, Missouri, of the value of about $24.48, with intent to defraud the owner thereof, namely, Albert Pick, Hotels, Inc., a corporation of the State of Illinois.

Specification 4: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 16 June 1943 and 24 June 1943, wrongfully obtain lodging and telephone service from the Hotel Lennox of St. Louis, Missouri, of the value of about $27.65, with intent to defraud the owner thereof, namely, Lennox Hotel Company, a corporation of the State of Missouri.

Specification 5: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 6 July 1943 and 14 July 1943, wrongfully obtain lodging and laundry service from the Hotel Statler of St. Louis, Missouri, of the value of about $25.54, with intent to defraud the owner thereof, namely, Hotel Statler Company, Inc., a corporation of the State of New York.

Specification 6: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 15 July 1943 and 24 July 1943, wrongfully obtain lodging and telephone service from the Hotel Statler of St. Louis, Missouri, of the value of about $30.71, with intent to defraud the owner thereof, namely, Hotel Statler Company, Inc., a corporation of the State of New York.

Specification 7: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 22 July 1943 and 30 July 1943, wrongfully obtain lodging from the New Hotel Jefferson of St. Louis, Missouri, of the value of about $32.13, with intent to defraud the owner thereof, namely, Jefferson Hotel Company, a corporation of the State of Missouri.

Specification 8: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 29 July 1943 and 10 August 1943, wrongfully obtain lodging and radio service from the Hotel De Soto of St. Louis, Missouri, of the value of about $38.17, with intent to defraud the owner thereof, namely, Allied Hotels, Inc., a corporation of the State of Missouri.

Specification 9: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 4 August 1943 and 11 August 1943, wrongfully obtain lodging from the Hotel Lennox

of St. Louis, Missouri, of the value of about $32.64, with intent to defraud the owner thereof, namely, Lennox Hotel Company, a corporation of the State of Missouri.

Specification 10: In that 2nd Lieutenant Thomas E. Hatchett, Field Artillery, Army of the United States, did, at St. Louis, Missouri, between 11 August 1943 and 18 August 1943, wrongfully obtain lodging from the Hotel Mayfair of St. Louis, Missouri, of the value of about $28.57, with intent to defraud the owner thereof, namely, Mayfair Hotel, Inc., a corporation of the State of Missouri.

He pleaded to Charge I, not guilty but guilty of a violation of Article of War 61; to the Specification, Charge I, guilty except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty; to Specification 2, Charge III, not guilty; to all remaining Charges and Specifications, guilty. He was found not guilty of Specification 1, Charge III; of all remaining Charges and Specifications, guilty. 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 at such place as the reviewing authority may direct for 10 years. The reviewing authority approved so much of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for 5 years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 22 January 1943, while a patient at O'Reilly General Hospital, Springfield, Missouri, the accused received an order issued by proper authority on 20 January 1943, directing him to proceed to the Field Artillery Replacement Center at Fort Sill, Oklahoma, and to report upon arrival to the commanding officer for specific assignment to duty. Having signed out, he departed by rail, stopping off for 2 weeks at Oklahoma City; thence, early in February, proceeding to St. Louis, Missouri, where he remained until apprehended on 19 August 1943 (R. 13, 15, 45, 61, 74, 76, Exs. 1-4, 26, 33).

On 13 April 1943, the credit manager of the New Jefferson Hotel, where he was staying, telephoned the accused, requesting him to come to the hotel office to discuss his account, amounting at that time to $37.02, with no credits since 3 April 1943. Leaving his luggage in his room, the accused left the hotel without complying with this request, mailing a letter the next day to the credit manager stating

that he was leaving his bag and more than $75 worth of clothes as security (R. 25-26, 69, Exs. 11, 18-19).

On 2 June 1943, at the St. Louis Union Station, the accused stole a travelling bag, valued at $15, belonging to Staff Sergeant Solon E. Burgess, Jr., who had left it momentarily unattended outside the door of the cocktail lounge. The accused took this stolen bag to the Hotel Mark Twain, where, having registered as "Joe F. Ellis, Albany, New York," he remained until 9 June 1943, when he departed without paying his hotel bill of $25, leaving the stolen bag with its contents in the room he had occupied (R. 19-21, 63-64, 71, Exs. 9, 14-15, A).

On 16 June 1943, having, at the Union Station, stolen a travelling bag valued at $25, containing, among other items, a Colt .45 automatic pistol, valued at $26.97, belonging to Captain A. B. Cain, AUS, the accused took the bag and contents to the Hotel Lennox, where he registered as "Chas. W. Mason, Jr., Dallas, Texas," occupying a room there until 24 June 1943, when he departed owing $27.53, leaving bag and pistol in the room he had vacated (R. 23, 29, 31, 64, 73; Exs. 8, 16, 21, B).

On 6 July 1943, again at the Union Station, the accused stole First Lieutenant Carlos W. Faulkner's travelling bag, valued at $10, while Lieutenant Faulkner was buying a ticket, taking it to the Hotel Statler, where he registered as "Thomas E. Hatchell, Dallas, Texas," occupying a room there until 13 July 1943, departing without paying his bill of $25.43, leaving the bag behind him (R. 33, 35, 46, 65, 72; Exs. 13, 23, 27, C).

On 14 July 1943, at the Union Station, the accused stole Otto Wulfert's travelling grip, of the value of $5, and returned with it to the Hotel Statler, where he was already occupying a room as Thomas E. Hatchell. There, on 15 July 1943, he registered for another room as "Charles J. Webster, Dayton, Ohio". He retained this room until 24 July 1943, leaving Wulfert's grip, and an unpaid hotel bill of $30.71, upon his departure (R. 43-44, 47, 65-66, 72, Exs. 28, D).

On 22 July 1943, he registered at the New Jefferson Hotel as "James C. Washburn, 2312 Ohio Street, Cincinnati, Ohio," retaining the room so obtained until 30 July 1943, leaving an unidentified bag and an unpaid hotel bill of $32.13 (R. 25-26, Exs. 10, 17).

On 29 July 1943, he registered at the Hotel DeSoto as "Howard Chas. Tucker, O'Reilly General Hospital, Springfield, Missouri", retaining a room there until 10 August 1943, leaving an unpaid bill of $38.17 (R. 42, 43; Exs. 12, 25).

After having stolen E. C. Bromiley's suitcase, of the value of $10, at the Union Station on 3 August 1943, the accused, on 4 August 1943, registered at the Hotel Lennox as "Gordon C. Ambler, O'Reilly General Hospital, Springfield, Missouri," remaining until 11 August 1943, when he abandoned the stolen bag in the room which he had thus obtained (R. 29, 31-32, 47, 66-67, Exs. 7, 22, 29, E).

On 11 August 1943, the accused revisited the Union Station, stole a travelling grip of the value of $15, belonging to Second Lieutenant Homer B. Matlock, AUS, and proceeded to the Hotel Mayfair, where he registered as "Thomas C. Connors, O'Reilly General Hospital," remaining until 19 August 1943, when he was apprehended in his room by the civilian and military police. His unpaid hotel bill amounted to $28.57. Lieutenant Matlock's travelling bag was found in the room which the accused occupied at the Mayfair Hotel (R. 29, 31, 47-48, 68, 74, 76; Exs. 6, 20, 30, F).

On the date of the trial, none of the hotel bills mentioned above had been paid (R. 82, 83).

4. The evidence for the defense shows that the credit manager of the New Jefferson Hotel, after requesting the accused to call at his office to discuss his account, received the following letter from the accused dated 14 April 1943:

"Dear Sir,

Sorry I don't have cash now to pay my bill - am leaving bag as security - more than $75 worth of clothes.

Will send money as soon as I reach my station & address to ship bag.

Thank you

Thos. E. Hatchett

(Room 731)".

The credit manager did not send the accused's bag to him but held it until the day before the trial (R. 87-88; Def. Ex. 1).

5. After having been properly advised of his rights, the accused elected to make an unsworn statement through counsel, in which he stated that he had been inducted into the Army 25 March 1942 and was sent to Camp Lee, Virginia, where he stayed five days and was then transferred to Fort Bragg, where he remained for three months; that while at Fort Bragg he qualified for Officer Candidate School in the Field Artillery, was sent to Fort Sill, Oklahoma, completed the course in the Officer Candidate School there, and received his commission on 1 October

1942. After about two weeks on duty at Fort Sill he became sick and entered the cantonment hospital, where he remained for some time, until he was sent, about 20 December 1942, to O'Reilly General Hospital at Springfield, Missouri; that he was discharged from the hospital 22 January 1943 with orders to return to Fort Sill; that, in order to get into Officer Candidate School at Fort Sill, it had been necessary for him to sign a waiver because he was seventeen pounds underweight; that, before he completed the course and received his commission, he was re-examined and found to be still seventeen pounds underweight, and signed a waiver in order to get his commission; that the board at O'Reilly General Hospital gave him a limited service classification and returned him to duty; that in civilian life he was a bookkeeper and went as far as three years in high school, then worked in a very small baking company as bookkeeper in Roanoke, Virginia; that his family consists of his father who is 81, four brothers, and a sister; that the reason he did not return to Fort Sill was that the climate and water there did not agree with him; that he never intended to desert the service, but at all times while he was absent he wore his uniform; that he did not intend to cover up any of the things he did, and that he has been cooperative with the military and civilian authorities; that he "has no excuse for what he has done. He admits he has done wrong and he knows that this court must find him guilty of all of those charges that have been preferred against him, except those to which he has pleaded not guilty, and he knows that he has punishment coming as an officer of the Army, and as an officer of the Army, he offers no excuse for the things that he has done" (R. 90-91).

6. The Specification, Charge I, alleges desertion. Although the accused's plea of not guilty of desertion (but guilty of absence without leave), and his unsworn statement, both disavow the essential intent, the duration of his absence in time of war - from 26 January to 19 August - and the series of criminal acts which punctuated it, are adequate to support the inference constituting the basis of the court's finding.

7. The larcenies alleged in Specifications 1 through 6, Charge II, are all clearly established by competent evidence, substantiating the accused's pleas of guilty.

8. Specifications 2 to 10 inclusive, Charge III, are all defective in that each merely states conclusions of the pleader, rather than facts constituting the offense. Each alleges that between given dates the accused obtained, from a named hotel, lodging - and in some instances other services - of a stated value, with intent to defraud the owner thereof. The proof shows, in the case of Specifications 3 to 10 inclusive, that the lodging and services were obtained by registering under an assumed name, and thereafter taking a surreptitious departure. Since the record indicates that the accused was not misled by the defects noted, and that, in pleading guilty, he was fully aware of the identity and all of the elements of each offense intended to be described, the findings need not be disturbed.

9. Specification 2, Charge III alleges the wrongful obtaining of lodging and telephone service from the New Hotel Jefferson with intent to defraud the owner thereof. The proof shows that during the period specified, the accused was a guest there, registered under his own name, and that, upon his departure, he not only left his own bag and personal belongings as security for his unpaid bill, but promptly notified the management by letter of that fact. While it shows clearly that he left without paying his bill, the evidence is insufficient to establish the wrongful obtaining of the lodging and services in question with intent to defraud the owner of the hotel.

10. War Department records show the accused to be 32 years of age with enlisted service from 25 March 1942 until temporarily commissioned second lieutenant, AUS, 1 October 1942.

11. The court was legally constituted. In the opinion of the Board of Review, the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge III, legally sufficient to support the remaining findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 58, 93, 96.

Abner E. Lipscomb, Judge Advocate

Gabriel H. Goldberg, Judge Advocate

Benjamin R. Shafer, Judge Advocate

SPJGN
CM 244498

1st Ind.

War Department, J.A.G.O., 15 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 Second Lieutenant Thomas E. Hatchett (0-1170771), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding of guilty of fraudulently obtaining lodging and telephone service from The New Hotel Jefferson as alleged in Specification 2, Charge III, legally sufficient to support all of the other findings, and legally sufficient to support the sentence as approved by the reviewing authority 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

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.

(Finding of guilty of Specification 2, Charge III, disapproved. Sentence as approved by reviewing authority confirmed. G.C.M.O. 37, 24 Jan 1944)

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

SPJGQ
CM 244521

16 DEC 1943

UNITED STATES	)	FIRST SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Fort Devens, Massachusetts, 16 November 1943. Dishonorable discharge (suspended), total forfeitures, and confinement for one (1) year. Rehabilitation Center, Fort Devens, Massachusetts.
General Prisoner DAVID R. HUMPHREY.	)	

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

1. The record of trial in the case of the general prisoner 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 69th Article of War.

Specification: In that General Prisoner David R. Humphrey, having been duly placed in confinement in the First Service Command Rehabilitation Center, Fort Devens, Massachusetts, did at Fort Devens, Massachusetts, on or about 20 May 1943, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions during the accused's status as a general prisoner was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence but suspended that portion thereof adjudging dishonorable discharge until released from confinement. The proceedings were published in G.C.M.O. No. 326 dated 18 November 1943, Hdqrs. First Service Command, Boston, Massachusetts.

3. The evidence for the prosecution showed that the accused on 20 May 1943 was a general prisoner and a member of the Prison Detachment, First Service Command Rehabilitation Center, Fort Devens, Massachusetts (R. 10). He had been a general prisoner at that Rehabilitation Center since 27 January 1943 (Ex. 1). He had been made a member of the honor company at the Center which meant that he was a privileged prisoner entitled to be without a guard and could properly leave the Center and go to any point designated by his commanding officers without guard (R. 11, 13). Accordingly, with the permission of one of his commanding officers, on 20 May 1943 the accused left the Rehabilitation Center without a guard for the purpose of going to the New Station Hospital for medical treatment. This hospital as well as the Rehabilitation Center is within the Fort Devens Military Reservation (R. 12). The accused had no authority to leave the reservation (R. 13, 17). While in the neighborhood of the Station Hospital, which was located on the other side of the Nashua River from the Rehabilitation Center, he disappeared and was not seen again until his return 8 November 1943 (R. 11; Ex. 3).

4. The defense counsel moved the court to find the accused not guilty on the ground that the accused was not in confinement at the time of his alleged escape, having been allowed to leave the Rehabilitation Center without guard (R. 14). The motion was denied by the court.

The accused was then duly advised as to his rights as a witness by the president of the court and elected to remain silent (R. 16).

