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Volume XXX

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CM 246219 to CM 247671

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

SPJGQ
CM 246219

6 JAN 1944

UNITED STATES	)	104TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Horn, Arizona, 8 December
First Lieutenant HARVEY J.	)	1943. Dismissal and total
GARROW (0-1289234), Infantry.	)	forfeitures.

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

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

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

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

Specification 1: In that First Lieutenant HARVEY J. GARROW, Four Hundred and Thirteenth Infantry, Oregon Maneuver Area, Oregon, did, at Oregon Maneuver Area, Oregon, on or about 1 September 1943, with intent to deceive Captain BENJAMIN A. ALMVIG, JR, Finance Officer, One Hundred Fourth Infantry Division, officially state to the said Captain BENJAMIN A. ALMVIG, JR, that one Bette Lou Garrow was his lawful wife, by signing Pay Voucher to that effect, which statement was known by the said First Lieutenant HARVEY J. GARROW to be untrue inthat the said First Lieutenant HARVEY J. GARROW was then legally married to one Irene Koury Rose.

Specification 2: In that First Lieutenant HARVEY J. GARROW, Four Hundred and Thirteenth Infantry, Oregon Maneuver Area, Oregon, did, at Oregon Maneuver Area, Oregon, on or about 5 October 1943, with intent to deceive Captain BENJAMIN A. ALMVIG, JR, Finance Officer, One Hundred Fourth Infantry Division, officially state to the said Captain BENJAMIN A. ALMVIG, JR, that one Bette Lou Garrow

was his lawful wife, by signing Pay Voucher to that effect, which statement was known by the said First Lieutenant HARVEY J. GARROW to be untrue in that the said First Lieutenant HARVEY J. GARROW was then legally married to one Irene Koury Rose.

Specification 3: In that First Lieutenant HARVEY J. GARROW, Four Hundred and Thirteenth Infantry, Oregon Maneuver Area, Oregon, did, at Camp Adair, Oregon, on or about 13 July 1943, with intent to deceive Major JOSEPH GODLEY, Finance Officer, One Hundred and Fourth Infantry Division, officially state to the said Major JOSEPH GODLEY that one Bette Lou Garrow was his lawful wife, by signing Authorization for Allotment of Pay to that effect which statement was known by the said First Lieutenant HARVEY J. GARROW to be untrue in that the said First Lieutenant HARVEY J. GARROW was then legally married to one Irene Koury Rose.

Specification 4: In that First Lieutenant HARVEY J. GARROW, Four Hundred and Thirteenth Infantry, Oregon Maneuver Area, Oregon, did, at Oregon Maneuver Area, Oregon, on or about 17 September 1943, with intent to deceive Captain BENJAMIN A. ALMVIG, JR, Finance Officer, One Hundred Fourth Infantry Division, officially state to the said Captain BENJAMIN A. ALMVIG, JR, that one Bette Lou Garrow was his lawful wife, by signing Authorization for Allotment of Pay to that effect, which statement was then known by the said First Lieutenant HARVEY J. GARROW to be untrue in that the said First Lieutenant HARVEY J. GARROW was then legally married to one Irene Koury Rose.

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

Specification: In that First Lieutenant HARVEY J. GARROW, Four Hundred and Thirteenth Infantry, Oregon Maneuver Area, Oregon, did, at Salem, Oregon, willfully, knowingly, and unlawfully, from about 1 September 1942, to on or about 1 August 1943, cohabit and live in open relationship with a female person known as Bette Lou Garrow, a female person not his wife.

Accused 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 and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved so much of the findings of guilty of the Specification of Charge II and of Charge II as involve a finding of guilty of unlawful cohabitation from about 1 September 1942 to about 3 November 1942 and from about 13 April 1943 to about 1 August 1943, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The pertinent evidence for the prosecution may be summarized as follows:

Irene Marion Koury, then 17 years of age, and accused, then 20 years of age, were lawfully married by Rev. Herman N. Baird, in Whitestown, New York on 17 October 1936 (Pros. Ex. D). At that time accused was known by, and used the name "Harry John Rose" and resided in Whitesboro, New York (Pros. Ex. D). They lived together as husband and wife for eight months after which there was a separation, though the reason for it and the manner in which it was accomplished does not appear. Mrs. Rose last saw accused in October 1940 at which time he was in uniform and she then learned from him for the first time that he was known by the name of "Harvey J. Garrow". She had never received any official notice of divorce proceedings, but did receive a letter from accused advising her that he had obtained a divorce in Salem, Oregon, on or about 7 October 1942. A check of the chancery court dockets revealed no record of such proceedings. She had, however, written to accused (at a time not disclosed) saying she "did not desire monetary support from him but only (her) freedom" and that he should do "either one or the other". There has been no divorce. Irene Koury Rose is still alive, and the marriage between her and accused still exists (R. 6c, 6f; Pros. Ex. D).

Some time in 1938 Elizabeth Louise McGrath, also known as "Bette Lou", met accused. The acquaintance ripened into a friendship in 1940 and resulted in her living with him as his wife, from about 12 September 1942 until about 13 April 1943. Two children were born as the result of their association, one at Fort Riley, Kansas on 19 February 1942 and the other at Salem, Oregon on 6 July 1943. Accused commenced contributing to the Support of Bette Lou McGrath (who took and used the name "Garrow") in April 1941 and continued to do so, by cash payments, until September 1943 when she began to receive an Army allotment of $150 per month (R. 6a; Pros. Ex. B).

Barbara Anderson, a resident of Salem, Oregon, had known Bette Lou Garrow and accused since April 1943 at which time accused introduced Bette Lou to her as his wife. She visited them at their home in Salem, Oregon, during April and May 1943 and attended "the Garrow's Aniversary party" in April of 1943 at which time "a large group of friends of Lieutenant Garrow came to the house on Columbia Street". She also had heard accused acknowledge Bette Lou's children as his own and has seen accused introduce Bette Lou socially to other acquaintances as his wife (R. 6b, 6c; Pros. Ex. C).

Chief Warrant Officer Donald S. Jones, 413th Infantry, testified that he has known accused 15 or 16 months and has visited him socially in his home in Salem, Oregon, where he lived with "his wife" Bette and "some Captain and his wife"; accused introduced Bette to him as his wife. Accused and Bette had one child at the time (R. 6h).

Second Lieutenant Alfred F. Wechsler, 413th Infantry, testified that he has known accused since December 3, 1942. This witness was the Investigating Officer in this case and had several conversations with accused in which he warned him of his rights and "explained to him that I was assigned to investigate the charges against him, and I told him very plainly that he need not answer any questions, but, if he did choose to answer, they might be used against him". He did not offer accused any hope of reward or coerce him in any way. Accused told the witness there was no reason for accused to make any statement to him as he had made a complete statement to the Inspector General and that witness could get all the information that he needed or wanted from that statement. Witness obtained that document and showed it to accused who identified it as his statement given to the Inspector General. This statement was admitted into evidence as Exhibit "E", at which time the Defense advised the Court there was no objection (R. 6k).

The statement shows that the Assistant Inspector General, who took the statement, first warned the accused of his rights under the 24th Article of War. Accused said he understood his rights and thereupon stated, in substance, that he formerly lived under the name of "Rose". He married Irene Koury about 1936 or 1937 but shortly left her for cause. He discovered that the name under which his father had married his mother was "Garrow", so he accepted that name. He received one letter while at Fort Riley, Kansas from his wife (Irene Koury Rose) demanding support and saw her on a trip back east. He received 4 or 5 letters from her, mostly since being at Camp Adair, demanding support. In the meantime "I tied up again under what I legally believed to be common law". He was told by a lawyer in Kansas that "common law was legal" there. In his own frank opinion he is not legally married to the woman he now professes as his wife. He has lived with Bette Garrow 3 or 4 years and has two children. He first started an attempt to divorce his wife, Mrs. Rose, at Utica, New York, about seven years ago. At the present time he claims Bette Garrow as his wife and he realizes he actually has two wives; and admits that he married Mrs. Irene Rose about 1936 or 1937, at Whitesboro, New York as "Harry Rose".

There was introduced and received in evidence as Exhibit "F" a stipulation signed by the accused, Defense Counsel and Trial Judge Advocate (R. 6t), which has attached, as a part thereof, copies of original pay vouchers signed by the accused on September 30, 1943 and October 31, 1943, respectively, claiming commutation of rental and subsistence allowances and also copies of original Authorizations for Allotment of Pay signed by the accused on July 13, 1943 and September 17, 1943, respectively. Each of these pay vouchers designates "Bette L. Garrow, 1120 Columbia, Salem, Oregon" as the maker's "lawful wife" and contains a certificate that "the foregoing statement and account is true and correct." The Authorizations show that "deposit should be made to the credit of — Bette Lou Garrow . . wife." There is a certificate on each stating that the purpose for which

the allotment is granted is solely for the support of wife, child, or dependent relatives. The stipulation further recites that the accused knew when he signed the instruments that they were official documents executed by him to obtain funds and allotments on the basis of the information contained therein; and that Captain Benjamin A. Almvig was Finance Officer, 104th Division, at the time the vouchers and one of the authorizations was signed, and Major Joseph Godley was Finance Officer, 104th Division, at the time the other authorization was signed.

4. The accused after being warned of his rights chose to take the stand and be sworn as a witness (R. 6v). He testified in pertinent part that he married Irene Koury Rose in 1936 and lived with her a few months. He saw her again in October or November 1940. He sought to find her later and could not. He "married" Bette Lou Garrow in April 1941, believing a Kansas lawyer's statement that common law marriages were recognized in Kansas. Shortly afterwards he had a letter from his first wife and he heard from her again "last August". He told the "Executive Officer" who called him in at that time that he had taken necessary steps to get a divorce (R. 6v—6w).

There was introduced and received in evidence a stipulation of the accused, Trial Judge Advocate and Defense Counsel, reciting that about 15 October 1942 the accused consulted W. W. McKinney, attorney of Salem, Oregon, concerning institution of divorce proceedings against his wife, Irene Rose, who advised that a one year residential requirement prevented institution of the action at that time. Certain papers were prepared to be subsequently filed and the divorce action has recently, since 1 December 1943, been filed at Salem, Oregon (R. 6x, Defense Exhibit "A"). He made out an allotment "for the children and the mother", but at the time he signed the first pay voucher, listing Bette Lou Garrow as his legal wife, he did not know his first wife was alive (R. 6y).

On cross examination accused testified that he talked to a lawyer in Manhatten, Kansas, between February and April 1941, who advised him that it was proper for him "to be married this second time". He had seen Irene toward the end of October 1940 and he had no evidence she was dead (R. 6y). He went to a lawyer in Salem, Oregon after August 20, 1942 (when a letter was received from his wife) and "the papers were filed in 1942", although the decree could not be obtained until 1943 (R. 6z). On re-direct examination there were introduced certain letters and receipts as Defense Exhibit "B", "C", "D" and "E", showing steps taken by the accused to start divorce proceedings in Salem, Oregon, beginning in October 1942 (R. 6aa-6bb).

Later, on being recalled to the stand, the accused admitted that he had never obtained a license or gone through any ceremony with Bette Lou Garrow because "on the advice of the lawyer I couldn't as they would have a bigamy charge against me"; and "I was afraid if I went through with the marriage ceremony they would really have me. I was being stationed all

over the country and was never in one place long enough to secure a divorce" (R. 6dd). The allotments were made after he knew about the letter of August 1942, through channels, from his first wife, that he realized after thus hearing from her that she was his legal wife.

5. Irrespective of the law of the State of Oregon regarding common law marriages and whatever may have been accused's honest belief previous to the Fall of 1942, it is shown beyond reasonable doubt that, thereafter, he knew that Irene Koury Rose was living, fully realized that she was his lawful wife and, therefore, he could not be legally married to Bette Lou Garrow under any circumstances whatsoever.