5. The only question of law involved in the subject case is whether or not the accused, under the foregoing facts, can properly be found to be guilty of escape from confinement. The Manual for Courts-Martial, 1928, paragraph 139a, page 153, provides that "Confinement imports some physical restraint." A distinction is made between arrest and confinement. The restraint in an arrest is a moral restraint, usually imposed by orders fixing the limits of arrest. The restraint in confinement means a physical restraint. The accused in the subject case was charged with and found guilty of escape from confinement. The distinction is important because one charged with escape from confinement must first be shown to have been physically restrained, that is, confined. A breach of an arrest is not a lesser included offense of escape from confinement (CM 171335).

In CM 219725, Lowry (1942), the accused was a prisoner in the guardhouse and was given a bed in the ward in the Station Hospital. No guard was placed over him. The accused left the ward without authority and remained away for a period of four days. It was held that the

evidence was not legally sufficient to support the findings of guilty of escape from confinement because of the absence of proof of any physical restraint.

In CM 224109, Medlock (1942), the accused, while a prisoner in a post guardhouse, was sent by a sergeant to wash some pails in a lake about 50 to 75 yards from the guardhouse and out of sight of any sentry. He failed to return. It was held that the accused committed an offense in the nature of breach of parole but may not properly be found guilty of escape from confinement under Article of War 69. Proof of a physical restraint at the time of the commission of the offense was again lacking.

Similar conclusions have been reached in CM 191693, Boudreau, CM 191766, Gilchrest, and CM 201493, Smith.

In view of the legal principles outlined in the Manual for Court-Martial and the above decisions, the conclusion is inevitable that the accused, having been permitted freedom without guard, may not properly be found guilty of escape from confinement under the circumstances related. The fact that he was a member of the honor company showed that he was on his honor not to leave the reservation. This was a moral restraint and not a physical one.

The Staff Judge Advocate, in his review, avers that the Rehabilitation Center is on the same Government reservation as Fort Devens, and that a barbed-wire fence, 8 to 10 feet in height, surrounds the entire reservation of 28 square miles, except at the various gates where guards are stationed, and contends that the existence of this fence constituted a physical restraint upon the accused. The existence of such a fence is not a matter of record. It is the opinion of this Board, however, that even if these facts had been shown as a matter of record such a fence would not constitute evidence of that kind of physical restraint required by the principle of law set forth above. Fort Devens is not a concentration camp. The fence around Fort Devens was not placed there for the purpose of confining all those within its boundaries. If the fence was treated the same as a fence around a stockade or guardhouse, then, any member of the military personnel who left Fort Devens without authority, would be guilty of breach of confinement. To imply from the mere existence of this fence that all those within its confines were in confinement would not only be absurd but also contrary to well known facts regarding the military personnel occupying the 28 square miles within its boundaries and outside of the confines of the stockade. Such an implication would also be contrary to the evidence in the record to the effect that the accused himself was freed from physical restraint when he was made a member of the honor company and permitted to move about the reservation without guard. This in itself meant without physical restraint.

6. It appears from the record that the accused is 21 years of age, and that he enlisted at Montgomery, Alabama, 14 March 1940, to serve three years. His term has been extended by the Service Extension Act of 1941.

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.

William H. Pounds, Judge Advocate.

Paul Hoffman, Judge Advocate.

Herbert B. Fuller, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 DEC 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 General Prisoner David R. Humphrey.

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.

Myron C. Cramer
Major General,
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. 8, 6 Jan 1944)

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

(343)

SPJGH
CM 244523

30 DEC 1943

UNITED STATES	)	FAIRFIELD AIR SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Bowman Field, Louisville, Kentucky, 27 October 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant JAMES G. BENNETT (O-399808), Air Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and CLEMENTS, 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 James G. Bennett, Glider Crew Training Center, I Troop Carrier Command, Bowman Field, Kentucky, did, without proper leave, absent himself from his station and flight at Bowman Field, Kentucky, from about 2 September 1943 to about 20 September 1943.

He pleaded guilty to and was found guilty of the Specification and Charge. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: By paragraph 8, Memorandum 11, Glider Crew Training Center, I Troop Carrier Command, Bowman Field, Kentucky, dated 24 August 1943 (Ex. B), accused was assigned to Flight 17. Routine roll calls of Flight 17 disclosed that accused was not present at any of the formations from 2 September to 20 September 1943. An extract copy (Ex. A) of the morning report of the Glider Crew Training Center, to which accused was attached, showed him from duty to absent without leave as of 1 September 1943, and from absent without leave to duty as of 20 September 1943. It was stipulated that Flight Officer Edmond Lopez would testify that on the

morning of 20 September he saw accused at his home in Louisville, Kentucky, that accused admitted he was absent without leave, and that, at the suggestion of Lopez, they returned to Bowman Field (R. 6-8, 11).

4. Evidence for the defense: Accused, as a witness, admitted that he was absent without leave. He attributed the cause to the belief that during the four or five months immediately preceding his absence, he had missed an overseas assignment and a promotion, and that this succession of "bad breaks" made him go "haywire". Accused stated that he is married, that his wife maintained a home in Louisville, but was away visiting until about "four days before I turned myself in". He added that he was planning to return to the field on the same day that Flight Officer Lopez visited him in his home. He further stated that none of the officers under whom he had served for any period of time and who are qualified to judge his character and his work was available to testify because all of them had been transferred (R. 12-14).

5. It is shown by the evidence and admitted by the plea of guilty that accused without proper leave absented himself from his post and duties from about 2 September 1943 to 20 September 1943.

6. After the findings and sentence were announced by the court the defense entered an objection that "persons, not members of the court, came into the court room while the court was deliberating upon the sentence" (R. 16). In a written statement submitted to the reviewing authority subsequent to the trial, the president and law member (same person) verified the fact that a civilian employee, not the reporter, and an officer who was not a member of the court had entered "the courtroom after it had been cleared and closed for the purpose of determining the sentence". However, he stated that "while the unauthorized personnel were in the courtroom the accused or his sentence were not discussed. The discussion was on a point of law regarding maximum fines a court martial could sentence an officer too".

In CM 237637, Seery, wherein it was held, in view of all the circumstances, that "the action of the court in consulting a local staff judge advocate in closed session during the proceedings designed to revise the court's findings" did not injure the substantial rights of the accused, the Board of Review stated:

> "Although The Judge Advocate General has held that 'A court-martial is not permitted in closed session to consult any outside authority' (CM 156620), he has also held that the improper appearance of the judge advocate in a closed session

of a court-martial which did not injure the substantial rights of the accused did not require the disapproval of the case (CM 114903, CM 141915)."

In view of the explanation by the president and law member of the subject of the discussion in the present case, the Board of Review is of the opinion that the action of the court in admitting unauthorized personnel into the closed session under the circumstances indicated, while improper, did not injuriously affect the substantial rights of the accused.

7. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, Infantry-Reserve, Army of the United States, 6 November 1940 and active duty 5 February 1941.

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.

Samuel M. Drew, Judge Advocate

F J Lottichos, Judge Advocate

Judson S. Clements, Judge Advocate

1st Ind.

War Department, J.A.G.O., 11 JAN 1944 - 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 G. Bennett (0-399808), 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 his station for about 18 days. The only excuse given by accused for his absence is that he went "haywire" because of disappointment at missing an overseas assignment and a promotion. In his fourth indorsement to the letter forwarding the charges, the Commanding General, I Troop Carrier Command, stated: "It has been found that strict disciplinary action is essential at the Glider Crew Training Center at Bowman Field". I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution. Consideration has been given to letters attached to the record of trial in which a member of the court and the trial judge advocate recommend that the sentence be suspended.

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

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 95, 14 Mar 1944)

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

SPJGN
CM 244546

27 DEC 1943

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Scott Field, Illinois, 30 October 1943. Dismissal, total forfeitures and confinement for four (4) years.
	)	
Second Lieutenant KENNETH F. KLINKERT (0-408799), Air Corps.	)	

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

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

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

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

Specification: In that 2nd Lieutenant Kenneth F. Klinkert, attached unassigned to 1st Heavy Bombardment Processing Headquarters, Scott Field, Illinois, did at Scott Field, Illinois, absent himself from his station without proper leave from about 1800 hours October 12, 1943, to about 1420 hours October 13, 1943.

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

Specification: In that 2nd Lieutenant Kenneth F. Klinkert,

> attached unassigned to 1st Heavy Bombardment Processing Headquarters, Scott Field, Illinois, did, at Scott Field, Illinois on or about October 11, 1943, with intent to commit a felony, viz, rape, commit an assault upon 2nd Lieutenant H. Cordelia Lampe, ANC, by wilfully and feloniously throwing to the ground and striking the said 2nd Lieutenant H. Cordelia Lampe, ANC, on the head with his hands.

The accused pleaded not guilty to and was found guilty of both 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 might direct for four years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3a. The evidence for the prosecution concerning the charge of being absent without leave (the Specification, Charge I), shows that about 1800 o'clock on 12 October 1943, the accused absented himself without leave from his station and remained absent until he returned thereto at about 1420 o'clock on 13 October 1943. This unauthorized absence is shown by oral testimony as well as by an authenticated extract copy of the morning report of the accused's organization (R. 33; Pros. Ex. 1,2).

b. The evidence for the prosecution concerning the charge of assault with intent to rape (the Specification, Charge II), as presented by the testimony of Second Lieutenant H. Cordelia Lampe, Army Nurse Corps, hereafter referred to as the prosecutrix, shows that she first met the accused at the Scott Field Officers' Club, on Sunday night, 10 October 1943. After an acquaintance of a few minutes, the prosecutrix was accompanied to her quarters by the accused, where the accused, within the limits of 45 minutes, kissed her twice without permission. On the following afternoon, from about 2:30 to 3:30, the accused and the prosecutrix went for a walk "up towards the woods and came back again". The road along which they walked was described as passing through a rather secluded and wooded area. During the walk the prosecutrix explained to the accused that she "didn't want any more advances from him" and "explained why and he agreed with" her. The prosecutrix did not remember the details of their conversation during the walk but she admitted that she might have told the accused of the custom of the people of Korea of going about with their breasts exposed. She explained that she was twenty-eight years of age and had been born in Korea and had lived there during the first eighteen years of her life. The prosecutrix testified that during the afternoon while

on the walk, the accused "pinned" her "up against a tree and kissed" her. She explained that she had "wiggled away from him" and showed him by her actions that she did not like being kissed. Shortly thereafter he again tried to kiss her but she told him that she "wouldn't see him that evening" and he desisted from his efforts to kiss her. After the accused had apologized for his actions the prosecutrix accepted "a date with him" for the evening. At about 6:30 in the evening they met at the Officers' Club. Later they started toward the Nurses' Recreation Hall. The moon was shining and the prosecutrix suggested that "it would be a nice evening for a walk". Thereupon the accused suggested that they take a walk. The prosecutrix said, "all right, if you will behave yourself". They then took the same walk down the secluded road which they had taken during the afternoon. The accused again tried to kiss her but was unsuccessful. When they reached a place in the road where there was a high bank the accused placed his arm around her. She immediately became angry, stamped her foot on the ground and turned to go back. The accused thereupon - and suddenly - pushed her to the side of the road into a sitting position. The exact technique employed in this change of positions was not remembered by the witness. The accused then placed himself on top of her, pulled at her left leg and skirt and endeavored to turn her over on her back. The prosecutrix explained that "* * * he told me to turn over on my back and spread my legs". She testified "* * * I was crying and he wanted to screw me". At this point she began to scream which she continued to do "until he got up, and then some". At the same time she began "beating him in the face", whereupon the accused slapped her and put his hand upon her throat, but "he left go right away". She asserted that she believed that the accused's purpose in slapping her was "to pervert his anger", adding that "* * * He did it in anger". After this one outburst the accused desisted from further violence. The prosecutrix, after securing her hat, arose from the ground, and the accused "brushed her off" and held her in his arms. At this time she did not think to resist. They then walked back to the hospital. The accused stopped frequently to "swear at me and try to calm me down". The accused kissed her several times on their return walk and she did not resist because, as she testified, she "was scared not to let him". He told her "he thought Queen Victoria was out" and she supposed that his statement was in the form of an apology. Before reaching the hospital they stopped and sat down for about 15 minutes while they smoked three cigarettes. After reaching the nurses' quarters she "forgave him for his actions". The following evening she told her best friend of what had occurred and her "best friend" insisted that the prosecutrix tell Miss Johanna Gorman, the prosecutrix' chief nurse. When questioned as to her present attitude toward the accused she stated, "I think I feel a little sorry for him". She testified further that she did not realize until the following day how frightened she had been (R. 40-67).

A medical officer testified that he had examined the prosecutrix about three o'clock on either the 13th or 14th of October and that he had found certain bruises and lacerations about her cheeks at that time. He also testified that he had found a bruise on each temple and numerous bruises on the left thigh as well as scratches on her right leg (R. 67).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to remain silent.

5. The Specification, Charge I, alleges that the accused "did at Scott Field, Illinois, absent himself from his station without proper leave from about 1800 hours October 12, 1943, to about 1420 hours October 13, 1943". Oral testimony as well as an authenticated copy of the accused's organization's morning report support, beyond a reasonable doubt, the findings of guilty of this Specification and Charge I.

6. The Specification, Charge II, alleges that the accused did "with intent to commit a felony, viz, rape, commit an assault upon 2nd Lieutenant H. Cordelia Lampe, ANC, by wilfully and feloniously throwing to the ground and striking the said 2nd Lieutenant H. Cordelia Lampe, ANC, on the head with his hands".

In order to establish the offense charged, the evidence must show beyond a reasonable doubt that the accused assaulted the prosecutrix and that at the time of the assault he had the specific intent to have carnal knowledge of her by force and without her consent.

> "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" (M.C.M., 1928, par. 149l).

The evidence in the present case shows that the accused met the prosecutrix on Sunday evening, 10 October 1943, and that within 45 minutes of their meeting he had escorted her to her barracks, forcibly kissed her twice, and made an engagement to meet her on the following day. On the following afternoon between 2:30 and 3:30, the accused and the prosecutrix went for a walk along a secluded roadway. During the course of this walk the accused "pinned" the prosecutrix to a tree and forcibly kissed her. A second attempt to kiss her during the walk was frustrated by her. Upon his apologizing for his actions, the accused was forgiven and the

prosecutrix agreed to give him a "date" for the evening. The scope of the conversation engaged in by the couple was not clear in the prosecutrix' memory but she admitted that she might have told the accused of some of the customs of the people of Korea, including the custom of people there of going about with their breasts exposed. On the evening of the same day, the prosecutrix and the accused again met and repeated by moonlight the walk of the afternoon. The prosecutrix testified that she suggested that the evening was a fine night for a walk, and that thereupon the accused suggested that they go for a walk. The prosecutrix then agreed to go with the accused under the condition that the accused would "behave himself". On this walk the accused after trying to kiss the prosecutrix forcibly seated the prosecutrix on the ground, placed himself upon her, and endeavored to have sexual intercourse with her. According to her own testimony, the prosecutrix screamed and began to beat the accused in the face, whereupon he struck her several times in anger and desisted from his apparent purpose. Thereafter he assisted her to rise, brushed the dust from her clothes and walked home with her. On this return walk he placed his arms about her and kissed her several times. She did not remonstrate against these advances because, as she testified, she was afraid to do so. At one time they stopped and seated themselves and smoked three cigarettes. The prosecutrix admitted that she "forgave the accused". Upon returning to her quarters, she made no immediate complaint but the following evening she told her "best friend" about what had occurred and thereafter, upon the advice of her "best friend", she complained to her superior officer.

The above facts show unquestionably that the accused endeavored, in a crude and precipitate manner, to have sexual intercourse with the prosecutrix. They do not show, however, that the importunate acts of the accused were accompanied by an intent to gratify his licentious desire by overcoming "any resistance by force". The accused may have assumed, and not without some cause, that since he had been twice forgiven for repeated improper advances, that further and more amorous actions might also be received in a forgiving spirit. Obviously, however, he must have been mistaken in such an assumption for according to the testimony of the prosecutrix, the accused's actions in forcing her to the ground and of placing himself upon her were unlicensed acts involving, therefore, all of the elements of an assault. The brutal part of the accused's conduct in striking the prosecutrix, did not, however, occur until after the accused had been beaten in the face by the prosecutrix. According to the prosecutrix' own testimony, the accused's shameful retaliation in kind was made in anger, the prosecutrix asserting that the accused "perverted his anger" and that "* * * He did it in anger". It thus clearly appears that the brutal part of the accused's attack, and the part which might otherwise

have indicated a purpose to beat the prosecutrix into sexual submission, was the result of an outburst of temper rather than a part of a premeditated plan or a part of a determined intent to gratify, at all cost, his sexual urge. When the facts are thus viewed in their true light we are impelled to the conclusion that the accused did not intend to rape the prosecutrix in the legal sense of having intercourse with her regardless of the ultimate force which might be required for that purpose, but rather that he intended to have intercourse with her if his crude and precipitate advances resulted in securing from her either consent expressed in words or implied by conduct. The authorities assert that,

> "If there be an assault without an intent to ravish by force, then it has been held that a conviction for assault with intent to ravish cannot be sustained" (Wharton's Criminal Law, 12th Ed., Sec. 749, and numerous cases therein cited; Underscoring supplied).

The evidence is legally sufficient, therefore, to sustain only so much of Charge II and the Specification thereunder as involves a finding that the accused did at the time and place alleged, "commit an assault upon 2nd Lieutenant H. Cordelia Lampe, ANC, by wilfully * * * throwing to the ground and striking the said 2nd Lieutenant H. Cordelia Lampe, ANC, on the head with his hands", in violation of Article of War 96.

7. The records of the office of The Adjutant General show that the accused is approximately 24 years and 8 months of age. He was commissioned a second lieutenant, Infantry Reserve on 7 June 1941, and entered upon active duty 7 July 1941.

8. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Specification, Charge I and Charge I; legally sufficient to support so much of the findings of guilty of the Specification, Charge II, and Charge II as involves a finding that the accused did, at the time and place alleged "commit an assault upon 2nd Lieutenant H. Cordelia Lampe, ANC, by wilfully * * * throwing to the ground and striking the said 2nd Lieutenant H. Cordelia Lampe, ANC, on the head with his hands", in violation of Article of War 96; legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of Article of War 61 or 96.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(On Leave), Judge Advocate.

SPJGN
CM 244546

1st Ind.

War Department, J.A.G.O., 22 JAN 1944 To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth F. Klinkert (0-408799), 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 of the Specification, Charge I and Charge I, legally sufficient to support so much of the findings of guilty of the Specification, Charge II and Charge II as involves a finding that the accused did, at the time and place alleged, "commit an assault upon 2nd Lieutenant H. Cordelia Lampe, ANC, by wilfully * * * throwing to the ground and striking the said 2nd Lieutenant H. Cordelia Lampe, ANC, on the head with his hands", in violation of Article of War 96; legally sufficient to support 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 sentence as thus modified 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

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 disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 108, 10 Mar 1944)

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

SPJGQ
CM 244621

15 DEC 1943

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 4 November 1943. Dismissal.
Second Lieutenant JOSEPH A. MORRISON (0-1641600), Signal Corps.	

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

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

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

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

Specification: In that Second Lieutenant Joseph A. Morrison, First Reporting Company, 552nd Signal Aircraft Warning Battalion, did at Drew Field, Tampa, Florida, on or about 16 August 1943, feloniously embezzle by fraudulently converting to his own use the sum of sixty-seven dollars and three cents ($67.03), the property of First Reporting Company, 552nd Signal Aircraft Warning Battalion, entrusted to him by Staff Sergeant Thomas S. MacNichol, First Reporting Company, 552nd Signal Aircraft Warning Battalion, for the payment of the Company Laundry bill.

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

Specification 1: In that Second Lieutenant Joseph A. Morrison, First Reporting Company, 552nd Signal Aircraft Warning Battalion, did, at Drew Field, Tampa, Florida, on or about 1 May 1943, borrow from First Sergeant Harold C. Schuh, First Reporting Company, 552nd Signal Aircraft Warning Battalion, the sum of seven dollars ($7.00), in cash, the said First Sergeant Harold C. Schuh being an enlisted man in the Army of the United States this being prejudicial to the good order and discipline of the Military Service.

Specification 2: In that Second Lieutenant Joseph A. Morrison, First Reporting Company, 552nd Signal Aircraft Warning Battalion, did at Drew Field, Tampa, Florida, on or about 20 June 1943, borrow from Technician Fifth Grade Robert Thibault, First Reporting Company, 552nd Signal Aircraft Warning Battalion, the sum of ten dollars ($10.00), in cash, the said Technician Fifth Grade Robert Thibault being an enlisted man in the Army of the United States this being prejudicial to the good order and discipline of the Military Service.

Specification 3: In that Second Lieutenant Joseph A. Morrison, First Reporting Company, 552nd Signal Aircraft Warning Battalion, did at Drew Field, Tampa, Florida, on or about 15 July 1943, borrow from Technician Fifth Grade Thomas F. Lamken, 501st Signal Aircraft Warning Regiment, the sum of ten dollars ($10.00), in cash, the said Technician Fifth Grade Thomas F. Lamken being an enlisted man in the Army of the United States this being prejudicial to the good order and discipline of the Military Service.

Specification 4: In that Second Lieutenant Joseph A. Morrison, First Reporting Company, 552nd Signal Aircraft Warning Battalion, did at Drew Field, Tampa, Florida, on or about 16 June 1943, borrow from Private John J. Lamay, 501st Signal Aircraft Warning Regiment, the sum of thirty dollars ($30.00), in cash the said Private John J. Lamay being an enlisted man in the Army of the United States this being prejudicial to the good order and discipline of the Military Service.

Specification 5: In that Second Lieutenant Joseph A. Morrison, First Reporting Company, 552nd Signal Aircraft Warning Battalion, did, at Drew Field, Tampa, Florida, on or about 2 July 1943, borrow from Private Marvis P. Expervier, 501st Signal Aircraft Warning Regiment, the sum of five dollars ($5.00), in cash, the said Private Marvis P. Expervier being an enlisted man in the Army of the United States this being prejudicial to the good order and discipline of the Military Service.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of record for the prosecution discloses the

following facts:

Charge I and Specification thereunder:

The accused was supply officer of the First Reporting Company, 552nd Signal Aircraft Warning Battalion, Drew Field, Florida, for a period of nearly four months, between 1 May 1943 and 20 August 1943 (R. 6, 8, 14). During this time Sergeant Bradley was supply sergeant and Staff Sergeant Thomas S. MacNichol and Sergeant Robert Thibault were supply clerks of this organization. During this same period of time laundry for the enlisted personnel of the First Reporting Company was handled through the company supply room. Clothes to be laundered were turned into the supply room by individual soldiers and thence sent to the Dixie Laundry in Tampa. When finished they were returned to the men through the company supply room, the soldiers paying the respective amounts due for their laundry at the time of receiving it. These payments were made direct to the company supply sergeant or to one of the supply clerks (R. 14, 7). Dixie Laundry charged all items direct to the company and was paid at the end of the month by some officer or noncommissioned officer of the company with the funds collected from members of the company as above set out (R. 14). Payments were made monthly by the company to the laundry (R. 7) and, pending such payments, the amounts collected from the individual soldiers in the company were retained, unsegregated, in the supply room, being kept in a cigar box in a field safe, but separate from other funds (R. 8, 15).

Sergeant MacNichol, supply clerk, ordinarily handled the laundry, collected from the enlisted men, and had possession of the key to the field safe in which the money was kept (R. 7). Early in July 1943, he was granted a furlough and left the key of this safe with a private first class, who in turn delivered it to supply clerk Robert Thibault. Thereafter, during the absence of Sergeant MacNichol, Thibault attended to collecting for the laundry, placed the money in the safe and retained the key to the safe. On or about 20 July 1943 (R. 9), while Thibault was exercising these functions, and at a time when he was counting the laundry money, Sergeant Bradley, company supply sergeant, asked how much laundry money there was on hand and upon being informed that there was $30, he told Thibault "Lieutenant Morrison would like to borrow the money. He needs the money bad". Thibault at first demurred, but upon being informed by the supply sergeant that Lieutenant Morrison was the supply officer, could go over and get the money if he wanted to, and was responsible for everything in the supply room, he personally handed the $30 to accused (R. 9). Accused thereupon executed his IOU, which was placed in the safe (by whom not shown by the evidence) in lieu of the money (R. 9-10; Pros. Ex. A). Accused represented that he would be in a position to repay the money during that or the following week (R. 10).

It was properly stipulated that if Staff Sergeant Thomas S. MacNichol who had been transferred from Drew Field, were present, he would testify under oath as follows:

"About two days after I returned from my furlough, Lieutenant Morrison wanted to increase the IOU to $34.00. I gave Lieutenant Morrison the $4.00, which increased the IOU to $34.00 (R. 12).

"At a time when we were due to pay some laundry bills, Lieutenant Morrison was going into town and so he said that he would take the money that was on hand in the laundry fund and pay the bills, adding in what he had borrowed. I gave Lieutenant Morrison $105.00. He brought back a receipt from the laundry for $71.97. Lieutenant Morrison did not return the $33.03 balance to me, the difference between the amount of the receipt and the amount given him to pay the laundry bill" (R. 12).

At the time of receiving the $4 from Sergeant MacNichol, accused changed the original IOU to read $34 instead of $30 and initialed the change (R. 27; Pros. Ex. A). Under date of 16 August 1943, accused executed a receipt to the laundry fund for $105 and, upon payment of $71.97 to the Dixie Laundry, obtained a receipt from the laundry for that amount bearing the same date (R. 27; Pros. Exs. B, C). This receipt from the Dixie Laundry was also placed in the cigar box in the safe where the laundry fund was kept.

Accused was relieved as supply officer, sometime between 15 and 20 August 1943, and was succeeded by Lieutenant Johnson (R. 14). The latter found Lieutenant Morrison's IOU and receipts in the safe where the laundry fund was kept, and called the company commander's attention to the fact that the laundry fund was short $67.03 (R. 14). The company commander and Lieutenant Johnson interviewed accused within two weeks after the latter had been relieved as supply officer, with the view of recovering the money (R. 15-16). He, however, did not repay the money at that time but indicated that he would get the money elsewhere and make payment (R. 15-16). Accused did make payment on 30 September 1943 (R. 15). Whether the whole of the sum of $67.03 was repaid or only $64 thereof is not definitely or precisely shown in the record. First Lieutenant Lacy Edgar Nunn, company commander at the time the payment was made, testified in part as follows: "it was on the 30th of September, I approached him with the fact, and he did pay the money. He paid $64.00 of the money back to me." (R. 15).

No books or records were altered in connection with any of the above-mentioned transactions nor does the record disclose any attempt at any time to conceal the fact that accused had availed himself of the money from the laundry fund, nor did he ever deny owing the sum of $67.03 (R. 11, 16).

Charge II and Specifications thereunder:

The evidence for the prosecution establishes the following facts:

Late in June 1943, accused borrowed $10 from Sergeant Robert Thibault, an enlisted man, representing that he would repay the amount in a "couple of weeks, or something like that", and subsequently he again

stated that he would repay the sum. But repayment was never made by him (R. 10-12).

About 3 May 1943, accused borrowed $7 from First Sergeant Harold C. Schuh, an enlisted man under accused's command, representing that he could possibly pay it back by the end of the month (May). Later accused told Sergeant Schuh that he would pay him when he returned from his leave. This was around the 1st of July 1943. The loan has never been repaid (R. 20-21).

During June 1943, accused borrowed $20 and $10 on successive days from Private John J. La May, an enlisted man under accused's command, representing that the sums would be repaid toward the end of the month. Private La May was transferred from the company in August and thereafter asked accused about the amount the latter owed him. Accused asked what company he was in and told him he would see him the first thing in the morning. Accused did not see Private La May as promised and has never repaid the loan (R. 21-22).

On or about 2 July 1943, accused borrowed $5 from Private Marvis P. Expervier, an enlisted man, and on or about 15 July 1943, accused borrowed $10 from Technician Fifth Grade Thomas F. Lamken, an enlisted man, which sums have not been repaid (R. 22-23).

4. Accused, having been advised of his rights, elected to be sworn and to testify only in reference to the Specification of Charge I and Charge I. On that Charge he testified as follows:

He married on 7 January 1943. Almost immediately his wife became seriously ill and had to undergo an operation for a tumor. Not knowing that he could make use of Army surgeons and hospital facilities, he became rather heavily indebted as a result of having the operation performed by a civilian surgeon. He borrowed from both officers and enlisted men and also borrowed $150 from the Army Emergency Relief to pay off these personal loans. He and his wife then began having some disagreements and he had to humor her to get along with her. Before going on leave in July he paid all the bills he could, but "paid off too many". He then did not have enough money to run the household for the remainder of the month and had to borrow from some of the men at that time. Most of the debts were incurred before he went on leave, but when he got back from his leave he was broke, having "foolishly" spent more than he should have while on leave. Then, in order to feed himself and his wife, he borrowed the $30 from the laundry fund. One reason he had been unable to live on his income was that for a "long time" he was living in a hotel because he was unable to find other accommodations. He intended to repay the money. He never at any time made any misleading statements to anybody concerning the laundry fund nor did he try to conceal it in any way. He placed an IOU in the safe for the first two amounts (the $30 and the $4) and thought he had placed an IOU in there for the other

amount - the difference between the $105 and the amount thereof paid Dixie Laundry. On 30 September 1943 he repaid the money voluntarily before he knew that charges were to be filed against him and before he had been threatened with prosecution (R. 24-26).