Regardless of what he may have formerly believed his marriage status to be, accused admitted, at the trial, that after he received a letter from Irene Koury Rose in August 1942 he realized that she was his legal wife. Recognizing the necessity for a divorce he employed a lawyer in Salem, Oregon, to take necessary steps to procure one and the evidence relating to the consultations and correspondence in the matter conclusively show that accused was fully aware, from a legal standpoint, of his marital status. Indeed, by his own testimony he admitted that he could not risk having a formal marriage ceremony with his paramour, Bette Lou McGrath, because "on the advice of the lawyer I could not, as they would have a bigamy charge against me . . . I was afraid if I went through with the marriage ceremony they would really have me." All this transpired in 1942.

When, therefore, he prepared and tendered pay vouchers for the months of September and October, 1943, certifying that Bette Lou Garrow was his "lawful wife" he made false official statements for the purpose of deceiving the finance officer and obtaining unlawful disbursements of government funds thereon.

Likewise, when he executed authorizations for allotments of money payable to Bette Lou Garrow, showing her relationship to him as "wife", he did so with a guilty knowledge that she was not his lawful wife.

It is not reasonable to believe, in view of his admissions and all other factors in evidence, that, at the time he executed the vouchers for pay and the authorizations for allotments, accused entertained an honest belief that Bette Lou McGrath was, legally, his wife. Yet he nevertheless continued to live with her, had another child by her, and introduced her to Army officers and acquaintances as his wife.

The fair, logical and reasonable inference in each instance with respect to the pay vouchers and the allotment authorizations is, that accused intended to, and did, deceive the officers responsible for the disbursement of government funds by false statements regarding his marital status.

Since it is not disputed that the marriage with Irene Koury Rose still existed at the time of the trial, then it necessarily follows, that any purported second marriage to any other person, whether such marriage was under the common law or otherwise, was necessarily void and a legal nullity. This being so, the only question regarding guilt under Charge II is that of accused's guilty knowledge and the duration of the unlawful cohabitation between accused and Bette Lou McGrath. His guilty knowledge was adjudged by the findings of the court. The period of unlawful cohabitation has been determined by the action of the reviewing authority. Since the modification of the findings of the court is in accord with the evidence nothing further need be said.

Whatever else is reflected by the evidence is clearly matter which can only be considered in mitigation and not in defense or condonation. The record is legally sufficient to support the findings, as modified, and the sentence.

6. Attached to the record of trial is a "Recommendation for Leniency" submitted to the reviewing authority by four of the five members of the court. The fifth member, Captain Fred F. Bentley, was not available when the recommendation was proposed but Lieutenant Colonel Scott T. Rex, Law Member, stated in writing that he "believes that the above (recommendation) represents his (Bentley's) views on the question involved." In substance, the request for clemency sets forth that, because of his youth, the treatment accorded by him to his "second wife" and children, his competency as an officer, his efforts to secure a divorce, the fact that the false statements did not "result in additional funds being disbursed to him or his family" and the punishment and embarassments he has already suffered, this officer should be given a chance to right his personal affairs and be of service to his country. For these reasons it was recommended that "the sentence of dismissal be set aside, that accused be reprimanded, that his restraint be lifted and that he be sent to another station."

7. Accused is 28 years of age. He was born in Ilion, New York, and attended the grade schools and was graduated from the High School in 1931. He then attended Carnegie Institute, Pittsburgh, Pennsylvania, for 2 years. On 7 April 1939 he enlisted in and became a member of Headquarters Troop and Service Train, 2nd Cavalry. He attended a Signal Corps school for 3 months and a Radio and Television School for an equal period. On 4 August 1942 he was graduated from the Infantry School, Fort Benning, Georgia, was commissioned a second lieutenant, Army of the United States, and assigned on active duty to the 104th Infantry Division, Camp Adair, Oregon. On 22 January 1943 he was promoted to first lieutenant, Army of the United States.

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 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 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

Paul W. Stephens, Judge Advocate

Herbert B. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O., 7 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 First Lieutenant Harvey J. Garrow (0-1289234), 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. The court made a recommendation for clemency in which commutation is suggested for reasons therein indicated. I do not concur in that recommendation. 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 but commuted to reprimand. G.C.M.O. 128, 16 Mar 1944)

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

SPJGH
CM 246334

20 JAN 1944 N.D. (11)

UNITED STATES v. Second Lieutenant MAURICE M. HOGGARD (0-1551871), Ordnance Department.	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Seymour Johnson Field, North Carolina, 8 December 1943. Dismissal.

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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Maurice M. Hoggard, attached Detachment 2061st Ordnance Company Aviation, was, at Charleston, S.C., on or about 28 Aug 43, in a public place, to wit, St. John Hotel, drunk while in uniform.

Specification 2: In that 2nd Lieutenant Maurice M. Hoggard, attached Detachment 2061st Ordnance Company Aviation, was, at Charleston, S.C., on or about 29 Aug 43, drunk while in a room at the St. John Hotel.

Specification 3: In that 2nd Lieutenant Maurice M. Hoggard, attached Detachment 2061st Ordnance Company Aviation, was, on or about 31 Aug 43, drunk while in a room at the St. John Hotel.

Specification 4: In that 2nd Lieutenant Maurice M. Hoggard, attached Detachment 2061st Ordnance Company Aviation, having received a lawful order from the Commanding General, Charleston Port of Embarkation, Charleston, S.C., as contained in Par. 18, Special Orders No. 215, Hq. Charleston Port of Embarkation, dated 26 Aug 43, to proceed to his new station, Seymour Johnson Field, N.C., did at Charleston, South Carolina, on or about 28 Aug 43, fail to obey the same.

He pleaded guilty to and was found guilty of the Charge and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

a. (Spec. 1). It was stipulated (Stip. 5) that if Mrs. F. G. Ivy were present she would testify that she is the secretary of the St. John Hotel, Charleston, South Carolina, that at about 5:00 o'clock p.m. on 28 August 1943, when she was substituting as room clerk, she saw the accused in the lobby of the hotel when several other guests were present, and that he was definitely under the influence of alcohol. The accused left a call at the desk for 8:30 a.m. of 29 August 1943, and Mrs. Ivy had difficulty in getting him aroused. He left the hotel in a cab but returned in about an hour and "checked back into the same room". It was evident that the accused had been drinking. Mrs. Ivy has seen many persons under the influence of alcohol, and during the two succeeding days that she saw the accused in the lobby of the hotel he was intoxicated (R. 7-8).

b. (Spec. 2). It was also stipulated (Stip. 4) that if Joseph Patrick, bell captain in the St. John Hotel at Charleston, South Carolina, were present he would testify that on 29 August 1943, in response to a call, he went to the room of accused in the hotel, and upon being requested to "Pour me a drink", poured accused a drink. Several full pints of whiskey and two quart bottles, almost empty, were in the room at the time. Patrick was called to the same room on three or four occasions, and on each visit was requested by accused to "Pour me a drink". On each occasion the accused was intoxicated (R. 7).

c. (Spec. 3). It was also stipulated (Stip. 3) that if Major Anthony I. Mader, Medical Corps, were present he would testify that at about 1:00 p.m., 31 August 1943 he saw the accused lying in bed, half dressed, in a room at the St. John Hotel, Charleston, South Carolina. The room was in great disorder, an empty whiskey bottle was beside the bed, the voice of accused was unsteady and gutteral and his movements were those of an intoxicated person. Accused was taken to the dispensary where he admitted having drunk two quarts of whiskey in the past two days, he was not certain of the day of the week, his pulse rate was found to be high (96), his blood pressure low (110/76), his equilibrium unsteady, and the alcoholic content of his blood 2.5 milligrams per cubic centimeter. In the opinion of Major Mader the accused was suffering from the effects of alcohol and was not fit to carry on his duties as an officer (R. 7).

It was further stipulated (Stip. 6) that if First Lieutenant Howard Damsgard were present he would testify that on 31 August 1943 he accompanied Major Mader to Charleston, South Carolina, where he saw the accused on the bed in his room at the St. John Hotel, and that the accused was returned to the staging area and delivered to Stark General Hospital (R. 8).

It was further stipulated (Stip. 2) that if Lieutenant Colonel John E. Davis, Jr., Medical Corps, were present he would testify that the accused was admitted to Stark General Hospital on 31 August 1943; that according to the hospital records his diagnosis at that time was "Alcoholism—acute"; and that he had recovered upon his discharge from the hospital (R. 6).

d. (Spec. 4). It was further stipulated (Stip. 1) that if the Assistant Adjutant General of the Charleston Port of Embarkation, Charleston, South Carolina, were present he would testify that the accused departed that station on 28 August 1943 but that he did not at any time during the period from 28 August to 31 August 1943 sign the "outgoing register" (R. 6).

It was finally stipulated (Stip. 7) that if the Chief of Staff to the Commanding General of the Charleston Port of Embarkation were present he would testify that pursuant to paragraph 18, Special Orders 215, that headquarters, 26 August 1943, the accused was ordered to return to Seymour Johnson Field, North Carolina. On 28 August 1943, accused made the proper clearances at the staging area and departed the post without signing the officers' register. On 31 August 1943 accused was returned to Stark General Hospital, and on 3 September 1943, was released from the hospital and brought to headquarters, where he was given a second written order to comply with previous orders to return to Seymour Johnson Field (R. 8).

4. For the defense, Major Frederick LeDrew, Chief of the Neuropsychiatric Section, Station Hospital, Seymour Johnson Field, testified that he observed the accused from 10 November 1943, when the latter was admitted to the hospital, until 8 December 1943, and had also studied the past record of accused. Major LeDrew was of the opinion that accused was suffering from "chronic alcoholism". He had been taking alcohol to an excess since he was 16 years of age, and had been admitted at least 40 times to civilian hospitals "on account of chronic alcoholism and acute alcoholism". Major LeDrew had in his possession the clinical records of several of these hospitals, the diagnosis in each of them was "alcoholism or acute alcoholism", and in one case "alcoholic gastritis". In his opinion, based upon a study of the records, the condition of accused was not curable. Major LeDrew knew of the substance of the stipulations appearing in the record to the effect that accused was "suffering from acute alcoholism" from 28 August to 31 August 1943, inclusive, and would not expect "complete compliance" with any orders given him during that time "if he were under considerable intoxication". Major LeDrew was of the opinion that "great damage" would be done the service by retention of accused and that his condition could not be improved by the service (R. 9-11).

Mrs. Carmen Hoggard testified that she had been married to accused for about three years. When the accused was sent to the Charleston Port of Embarkation he was pleased at the prospect of foreign service. He later telephoned Mrs. Hoggard and apprised her of the fact that his orders had been cancelled. He expressed disappointment at the change in orders, but prepared to return to Seymour Johnson Field in accordance with the new written orders. He called her on "Saturday afternoon" when he was "perfectly sober" and made arrangements to meet her in Wilson the following day. When accused failed to keep this appointment, she called him at his hotel. He was intoxicated and stated that he would catch the next train. She waited until Monday and when accused failed to arrive, returned to her home. She heard Major LeDrew's testimony and knew of her own knowledge that it is correct (R. 11-12).

The accused elected to remain silent (R. 12).

5. It is shown by the evidence and admitted by the pleas of guilty to all the Specifications and the Charge that the accused was drunk at the times and places and under the circumstances alleged, and that he failed to execute the lawful order of the Commanding General of the Charleston Port of Embarkation, Charleston, South Carolina, to proceed to a new station.

6. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 24 July 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty, 12 December 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 96th Article of War.

Samuel M. Dwer, Judge Advocate

[illegible], Judge Advocate

F. Lotthrop, Judge Advocate

1st Ind.