Accused testified further that while he could not say exactly, it "seemed" to him that at the time he failed to apply all of the $105 on the laundry bill, the $71.97 that was applied paid the bill up to one date, and the amount remaining was insufficient to pay the next full bill, and the representative of the laundry had requested that no partial payment be made (R. 27). He appropriated to his own use and benefit the balance remaining after the $71.97 was paid, having purchased groceries with approximately $15 thereof (R. 27). Accused called no other witness and offered no other evidence.

5. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (MCM, 1928, par. 149h, p. 173). The evidence introduced upon the trial of this case touching the manner of handling, and the use made by accused, of the fund which is referred to in the evidence as the "laundry fund" or the "company laundry fund" is sufficient to bring the offense charged within the requirements of the definition.

Accused is charged with having embezzled the sum of $67.03, the property of the First Reporting Company, 552nd Signal Aircraft Warning Battalion. The evidence sufficiently supports this allegation of ownership. It shows that, as a company function, outgoing laundry of the enlisted men of the company was collected weekly through the company supply room and sent to the Dixie Laundry to be laundered. When this had been done, the laundry was returned to the company supply room and from there distributed to the soldier owners by the company supply clerks. Dixie Laundry made its charges for this laundry service direct against the First Reporting Company and collected therefor at the end of each month. The company supply clerks collected the respective sums due from each individual soldier of the company at the time of delivering his laundry.

It thus appears that the company dealt with Dixie Laundry on a credit basis and with the soldiers on a cash basis. The relationship of debtor and creditor existed between Dixie Laundry and the First Reporting Company, not between the laundry and the enlisted men of the company. The conclusion is inescapable that at the time of making their respective payments the soldiers intended to part with title to their money, and it is concluded that they did part with title and that title thereto vested in the company and that it became general owner thereof.

But, even if the view should be entertained that the First

Reporting Company, through its officers or other personnel, was acting as agent for its members to make payment to Dixie Laundry or as agent for the latter to collect the money from the soldiers, the company still had special title to the money, during the time it was retained by it between collection and payment, sufficient to satisfy the requirements of the law.

The proof required on this element of embezzlement is no different from that required in larceny. In Wharton's Criminal Law, Volume 2, it is said:

> "But it is not necessary that the alleged owner should be legally entitled to hold the property. It is enough if he in any sense have title" (sec. 1172).

Also:

> "Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either, and 'every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not devested if the special owner parts with the possession under a mistake.' Thus, goods left at an inn, or intrusted to a person for safe-keeping, or for sale, or to a carrier to carry; cloth to a tailor to make into clothes; linen to a laundress to wash; and goods pawned for money, -- may be laid as the property either of the owner or of the person in whose custody they were at the time.
>
> "Every person who has obtained by any means possession of any movable thing is deemed to be the special owner thereof, as against any person who cannot show a better title thereto.
>
> "The bailee may be laid as owner, even when the thing came into his actual possession and control fortuitously or by mistake" (sec. 1179).

The evidence clearly establishes that $105 which had been collected from enlisted men of the company under the circumstances above-mentioned, was delivered to accused by Sergeant MacNichol for the express purpose of having it applied toward the payment of laundry bills owing by the company to Dixie Laundry. Accused procured delivery of the money to himself by expressly representing that he would so apply it. Even if accused was not already legal custodian of the "laundry fund", the fiduciary relationship between accused and the owner of the fund, which is an essential element of the offense of embezzlement, arose from the manner in which, and the purpose for which, the $105 was delivered into the actual

possession of, and entrusted to, accused. When accused converted $33.03 thereof to his own use and benefit, as he admittedly did, he breached the trust and committed embezzlement.

It having been clearly established that the funds were held by accused in trust, and that he made use of them for his own personal purposes, there was a sufficient showing of a fraudulent conversion (CM 192530 (1930) Dig. Op. JAG, 1912-40, sec. 451). This is particularly true when it appears, as it does in this case, that the custodian or trustee, making use of trust funds for his own private purposes, is not at all times able and ready to make restitution on demand (CM 130989 (1919) Dig. Op. JAG, 1912-40, sec. 451 (17)).

The fact that accused may have intended to return the money, or even that he did return the amount of the fund, after the offense was complete, is no defense (CM 192530 (1930) supra; CM 123492 (1918) Dig. Op. JAG 1912-40, sec. 451 (17)).

The question of whether accused is also guilty of having embezzled the remaining $34, which he purported to borrow from the supply clerks and for which he gave his IOU, requires separate discussion only for the reason that it becomes necessary to determine whether accused lawfully came into possession of this money while it constituted trust funds. The money was not a part of the ordinary company fund, of which the company commander was legal custodian, but was a special fund - not provided for, or recognized by, Army Regulations - which was being legally collected and administered through the supply branch of the company. Accused was company supply officer and was chargeable with the proper administration of the affairs of the company supply branch. He had custody of, and was accountable for, the supplies and funds incident to the operation of the supply room and the conduct of the affairs of his office. It is obvious that accused was legally the custodian of the "company laundry fund" and, as such, bore a relationship to it comparable to that which a company commander bears to a company fund. This being so, he could not borrow from himself, and when he made personal and unauthorized use of the money under the guise of borrowing it, accused was guilty of embezzlement (CM 192530 (1930) Dig. Op. JAG, 1912-40, sec. 451 (18); CM 167487 (1925)).

It can make no difference that accused did not have actual possession of the money or that he did not keep the key to the safe in which the money was kept. If it be conceded that the supply clerks had actual possession of the money, they were nevertheless holding it as agents for accused, and their acts in delivering the money to accused did not change the situation legally from what it would have been if accused had gone into the safe and obtained the money himself.

It may also be pointed out that proof that any part of a sum alleged to have been embezzled was, in fact, embezzled is sufficient to

sustain a finding of guilty of a specification charging the offense, and punishment in the instant case is not dependent upon the amount embezzled (CM 130989 (1919) Dig. Op. JAG, 1912-40, sec. 451 (23)).

The fact that it appears from the evidence that $30 of the money was delivered into accused's actual possession by Sergeant Robert Thibault, instead of by Sergeant MacNichol as alleged in the Specification, does not constitute a material variance. It is immaterial who actually delivered the money to the accused, as the necessary fiduciary relationship between the accused and the owner of the money was established by the evidence (CM 130989 (1919) Dig. Op. JAG, 1912-40, sec. 451 (23)).

The evidence in support of Specifications 1 to 5 inclusive, Charge II, is sufficient to show that accused solicited and procured loans from each of the enlisted men as alleged and in the amounts as charged. The evidence further reflects that, in most of these instances, the time within which accused had indicated he would repay these sums had long since passed, and that more than a reasonable time within which to repay all of them had elapsed, without payment having been made. The mere act of an officer borrowing money from an enlisted man is an offense under Article of War 96, and the finding of guilty of a violation of that Article of War is amply sustained by the record (CM 122920 (1918), CM 244263 (1943) Dig. Op. JAG, 1912-40, sec. 453 (5)).

6. The War Department records show accused to be 23 years of age and married. He completed four years of high school, graduating in 1938. He enlisted at Fort Sam Houston, Texas, 2 August 1939, for Air Corps (Unasgd), March Field, California; was transferred to Signal Corps, same station, 2 March 1940; was ordered to foreign service 1 April 1941, with Camp Clatsop, Oregon, as temporary station, and arrived at Fort Greely, Kodiak, Alaska, 17 July 1941. He was commissioned a temporary second lieutenant, Army of the United States, 31 December 1942, after having completed a course at Officer Candidate School for Signal Corps, Fort Monmouth, New Jersey. Before entering the Army accused installed telephones and was "trouble-shooter" for a telephone company.

7. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 or of Article of War 96.

William A. Downs, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 JAN 1944 - 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 A. Morrison (0-1641600), Signal Corps.

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

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

Myron C. Cramer.

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

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

(Sentence confirmed. G.C.M.O. 115, 10 Mar 1944)

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

SPJGK
CM 244631

24 DEC 1943

UNITED STATES	8TH ARMORED DIVISION
V.	Trial by G.C.M., convened at North Camp Polk, Louisiana, 13 November 1943. Dismissal.
Second Lieutenant RAYMOND J. O'CONNELL (O-1176149), Field Artillery.	

OPINION of the BOARD OF REVIEW
TAPPY, 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 Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Raymond J. O'Connell, Headquarters Battery, 405th Armored Field Artillery Battalion, did without proper leave, absent himself from his organization at North Camp Polk, Louisiana from about November 2, 1943 to about November 5, 1943.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence, remitted the forfeitures, and forwarded the record for action under the 48th Article of War.

3. Evidence introduced by the prosecution showed that accused was a second lieutenant, Field Artillery. He was assigned, and on 31 October 1943 reported for duty to the 405th Armored Field Artillery Battalion at North Camp Polk, Louisiana. He reported to Second Lieutenant Harry M. Vortriede, Battalion Adjutant and Battalion Duty Officer on that date (R.6, 7; Exs. A,B). Lieutenant Vortriede stated that he saw accused at North Camp Polk during the day of 1 November 1943 but did not see him again until 6 November 1943, at which time accused came into battalion headquarters. He was told by Lieutenant Vortriede that "he had been marked as A.W.O.L.", whereupon accused said that he had returned to camp and had reported to the

night duty officer on the night of 5 November 1943 (R.7). Certified extract copies of the morning report of the 405th Armored Field Artillery Battalion, North Camp Polk, Louisiana, show accused recorded on 5 November 1943:

"Fr. dy. to AWOL since 2 November, 1943, 0700",

and recorded on 6 November 1943:

"Fr. AWOL to ar. in qrs. 2300, 5 November" (R.7,8; Exs. C,D).

4. Accused did not testify and called no witnesses. From Exhibit A it appears that prior to reporting for duty with the 405th Armored Field Artillery Battalion, accused had been a student officer with the Second AAF Liaison Training Detachment, AAF Contract Pilot School (Liaison-Elementary) at Pittsburgh, Kansas, and had there been released from temporary duty. On cross-examination, Lieutenant Vortriede stated that on the night when accused reported to him for duty, accused was "rather dejected and he wondered how the officers would greet him upon his return. He also felt rather badly about missing out at school".

5. In addition to accused's plea of guilty, evidence of the prosecution shows accused to have been absent from his organization without leave from about 2 November 1943 to about 5 November 1943 in violation of Article of War 61, as alleged in the Specification of the Charge, in violation of Article of War 61.

6. Appended to the record of trial is a request for clemency signed by defense counsel. The request is based upon accused's satisfactory performance of a previous assignment as Battalion Survey Officer and recommends in effect that the sentence be suspended and that accused be transferred for duty with Infantry Division Artillery.

7. Accused is 30 years of age. He was commissioned a second lieutenant, Field Artillery, 14 January 1943, after attending Officer Candidate School. He enlisted on 10 April 1942 and served to 13 January 1943, when he was discharged as corporal to accept his commission. He is single. He graduated from high school. In civilian life he was employed as a laborer.

On 27 May 1943, accused was adjudged guilty by general court-martial of absence without leave from 19 April to 10 May 1943. The sentence as approved by the reviewing authority provided for forfeiture of $75 of his pay for 6 months and restriction to camp limits for three months.

8. 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 of the

Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized under Article of War 61.

Thomas N. Jaffy, Judge Advocate.
John Wannwell, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

SPJGK.
CM 244631

1st Ind.

War Department, J.A.G.O., 1 JAN 1944 - 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 J. O'Connell (O-1176149), Field Artillery.

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

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 116, 10 Mar 1944)

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

SPJGQ
CM 244648

3 DEC 1943

UNITED STATES v. Second Lieutenant GEORGE W. TUTTLE (0-1589555), Quartermaster Corps.	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Lee, Virginia, 12 November 1943. Dismissal.

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

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

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

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

Specification 1: In that 2nd Lieutenant George W. Tuttle, Company E, 6th Quartermaster Training Regiment, did, at Camp Lee, Virginia, on or about 31 July 1943, make a claim against the United States by presenting said claim to Lieutenant Colonel Alfred N. Taylor, F.D., Finance Officer at Camp Lee, Virginia, an officer of the United States duly authorized to pay such claims in the amount of ninety-six dollars and seventy cents ($96.70) for rental allowance and subsistence allowance, which claim was fraudulent in that at the time of presenting this claim, said 2nd Lieutenant George W. Tuttle was not married and that said claim was then known by said 2nd Lieutenant George W. Tuttle to be fraudulent.

Specification 2: In that 2nd Lieutenant George W. Tuttle, Company E, 6th Quartermaster Training Regiment, did, at Camp Lee, Virginia, on or about 31 August 1943, make a claim against the United States by presenting said claim to Lieutenant Colonel Alfred N. Taylor, F.D., Finance Officer at Camp Lee, Virginia, an officer of the United States duly authorized to pay such claims in the

amount of ninety-six dollars and seventy cents ($96.70) for rental allowance and subsistence allowance, which claim was fraudulent in that at the time of presenting this claim, said 2nd Lieutenant George W. Tuttle was not married and that said claim was then known by said 2nd Lieutenant George W. Tuttle to be fraudulent.

Specification 3: In that 2nd Lieutenant George W. Tuttle, Company E, 6th Quartermaster Training Regiment, did, at Camp Lee, Virginia, on or about 30 September 1943, make a claim against the United States by presenting said claim to Major W. R. Tabler, F.D., Finance Officer at Camp Lee, Virginia, an officer of the United States duly authorized to pay such claims in the amount of ninety-six dollars ($96.00) for rental allowance and subsistence allowance, which claim was fraudulent in that at the time of presenting this claim, said 2nd Lieutenant George W. Tuttle was not married and that said claim was then known by said 2nd Lieutenant George W. Tuttle to be fraudulent.

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

Specification: In that 2nd Lieutenant George W. Tuttle, Company E, 6th Quartermaster Training Regiment, did, at Colonial Heights, Chesterfield County, Virginia, from on or about 29 May 1943, to on or about 22 October 1943, wrongfully, dishonorably and unlawfully live and cohabit with a woman, Lena Behrman nee Lena Rose Bennett alias Evelyn Bennett, not his wife.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under the 48th Article of War.

3. With reference to Charge I and the Specifications thereunder Major W. R. Tabler, F.D., Post Finance Officer at Camp Lee, Virginia, identified a photostated copy of the pay and allowance account of accused for the month of July 1943 signed by accused, which was received in evidence without objection (R. 14). This voucher shows a claim for $43.40 for subsistence allowance, calculated on the basis of two rations per day at 70 cents a ration or 31 days at $1.40 per day (R. 14). If single he would receive only $21.70 (R. 15). The voucher also shows a claim for $75 as rental allowance. If accused had not claimed to be married he would receive nothing for rental allowance (R. 15). On the

voucher, in answer to question (3), accused stated, as his lawful wife, "Fannie Prichard Tuttle, 815 Sheppard Street, Petersburg, Virginia," and certified the statement to be true and correct. On the strength of the claim that he was married he was paid $75 (rental) plus ($21.70 (subsistence) or a total of $96.70 (R. 15).

It was stipulated by accused and his counsel, on one hand and the prosecution on the other, and with the consent of the court, that accused's pay and allowance accounts for August and September 1943 (Pros. Exs. 2 and 3), signed by accused, and claiming as rental and subsistence allowances, $96.70 for August and $96.00 for September, were paid solely on accused's claim that Fannie Prichard Tuttle was his lawful wife (R. 15-16). Accused's signature on the voucher makes it a claim against the Government. Accused also signed a certificate thereon which reads "I certify that the foregoing statement and account are true and correct;".

The prosecution offered, without objection by defense, a certified copy of the final decree in divorce in the Court of Chancery, New Jersey (No. 145/518, 79965), between Fannie Prichard Tuttle and George Wilhelm Tuttle, dated 6 July 1943 (Pros. Ex. 4).

First Lieutenant Curtis M. Dozier, Jr., Quartermaster Corps, Camp Lee, Virginia, testified that as investigating officer of the instant Charges he interviewed accused on 1 November 1943, who, after proper warning of his right to remain silent, voluntarily stated (R. 18), with respect to his claims for subsistence and rental allowances as alleged (R. 20) as follows:

> "* * * I asked him whether or not it was true that he had filed a claim for rental and subsistence allowance that is allowed to married Officers and he said he had and I asked him whether or not it was true on that claim that Fannie Bell Prichard was his wife and he said that was true, and I asked him if he filed such claim with the Finance Officer in Camp Lee for the month of July 1943 and he answered he had and I asked him if at the time he made the claim and filed it whether it was a false claim and he said he knew it was a false claim. I asked him then if he received payment on the claims from the Finance Officer and he said, yes, he did and I asked him if he realized that he received money based on a false claim and he said he had. I then repeated the same question for the months of August and September, pointing out to him that the claims had to be filed on the basis that he was married to Fannie Bell Prichard and that he received payment which he acknowledged."
>
> * * * * *
>
> "A. I asked the accused whether he was married to Fannie Bell Prichard when he filed his claim. He said he was not and

I asked him then if he had not certified to a false claim and he said he had.

"Q. A false claim in what particular?

"A. False in that he was making a claim by use of the pay voucher for allowances for rent and subsistence allowed to married Officers showing thereon he was married to Fannie Bell Prichard when in fact he was not married to her. He stated that he realized the situation." (R. 20).

* * * * *

"* * * Did you ask the accused whether the statement that he was married to this Fannie Bell Prichard was false and whether he knew that was false? Is that the question you asked him?

"A. I asked the accused this question, sir. 'You filed a claim for subsistence and rental allowance and showed on your claim that you were married to and living with Fannie Bell Prichard for the month of August 1943. That was not true?' His answer to it being untrue was yes. That was the answer. Then I asked him, 'You knew when the claim was filed that it was a false claim; did you not?' He said, 'Yes, sir.' Then I asked him, 'You knew you were not married to her and you knew the claim was false?' He said, 'Yes.'" (R. 23).

The Specification of Charge II (unlawfully cohabiting with a woman not his wife) was amended during the trial by the court on motion of the prosecution (R. 33) and with the consent of the defense, so as to insert and include therein the words "at Petersburg, Virginia and", for the reason that as the evidence at the trial unfolded it discloses that the offense charged was committed at two different places and periods (R. 33-34). Accused was advised that if he had been misled by the Specification as originally drawn, or needed further time to meet this additional allegation, a continuance would be granted (R. 34). In addition it was stipulated that accused and Lena Rose Bennett were parties to a ceremony in Suffolk, Virginia, on 11 July 1943 before a minister of the gospel, the Reverend Goodwin, purporting to be a marriage ceremony (R. 37).

Lena Rose Tuttle of 912 Floyd Avenue, Richmond, Virginia, and working in a furniture store, testified, as a defense witness, that accused is her husband (R. 27). She was married to him on 11 July 1943 in the First Baptist Church at Suffolk, Virginia, by Reverend Goodwin (R. 28). She had been married previously to Paul Albert Behrman on 10 June 1933 at Boston (R. 29). She comes from England but is a naturalized citizen. Behrman came from Germany. They separated just after Pearl Harbor (7 December 1941) and, because he showed her a letter from an attorney about a Mexican divorce, at the Trailway Bus Depot in Baltimore, Maryland, in December 1942, at which time he was seeking a divorce in order to remarry, and knew that she also wanted one, she thought she was divorced (R. 29) when she went through the purported marriage ceremony with accused in

Suffolk (R. 37). She understood it took about two months to obtain a final decree and assumed she was divorced in February 1943 (R. 29, 30, 35). In October 1943, more than three months after this purported marriage to accused, both the Federal Bureau of Investigation, who was investigating her first husband, Behrman, and Behrman himself, told her she was not divorced from him (R. 30). She first met accused in 1941 when he was a civilian. She accompanied him to Petersburg, Virginia, in December 1942. She first lived at 108 Lafayette Avenue, Colonial Heights, Virginia (R. 32). Later she occupied a room in a private home at 815 Sheppard Street, Petersburg, Virginia, in May of that year (R. 32), where she was known as Mrs. George Tuttle (R. 34) and occupied the same living quarters with accused as man and wife (R. 35). Accused commenced living at that address in the beginning of May and it was from this address that they were married in July 1943 (R. 33). At the end of July they moved to Highland Avenue, Colonial Heights, where they lived as man and wife (R. 35).

Accused, having been properly warned of his legal rights, voluntarily made a statement, first orally, then in writing, signed by him, to First Lieutenant Curtis M. Dozier, Jr., Q.M.C., the officer who investigated the charges in this case (R. 16-17) and who testified at the trial that accused admitted he had first married a Miss Fannie Bell Prichard in July 1932, lived with her for about two and a half years, and separated from her in the fall of 1935. They have not lived together since (R. 19). His first wife instituted divorce proceedings in New Jersey and a final decree had been entered on 6 July 1943. Accused received the original papers but did not receive the final decree. The attorney, Joseph Cramer, Jersey City, New Jersey (R. 26), representing accused's wife, advised him about 10 July that he could secure a copy of the final decree for a fee but, since accused had the information from the lawyer's letter, he never requested the decree (R. 20). (The final decree dated 6 July 1943 was offered by the prosecution as Exhibit 4 and shows accused was not divorced from his lawful wife, Fannie Bell Prichard, until that date.) Accused claims he did not discover that Evelyn Behrman was not divorced from her husband until the latter part of July 1943 when she received a letter from Paul Behrman, her husband, which stated that he had not instituted divorce proceedings of any kind against her (R. 21, 24), that he went into the Army and the divorce he had told her about was never completed (R. 35) and that he was investigating possibilities of aid from the Army in securing a divorce (R. 24). Accused admitted that he and Evelyn Behrman had been "living together" in both Petersburg, Virginia, and Colonial Heights, Virginia, for a period extending back shortly before he graduated from OCS in March 1943 and that after she received the letter from her husband, Paul Behrman, saying she was not divorced, she and accused continued to live together as husband and wife until 22 October 1943 (R. 22).

Second Lieutenant John M. Bond, Quartermaster Corps, Company H, 6th Quartermaster Training Regiment, Camp Lee, Virginia, testified that on 29 May 1943, he and his wife stopped at accused's home on Sheppard

Street, Petersburg, Virginia, to drive them to a regimental dance at the Officers' Club. When "Lieutenant Tuttle (accused) and his wife came downstairs, went outside and at the car she was introduced to my wife and myself as his wife Evelyn." During the dance at the Club accused introduced this lady as his wife to Lieutenants Ellis, Gould, Wood and other officers and their companions (R. 7). Subsequently, at dances or parties, on 11 June, again in July, at a regimental party on 2 August, and in September, he saw accused and his wife. During the period between 29 May and September 1943 he knew this couple as "Lieutenant and Mrs. Tuttle" and "knew them both well enough to call them by their first names George and Evelyn" (R. 7). Accused never called her Fannie, Fannie Bell or Fannie Prichard. On 17 July the accused and his wife moved to Highland Avenue in Colonial Heights (R. 7). Bond carried accused back and forth to work in his car frequently until 1 October and saw Mrs. Tuttle "quite often" in the Officers' Snack Bar and the Officers' Mess Hall throughout the whole period between 29 May up until the middle of October. During this period they resided at the same address and accused "held her out" to Lieutenant Bond "as being his wife during this time" (R. 9).

Mrs. Rosalie Bond, 2006 Snead Street, Colonial Heights, wife of the preceding witness, corroborated her husband's testimony and added that at the Red Cross meetings attended only by officers' wives (R. 13) she saw Mrs. Tuttle sign a register stating the number of hours spent, as "Mrs. Evelyn Tuttle" (R. 11) and the first Thursday in August she saw Mrs. Tuttle's visitors' pass which is of the type issued by the Provost Marshal to officers' wives or visitors to come on the Post. The pass stated "her name Evelyn Tuttle * * * and the fact that she was the wife of Lieutenant George Tuttle" and had on it her photograph (R. 12).

Captain Irwin F. Carpenter, Quartermaster Corps, Company E, 6th Quartermaster Training Regiment, Camp Lee, Virginia, testified that on 15 October at a company dance accused came up to him and said, "Captain I would like for you to meet my wife Evelyn--Captain Carpenter" (R. 27).

4. Accused admitted to the investigating officer his conscious guilt of both Charges and of their respective Specifications and the latter testified in precise detail as to each at the trial. The accused's admissions were wholly voluntary and made only after a legally proper and comprehensive warning as to his rights in the premises. In addition thereto the testimony of other witnesses is sufficient standing alone to establish that accused and his paramour, Evelyn Bennett Behrman lived together as man and wife, occupying the same living quarters, from about 1 May to 22 October 1943, first in Petersburg, Virginia, and later in Colonial Heights, Virginia. During this period accused introduced and falsely misrepresented this woman as his wife to brother officers and their wives at various parties and dances given on the post of Camp Lee, Virginia. Also, Evelyn Bennett Behrman posed as accused's wife

by signing her name as such on a public register and by carrying and using a Provost Marshal's identification pass, with her photograph attached, wherein she is described as accused's wife. Even had the purported marriage ceremony of 11 July been valid, the offense here alleged in Charge II would have been committed in any event, as accused cohabited as man and wife with Evelyn Bennett Behrman for at least two months before that date. Legally she was and still is the legal undivorced wife of Behrman and has been since 1933. Up until the date of this trial she had never been divorced from Behrman. From her standpoint the purported marriage to accused on 11 July 1943 was bigamous. Her alleged belief that she thought she was divorced in February 1943 is too thin to be credible and so likewise is accused's assertion of belief in that story. But even granting for the sake of argument that it is true, he, nevertheless would be guilty of cohabiting in adultery with a woman not his wife for the period between 29 May and 6 July 1943. Accused was legally a married man from the date of his marriage to Fannie Bell Prichard in 1932 until their divorce 6 July 1943. Therefore, he too was guilty of publicly living in adultery with Evelyn Bennett Behrman during the entire period of their cohabitation prior to 6 July 1943, when his wife's divorce decree became final, and of further cohabiting with her as man and wife, without even the possible pretense of a common law marriage status, after 6 July when he himself became legally eligible for marriage. It is not the function of courts-martial to enforce moral codes or punish their infraction as such, but when the military code of honor is violated by an officer who publicly flaunts a mistress in the face of officers and their wives on an Army post he violates the decencies of civilized society, military or civil and his conduct is a flagrant violation of Article of War 95.

The misrepresentations set forth in accused's pay vouchers for July, August and September 1943 as to his right to claim commutation of rental and subsistence allowance from the Government are based on a palpable falsehood and this accused specifically admits to be so. Prosecution's Exhibit 4, the final divorce decree of 6 July 1943 between accused and his wife, Fannie Bell Prichard, are sufficient proof of the falsity of the assertions made by him in his pay vouchers. Accused not only made claims for, but collected from the Government the amounts of the rental and subsistence allowances set forth in the pay vouchers by using his former wife's name and marital status as a false pretense. (Accused could not help but know that Fannie Bell Prichard was no longer his wife after 6 July). All the elements of proof of the offense are established by the evidence of record.

5. War Department records disclose that this officer is now 34 years of age and on 2 February 1943 declared himself to be married and having no other dependents than his wife. He graduated from the Wakefield, Massachusetts, High School and in 1931 from Tufts Engineering School with the degree of Chemical Engineer. He worked for the Kraft-Phoenix Cheese Company in Jersey City, New Jersey for two and a half years and also for the McKay Milk Products Company in New York City, as a quality food control engineer. He enlisted in the National Guard of New York in April 1931 and was honorably discharged in the grade of sergeant in 1934. He reenlisted therein 5 April 1934 and was honorably discharged in March 1935. He was inducted at Fort Jay, New York, 10 April 1942 and served in a Chemical Laboratory Company at Edgewood Arsenal, Maryland, until December 1942 when he was sent to the Quartermaster Officer Candidate School at Camp Lee, Virginia, where he was appointed a second lieutenant, Quartermaster Corps, Army of the United States, and entered on active duty on 19 March 1943. He is commissioned for limited service only because of defective eyesight.

6. The court was legally constituted and had jurisdiction of the person and of the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 and mandatory upon conviction of a violation of Article of War 95.

William A. Rounds, Judge Advocate.

Paul Weltum, Judge Advocate.

Herbert A. Friedman, Judge Advocate.

1st Ind.

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 Second Lieutenant George W. Tuttle (0-1589555), Quartermaster Corps.