War Department, J.A.G.O., 3 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 Maurice M. Hoggard (O-1551871), Ordnance Department.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused having received a lawful order from a superior officer to proceed to a new station on 28 August 1943, failed to obey the same (Spec. 4), on the same day was drunk in uniform in a public place (Spec. 1), was drunk in a hotel room on 29 August (Spec. 2) and again on 31 August 1943 (Spec. 3). Major Frederick LeDrew, Chief of the Neuropsychiatric Section, Station Hospital, Seymour Johnson Field, a witness for the defense, testified that accused was suffering from incurable, chronic alcoholism, that he had been admitted to civilian hospitals at least forty times on account of that affliction and that in his opinion the retention of accused as an officer would be very detrimental to the military service. 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-Dft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 105, 10 Mar 1944)

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

SPJGK
CM 246417

21 JAN 1944

UNITED STATES v. Private ANDREW H. BERRY (39860343), Company D, 1310th Engineer General Service Regiment.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Claiborne, Louisiana, 14 December 1943. To be hanged by the neck until dead.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Andrew H. Berry, Company D, 1310th Engineer General Service Regiment, did, at Camp Claiborne, Louisiana, on or about 5 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Elijah Franklin, Company D, 1310th Engineer General Service Regiment, a human being, by shooting him with a gun.

He pleaded not guilty to the Charge and Specification. All members present concurring, he was found guilty of the Charge and Specification. Evidence of two previous convictions by summary court-martial was introduced: (a) failure to obey an order of a commissioned officer in violation of Article of War 96, and (b) absence without leave in violation of Article of War 61. All members present concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the findings and sentence and forwarded the record of trial, stating "Pursuant to Article of War 48 the order directing the execution of the sentence is withheld". The record has been treated as though forwarded for the action of the President under Article of War 48.

3. Evidence for the prosecution.

The events related occurred on the morning of Sunday, 5 December 1943 (R.12). The deceased, hereinafter referred to as Franklin, was the supply

sergeant of accused's company (R.17).

Before breakfast, accused was ordered to obtain an "MI" rifle from the supply room, but without permission took a carbine (R.14,15,18). At about 8:30 a.m. the company was ordered to fall in for the purpose of checking rifles (R.22,31,36,47,48). Accused was in the mess hall eating breakfast. When told by Franklin to come out for the formation, accused refused to do so and said that he was going to finish breakfast. He called Franklin a "mother fucker" (R.22,31). Franklin remonstrated and they started fighting or tussling (R.22,31,32,37). During the course of the encounter, accused kicked Franklin (R.31,37). After the "tussle", Franklin left the mess hall and entered the supply room. He returned almost immediately and came to the orderly room front door, which faced the mess hall (R.23,32). He was holding a carbine at port arms (R.29,32, 34). He shouted to the cooks, who were at the mess hall door, "'don't let him out of there because I will shoot him'" (R.23,33). One witness also heard Franklin warn, "if you stick your head out of that door, I will blow your head off". This witness did not know to whom Franklin was addressing his remarks. Franklin then went back into the orderly room (R.43).

After a moment or two accused came out of the mess hall and went to his barracks, which were close by (R.12,43). When seen in his barracks he had a carbine in one hand and a "bullet" in the other (R.12). There was no cartridge in the chamber (R.16). Accused asked Private Nelson Jackson, a member of the same company, whether he knew how to load the rifle. Jackson replied that he did not (R.12,16). Accused then turned around and walked to the door. In response to Jackson's inquiry as to where accused was going, accused said that he was "going to shoot a mother fucker" (R.12,17). According to Jackson, accused looked the same as usual and did not appear angry (R.14,17). Jackson thought that he saw accused loading the rifle as he was "going down" (R.12).

Meanwhile Franklin returned to the supply room, and he and another enlisted man started out, apparently for the formation (R.23). Franklin "had his carbine slung on his left shoulder" (R.23,29,49). They stopped at the orderly room and spoke to the first sergeant (R.23). At this point accused entered the orderly room, holding a carbine at port arms (R.23, 35,48). Accused asked Franklin, "'Do you want to shoot me?'", to which Franklin answered that he did not (R.23,30,35,48). Accused walked toward Franklin, and, upon arriving near him, pointed the rifle at him (R.23, 29,30,37,49). Franklin lunged and grabbed the rifle, and a "tussle" ensued, during the course of which Franklin's rifle fell from his shoulder to the floor (R.23,30,35,49,50). One witness heard accused's rifle "snap", at which Franklin said, "'oh, he hasn't got anything'" (R.23,24).

Apparently succeeding in getting away, accused left the orderly room by the door leading outside, and went around the side of the building, where he "flattened himself out against the wall" (R.24,37,43,45, 46,48). A witness testified that except by going around the building, accused would have been exposed (R.46). While accused was outside, he inserted a clip in the rifle, raised it as though to fire from a standing position, and "angled" it toward the door (R.24,43).

After accused left the orderly room, Franklin picked up his rifle in his left hand, ran to the front door and evidently just outside, and asked which way accused had gone (R.12,24,28,36,38,48). As Franklin looked in the opposite direction, accused stepped forward around the corner of the building, "just enough to see around to the orderly room door", and fired a shot (R.12,13,24,27,28,43). Franklin fell (R.13,24,49) and died on the same day as a result of the shot (R.9,10).

4. Evidence for the defense.

The only witness for the defense was the accused. His story is as follows: He admitted wrongfully taking the carbine and hiding it in the latrine while he went to breakfast (R.53,54,56). Describing the scene in the mess hall, he testified that while he was eating breakfast, Franklin entered the room and ordered accused out. An argument ensued, in which profanity was used. Franklin grabbed some cups, and accused grabbed Franklin's arm. However, no "licks" were passed. The mess sergeant seized both of them, but Franklin broke loose and ran away. Accused started to leave, but was restrained by the mess sergeant. Franklin reappeared at the door, this time carrying a carbine. He told the mess sergeant not to let accused out, because he would shoot accused's "so and so head off" (R.52, 53,59). This made accused angry and he wanted to leave the mess hall, but under the persuasion of the mess sergeant he sat down and finished his meal (R.53,58,67).

Thereupon accused left the mess hall, picked up the carbine at the latrine, and returned to the barracks (R.53). There he "kicked" the bolt out of the carbine, and a cartridge came out (R.54). He picked it up and put it in his pocket (R.66). He asked Jackson to show him how to load the carbine, but Jackson did not know how. As accused left the barracks, Jackson asked where he was going. Because the men in the barracks "always say things" between one another, accused told Jackson that he was going to "kill a mother fucker" (R.54). Intending to put back the carbine, accused went to the orderly room (R.54,55). Franklin was there and told him not to come in, but accused already was inside (R.54,55). Accused took two or three steps forward (R.64). He was neither afraid nor angry (R.59), although he knew that his rifle was not loaded (R.66). He asked Franklin whether the latter wanted to shoot him. Franklin said that he did not (R.59).

Franklin was coming toward accused at the time (R.64). If accused's carbine was pointed toward Franklin, the act was not intentional (R.59). Franklin had a "weapon", which he carried at "sling arms" on his shoulder (R.56,57), and which accused assumed to be loaded (R.67). Franklin seized accused's carbine, and a tussle ensued, during which Franklin's rifle fell to the floor and accused's carbine "went off" and "clicked" (R.55,57,59,64). Making some remark about accused's carbine being unloaded, Franklin let go of it and reached for his own rifle (R.57,65). Although not angry, accused was scared that Franklin would shoot him, so he ran outside and around the corner of the building, there being no other place where he could hide (R.55,57,60,61,63-66).

While around the corner of the building, accused loaded the carbine with the cartridge which had fallen out of the chamber, there being no cartridges in the clip. He seemed to load it by reason of some "instinct" and because he was afraid (R.55,62,63,65). Franklin came out from the orderly room, a "weapon" in his hand. In a loud voice he asked where accused had gone, and he looked toward the company, which evidently was in the opposite direction from accused's hiding place (R.55,56,67). Then Franklin "started turning back around" (R.56). He was four and a half or five feet away. Accused pulled the trigger and shot him (R.56, 62).

5. The evidence thus shows that accused intentionally shot Franklin, causing his death. The killing was not in self-defense. Since accused had hidden and his whereabouts were unknown to Franklin, there existed no reasonable ground to believe that he was in imminent danger of losing his life or suffering great bodily harm. Furthermore, he was bound to retreat as far as possible, instead of which he remained beside the building and stepped forward to fire the fatal shot when Franklin appeared (MCM,1928, par. 148a).

Nor do the facts reduce the homicide to manslaughter. No profane or threatening language on the part of Franklin would constitute a legal provocation (MCM, 1928, p. 166). And the evidence does not indicate any mutual blows sufficient to amount to a "sudden quarrel". In addition, accused admitted that he was not in the heat of anger at the time. There being no justification, excuse, or provocation, the killing, obviously intentional, was murder (Winthrop, Military Law and Precedents, 2nd ed., rev.,pp. 674-675).

6. The law member erred in admitting two doctor's certificates, diagnosing Franklin's condition (R.7-10; Pros. Exs. A,B). But the error is harmless in view of the fact that one of the doctors testified in detail about the matter.

7. The charge sheet shows that accused is 21 years of age. He was inducted into the military service on 7 June 1943.

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

[illegible], Judge Advocate.

(On Leave), 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 Private Andrew H. Berry (39860343), Company D, 1310th Engineer General Service Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. In view of the brutal and calculated nature of the homicide, I recommend that the sentence of death be confirmed and carried into execution at a time and place to be designated by the reviewing authority.

3. 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 dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 186, 23 May 1944)

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

SPJGK
CM 246422

20 MAY 1944

UNITED STATES v. Second Lieutenant LAWRENCE S. RAPPORT (0-442098), Field Artillery.	FIELD ARTILLERY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Fort Sill, Oklahoma, 14 December 1943. Dismissal, total forfeitures, and confinement at hard labor for one and one-half (1-1/2) years.

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 Charges and Specifications:

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

Specification 1: In that Second Lieutenant Lawrence S. Rapport, Army of the United States, did, at Fort Sill, Oklahoma, on or about 25 April 1943, present for approval and payment a claim against the United States, by presenting to Lieutenant Colonel R. W. Nuss, Finance Officer at Fort Sill, Oklahoma, an officer of the United States duly authorized to approve and pay such claims, in the amount of Three Hundred and Thirty-Two Dollars ($332.00) for base pay, subsistence allowance and rental allowance for the period from 1 April 1943 to 30 April 1943 as a captain in the third pay period having a dependent mother, which claim was false and fraudulent in that Second Lieutenant Lawrence S. Rapport was not a captain in the Army of the United States and further in that he had no dependent, and was then known by the said Second Lieutenant Lawrence S. Rapport to be false and fraudulent.

Specification 2: In that Second Lieutenant Lawrence S. Rapport, * * *, did, at Fort Sill, Oklahoma, on or about 5 May 1943, present for approval and payment, a claim against the United States, by presenting to Lieutenant Colonel R. W. Nuss, Finance Officer at Fort Sill, Oklahoma, an officer of the United States duly authorized to approve and pay such claims,

in the amount of Three Hundred and Thirty-Three Dollars and Forty Cents ($333.40) for base pay, subsistence allowance and rental allowance for the period from 1 May 1943 to 31 May 1943 as a captain in the third pay period having a dependent mother, which claim was false and fraudulent in that Second Lieutenant Lawrence S. Rapport was not a captain in the Army of the United States and further in that he had no dependent, and was then known by the said Second Lieutenant Lawrence S. Rapport to be false and fraudulent.

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

Specification 1: In that Second Lieutenant Lawrence S. Rapport, * * *, did, at Fort Sill, Oklahoma, on or about 20 May 1943, knowingly, willfully and wrongfully represent himself publicly to be a captain in the Army of the United States, a recipient of the Order of the Purple Heart and a veteran of foreign theaters of operations and did publicly wear the insignia thereof, being in truth and in fact and well knowing himself to be wholly unentitled thereto.