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

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 44, 27 Jan 1944)

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

SPJGK
CM 244666

3 JAN 1944

UNITED STATES v. Second Lieutenant BILL G. SCHALLENBERG (0-566637), Air Corps, 32nd Transport Squadron.	SOUTH ATLANTIC WING AIR TRANSPORT COMMAND Trial by G.C.M., convened at Parnamirim Field, Natal, Brazil, 22 September 1943. Dismissal.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: In that 2nd Lieutenant Bill G. Schallenberg, A.C., 32nd Transport Squadron, 9th Transport Group, South Atlantic Wing, Air Transport Command, did, at or near APO 604, c/o Postmaster, Miami, Florida, on or about 24 August 1943, feloniously take, steal and carry away a pistol, the property of O.K. Joy of the value of $21.75.

He pleaded not guilty to the Charge and its Specifications. He was found not guilty of Specification 1, and guilty of Specification 2 and of the Charge. 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, including in his action the following:

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

The record of trial should have been forwarded for action under Article of War 48 and has been so treated.

3. Summary of the relevant and material evidence.

The incidents which the prosecution contended constitute the offense of larceny took place on or about 24 August 1943, at a place within the jurisdiction of "APO 604, c/o Postmaster, Miami, Florida". Accused is a second Lieutenant in the 32nd Transport Squadron, 9th Transport Group, stationed near the town in which was located the shop of Mario Alcoforado. (R. 1, 6, 15, 16)

Mario Alcoforado testified that he owned the "Nickelegem", a small shop in Natal, where mechanical repairs are made and plating work done on firearms and surgical instruments (R. 15, 16, 18; Ex. 4). On 29 July 1943, one "O.K. Joy" brought to Alcoforado a .25 caliber Colt automatic pistol to be nickel plated (R. 16). Alcoforado gave Joy a receipt for the gun (R. 18; Ex. 4). Joy instructed him what was to be done to the pistol, but said nothing about delivering the pistol to anyone other than Joy; and it was stipulated that he did not subsequently authorize anyone to obtain the pistol for him from the "Nickelegem" (R. 5, 17; Ex. 1). Two or three days prior to 21 August 1943, accused had been in Alcoforado's shop. Alcoforado showed him Joy's pistol and asked accused if he knew the owner. At first accused said he did not but "after thinking awhile" he stated that he did know the owner, who was "another officer in the camp" and "a friend of his" (R. 18).

Corporal Michael A. Napolitano, 32nd Transport Squadron, 9th Transport Group, testified that about 21 August accused asked him "to pick up a gun in town" (R. 6). He identified the gun which he picked up as that offered in evidence by the prosecution (R. 7; Ex. 2). Accused gave witness a letter in a sealed envelope and told him, "that if I was going to town I could do him a favor by bringing the letter to the Nickelegem" (R. 9). Witness said that he did not read the letter, and claimed he did not know what was in the envelope at the time (R. 7, 8, 9, 10, 11; Ex. 3). He did not ask accused how much he was to pay for the gun (R. 10). This witness knew where to go because he had been there before, once to pick up a small .25 automatic pistol for accused, "another pistol" not Exhibit 2, and also to have some belt buckles plated for himself (R. 10). Accordingly, Corporal Napolitano went to town and to the Nickelegem where he picked up the gun (R. 7).

The conversation between Alcoforado and Napolitano at that time was carried on in Portuguese. Alcoforado was certain of that (R. 20). Alcoforado said that Napolitano handed him a letter in an unsealed envelope (R. 17, 19, 21) and claimed that he had lost the receipt for the pistol. The letter was in Portuguese (R. 9, 17; Ex. 3). The court interpreter's translation was as follows: (R. 17)

> "Please give this soldier a small .25 automatic pistol. This man will give you plenty of money for a nickel plating job. Thank you very much."

It was signed, "O.K. Joy", over a similar typewritten signature, followed by the typewritten words, "Official de Campo" (R. 9; Ex. 3). Alcoforado testified that he was suspicious, and had the corporal sign the bottom of the letter as a receipt (R. 17, 18, 19). Witness asked Napolitano why the owner did not come in himself. Napolitano told him the owner was a very busy man, and was occupied at the present time. No name was specifically mentioned, but witness understood that it was Joy who was "occupied at the present time". Napolitano did not speak of any lieutenant, and the word "lieutenant" was not used (R. 19). Alcoforado had agreed with Joy that the nickel plating would cost 40 milreis ($2.00). Because of his suspicions about the transaction, and because the letter which Napolitano presented said that the soldier would be willing to pay the price, witness charged 60 milreis ($3.00) (R. 18, 19). The next day, Joy came into the store with the original receipt to get the pistol which, of course, was gone (R. 18, 19; Ex. 4).

Corporal Napolitano's story differed in particulars but was to the same general effect. He stated that he spoke very little Portuguese and that Alcoforado did not speak English (R. 8, 9). Witness could not read Portuguese (R. 12). The conversation between them was mostly by gestures, witness indicating that he wanted the pistol (R. 10). He gave Alcoforado the envelope, and five or ten minutes later Alcoforado gave witness a piece of paper, pointing to it to indicate that witness was to sign it (R. 11). Witness thought this was a receipt for the gun, and signed his own name (R. 7). Alcoforado then presented him with another paper written "in Brazilian", and witness signed this using the name "J.H. Smolker" (R. 8). Napolitano explained to the court that Smolker was a friend of his, in the Infantry, then in New Caledonia (R. 12). He said that he used this fictitious name "just in case he tried to put something over on me" (R. 14). He continued: "I figured there was something fishy about the O.K. Joy and all this other stuff. I didn't think that I should sign my own name" (R. 11). Witness received the pistol, inserted the receipt on which he signed his own name in the magazine of the pistol, put the pistol in his pocket, and walked out of the shop (R. 12, 14). He got back to the field about 8 o'clock, saw the accused the next day, and gave accused the pistol with the receipt inserted in the magazine (R. 12, 14, 15). He told accused the cost was sixty milreis (R. 12). Accused said, "Thank you", and took the pistol and walked away (R. 12, 13, 15). Accused asked him no questions (R. 13). Accused never did recompense Napolitano for his expenditure. When Napolitano had picked up a pistol for accused the first time, accused gave him the money to pay for it before Napolitano picked it up (R. 13, 14).

Lieutenant Jack A. Sostrin, 1208th Military Police Company was a witness for the prosecution. He was the Military Police duty officer in town the night that O.K. Joy came in and "reported the case". When Joy made his complaint, witness commenced an investigation. Witness trailed accused because Alcoforado knew that accused "used to come on a motorcycle" and witness knew that accused rode a motorcycle (R. 23). Alcoforado identified accused to Lieutenant Sostrin (R. 24). Lieutenant Sostrin went

to accused's quarters. A couple of Brazilian workmen were busy in them and saw witness and Alcoforado when they came in. One put his hand in the closet and pulled out the gun, Exhibit 2. Witness picked it up, compared it with the number on the receipt given by Alcoforado to Joy and found the numbers corresponded (R. 22).

Sergeant Simon Bounan, Headquarters and Headquarters Squadron, was with Lieutenant Sostrin when they picked up accused, and also when the gun was found in accused's quarters (R. 29). He testified that the gun was found in the clothes closet, unlocked, on one of the shelves, on the left hand side of the closet (R. 29, 31). It was well back on the shelf (R. 31). A Brazilian workman was in the room. Witness asked him if he knew of any guns accused had. The Brazilian knew of a .45. He put his hand on the shelf to get the .45 and pulled out the .25. The numbers corresponded with those of Exhibit 2. Witness could not see the exact spot from which the pistol was taken as it was too dark in the closet. Witness put his hand in and found that the .45 was on the same shelf with the .25. Witness, in one of his answers, inferred that ~~the~~ Brazilian had nothing in his hand when he first put it into the closet. The Brazilian knew where to put his hand (R. 31).

Though it is not clearly stated in the record, it appears that accused was then taken to Lieutenant Sostrin's office for questioning (R. 24). Some time during the questioning accused was "warned of his rights" (R. 24). What was said by way of warning nowhere appears in the record. After the warning was given, accused declined to make a statement (R. 24). Prior to the warning Lieutenant Sostrin asked accused if he had any guns, and accused replied that he did (R. 22, 24, 29). Sostrin told accused to describe the guns. Accused said he had a .45 caliber Army pistol, and a .32 caliber pistol. Lieutenant Sostrin said that he was "not interested in any GI issue", and asked accused if he had any other (R. 22, 30). Accused then said he had sold "the gun", meaning presumably the .32, and showed a receipt for it. Sostrin told accused that he did not want to see a receipt for a .32, and asked accused "if he had any other guns that he sold". Accused said he did not, that he had no other gun (R. 22, 30). Sostrin took the .25 out of his pocket and confronted accused with it, asking him if he had seen it before (R. 22, 24, 30). Witness Sostrin says that accused replied; "I guess I had better say that I have seen it before" (R. 22, 24). Witness Bounan said accused replied; "I suppose I must have seen it. I should remember it, shouldn't I" (R. 30). Lieutenant Sostrin testified that he asked accused "who got the gun" [from the Nickelegem]. He said, in this connection, he stated to accused, "You better tell me, or I will tell your Commanding Officer". This was the only threat made according to this witness (R. 24). Accused then said that it was Corporal Napolitano, - "I might as well tell you, Corporal Napolitano" (R. 30, 32).

After accused was "warned of his rights" he refused to make any further statements. What accused said, in this connection, was prior to his being advised or "warned" of his rights (R. 24).

Staff Sergeant Joseph Smolker, Headquarters and Headquarters Squadron, 9th Transport Group testified that the signature "J.H. Smolker", on Exhibit 3, was not his signature, that he did not know Corporal Napolitano, had never had any dealings with him, and that he was on guard duty about the 24th of August (R. 32, 33).

Captain Warren L. Starrett, 32nd Transport Squadron, was a witness for the prosecution. Prior to entering the Army he had been connected with the Mellon National Bank, Pittsburgh, Pennsylvania for 14 years. In his work he had been connected with the handling of checks, and had been required to study handwriting and forgery (R. 25). He examined Exhibits 3 and 4. The signatures on them were not, in his opinion, made by the same person (R. 26). He did not believe that the signature "J.H. Smolker", on Exhibit 3, and the signature "O.K. Joy", on the same exhibit, were made by the same person. Captain Starrett would not say that the signature "O.K. Joy" on the letter of 21 August, Exhibit 3, was in the handwriting of accused (R. 27).

The defense offered no evidence, and accused elected to remain silent (R. 33).

4. The evidence shows that at the place alleged in Specification 2 of the Charge and on or about 29 July 1943, one O.K. Joy, a civilian employee at the same airfield at which accused was stationed, took a small .25 caliber Colt automatic pistol to a shop in a nearby town to be nickel-plated.

Several days before 21 August 1943, accused was in this shop, and upon being shown this pistol by the proprietor and asked if he knew the owner, replied that he did. A few days later accused gave a corporal at his field a note in an envelope, telling him to take it to the shop in town and to pick up the pistol. The note directed the proprietor to deliver the pistol to the soldier and added that the bearer would pay plenty of money for the job. O.K. Joy did not authorize anyone to obtain the pistol for him from the shop. The note was signed "O.K. Joy".

Upon receipt of the note, the proprietor delivered the pistol to the corporal, who in turn delivered it to accused at their field on the following day. Shortly thereafter, O.K. Joy called at the nickel-plating shop to claim his pistol. Upon investigation of the incident the pistol was found on a shelf in a closet in accused's quarters. Accused admitted that he had seen the pistol before.

5. The evidence supports beyond a reasonable doubt the findings of guilty of the Charge and of Specification 2 thereunder. Accused was found not guilty of Specification 1, charging forgery of Joy's name to the note which secured possession of the pistol from the shop keeper, but the conviction under Specification 2, charging larceny, is not inconsistent therewith.

The record shows that the corporal obtained the pistol from Alcoforado's shop at the instance of the accused by means of a forged note given to the corporal by accused, and that this pistol was turned over to accused immediately after the corporal obtained it. The evidence also shows that accused knew of the pistol at the shop and knew the name of its owner before he sent the corporal after it. The further fact is that the owner never authorized anyone to "obtain" the pistol from the shop. On these facts, unexplained, no inference is reasonable other than that of guilt.

6. Two legal problems are presented for consideration. Defense counsel argued that essential elements of larceny were missing since accused did not enter the shop, take the gun, and walk out with it.

It was the corporal, true, who obtained the pistol from the repairman, but he acted as accused's agent. His acts are those of accused. We have here larceny by trick. Wharton, in his treatise on Criminal Law, says, in Volume 2, Section 1128, page 1447:

> "Suppose A, pretending to be C goes to B, and fraudulently obtains from B certain goods of C, which are in B's hands as bailee. Is this larceny? It certainly is, because B has no intention of passing the property in the goods to A; or to anyone; he (B) considering himself to have no property in the goods to pass. The distinction has been vindicated in Massachusetts in the following case: 'Sanderson had left his watch at a watchmaker's to be repaired, and the defendant went to the shop, pretending to be Sanderson, asked for the watch, paid for the repairing, and took the watch with a felonious intent.' 'These acts', said Chapman, J., 'constitute larceny at Common Law * * * because the servant had no authority to deliver it to him, so that no property passes to him, but mere possession feloniously obtained.'"

See also Rex v. Longstreeth, 1 Moody, C.C., 137; Smith v. People, 53 N.Y. 111; Reg v. Middleton, 12 Cox C.C. (Eng.) 260; Wharton, op. cit., sec. 1156.

Whether or not accused wrote the note and forged the signature, it is clear that he made use of it and without authority obtained possession of the pistol from the shop keeper by means of it, and did not turn the pistol over to the rightful owner. Guilty knowledge is properly inferred from all the facts.

The other problem is involved in the fact that accused was confronted with the pistol, asked certain questions prior to being advised of his rights, that he replied in effect that he had seen the pistol before, and that this statement of accused was received in evidence. A similar problem lies in the fact that accused also and under similar circumstances said that he got the gun from Corporal Napolitano, and the fact that this statement was received in evidence.

Though Lieutenant Sostrin testified that accused made this last statement after Sostrin said to him, "You better tell me, or I will tell your Commanding Officer," the law member ruled that this was an admission against interest, rather than a confession, and therefore not subject to the rules excluding confessions obtained by threats.

In this ruling the law member was correct. Wigmore, in his work on Evidence, Confession, sec. 821 (3) says as follows:

> "An acknowledgment of a subordinate fact, not directly involving guilt, or, in other words, not essential to the crime charged, is not a confession; because the supposed ground of untrustworthiness of confessions is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment; and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions."

See also Crossfield's Trial, 26 How. St. T. 215 (1796), Eyre, L.C.J.; People v. Strong, 30 Cal. 157; State v. Porter, 49 Pac. 964; Ballew v. U.S., (1895) 160 U.S. 187, 193; CM 141755 (1920), Dig. Op. JAG, 1912-1940; CM 124891 (1919), Dig. Op. JAG, 1919-23, January, 1919, pg. 42.

These statements made by accused were not conclusive of guilt and were not confessions, and there is ample evidence aliunde to convict the accused of larceny. They were properly admitted.

7. It was stipulated that the value of the pistol which was taken from the Nickelegem was less than Fifteen Dollars (R. 32). The Specification of Charge II alleges its value to be twenty-one dollars and seventy-five cents. The pistol was otherwise correctly identified in the trial. Since no confinement was imposed by the court and since there is no maximum punishment involved, the variance is not material.

8. The Charge Sheet shows that accused is 20 11/12 years of age, a second lieutenant in the Air Corps, and married. He enlisted in the Air Corps, 12 December 1941 and was commissioned 27 October 1942. He attended Fresno (California) State College for one and one-half years, and his character was stated by his commanding officer at the time accused was recommended for attendance at Officer Candidate School to be "Excellent".

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

the opinion of the Board of Review the record of trial is legally sufficient to support the finding of guilty and the sentence. Dismissal is authorized under Article of War 93.

Thomas H. Tappy, Judge Advocate.

Irving C. Gray, Judge Advocate.

John Wannall, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 11 JAN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Bill G. Schallenberg (O-566637), Air Corps.

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

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

(Sentence confirmed. G.C.M.O. 121, 10 Mar 1944)

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

SPJGN
CM 244672

1 DEC 1943

U N I T E D S T A T E S	)	92ND INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Huachuca, Arizona, 20
Second Lieutenant CLIFFORD	)	October 1943. Dismissal,
(NMI) LUCAS (0-1293983),	)	total forfeitures and con-
370th Infantry.	)	finement for one (1) year.

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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. He was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Clifford (NMI) Lucas, Company F, Three Hundred Seventieth Infantry, did, without proper leave absent himself from his organization and station at Fort Huachuca, Arizona from about 5 August 1943 to about 10 September 1943.

He pleaded guilty to and was found guilty of the Charge and its 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, at such place as the reviewing authority may direct, for three (3) years. The reviewing authority approved the sentence but remitted two (2) years of the confinement imposed, forwarded the record of trial for action under Article of War 48 and at the same time improperly published the results of the trial.

3. The evidence for the prosecution supporting the accused's plea of guilty, which he refused to withdraw after full explanation of the effect thereof, shows that the accused was not found present for duty by his company commander at any time between 5 August 1943 to 11 September 1943 during which period the accused was not authorized to be absent. The organization's morning report during this period showing his absence without leave was also in evidence (R. 6-8; Ex. "A").

4. The evidence for the defense shows that the accused's company commander rated him as an "excellent" officer whose men "idolize" him and characterized him as "the best Weapons Platoon Leader I have ever known." A brother officer, who had served with the accused during their entire Army career which commenced about 28 January 1942, rendered similar praise to the accused (R. 8-10, 10-13).

The accused, after explanation of his rights as a witness, elected to make through his counsel the following unsworn statement:

> " I went to Battle Creek, Michigan, on leave, and I started back on August 2nd. I had a ticket to Chicago and enough money to buy a plane ticket at Chicago: on the train my money was lost, and I reached Chicago without funds. My mother, in Saginaw, Michigan, sent me enough money to return to Saginaw, which I did. I then wrote to Colonel Sherman, telling him that I didn't have enough money for returning. Lieutenant Murray finally sent me enough money to come back. Colonel Sherman sent me a telegram, to report to Camp Custer, and I did report to Colonel Wilkerson, Post Quartermaster, and he told me they didn't advance money to officers." (R. 14)

5. The Specification alleges that the accused absented himself without proper leave from his organization and station at Fort Huachuca, Arizona, from about 5 August 1943 to about 10 September 1943. The elements of the offense and the proof required for conviction thereof, according to applicable authority, 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" (MCM, 1928, par. 132).

The evidence for the prosecution conclusively establishes the commission of the offense as alleged, thereby supporting the accused's plea of guilty thereto. The findings of guilty of the Charge and its Specification are, therefore, warranted beyond a reasonable doubt.

6. The accused is about 25 years of age. The War Department records show that he has had enlisted service from 30 September 1935 to 29 September 1938 and from 26 November 1941 until 18 September 1942 when he was commissioned a second lieutenant upon completion of Officer Candidate School and that he has been on active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion

that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lefscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 244672

1st Ind.

War Department, J.A.G.O., 31 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 Second Lieutenant Clifford (NMI) Lucas (0-1293983), 370th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified be 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

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 forfeiture of $25 per month for six months. G.C.M.O. 126, 11 Mar 1944)

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

SPJGK
CM 244713

23 Dec 1943

U N I T E D S T A T E S	)	10TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Hale, Colorado, 5, 8 and 9 November 1943. Dismissal, total forfeitures, and confinement for three (3) years.
	)	
Second Lieutenant ALLAN C. KEMERER (0-1170797), Field Artillery.	)	

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

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

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

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

Specification 1: In that Lt. ALLAN C. KEMERER, 605th Field Artillery Battalion did, at Camp Carson, Colorado, on or about July 18, 1943, feloniously take, steal, and carry away a pair of officer's tropical worsted trousers, value about $15.00, the property of Lt. HENRY F. BOLLMAN.

Specification 2: In that Lt. ALLAN C. KEMERER, 605th Field Artillery Battalion did, at Camp Carson, Colorado, on or about July 11, 1943, feloniously take, steal, and carry away an officer's tropical worsted shirt, value about $15.00, the property of Lt. HENRY F. BOLLMAN.

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

Specification 1: In that Lt. ALLAN C. KEMERER, 605th Field Artillery Battalion did, at Ft. Sill, Oklahoma, on or about March 10, 1943, with intent to defraud wrongfully and unlawfully, make and utter to Station Hospital, Ft. Sill, Oklahoma, a certain check, in words and figures as follows, to wit: Lawton, Okla., Mar 10, 1943 No. 63 The Security Bank & Trust Co. of Lawton Pay to the order of Station Hospital, Ft.Sill,Okla. $9.00 Nine---00/100 Dollars For Subsistence, Dec. 7-16 Inc. Allan C. Kemerer 2d Lt. 605th FA Bn 0-1170797:

in payment of subsistence, December 7, 1942 to December 16, 1942, inclusive, he the said Lt. ALLAN C. KEMERER, then well knowing that he did not have and not intending that he should have sufficient funds in The Security Bank & Trust Company of Lawton for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 27 March 1943, made and uttered to Camp Carson Exchange, Camp Carson, Colorado, in the sum of $25.00, and fraudulently obtaining $25.00 thereby.

Specification 3: (Finding of not guilty).

Specification 4: Same form as Specification 1, but alleging check dated 25 May 1943, made and uttered to Camp Carson Exchange, Camp Carson, Colorado, in the sum of $20.00 and fraudulently obtaining $20.00 thereby.

Specification 5: Same form as Specification 1, but alleging check dated 29 May 1943 drawn on the City National Bank, made and uttered to Carson Officers Mess, in the sum of $10.00 and fraudulently obtaining $10.00 thereby.

Specification 6: (Finding of not guilty).

Specification 7: Same form as Specification 1, but alleging check dated 18 April 1943 drawn on the City National Bank, made and uttered to Henry F. Bollman, in the sum of $10.00 and fraudulently obtaining $10.00 thereby.

Specification 8: Same form as Specification 1 but alleging check dated 21 January 1943, made and uttered to Billeting Officer F.A.R.T.C. in the sum of $59.00 in payment of Mess and Orderly account for the months of November and December 1942.

Specification 9: Same form as Specification 1, but alleging check dated 21 January 1943, made to the order of Cash and uttered to the Officers' Club, 6th Regiment FARTC, Fort Sill, Oklahoma, in the sum of $10.00, and fraudulently obtaining $10.00 thereby.

Specification 10: Same form as Specification 1, but alleging check dated 27 January 1942 made and uttered to the Billeting Officer FARTC, Fort Sill, Oklahoma, in the sum of $25.40, in payment of Mess and Orderly bill for 26 days in January 1943.

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

Specification: In that Lt. ALLAN C. KEMERER, 605th Field Artillery Battalion did, at Camp Hale, Colorado, on or about 1630, September 6, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Denver, Colorado, on or about September 23, 1943.

Accused pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and the Specifications thereunder, guilty of Charge II and Specifications 1,2,4,5,7,8,9 and 10 thereunder, guilty of the Additional Charge and its Specification, and not guilty of Specifications 3 and 6, Charge II. Evidence of one previous conviction was introduced. He was sentenced to dismissal, total forfeitures, and confinement for three years. The reviewing authority approved only so much of the findings of guilty of the Specification of the Additional Charge and of the Additional Charge as involves a finding of guilty of absence without leave from 6 September 1943 to 21 September 1943 in violation of Article of War 61, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence introduced by the prosecution showed that accused was a second lieutenant, 605th Field Artillery, stationed at Camp Hale, Colorado (R.6). First Lieutenant Henry F. Bollman, 605th Field Artillery, testified that he knew accused. The lieutenant said that on the evening of 11 July he missed from his room in his quarters at Camp Carson (Colorado) a tropical worsted suntan colored shirt of the value of $15. On 18 July he found that the trousers which matched this shirt, also of a value of $15, were also missing. He went into the room of accused to speak to him and across a chair lay the witness' shirt and trousers. He asked accused what he was doing with the uniform and the accused replied: "Oh, are they yours, well go ahead and take them". The witness identified the clothing by a laundry mark which bore his name in indelible ink, and identified his trousers by a laundry mark and also by a number. When he "located" the shirt the name of accused was in the collar and that name had not been there on 11 July. Lieutenant Bollman had not loaned the shirt or trousers to accused and had not authorized him to take them. He had, however, on a prior occasion loaned a pair of boots to accused. These had been returned (R.6-9).

Major Frank Stepczyk, Pharmacy Corps, Station Hospital, Fort Sill, Oklahoma, testified by deposition that on or about 10 March 1943 accused presented a check to the cashier's office, Station Hospital, in payment "for subsistence for hospitalization" from 7 to 16 December 1942. This check was dated 10 March 1943, was drawn on the Security Bank and Trust Company of Lawton, Oklahoma, payable to the Station Hospital, Fort Sill, Oklahoma, in the sum of $9.00, and was signed by Allan C. Kemerer. This witness identified the check in question. The check was returned marked "dishonored". This check "was made good by money order received 26 March 1943" (R.13; Exs. E,F,FF).

Captain Raymond Hargraves, Army Exchange Service, Exchange Officer, Camp Carson, Colorado, testified by deposition in support of Specifications

2 and 4 of Charge II. He said that in the usual course of business his office received 2 checks cashed by the post exchanges for accused. One check was dated 27 March 1943 drawn on the Security Bank and Trust Company of Lawton, Oklahoma, payable to the Camp Carson Exchange for $25.00, and signed by Allan C. Kemerer. This check was returned by the bank stamped "insufficient funds". The second check was dated 25 May 1943, drawn on the Security Bank and Trust Company of Lawton, Oklahoma, payable to the Camp Carson Exchange for $20.00, and was signed by Allan C. Kemerer. This second check was returned by the bank marked "account closed". This witness identified the two checks. Accused "made these checks good" 1 July 1943 (R.13; Exs. G.H,HH,I,II).

Corporal Julian Rochelle, Headquarters Detachment, Seventh Service Command Unit No. 1748, Camp Carson, Colorado, testified by deposition that he had known the accused for approximately six and one-half months, that he was the steward at the Camp Carson Officers' Mess on 29 May 1943 and that on or about that date he cashed a check for accused in the sum of $10.00. He testified that the check was dated 29 May 1943, was drawn on the City National Bank of Lawton,Oklahoma, payable to Camp Carson Officers' Mess (Club) for $10.00, and was signed by Allan C. Kemerer. Corporal Rochelle testified that he saw the check thereafter and that it bore notations not on the face at the time he accepted it. This notation was: "No acct." He identified the check in question. He also testified that accused "made good that check" 3 July 1943(R.14; Exs. L,M,MM).

Lieutenant Bollman, recalled as a witness, testified in support of Specification 7 of Charge II. He said that on or about 18 April 1943 he cashed a check for accused in the sum of $10 and that he received the check back from his bank, where he had sent the check for deposit, marked: "unable to read signature". This check was dated 18 April 1943, drawn to the order of Henry F. Bollman for the sum of $10, and was apparently signed "Lt. Allan C. Kemerer". This witness identified the check in question. Lieutenant Bollman testified that accused had never made any effort "to repay the amount of the check". The check was uttered to the witness at Camp Carson, Colorado (R.16-18, Ex. O,OO).

First Lieutenant Lester W. Holbrook, Field Artillery, South Replacement Officers' Pool, Army Ground Forces Replacement Depot No. 1, Fort Meade, Maryland, testified by deposition. Between 21 and 27 January 1943 he was "Assistant Billeting Officer, FARTC, Fort Sill, Oklahoma". He accepted three checks from accused during this period for mess, orderly or club bills. Two of these checks are those mentioned in Specifications 8 and 10, Charge II. The first was given to the witness in his official capacity as Assistant Billeting Officer for mess and billeting of accused for November and December 1942. This check was dated 21 January 1943, drawn on the Security Bank and Trust Company of Lawton, Oklahoma, payable to "Billeting Officer FARTC", in the sum of $59, and was signed Allan C. Kemerer. The check in question was identified by this witness. It was

returned after being deposited, marked "insufficient funds". The third check was given by accused to this witness, and was dated 27 January 1943, drawn on the Security Bank and Trust Company, Lawton, Oklahoma, payable to the "Billeting Officer", for $25.40, and was signed by Allan C. Kemerer. It was in payment of the billeting and mess account of accused. This check, also identified by the witness, was not deposited because of a conversation had by the witness with the bank on which the check was drawn (R.19; Exs. P,Q,QQ,S,SS).

The last named witness, Lieutenant Holbrook, also testified with respect to the second ot the three checks, as stated. Evidently this check is the subject matter of Specification 9 of Charge II. He testified that a check dated 21 January 1943, drawn on the Security Bank and Trust Company of Lawton, Oklahoma, payable to cash, for $10, and signed by Allan C. Kemerer, was given to him in his "official capacity as Assistant Billeting Officer, FARTC, Fort Sill, Oklahoma, through the 6th Regimental Club, Fort Sill, Oklahoma, in the regular course of business and was deposited in the regular course of business". The witness identified this check and testified that it was returned marked "insufficient funds" (R.19, Exs. P,R,RR).