Specification 2: In that Second Lieutenant Lawrence S. Rapport, * * *, did, at Borden General Hospital, Chickasha, Oklahoma, on or about 23 July 1943, knowingly, willfully and wrongfully represent himself publicly to be a captain in the Army of the United States, a recipient of the Order of the Purple Heart and a veteran of foreign theaters of operations and did publicly wear the insignia thereof, being in truth and in fact and well knowing himself to be wholly unentitled thereto.

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, to pay to the United States a fine of $2,000, and to be confined at hard labor for ten years. The reviewing authority approved only so much of the sentence as provided for dismissal, total forfeitures, and confinement at hard labor for one year and six months, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence for the prosecution.

a. Charge I.

That accused presented vouchers for and received the pay and allowances of a captain having a dependent mother when he was entitled neither to the pay of that rank nor the extra dependency allowance, was conclusively proved by the testimony of witnesses who worked in the Finance Office at Fort Sill,

by copies of the vouchers and accompanying affidavits of dependency, and by a certificate concerning accused's military rank and history from The Adjutant General. The certificate showed that accused was appointed a second lieutenant in the Army of the United States on 9 March 1942, accepted the appointment 12 March 1942, entered upon active duty on 28 March 1942, and was still a second lieutenant as of 8 November 1943, which last date was subsequent to that of all offenses committed by him (R. 9; Pros. Ex. 2).

The testimony of Mr. Myron Smith, Mr. Cobart J. Miller and Mrs. Eva Bell Highfill, civilians, of Lawton, Oklahoma, the employees in the Finance Office, together with the vouchers and affidavits themselves, showed that sometime late in April or early in May of 1943 accused presented to Mr. Smith vouchers for the pay and allowances of a captain for the month of April, attaching to the voucher an affidavit concerning his mother's dependency upon him for support. The voucher had already been filled in and the dependency affidavit made out by accused. Minor corrections in dates and the designation of the payee of the checks were made by accused at Smith's direction. While Smith did not describe the circumstances surrounding the presentation by accused of the claim for pay and allowances, and the dependency allowance for May of 1943, he stated that accused claimed pay as a captain for "both April and May", and that he helped accused only on the one occasion, and only on the vouchers for the months of April and May (R. 35-37; Pros. Ex. 6a).

The two vouchers were identical except for minor variations in amounts, due to the difference in the length of the months. In each of them accused claimed $200 for base pay, $90 for quarters, and $42 and $43.40, respectively, for subsistence. The dependency affidavits were likewise similar except for the dates. In both the vouchers and affidavits accused referred to himself as "captain". In the latter he stated that his mother was Freda Savage Rapport of Chicago, that the amount required for her reasonable and proper living expenses was from $150 to $200 per month, that her total gross income from all sources other than accused's contributions had not exceeded $360 per year, and that during the months of April and May he had contributed to her support the sum of $150 per month (Pros. Ex. 6a).

Mr. Miller testified that Prosecution's Exhibit 6a consisted of photostatic copies of the April and May vouchers and affidavits submitted by accused for payment, and that the finance officer at Fort Sill authorized to approve claims for pay and allowances was Lieutenant Colonel R. W. Nuss, Finance Department (R. 28-30). Mrs. Highfill testified, and the records showed, that check No. 392,484, in the amount of $332, and check No. 397,443, in the amount of $333.40, were issued to the Mercantile National Bank, Chicago, Illinois, for deposit to the credit of accused, in the months of April and May, respectively. Mrs. Highfill also stated that a Treasury statement in her custody showed that both checks had been paid (R. 33,34; Pros. Ex. 6a).

b. Charge II.

Evidence concerning accused's representations publicly that he was a captain, his wearing unauthorized ribbons and decorations, and the events which led up to the commission of these offenses, was offered through the depositions of Sergeant Norbert J. Erhart, and Lieutenant Colonel Sydney V. Kibby, both of the Station Medical Section, 1580th Service Unit, Camp Campbell, Kentucky, by an affidavit of Captain Clifton G. Burke, Field Artillery Officers Replacement Pool, Fort Sill, and by the testimony of Second Lieutenant Robert J. Fikejs, Field Artillery Replacement Training Center, Fort Sill, of Captain Elton C. Hefley, Air Corps, 38th Air Base, Will Rogers Field, Oklahoma City, and of Colonel William Henry Garden and Captain Lee D. van Antwerp, Medical Corps, Borden General Hospital, Chickasha, Oklahoma.

Sergeant Erhart stated that accused was admitted to the Station Hospital at Camp Campbell, Kentucky, where Erhart was admitting clerk, on 16 February and on 4 March 1943. Erhart was present on both occasions and made the entries upon clinical records from information supplied by accused in response to witness' questions. Asked his rank, accused gave that of first lieutenant on the first occasion, and of captain on the second. Accused was later transferred as a captain to Nichols General Hospital, Louisville, Kentucky, by Special Orders of 24 and 25 March 1943, which were issued upon the basis of the information supplied by accused upon his entrance into the hospital. Lieutenant Colonel Kibby, the commanding officer of the hospital, corroborated Sergeant Erhart's testimony in every substantial particular, stating also that he had requested accused's transfer to Nichols General Hospital as a captain based upon his rank as obtained from the forms filled out when accused was admitted, and that no other Lawrence S. Rapport was a patient there during February and March, 1943 (R. 24; Pros. Ex. 4 (Exs. A,B,C,D,E); Pros. Ex. 5(Exs.A,B)).

(1) Specification 1, Charge II.

Though it is not shown by the record, it appears that accused was subsequently transferred to the Field Artillery Officers' Replacement Pool, Field Artillery Replacement Training Center, Fort Sill, Oklahoma, and that while there he entered the Station Hospital. On or about 20 May 1943, accused, Captain Burke, Lieutenant Fikejs and "Lieutenants Defeori and Balder" went on passes to Harley's Cafe, in Lawton, Oklahoma, for dinner. Accused had previously worn captain's bars and several service ribbons and had told Captain Burke that he had been promoted to a captaincy on the field of battle in the Tunisian campaign. While in the cafe accused removed the Tunisian Campaign, Purple Heart, and other ribbons which he was wearing. The group went later with some Army nurses to a nearby dance pavillion. There accused called attention to his ribbons, had one of the nurses pin them on for him, and continued to wear them at the dance. Lieutenant Fikejs testified that upon another occasion he had referred to two

bronze stars on one of accused's ribbons, and that accused had "volunteered the information that one of those (stars) represented the Libyan campaign and one of them represented the Tunisian campaign" (R. 10, 11-13; Pros. Ex. 3a).

(2) Specification 2, Charge II.

Colonel Garden testified that accused was a patient at Borden General Hospital during July and part of August 1943. From the testimony of Colonel Garden, Captain Hefley, and Captain van Antwerp, it is clear that accused's orders from Fort Sill designated his rank as captain, that he wore the insignia of his rank in and about the officers' club and the hospital, and that he also wore ribbons of the American Theater, the African Theater, and the Purple Heart, and possibly other ribbons. This took place through almost all the month of July, and all witnesses testified to the specific occasion on or about 23 July 1943, the date alleged in the Specification (R. 15-17,19,20,22,23). Colonel Garden testified that upon another occasion accused was in his (witness') office, that he asked accused how it happened that he was wearing captain's bars, and that accused told him that he had been promoted to a first lieutenancy at Camp Campbell and to a captaincy at Nichols General Hospital. Witness asked accused where he had obtained the Purple Heart; he did not recall accused's answer, except that accused did not say that he had been wounded in battle (R. 23,24).

It was stipulated that accused was in the military service of the United States at the time of the trial and at all times material in this case (R. 9; Pros. Ex. 1). The certificate of The Adjutant General concerning accused's military history showed that his entire service had been within the continental limits of the United States and that he had been awarded no decorations (R. 9; Pros. Ex. 2).

Lieutenant Colonel Edgar F. Moegle, Field Artillery, testified that he was the inspector at Fort Sill, was acquainted with accused, and had made an investigation of the case as investigating officer on 20 September 1943 (R. 39). An examination of his testimony shows that he fully apprised accused of his rights to testify or remain silent (R. 39). Witness said that accused told him that he had entered the Army about March 1942, had been assigned as a second lieutenant to a training pool at Fort Sill, then to school, then to the 3rd Field Artillery at Fort Riley, Kansas, and then to the 50th Armored Battalion at Camp A. P. Hill, Virginia (R. 40).

Lieutenant Colonel Moegle stated that he had asked accused whether he had served overseas, and that accused said he had not (R. 40,41). He asked accused what was his rank during the entire time he had been in the Army, and accused replied that he had been a second lieutenant but that

he had worn the insignia of a first lieutenant and a captain (R.41). Witness questioned accused concerning his mother's dependency upon him and his support of her, and accused stated that he did not support his mother, but that he had put in "the voucher" stating that he did (R.41). Witness asked accused whether he had worn decorations or military ribbons, and accused stated that he had without authorization worn the Purple Heart and Foreign Theater ribbons (R. 41). Accused also told witness that he had signed pay vouchers for pay to which he was not entitled, and had drawn the pay of a captain for the months of April and May 1943 (R. 42,43).

Evidence for the defense.

Accused's father, David M. Rapport, testified in his son's behalf. Witness stated that he was 58 years of age and the president of a large manufacturing plant in Chicago, which manufactured rollers for the printing industry, and which employed approximately 200 people. He stated that he had an annual income of between $25,000 and $30,000, and told how he had reached his success after an orphaned and impoverished childhood. His own early hardships had led him to resolve that he would take care of his family in a "most proper manner". He never deprived his son of anything within his means, and though accused had never done anything "any more than any young man would do that don't cause any great trouble", he felt that at times he had "spared the rod when [he] might have used it". When accused was commissioned, the father gave him a $1000 Buick automobile and opened charge accounts for him in various sums up to $500. Witness stated that accused had needed only to write home for money in order to get it (R. 58-62).

Accused's counsel specifically disclaimed insanity as a defense, and admitted the commission by accused of the acts charged (R. 43). The only other witness for accused was Major Jesse O. Arnold, Medical Corps, psychiatrist to the Field Artillery Replacement Training Center at Fort Sill, who testified as an expert witness. He stated that among his duties at the center were the maintenance of a psychiatric consultation service, and the interviewing, treatment and help in the disposition of the military personnel at the post (R. 45,46). Major Arnold had given accused a routine psychiatric examination and had taken a comprehensive personal history of accused's background, including family and educational factors. Most of his information was received from accused (R. 47,53).

Members of accused's family had exhibited traits and had suffered from such ailments that witness concluded "that here is a family born to nervous disturbance" (R. 47). Real nervous disorders are not hereditary, "but personality types * * * are", and "emotional instability certainly is passed on from one generation to another" (R. 55,56). Accused's boyhood, young manhood, and Army history showed an emotional instability. He had not been able to retain friends, or to remain long engaged in one

course of action (R. 48,49,51). His emotional instability evidenced itself in "mild but nevertheless excessive" deviations from the normal range of reactions, and not always in a manner which accused might have expected to be beneficial to his interests. He exhibited undue anger when informed by witness that his family knew of his present difficulties, yet was boastful about his accomplishments and abilities. There were periods when a sudden burst of emotion would take control of his behavior (R. 49, 50,51). This showed "an inability to meet the situation he is facing" (R. 49).

Major Arnold stated unequivocally that accused was able to distinguish between right and wrong (R. 49,52). Questioned whether accused knew he was doing wrong at certain times, witness replied, "I think many times, yes", but that a "psychopathic personality capable of acting reacts so quickly that he probably never thinks the thing" to the extent of all its consequences (R. 52).