Captain Robert L. Hert, Field Artillery, Headquarters and Service Battery, 605th Field Artillery, Camp Hale, Colorado, identified a War Department signature card bearing the signature of "Allan C. Kemerer" and stated that the signature appearing thereon had been signed in his presence by accused (R.19,20; Ex.T).

Exall English, President, Security Bank and Trust Company of Lawton, Oklahoma, testified by deposition that on 2 November 1942 accused opened a checking account in his bank with a deposit of $141.70. He stated that this account was overdrawn in the sum of $7.03 on 24 December 1942; that subsequently two checks in the amount of $5 each were presented for payment and were paid by the bank. He testified that accused was notified by mail on several occasions of "the total overdraft of $18.11". This witness testified that "shortly after the overdraft occurred" regular overdraft notices were mailed to accused, and that thereafter and on 21 January and 2 February letters were addressed to accused requesting that the overdraft be taken care of. It was paid on 6 July 1943. This witness stated that after the "overdraft of $18.11 was created" several other checks drawn on accused's account came in but were returned dishonored because of insufficient funds (R.13; Ex. G).

Mr. R. B. McCoy, Vice-President, City National Bank, Lawton, Oklahoma, testified by deposition that accused did not have an account at the City National Bank of Lawton, Oklahoma, on 5 June or 7 June 1943 and that to the best of his knowledge accused never had a checking account or any other account with that bank (R.13, Ex. D).

First Sergeant Hubert R. Jones, Battery B, 605th Field Artillery, Camp Hale, Colorado, testified that on or about 6 September 1943 he was First Sergeant, Battery B, 605th Field Artillery, and that at that time accused was a member of the same organization. He testified, further, that as first sergeant he made out the morning report of that unit. He was asked by the prosecution to refresh his memory (referring to the morning report of September 1943). The defense stated, "No objections". Asked if he had any entry for 6 September and stating that he had, he was asked to read the entry, which he did, as follows:

"Kemerer, Allan C, 2nd Lt. duty to AWOL September 6, 1943".

He read a further entry as of 21 September 1943 with respect to accused:

"AWOL to absent in confinement, Denver, Colorado, by civilian authorities".

This witness stated with respect to each of these entries that it was signed by an officer whom he identified and described as the official custodian "of that morning report" (R.20-21).

Lieutenant Colonel James F. Pearson, Field Artillery, stated that he was "commanding the 605th" and that on 27 August 1943 he personally restricted accused "to the limits of the post", and that on 6 September accused was not on leave or pass and that no one had authority "to release him from arrest". He stated further that during the periods of "September 6 to 23" the accused was not for any period "on leave or pass" (R.21-23).

Depositions of Sergeant James L. Ingraham, Military Police Detachment, Denver, Colorado, and First Lieutenant Henry Anderson, Corps of Military Police, Denver, Colorado, showed that accused was arrested in Denver, Colorado, on 21 September 1943 (R.23; Exs. U,V).

4. Accused testified on his own behalf. He said that the tropical worsted trousers and shirt were in his room because he "went to Lieutenant Bollman's room and borrowed them". He had borrowed other articles from this officer before. He did not know how his name "came to be in the uniform of Lieutenant Bollman". While the printing looked like his, he did not believe it was (R.23-24). He testified further that the checks (those mentioned in Specifications 1,2,4,5,8,9 and 10 of Charge II) had all been "made good" (R.24-26). Accused stated that he intended to pay Lieutenant Bollman (the subject of Specification 7 of Charge II), and that to the best of his knowledge and belief he had had sufficient funds in his bank at the time to cover the check which he issued to Lieutenant Bollman (R.24,27). With respect to this check for $10 made to Lieutenant Bollman accused stated that at the time he made out that check he was drunk.

Accused testified that all the checks mentioned in the Specifications

of Charge II, except that given to Lieutenant Bollman, had been returned to him when he paid them and that he had those checks in his foot locker in June or July when "Major Stephens", his commanding officer at the time, ordered accused to give the checks to him. Accused complied with this order. He stated that this officer sent for him, took him in his car, went with accused to officers' quarters, up to accused's room, and said "give me all those cancelled checks you have". Accused said that he "presumed that it was an order and gave them to him". Accused said that at the time he was not advised that charges were being preferred against him and was not informed that the checks would be used against him in a court-martial proceeding (R.27).

Testifying generally as to the checks, accused stated that, after he opened a checking account in the Security Bank and Trust Company and late in January, he was transferred to Camp Hale and that from the time that he went to Camp Hale until he was changed to Camp Carson, his Government checks did not reach him. He testified that he believed his checks had been deposited in his bank as he "had requested this to be done". As a result, accused stated, he believed that he had funds in the bank to cover his checks. Accused did not claim that he had an account with the City National Bank but stated that the checks drawn on that bank were so drawn in error. His testimony purported to show that he had used what are commonly known as counter checks of the City National Bank with that bank's name printed on the face of these checks and that he had neglected to cross out the words "City National Bank" and write in "Security Bank and Trust Company". He attributed his neglect in this connection to the fact that he had been drinking too much at the time he wrote these checks. He was asked to tell the court "the circumstances surrounding" his alleged departure from camp "on or about September 6" and "later apprehension by the military authorities in Denver, Colorado". Accused's answer was that prior to the time he went away, Sunday afternoon, he started to drink in his room and went on a "binge" and that when he "finally came back down to earth and sobered up" he "immediately" knew he had been wrong. He was in Denver at the time. He went to the bus station and bought a ticket to Camp Hale. It was early afternoon and there was no bus intil 11 o'clock. He was arrested by the military police while getting something to eat (R.26-27).

On cross-examination accused stated that he arranged to have his pay checks sent to the Security Bank and Trust Company starting with January 1943. He stated that he found out later that this money had not been so deposited. He said he got three checks at one time about the middle of May. These checks he claimed were for January, February and March. He stated that he received a letter from his bank about an overdraft during the latter part of April or May, "about a month before" he paid it. He thought it was in June that he finally straightened out his account with the bank (R.28-29). On examination by the court he said that payment of the overdraft was entirely of his own volition and was not brought to his attention by Major Stephens. He replied that he had no notification of

an overdraft in January nor any statement of his balance during the months that his checks did not go to the bank. He added that he requested a bank statement at one time but received no answer. "At that time", he received only the mail that came to him from his home, due, he believed, to his change in station. He said that he was "ordered from Fort Sill to Camp Hale to Camp Carson back to Camp Hale then back to Camp Carson and back up to Camp Hale all since about February 1 of this year". He claimed that during the time he did not receive his pay checks he had to send home for money. On further cross-examination, he said that he still thought in May that he should have some money in the bank despite the fact that the bank had written him about an overdraft and the fact that he had learned his checks had not been deposited, because he had not cashed any checks to use the money on deposit. He explained that he had added up stubs he had written and still could not find the overdraft. He figured he should have about $85 in his account. Accused said that he had not had a bank checking account prior to this one. He stated that he kept a record of his expenditures in a notebook and that that notebook should be with the rest of his things in his former rooms or barracks to which he had not returned. The checks on the City National Bank of Lawton, Oklahoma, accused explained, came from the check book of "Lieutenant Pickett" or some of his friends (R.27-33).

5. With respect to Charge I: The evidence shows that accused took a pair of officer's tropical worsted trousers of some value and a tropical worsted shirt also of some value, the property of Lieutenant Bollman, from the Lieutenant's room and without his permission on the dates mentioned, respectively, in the two Specifications of this Charge. This clothing was not returned to Lieutenant Bollman but was found by him in accused's room the same day that the last garment was taken. The name of accused was found to have been written in the collar of the shirt after the taking. These facts were admitted by accused who, however, said that he had merely borrowed this clothing and who, while conceding that the writing looked like his, denied that he had written his name in the collar of the shirt. The only facts favorable to accused in this connection are that he had borrowed clothing from Lieutenant Bollman before and that the name of Lieutenant Bollman remained written into the garments at the time of the finding and that accused had not attempted to blot out or remove the owner's name. On these facts the Board of Review is of the opinion that the taking of this clothing was with felonious intent and constituted larceny as alleged. There can be no doubt that it was accused who wrote his name on the collar of the shirt. This act proved felonious intent.

With respect to Charge II: It was clearly established that accused made and uttered the checks as alleged in the Specifications of this Charge of which he was found guilty. There was before the court a proven specimen signature of accused. The checks bearing his name were also before the court. Comparison of the signature on each of these checks

with the proven signature of accused proves to even an inexperienced eye that accused in fact signed the checks. Nor is there any doubt that he received for each check the consideration alleged in the pertinent Specification. The accused on the witness stand admitted making and uttering the checks and told of making good all the checks except one. The prosecution showed that two of these checks were drawn on the City National Bank and that accused never had an account there. Accused admitted this. The remainder of the checks were drawn on the Security Bank and Trust Company during January, March, and May, 1943, the earliest having been drawn 21 January 1943. It was proved that accused opened a checking account in this last named bank on 2 November 1942 with a deposit of $141.70. It was further proved that this account was overdrawn on 24 December 1942 and that an overdraft notice was mailed to accused shortly thereafter and that on 21 January and 2 February 1943 letters were written to him by the bank requesting that the overdraft be taken care of. From the testimony given by an officer of this bank as well as by accused, it appears that accused made no deposits after the account was opened. The justification advanced by accused for drawing these checks is that he believed he had ample funds in the Security Bank and Trust Company to meet all of these checks. He believed, he said, that his pay checks were being deposited there. He stated that he never received any word from the bank as to the status of his account prior to the making of these checks. He added that in fact he had once written for a statement of his balance and had received no reply. He testified that he did not receive his checks for January, February, and March prior to the month of May, at which time he first learned that his instructions regarding the depositing of his pay checks had not been complied with. The explanation given by accused as to why he had received no word from his bank, and also as to why these pay checks had not caught up with him prior to May, was that since 1 February 1943 he had had five changes of station, the inference being that his mail had gone astray. During this time he had lived on money received from home. Accused stated with respect to the two checks drawn on the City National Bank that he had been intoxicated at the time he drew these checks, that they were drawn on counter checks of this bank and that he had failed to strike out the name "The City National Bank" and to write in the name of his own bank; in effect that he had not intended to draw checks on this bank in which he had no account. Accused made all of these checks good, except one for $10 to a friend. The bad check given on 10 March 1943 to the Station Hospital was made good 26 March.

To constitute a violation of Article of War 95 for making and uttering worthless checks, as here, the evidence must show that accused both knew that his bank account was short and that he did not intend to have funds on hand in his bank to meet the checks when they arrived at the bank. The Board of Review is of the opinion that the evidence sustains this charge with respect to each check which he was found guilty of fraudulently making and uttering.

Accused knew his account was short when he issued the checks. His

story of five moves from station to station to lend color to his claim that notices of overdrafts from his bank never reached or caught up with him in no wise supported or strengthened this claim. Notices of the overdrafts were sent him in December and on 21 January from the bank located on Fort Sill Boulevard, Lawton, Oklahoma. Accused was still at Fort Sill, Oklahoma, until at least 27 January. He drew and issued three of these checks at that station in January, two on the 21st and one on the 27th. There was ample time for the bank notices to reach him and no change of station to interfere with delivery before these checks were drawn. A further instance found in the evidence conclusively shows that he knew his account was short when he drew the check on 27 March to Camp Carson Exchange. The very day before, on 26 March, he made good to the Station Hospital a bad check which he had given on 10 March. Accused's testimony that he did not know he was overdrawn when he issued the checks is certainly proven false with respect to the three checks drawn in January and the check issued on 27 March. It can be assumed that he had accurate knowledge of the status of his account when he drew the other checks, all of which were subsequent to January. He actually made no deposits after his original deposit. His testimony that he believed his pay checks were bolstering his account was false on its face in one important respect. He said that he learned of his mistake in this connection some time in May. The fact clearly proven is that on 26 March he knew his pay checks were not being deposited to his credit. He would not have had to make good on that date a check which had been bad on 10 March had his claimed belief been valid. Furthermore, it is impossible to believe that the finance officer would have failed three times to carry out instructions to deposit pay checks of the accused according to instructions clearly given in pay vouchers, had such instructions in fact been given. The proven facts of the case, aggravated by the sham testimony of accused, lead to the reasonable inference that accused did not intend to have funds on hand in the bank to meet the checks when they arrived. Three of the checks were given in payment of bills, which checks under the circumstances were as much a violation of Article of War 95 as though they had been given in exchange for cash (Dig. Op. JAG 1912-1940, sec. 453 (24)).

With respect to Charge III it was proven and also admitted that accused was absent without leave from the service of the United States from 6 September to 21 September 1943 in violation of Article of War 61.

The court erred in permitting a witness to read items from the morning report without requiring the report to be introduced in evidence. The items so introduced were hearsay. However, this error was corrected by the fact that accused admitted his absence. It appears from the record that the checks which were used against accused in the trial were obtained by his commanding officer who ordered him to turn over the checks. The fact that these checks were so obtained and that they were so obtained for use in the trial would not affect their competency in a court-martial

proceeding. The immunity from searches and seizures guaranteed by the Fourth Amendment to the Constitution does not extend to premises on military reservations (Dig. Ops. JAG 1912-1940, sec. 395 (27)).

6. Accused is 32 years of age. War Department records show accused single as of 12 March 1942. However, accused's 201 file contains a letter of inquiry dated 8 June 1943 from the purported wife of a soldier bearing the same name and from the same address as that of accused. He graduated from high school and completed two years of college. In civilian life he was employed as a production clerk in the steel industry. He was commissioned second lieutenant, 1 October 1942, upon his graduation from Officers' Candidate School, Fort Sill, Oklahoma. He enlisted 23 January 1942.

7. On 5 April 1943 accused was found guilty by general court-martial of drunkenness in uniform in a public place and of falsely representing himself to be another in violation of Article of War 96. He was sentenced to forfeit $50 pay per month for 6 months and to be restricted to camp for 3 months.

8. 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 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 Articles of War 61, 93, and is mandatory under Article of War 95.

Thomas N. Jaffey, Judge Advocate.

John Wannstedt, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 1 - JAN 1944 - 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 Allan C. Kemerer (0-1170797), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures and two years of the imprisonment be remitted, that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures and two years of confinement remitted. G.C.M.O. 107, 10 Mar 1944)

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DATE	BORROWER'S NAME	EXT.