The reasons assigned by Major Arnold for accused's assuming the rank of captain, his wearing of unauthorized decorations, and his presentation of false pay vouchers, including the claim for additional dependency allowances, were "his more-or-less life-long feelings of insecurity * * * /and/ inferiority, and part of a psychopathic effort to make up for that deficiency, weakness or inadequacy"; also as a means of obtaining additional money in order to have a ready flow of money with which to entertain his fellow officers, whose friendship he was attempting to buy, in order "to be a big shot in the presence of a feeling of inferiority", and in order to make a form of social life for himself (R. 53,54,55).

Major Arnold's diagnosis of accused was "Pathologic inferiority, manifested by mild but nevertheless excessive forms of emotion, symptoms of neurotic tension", and "pathological lying /and/ lack of adult sense of responsibility" (R. 49,50). The latter is not a psychiatric term (R. 50).

The defense also introduced as its Exhibit A a receipt from the Finance Office, which showed the repayment to that office in two separate installments of all overpayments to accused as a result of false pay and allowance vouchers presented by him from the beginning of his masquerading (R. 57,64; Def. Ex. A). Upon explanation to him in open court of his rights to testify or to remain silent, accused elected to remain silent (R. 63).

4. The elements of all offenses charged were proved beyond any doubt by the evidence, by accused's admissions to the investigating officer, and by the pleas of guilty. Counsel for accused specifically stated that the question of accused's mental responsibility for his acts, was not in issue, and there is nothing in the record to indicate that accused was insane. The Board of Review holds that under such circumstances the

court was under no duty to make further inquiry into accused's mental condition or responsibility, and further holds that the record of trial is legally sufficient to sustain the findings and the sentence in all respects.

6. It does not appear with exactitude that the vouchers were presented for payment on the dates specified, but this failure of proof was cured by the pleas of guilty. Likewise, the prosecution failed to show by affirmative evidence that accused's mother was not in fact dependent upon him, but accused's statements to Lieutenant Colonel Moegle, his pleas of guilty, and his father's testimony concerning his own annual income, supply these elements of the proof. No substantial error occurred prejudicial to accused's rights.

The Board of Review is of the opinion that accused's conduct in wearing the insignia of rank and decorations to which he was not entitled was clearly violative of Article of War 95. While it has been held in CM 233900, Baker, that insignia speak for themselves and that no oral misrepresentation is necessary, the evidence in this case shows that accused on at least one occasion publicly and pointedly called attention to the decorations he had assumed to wear, and that he at other times volunteered false information when questioned concerning them. He used the insignia of the higher rank as part of a conceived plan for social aggrandizement and for obtaining for himself additional funds whereby he carried on the aggrandizement. For an officer to wear such decorations as the Purple Heart in time of war, when he is not entitled thereto, stamps him as totally lacking in the elements of the integrity and military social consciousness expected of the holder of a commission. It is not important that the Specifications of Charge II did not allege that accused intended to deceive. The clear showing in the evidence of the circumstances under which the acts took place, together with accused's pleas of guilty, supply any lacking technical niceties of pleading.

7. Consideration has been given to oral arguments offered and a brief presented by Herbert J. Friedman, Esq., of the Chicago bar, civilian counsel retained by accused, in a hearing before the Board of Review on 16 March 1944.

8. War Department records show that accused is 20-4/12 years of age and single. He spent five years at Culver Military Academy, graduating in 1939, and attended Armour Institute of Technology for three years, majoring in chemical engineering. He was appointed a second lieutenant in the Army of the United States on 9 March 1942, without previous military service, accepted the appointment 12 March 1942, and entered upon active duty 28 March 1942.

9. 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 as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95, and authorized upon conviction of violation of Article of War 94.

Percy E. Fox, Judge Advocate.

John Wannwell, Judge Advocate.

Stephen R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 JUN 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 Lawrence S. Rapport (0-442098), Field Artillery.

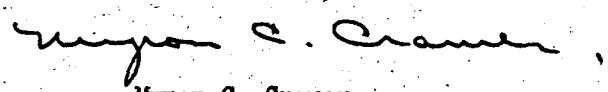
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed, that the forfeitures 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. Consideration has been given to an oral argument and to a written brief, made before and filed with Board of Review Number 2 on 16 March 1944, by Herbert J. Friedman, Esq., of the Chicago Bar, accused's civilian counsel. Consideration has also been given to a Report of Special Psychiatric and Psychological Examinations to which accused was subjected by Robert P. Knight, M.D., psychiatrist, and David Rapaport, Ph.D., psychologist, both of the Menninger Clinic, Topeka, Kansas, on 24 and 25 February 1944, which report was filed with Board of Review Number 2 by Mr. Friedman on 16 March 1944. Finally, consideration has been given to a report of the Proceedings of a Board of Medical Officers of Borden General Hospital, Chickasha, Oklahoma, held 10 May 1944, after an examination of accused.

4. The issue of accused's sanity was not raised during trial, and was, in fact, specifically disclaimed as a defense by his military counsel. It was, however, raised by Mr. Friedman in his argument and brief, and in the report of the examination conducted by the psychiatrist and psychologist of the Menninger Clinic, who concluded that although accused knew right from wrong in the usual sense, he was unable to adhere to the right because of a "severe personality disorder", and of "strong impulsiveness and * * * poverty of judgment". The Board of Medical Officers at Borden General Hospital (which was convened at the instance of this office) concluded that accused's condition was that of "constitutional psychopathic state, inadequate personality", and that he was able to adhere to the right and refrain from doing wrong at the time of the commission of his offenses, at the time of his trial, and at the time of his examination. I believe that accused is sane and legally responsible for his acts.

5. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action

designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



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

6 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Brief filed by Herbert J. Friedman.
Incl.5-Report of Sp. Psy. exam. by Menninger Clinic, 24 and 25 Feb. 1944.
Incl.6-Report of Bd. of Med. Off. of Borden Gen. Hos.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted and confinement reduced to one year. G.C.M.O. 418, 27 July 1944)

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

SPJGN
CM 246447

11 FEB 1944

UNITED STATES	)	ANTIAIRCRAFT ARTILLERY TRAINING CENTER
v.	)	Trial by G.C.M., convened at Camp Stewart, Georgia, 12 November 1943. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant ROBERT I. WEISBART (0-1050505), Coast Artillery Corps.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Robert I. Weisbart, CAC, 440th Antiaircraft Artillery Automatic Weapons Battalion, Blackstone, Army Air Field, Blackstone, Virginia, did at Camp Ibis, California, during the months of June, July, and August, 1943, feloniously embezzle by fraudulently converting to his own use one thousand four hundred fifty-two dollars and three cents ($1452.03), lawful money of the United States, the property of the 440th Antiaircraft Artillery Automatic Weapons Battalion Post Exchange entrusted to him as Officer of the said Post Exchange.

He pleaded not guilty to and was found guilty of the Charge and Specification, substituting in the Specification the words and figures "one thousand four hundred twenty-eight dollars and three cents ($1428.03)" for the words and figures "one thousand four hundred fifty-two dollars and three cents ($1452.03)". 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 one 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 during the months of June, July and August 1943, the organization to which the accused belonged, the 440th Antiaircraft Artillery Automatic Weapons Battalion, was stationed in the Desert Training Center at Camp Ibis, California. During this period the accused was the officer in charge of the 440th Antiaircraft Artillery Automatic Weapons Battalion Post Exchange, which was operated as a branch or unit of the Desert Training Center Exchange. Near the end of September 1943, approximately one month after the 440th Antiaircraft Artillery Automatic Weapons Battalion had removed from the Desert Training Center to Camp Pickett, Virginia, the commanding officer of the 440th Antiaircraft Artillery Automatic Weapons Battalion received a letter from the Desert Training Center Exchange Officer requesting that a board of officers be appointed to make an informal investigation as to why the shortage, which had been reported in the sales accountability statement of the unit post exchange for the month of August, existed. When called upon for an explanation of the reported shortage the accused first attributed it to the failure of his unit post exchange to receive the merchandise covered by three specific vouchers charged to the unit in a total amount approximately equal to the amount of the reported shortage. This explanation was wholly false, because when copies of the vouchers were produced by the Desert Training Center Exchange, they bore evidence of having been receipted for by the accused and the accused admitted that the merchandise called for by the vouchers had been duly received. No copies of these three vouchers were ever found among the accused's records. The accused "destroyed all of his records except very few". The commanding officer of the 440th Antiaircraft Artillery Automatic Weapons Battalion testified, in part, as follows:

> "* * * I had the S-2 helping the Post Exchange Officer to try to locate where his trouble was, and he went over all of his accounts and everything, and finally they couldn't get anywhere; so I took the accounts myself, and I noticed that in the statement for the month of August, there was set

> up the inventory as of the 26th of July, and the subsequent two or three days there was cash on hand some $2,000, and there was only $784 deposited, and that's the thing that struck me right off, and I couldn't understand why he should have that much money in his exchange and not make any deposits. So I told him to try to rack his mind to try to remember what he did with this, and I even went so far as to have him go over and talk to his Rabbi; inasmuch as he belonged to the Jewish faith, because he kept on getting more and more depressed, and I gave him every opportunity in the world. Finally, I went over to see the Judge Advocate in Camp Pickett and couldn't get anywhere, and that evening, there was still no way to explain why there was so much money on hand that wasn't deposited, and he said, 'Well, I guess I've stalled all along', or something to that effect, and he said, 'I took the money'" (R. 7-11, 13, 18).

The evidence for the prosecution further shows that on 8 October 1943, the accused, in the presence of four other officers, signed, under oath, a confession (Ex. P-3), reading as follows:

> "The following statement is made by me without duress and coercion. The money ($1452.03) that was short in the Post Exchange for the month of August was taken by me and lost gambling in the battalion over a period of 2 months - July to August. The above statement was made under oath".

Such confession was not made under any pressure, but on the contrary was voluntarily made. Before the confession was written out and signed by the accused (a) his rights under Article of War 24 were fully explained to him, (b) he was warned that anything he might say would or might be used against him, (c) he received no threats of any kind and (d) was given no promise of leniency or other benefit. Subsequently to the signing of the confession it was discovered that the accused was entitled to credit for one voucher in the amount of $24, which had been overlooked and which had the effect of reducing the reported shortage to $1428.03. The inventorying officers, whose duty it was to check the merchandise and the cash on hand in the unit post exchange once each month, made only spot checks of merchandise and bottles, and no check at all of the cash, simply

taking the accused's word as to the amount of cash on hand. After the inventorying officer for the month of July had prepared and certified the unit exchange's inventory as of 28 July 1943 (Ex. P-4), showing cash on hand in the amount of $1565.72, the cash item was changed, by interlineation, to read "$2,065.72", an increase of an even $500. The explanation of the change, as noted on the inventory, was as follows: "As changed by letter att." The letter referred to was a letter or certificate, dated 2 August 1943, (Ex. P-5), signed by the accused and simply certifying that the inventory "is incorrect" and that the "cash on hand should be $2,065.72" (R. 17, 19-20, 22, 26, 28, 31, 65, 68-69).

It was stipulated by the prosecution and the defense that Exhibit P-1, an accountability statement of the Desert Training Center Exchange covering the operations of the unit post exchange for the month of August 1943, accurately represents the items that appeared on the original vouchers, and that the item shown on page 3 as short in the amount of $1428.03 accurately represents what the accounts of the Desert Training Center Exchange show as being short for the unit post exchange, and that the amount shown on page 1 as being "on hand" of $2065.72 was not counted and the accuracy of that item was not stipulated (R. 6).

4. Major Edmund L. Meekins testified for the defense that from personal experience he was familiar with the problems of operating post exchanges in the Desert Training Center; that there is more than an average loss for the post exchanges in the Desert Training Center, much of which is due to unreturned bottles, melted ice cream and melted candy; that he had thoroughly checked the unit post exchange's inventory for the month of August; that the inventorying officer for the month of August was "pretty slipshod"; and that he had "no faith in the inventory at all". Major Meekins' testimony dealt mainly with the possibility of bottle losses due to the failure of the unit post exchange to receive credit on all returned bottles, and he admitted that for the month of August the unit exchange delivered to the Center Exchange a larger number of empty bottles than the number of full bottles it withdrew from the Center Exchange (R. 33, 35-36, 50-51).

Private Samuel V. McIntosh testified for the defense that a wreck was had with the unit post exchange truck and that "a little candy and cookies and cigarettes" were lost (R. 40-41).

Mrs. Dorothy Richman, sister of the accused testified for the defense that the accused had had no managerial experience prior to going into the Army (R. 42).

Mrs. Lydia Weisbart, wife of the accused, testified for the defense that the accused had had no managerial or administrative experience and that she and her husband have a joint checking account, and that there have been no deposits in the account in excess of the accused's pay, and that he has given her no other money or gifts that do not reflect a corresponding debit to that account (R. 43, 64).

Several character witnesses testified that the accused's reputation is good.

5. After his rights with respect to testifying, making an unsworn statement and remaining silent were fully explained to him, by the court, the accused elected to remain silent.

6. The Specification alleges that the accused did, during the months of June, July and August 1943, feloniously embezzle $1452.03, the property of the 440th Antiaircraft Artillery Automatic Weapons Battalion Post Exchange, entrusted to him as the Officer of said Post Exchange.

The Manual for Courts-Martial states that:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268).
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship" (par. 149h, M.C.M., 1928).

The evidence clearly shows that during the months of June, July and August 1943, the accused was the officer of his organization's post exchange; that as such he was entrusted with the funds of the post exchange; and that the accounts of the post exchange for the month of August showed a shortage of $1428.03. The principal item of evidence connecting the accused with the offense alleged is his confession that the money that was short in the post exchange for the month of August "was taken by me and lost gambling in the battalion over a period of 2 months — July and August".

To be admissible in evidence a confession must have been freely and voluntarily made. Controlling authority provides:

> "A confession is an acknowledgment of guilt. In view of the peculiar conditions in which accused persons are often placed when making confessions, evidence of confessions is in general to be received with caution. Where, however, a confession is explicit and deliberate as well as voluntary * * * it is indeed one of the strongest forms of proof known to the law" (par. 114a, M.C.M., 1928).

The evidence shows that the confession, in the instant case, was written out, signed and sworn to by the accused in the presence of four fellow officers, and their testimony is conclusive to the effect that at the time of signing the confession the accused was not acting under duress, coercion or pressure and that before the signing of the confession the accused (a) was fully advised as to his rights under Article of War 24, (b) was advised that anything that he might say would or might be used against him, (c) was not threatened in any way, and (d) was given no promise of leniency or other benefit. The Board is of the opinion that the evidence is ample to support the conclusion that the confession was freely and voluntarily made.

Controlling authority further provides:

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond a reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. * * * In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule" (par. 114a, M.C.M., 1928).

It was contended on behalf of the defense that there was an absence of sufficient corroborative evidence to warrant admission of the confession, and, in particular, that the stipulation, that Exhibit P-1 accurately reflected the shortage of the unit post exchange in the accounts of the Desert Training Center Exchange as amounting to $1428.03, was in and of itself insufficient corroborative evidence, because, as contended by the defense, there was no proof that such shortage might not have existed since prior to the time the accused became the unit post exchange officer. As to this, while the evidence adduced by both the prosecution and the defense tended to show that the accounts of the unit post exchange were kept in a loose manner and that the inventorying officers who made the monthly inventories for the months of June, July and August made only spot checks of the merchandise and no count whatever of the cash on hand, it is reasonable to infer that when the accused first assumed the duties of unit post exchange officer he had a sufficient check made to satisfy himself that the accounts were reasonably in balance.

Even if it be assumed, however, that the stipulation as to the shortage in the accounts is not in and of itself sufficient corroborative evidence, there are at least three other items of evidence in the record which, although circumstantial only, may be relied upon as having corroborative value. They are the following: (1) the evidence that, when the accused was first confronted with a reported shortage in his accounts and requested to explain, he gave a sham and fictitious explanation by asserting that the shortage was due to the failure of his post exchange to receive the merchandise called for by three specific vouchers which had been charged to his post exchange and which totalled approximately the amount of the reported shortage, which explanation he was forced to abandon when it was conclusively shown that the vouchers themselves bore evidence of the accused having personally receipted for the merchandise; (2) the evidence that the unit post exchange came into the possession of approximately $2000 within two or three days of 26 July 1943, while the accounts showed deposits of only $784 during this period; and (3) the evidence that after the inventory of the unit post exchange had been prepared and certified for the month of July, as of 28 July 1943, showing cash on hand in the amount of $1565.72, the accused caused the item of cash to be changed to read "$2065.72", an increase of an even $500, by simply attaching a certificate, signed by himself (Ex. P-5), certifying that the inventory was incorrect and that the cash on hand amounted to $2065.72, and giving no further explanation. The Board is of the opinion that the stipulation, together with the additional evidence referred to in this paragraph constituted sufficient corroborative evidence of the probable guilt of the accused of

the offense charged to warrant the admission of the confession, and that, therefore, the confession must be considered to have been properly admitted.

The position held by the accused as post exchange officer placed him in a fiduciary relationship requiring him to hold the funds entrusted to him in safekeeping for the owner. The breach of this fiduciary relationship, therefore, constitutes the offense of embezzlement. Every element of the offense charged is established by competent evidence beyond a reasonable doubt.

7. The records of the office of The Adjutant General show the accused to be approximately 24 years of age, that he entered active service as a soldier on 16 July 1942, and that he attended Officers' Candidate School and was commissioned a second lieutenant, Coast Artillery Corps on 21 January 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the finding of guilty of the Charge, and the Specification as amended by the above-described exceptions and substitutions, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 93.

Abner E. Lifsconb, Judge Advocate.

Benjamin H. Sleffer, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 246447

1st Ind.

War Department, J.A.G.O., 16 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 Robert I. Weisbart (0-1050505), 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 and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed and that the United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

3. Appropriate consideration has been given to letters from the Honorable Vito Marcantonio addressed to the Under Secretary of War and to The Judge Advocate General, and to a letter from Louis Weisbart, the father of the accused.

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

Myron C. Cramer

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

6 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. from Hon. Marcantonio addressed to Under Sec. of War.
Incl 5 - Ltr. from Hon. Marcantonio addressed to JAG.
Incl 6 - Ltr. from Louis Weisbart, father of accused.

(Sentence confirmed. G.C.M.O. 153, 4 Apr 1944)

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

SPJGQ
CM 246497

8 JAN 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Florence Army Air Field, Florence, South Carolina, 7 December 1943. Dismissal.
Second Lieutenant CHARLES H. DEVOE (0560909), 648th Bombardment Squadron, 411th Bombardment Group.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Charles H. DeVoe, 648th Bombardment Squadron, 411th Bombardment Group, then of 18th Reconnaissance Squadron, 65th Reconnaissance Group, did, without proper leave, absent himself from his organization at Florence Army Air Field, Florence, South Carolina, from on or about 21 July 1943 until he was apprehended at Los Angeles, California on or about 8 August 1943.

He pleaded guilty to and was found guilty of the Charge and the Specification. No evidence of any previous conviction 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. Notwithstanding the plea of guilty the prosecution showed by competent evidence that the accused, a second lieutenant assigned to duty with the 648th Bombardment Squadron stationed at the Florence Army Air

Field, Florence, South Carolina, on 21 July 1943 verbally requested from his commanding officer, Lt. Colonel B. B. Campbell, that he be granted "a number of days" leave for the purpose of visiting El Paso, Texas (R.7). His request was denied with an assurance, however, that the accused would be advised "in a day or so as to the possibility of his getting a leave" (R.7). Following this conversation Captain Louis Cohen informed the accused on 21 July 1943 that his request for leave was disapproved (R.9). On the same day the accused asked Master Sergeant Charles Goode what would happen if he (the accused) went AWOL and was told that he might be court-martialed (R.10). A duly authenticated copy of an extract of the morning report of the accused's organization pertaining to the accused, accepted in evidence without objection, shows that the accused absented himself without leave from his organization on 21 July 1943 (Ex.P-1).

By stipulation it was shown that the accused was apprehended by military authorities in the Hollywood Plaza Hotel, Hollywood, California, 8 August 1943 (R.6).

4. The accused having been advised as to his rights regarding testifying on his own behalf elected to remain silent but submitted an unsworn written statement (Ex.D-1). In this statement the accused claimed that he requested a leave of absence from Colonel Campbell on the morning of 21 July 1943 for the purpose of going to El Paso, Texas, and preventing his wife from incurring further debts in that city. Colonel Campbell verbally granted the leave but later that day he was informed by Captain Cohen that his request had been disapproved. Knowing that he would be punished for his act he nevertheless left without authority and went to El Paso, Texas. There he stopped all charge accounts and was assured by his wife that she would return to Florence, South Carolina, at the end of the week. The following day his wife disappeared and thinking that she had gone to visit friends in California the accused proceeded to Los Angeles, California, searching for her. He was there only three days having found no trace of his wife when he was apprehended.

Prior to this offense he served 23 months as an enlisted man with a character and efficiency rating of excellent. He was commissioned 5 August 1942 and has been rated as very satisfactory until the time he was transferred to his present organization.

5. The prosecution has clearly shown by competent evidence and the accused has admitted not only by his plea of guilty but also by his unsworn statement submitted to the court that on 21 July 1943 he did absent himself from his organization at Florence, South Carolina, and that he remained away until he was apprehended at Los Angeles, California, on 8 August 1943 - exactly as averred in the Specification of the Charge. It necessarily follows that the record is legally sufficient to support the findings of guilty of the Specification and the Charge.

6. The record of the Adjutant General shows the accused to be 22 years of age. He graduated from high school, attended Business College six months, and on 18 September 1940 enlisted in the United States Army

at Chanute Field, Illinois. On 4 March 1941 he was appointed corporal; on 6 May 1941 he was appointed sergeant; and on 16 May 1942 was sent to OCS at Miami Beach, Florida where on 5 August 1942 he was commissioned second lieutenant, Air Corps. On 29 June 1943 he was transferred to Stark General Hospital, Charleston, South Carolina for observation and treatment for a foot ailment (flat foot) not incurred in line of duty nor due to his own misconduct. He was returned to full active military service 20 July 1943.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation 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. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 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 Charles H. Devoe (0560909), 648th Bombardment Squadron, 411th Bombardment Group.

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

3. Consideration has been given to the attached letter from Mrs. Bertha A. Devoe, addressed to the Adjutant General's Office dated 13 December 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 designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of action.
Incl.4-Ltr. fr. Mrs. Devoe, 13 Dec. 1943.

(Sentence confirmed. G.C.M.O. 123, 11 Mar 1944)

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

(49)

13 APR 1944

SPJGH
CM 246498

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Barksdale Field, Louisiana, 6 December 1943. Dismissal.
Second Lieutenant LEANDER J. EICHORN (0-671912), Air Corps.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Leander J. Eichorn, 477th Bombardment Squadron (M), 335th Bombardment Group (M), Barksdale Field, Louisiana, did, on or about 4 November 1943 in the vicinity of Barksdale Field, Louisiana, knowingly violate Section II, paragraph 16 a (1) Army Air Forces Regulation 60-16, by flying an airplane at an altitude of less than 500 feet.

Specification 2: In that Second Lieutenant Leander J. Eichorn, 477th Bombardment Squadron (M), 335th Bombardment Group (M), Barksdale Field, Louisiana, did, on or about 4 November 1943, at a location approximately four (4) miles South of Barksdale Field, Louisiana, through neglect, suffer a L-4A Airplane, military property of the United States, of the value of approximately $1,800.00 be destroyed by striking a wire while in flight.

He pleaded guilty to and was found guilty of the Charge and both Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on 4 November 1943, the accused, a pilot, accompanied by Staff Sergeant Lyle W. Bergstrom, took off

from Barksdale Field, Louisiana, in an L-4A Government airplane on an authorized flight (Ex. A). After flying over the reservation for about 30 minutes and making two landings, accused proceeded to a point over highway No. 71 about four miles south of the field. While flying between the highway and a railroad track parallel to it, and at an altitude of 30 or 40 feet, the plane struck something and hit the ground. One wing was torn off, plexi-glass was broken and scattered, and the instrument panel was broken up. It was stipulated that the plane was destroyed, to the extent that it was impracticable to repair it, by striking a wire while in flight; that it was military property of the United States of a value of $1,800; and that it had some salvage value (R. 4-6, 8).

Shortly after 4:00 p.m. on 4 November the construction foreman of a telephone company went to a point on the "Coushatta Road" about "4.4" miles south of the "air base entrance" to meet a crew for the purpose of repairing a toll line. He found that the top six wires of the "top arm", 22½ feet above the ground, were damaged. A power company pole, 10 feet higher than the telephone pole, was broken, as was the guy wire to it. The plane which he understood had done the damage was still there (R. 6-8).

4. For the defense, Major Charles H. Sewell, operations officer of the 475th Bombardment Squadron (M), 335th Bombardment Group (M), testified that accused had been a member of his squadron and that he would rate him excellent in both efficiency and character. Captain Harold V. Larsen, a flight commander in the 477th Bombardment Squadron (M), 335th Bombardment Group (M), stated that the accused was an instructor pilot in his flight for approximately one month but he had not flown with accused. In his opinion accused was of excellent character, very conscientious, better than average as an officer, and "more than willing to do his share of work, wherever it may be, flying or any other detail to which he is assigned". Captain Lloyd B. Field, a flight commander in the 477th Bombardment Squadron, was of the opinion that the ability and character of accused were excellent, and stated that he would be glad to have accused serve in his flight again. It was stipulated that "Captain Gant", the assistant operations officer, and "Lieutenant Burns", a deputy flight commander, of the 477th Bombardment Squadron would testify that they had had an opportunity to observe accused, that his ability as a pilot and officer was excellent, and that he was of excellent character (R. 9-12).

The accused elected to remain silent (R. 12).

5. The evidence shows and the pleas of guilty admit that on 4 November 1943, accused, a pilot stationed at Barksdale Field, Louisiana, flew an L-4A airplane, military property of the United States of a value of

$1,800, at an altitude between 30 and 40 feet, near a highway, and that the plane struck a wire and was damaged beyond repair. In operating the plane in this manner accused violated paragraph 16 a (1)(d), Army Air Forces Regulation No. 60-16, 9 September 1942, providing a minimum flight altitude of "500 feet above the ground elsewhere than as specified above", and negligently suffered the airplane to be substantially destroyed (2 Bull. JAG 271; CM 233196). The record of trial sustains the findings of guilty.

6. The accused is 20 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 13 March 1942; aviation cadet from 18 June 1942; appointed second lieutenant, Air Corps Reserve, Army of the United States, and active duty, 16 February 1943.

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

Robert C. Clanner, Judge Advocate

F. J. Lotthuhos, Judge Advocate

(52) 1st Ind.

War Department, J.A.G.O., 8 MAY 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 Leander J. Eichorn (0-671912), 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, a pilot, flew an L-4A military airplane, property of the United States of the value of $1,800, at a low altitude contrary to Army Air Forces regulations providing a minimum flying altitude of 500 feet (Spec. 1), and on the same occasion, while flying 40 or 50 feet above the ground between a railroad track and a highway running parallel thereto, negligently suffered the plane to be substantially destroyed by striking some telephone wires while in flight (Spec. 2).

Attached to the record of trial is a recommendation of clemency by all members of the court and the trial judge advocate. Consideration has also been given to a letter in behalf of accused from Honorable J. Parnell Thomas, Member of Congress, dated 20 January 1944.

In a memorandum to me, dated 6 April 1944, the Commanding General, Army Air Forces, states that he has considered the evidence in the case and recommends that the sentence be confirmed and ordered executed. 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.

5 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Hon. Thomas, 20 Jan. 1944.
Incl.5-Memo. fr. CG, Army Air Forces, 6 Apr. 1944.

(Sentence confirmed. G.C.M.O. 252, 30 May 1944)

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

SPJGK
CM 246503

15 JAN 1944

UNITED STATES	ARMORED COMMAND
v.	Trial by G.C.M., convened at Fort Knox, Kentucky, 17 December 1943. Dismissal.
Captain VICTOR A. MAEEF (O-423220), Infantry.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Victor A. Maeef, Infantry, did, at Fort Knox, Kentucky, on or about 15 May 1943, wrongfully and unlawfully borrow the sum of twenty-six (26) dollars, United States currency, from Sergeant Ernest C. Bright, Company A, 526th Armored Infantry Battalion, to the prejudice of good order and military discipline.

Specification 2: In that Captain Victor A. Maeef, Infantry, did, at Fort Knox, Kentucky, on or about 15 June 1943, wrongfully and unlawfully borrow the sum of fifteen (15) dollars, United States currency, from Technician Fourth Grade Euin J. Bault, Company A, 526th Armored Infantry Battalion, to the prejudice of good order and military discipline.

Specification 3: In that Captain Victor A. Maeef, Infantry, did, at Fort Knox, Kentucky, on or about 28 July 1943, wrongfully and unlawfully borrow the sum of one hundred seventy three (173) dollars, United States currency, from First Sergeant Robert L. Elkins, Company A, 526th Armored Infantry Battalion, to the prejudice of good order and military discipline.

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

all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48 with a recommendation that the sentence as approved "be commuted to forfeiture of $25.00 of pay per month for six months".

3. After the arraignment the trial judge advocate stated to the court that all witnesses for the prosecution had been transferred from Fort Knox, Kentucky, and were at the time of the trial in the Maneuver Area in the California desert. Accordingly, with the permission of the court and without any objection on the part of the defense, the prosecution introduced in evidence a stipulation duly signed by the trial judge advocate, the accused, and the defense counsel, which stipulation constituted the only evidence introduced by the prosecution (R.6; Ex.1).

Concerning Specification 1, it was stipulated that if Sergeant Ernest C. Bright were present in court he would testify, in substance, that on or about 15 May 1943 both he and the accused were members of Company A, 526th Armored Infantry Battalion, at which time he (Bright) was serving as a noncommissioned officer; that on or about said date the accused, a captain, borrowed from him $26 and promised to repay the same on or about 1 June 1943; that the loan was made at Fort Knox, Kentucky, and has been fully repaid.

Concerning Specification 2, it was stipulated that if Technician Fourth Grade Euin J. Bault were present in court he would testify, in substance, that on or about 15 June 1943 both he and the accused were members of Company A, 526th Armored Infantry Battalion, at which time he (Bault) was serving as a noncommissioned officer; that on or about said date the accused, a captain, borrowed from him $15 and promised to repay the same on or about 1 July 1943; that the loan was made at Fort Knox, Kentucky, and has been fully repaid.

Concerning Specification 3, it was likewise stipulated that if Sergeant Robert L. Elkins were present in court he would testify, in substance, that on or about 28 July 1943 both he and accused were members of Company A, 526th Armored Infantry Battalion, at which time he (Elkins) was serving as a noncommissioned officer; that on or about said date the accused, a captain, borrowed from him $173 and promised to repay the same on or about 8 August 1943; that the loan was made at Fort Knox, Kentucky, and has been fully repaid (Ex. 1).

For the defense.

The accused testified in his own behalf and expressly admitted

borrowing $26 from Sergeant Bright, $15 from Technician Fourth Grade Bault, and $173 from Sergeant Elkins as alleged in the respective specifications (R.8), and stated that he did not know that borrowing money from enlisted men was contrary to Army Regulations (R.7). His explanation was that his wife had been confined in a hospital in New York from May until November 1943; that he was under great financial pressure in order to meet her hospital bills; and that his friends in the organization -

> "* * * must have been always broke, and the only way I could pay the bills was to borrow it and pay it back, and I paid it back. That's all I can say." (R.7)

The accused stated that he entered the Army at the age of 21 - "I just got out of school and went through ROTC training during the summer [1941], and was called for duty in September" (R.7). It appears from the testimony of the accused that the loans were not repaid until the latter part of October 1943 (R.10). In this connection he stated that he was transferred from the 526th to the 527th Armored Infantry Battalion in the early part of August. The 526th left Fort Knox for the California desert about the middle of August. Accused tried by mail and telegraph to ascertain the forwarding address of the organization for the purpose of transmitting payment of the loans, but the address was not received until 28 October 1943, upon which date proper remittances were made (R.11,12).

4. The undisputed evidence shows that the accused, while a captain, borrowed money from enlisted men of his organization as alleged in the Charge and Specifications. Such transactions, of course, were prejudicial to good order and military discipline in violation of Article of War 96 (CM 230736).

5. This case was first tried by a general court-martial appointed by paragraph 10, Special Orders No. 278, Headquarters Armored Command, Fort Knox, Kentucky, dated 21 October 1943. In that trial the accused was found guilty of the Charge and Specifications and was sentenced to dismissal. On 3 December 1943 the reviewing authority disapproved the sentence and ordered a rehearing. The record of trial now under consideration is based upon the rehearing by a new court appointed by paragraph 1, Special Orders No. 318, Headquarters Armored Command, Fort Knox, Kentucky, dated 1 December 1943. It is noted that in the original trial the sentence adjudged was one of dismissal only, whereas upon the rehearing and upon findings of guilty of the identical Charge and Specifications considered in the first trial the sentence adjudged was dismissal from the service, total forfeitures, and confinement at hard labor for three years. This sentence is plainly in violation of the express provisions of Article of War 50½, the pertinent part of which provides that upon a rehearing -

"* * * no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: * * *".

Obviously that part of the sentence involving forfeitures and confinement is in excess of and more severe than the original sentence of dismissal and is therefore illegal to that extent. This error however was completely cured by the action of the reviewing authority, who approved only so much of the sentence as provides for dismissal (MCM, 1928, par. 87b).

6. The accused is 24 years of age. The records of the War Department show that accused was born in Russia, 2 September 1919, and came to the United States with his father 17 March 1936. His father during the minority of the accused was naturalized as an American citizen. The accused was graduated from Riverside Military Academy (Georgia) in June 1941. He speaks, writes, and translates the Russian language. Upon his completion of the Reserve Officers Training course at Clemson College 17 July 1941 he was commissioned a second lieutenant, Infantry Reserve, Army of the United States, and on 21 August 1941 was ordered to active duty. On 3 November 1942 he was promoted to the grade of First Lieutenant, Infantry, and on 20 May 1943 he was promoted to the grade of captain.

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

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 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 Captain Victor A. Maeef (0-423220), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. In view of the youth and previous good record of the accused and the recommendation of the reviewing authority, 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. 112, 10 Mar 1944)

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

SPJGN
CM 246523

12 FEB 1944

UNITED STATES	)	NEW YORK-PHILADELPHIA SECTOR
	)	
v.	)	Trial by G.C.M., convened at Fort Hancock, New Jersey, 29, 30 November, 1 December 1943. Dismissal and confinement for two (2) years.
	)	
Major ANTHONY A. CARDELLA (0-302720), Coast Artillery Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, 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 93d Article of War.

Specification 1: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 24 May 1943, feloniously take, steal, and carry away a certain check, in words and figures as follows:

The Atlantic Highlands National Bank
No.532 Atlantic Highlands, N.J. April 30, 1943
Pay to the order of Btry. Fund, Hq Btry 245th CA. $41.65
Forty one_____65/100 dollars
Bty. Fund Hq. Bty. 52nd C.A.
James L. McCallister Jr
Captain Custodian

Indorsements:
Btry Fund, Hq Btry
245th CA pay to
Regt Fund 7 CA
Anthony A. Cardella
Anthony A. Cardella
Captain, C.A.
Custodian

value about $41.65 the property of Battery Fund, Headquarters Battery 245th Coast Artillery.

Specifications 2 to 16, inclusive, allege that the accused committed the same offense, in like manner, on the same day with respect to fifteen other checks drawn on the Atlantic Highlands National Bank in the following amounts and with the following payees, all executed by Captain James L. McCallister, as Custodian of the Battery Fund of Headquarters Battery, 52nd Coast Artillery, and all indorsed by the accused with directions to the payee fund to pay to the Regimental Fund, 7th Coast Artillery, of which he was the Custodian.

Specification	Amount of Check	Payee
2	$31.24	Btry.Fund, Hq.Btry., 1st Bn, 245th CA
3	20.82	Btry.Fund, Hq.Btry., 2nd Bn, 245th CA
4	20.82	Btry.Fund, Hq.Btry., 3rd Bn, 245th CA
5	62.47	Btry.Fund, Btry A, 245th CA
6	20.82	Btry.Fund, Btry B, 245th CA
7	20.82	Btry.Fund, Btry C, 245th CA
8	41.65	Btry.Fund, Btry D, 245th CA
9	20.82	Btry.Fund, Btry E, 245th CA
10	31.24	Btry.Fund, Btry F, 245th CA
11	62.47	Btry.Fund, Btry H, 245th CA
12	10.41	Btry.Fund, Btry I, 245th CA
13	20.82	Btry.Fund, Btry K, 245th CA
14	10.41	Btry.Fund, Btry L, 245th CA
15	52.06	Btry.Fund, Btry M, 245th CA
16	31.24	Btry.Fund, Searchlight Btry, 245th CA

Specification 17: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 24 May 1943, feloniously take, steal, and carry away a certain check, in words and figures as follows:

Sea Bright, N.J. April 30, 1943 No. 154
The Sea Bright National Bank
Pay to the order of Btry Fund, Searchlight Btry, 245th C.A.
$70.54
Seventy and 54/100 Dollars
Battery Fund
Hq Btry 3rd Bn 52nd
CA (Ry)
C.F. Spindler
Capt 52nd CA (RY),
Custodian

Indorsements:
Btry Fund, Slt Btry 245
pay to the order of
Regt Fund 7 CA

Anthony A. Cardella
Anthony A. Cardella
Captain, C.A.

value about $70.54, the property of Battery Fund, Searchlight Battery, 245th Coast Artillery.

Specifications 18 to 30, inclusive, allege the same offense as that set forth in Specification 17 committed in like manner on the same day with respect to thirteen other checks drawn on the Sea Bright National Bank in the following amounts and with the following payees, all executed by Captain C. F. Spindler, as Custodian of the Battery Fund of Headquarters Battery, 3rd Battalion, 52nd Coast Artillery, and all indorsed by the accused with directions to the payee fund to pay to the Regimental Fund, 7th Coast Artillery, of which he was the Custodian.

Specification	Amount of Check	Payee
18	$10.08	Btry.Fund, Reg. Hq. Btry, 245th CA
19	20.15	Btry.Fund, Hq. Btry., 4th Bn. 245thCA
20	10.08	Btry.Fund, Hq. Btry, 1st Bn. 245th CA
21	40.31	Btry.Fund, Btry. B, 245th CA
22	110.84	Btry.Fund, Btry. D, 245th CA
23	60.46	Btry.Fund, Btry. E, 245th CA
24	10.08	Btry.Fund, Btry. F, 245th CA
25	70.54	Btry.Fund, Btry. G, 245th CA
26	20.15	Btry.Fund, Btry. H, 245th CA
27	50.39	Btry.Fund, Btry. I, 245th CA
28	50.39	Btry.Fund, Btry. K, 245th CA
29	100.77	Btry.Fund, Btry. L, 245th CA
30	10.08	Btry.Fund, Btry. M. 245th CA

Specification 31: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 21 May 1943, feloniously take, steal, and carry away a certain check, in words and figures as follows:

May 12 1943 No. 32
The Peoples National Bank and Trust Company
of Pemberton, N.J.
Pay to the order of Commanding Officer 245th C.A.—$77.16
Seventy-seven and 16/100_____Dollars
Co Fund. Co B, 64th Sig Opn Bn
Alfred A. Beardmore, Custodian
1st Lt. Sig Corps

Indorsements:

Commanding Officer, 245th CA
pay to the order of Regt
Fund 245 CA (HD)
Anthony A Cardella
Capt. CAC
Custodian

value about $77.16, the property of Commanding Officer, 245th Coast Artillery.

Specification 32: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 2 June 1943, feloniously take, steal, and carry away a certain check, in words and figures as follows:

May 14 1943 No. 38
The Peoples National Bank and Trust Company
of Pemberton, N.J.
Pay to the order of Commanding Officer, 245th C.A. Ft Hancock, N.J.
$37.02
Thirty-seven and _____ 02/100 Dollars
Company Fund Co A 64th Sig Opn-Bn
Robert J Sommer
1st Lt. S.C. Custodian

Indorsements:

Commanding Officer
245 C.A. Fort Hancock NJ
pay to the order of
the Regt. Fund, 7 CA
(HD)
Anthony A Cardella
Capt CACA
Custodian

value about $37.02, the property of Commanding Officer, 245th Coast Artillery.

Specification 33: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 21 May 1943, feloniously embezzle by fraudulently converting to his own use the proceeds of a certain check value about $30.00, in words and figures as follows:

Sea Bright, N.J. May 21 1943 No.1
The Sea Bright National Bank
Pay to the order of Anthony A Cardella_____$ 30 00/100
Thirty & no 00/100_____Dollars
REGT. FUND, 7th CA (HD)
Anthony A Cardella
Capt. CAC Custodian

Indorsements:
For Deposit only
Anthony A. Cardella

the property of the battery funds of all batteries of the 245th Coast Artillery entrusted to him by the said batteries' battery funds.

Specifications 34 to 40, inclusive, allege that the accused between 29 May and 1 July 1943 committed the same offense as that set forth in Specification 33 with respect to the proceeds of seven other checks drawn on the account of the Regimental Fund, 7th Coast Artillery, with The Sea Bright National Bank and executed by him as "Captain CA (HD)", "Capt. C.A.C.", or "Captain, 7th CA (HD), Adjutant". The dates, amounts, payees, and indorsements were as follows:

Spec.	Date	Amount	Payee	Indorsement
34	22 May '43	$23.05	Gout Employees Ins. Co.	For deposit only to the credit of Government Insurance Company
35	2 June '43	37.50	Treas. of the U.S.	None
36	2 June '43	30.00	Gulf Oil Corporation	Pay Guaranty Trust Co. of New York, New York, or order Gulf Refining Company Collection Account Gulf Oil Corporation of Pennsylvania Collection Account. Gulf Oil Corporation, New York Sales Division Collection Account June 18, 1943
37	8 June '43	10.00	Esquire	For deposit only to the credit of an established account of Apparel Arts Esquire Coronet Esquire, Inc.

(64)

Spec.	Date	Amount	Payee	Indorsement
38	9 June '43	$22.29	Cash	For deposit only to credit of Anthony A. Cardella in the Great Neck Trust Co. Anthony A. Cardella
39	9 June '43	858.89	Captain Anthony A. Cardella	Credited to the account of the within named payee - The Sea Bright National Bank, Sea Bright, N.J.
40	1 July '43	194.80	A. Cardella	A. Cardella

Specification 41: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 17 June 1943, with intent to defraud falsely indorse the name of Lyle Saville on a certain check, in words and figures as follows:

Sea Bright, N.J. June 14 1943 No. 15
The Sea Bright National Bank
Pay to the order of Lyle Saville_____$12 93/100
Twelve & 93/100_____Dollars
Regimental Fund
7th Coast Artillery (HD)
Anthony A. Cardella
Anthony A. Cardella,
Captain, 7th CA (HD),
Adjutant.

Indorsements:
Lyle Saville
Anthony A Cardella

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

Specification 42: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 17 June 1943, with intent to defraud falsely indorse the name of Murray Todras on a certain check, in words and figures as follows:

Sea Bright, N.J. June 14 1943 No. 16
The Sea Bright National Bank
Pay to the order of Murray Todras _____ $12 93/100
Twelve & 93/100 Dollars
Regimental Fund
7th Coast Artillery (HD)
Anthony A Cardella
Anthony A. Cardella
Captain, 7th CA (HD),

Indorsements:
Murray Todras
Anthony A Cardella

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

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

Specification 1: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 17 June 1943, with intent to defraud, willfully, unlawfully, and feloniously utter as true and genuine a certain check, in words and figures as follows:

Sea Bright, N.J. June 14 1943 No. 15
The Sea Bright National Bank
Pay to the order of Lyle Saville_____$12 93/100
Twelve & 93/100____Dollars
Regimental Fund
7th Coast Artillery (HD)
Anthony A Cardella
Anthony A. Cardella
Captain, 7th CA (HD),
Adjutant

Indorsements:
Lyle Saville
Anthony A Cardella

A writing of a private nature, which might operate to the prejudice of another which said check was, as he, the said Major Anthony A. Cardella, then well knew, falsely indorsed and forged.

Specification 2: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 17 June 1943, with intent to defraud, willfully, unlawfully, and feloniously utter as true and genuine a certain check, in words and figures as follows:

Sea Bright, N.J. June 14 1943 No.16
The Sea Bright National Bank
Pay to the order of Murray Todras_____$12 93/100
Twelve & 93/100_____Dollars
Regimental Fund
7th Coast Artillery (HD)
Anthony A Cardella
Anthony A. Cardella,
Captain, 7th CA (HD).

Indorsements:
Murray Todras
Anthony A Cardella

a writing of a private nature, which might operate to the prejudice of another which said check was, as he, the said Major Anthony A. Cardella, then well knew, falsely indorsed and forged.

ADDITIONAL CHARGE II: Violation of the 93d Article of War.

Specification 1: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on about 24 February 1943, feloniously take, steal, and carry away a certain check, in words and figures as follows:

FORT HANCOCK EXCHANGE No. A 2777
Fort Hancock, N.J.
Fort Hancock, N.J. February 20, 1943
Pay
to the
order of Recruit Center 245th C.A. $246.68

FORT HANCOCK
—EXCHANGE→ ** $246DOL'S & 68CTS DOLLARS
Fort Hancock Exchange, Fort Hancock, N.J.

Herbert A Jones HERBERT A. JONES
Exchange Officer Lt.Col., C.A.C.
Exchange Officer

DATE	DO NOT REMOVE THIS VOUCHER	CREDIT	DEBIT
	Appropriation as delcared at approved council meeting dated February 16, 1943		246.68

Total 246.68

If settlement is not satisfactory return this remittance for correction

Indorsements:

This remittance is payment in full of the invoices listed on reverse side of check

Endorse below

Recruit Center 245CA.
Anthony A. Cardella
Anthony A. Cardella
Captain, 245th C.A. (HD)
Custodian.

value about $246.68, the property of Recruit Center, 245th Coast Artillery.

Specification 2: In that Major Anthony A. Cardella, Coast Artillery Corps, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 11 February 1943 feloniously embezzle by fraudulently converting to his own use the proceeds of a certain check value about $85.00, in words and figures as follows:

Sea Bright, N.J. January 5 1943 No.__

THE SEA BRIGHT NATIONAL BANK

Pay to the order of A. Cardella. $85 00/100

Eighty five & 00/100 Dollars
245 CA (HD) Mess Fund

245 C.A. (HD) MESS FUND

Anthony A. Cardella
Anthony A. Cardella
Captain, 245th C.A. (HD)
Adjutant

The property of the Mess Fund, 245th Coast Artillery (HD), entrusted to him by the said Mess Fund 245th Coast Artillery (HD).

Specifications 3 to 12, inclusive allege that the accused committed the same offense as that set forth in Specification 2 with respect to the proceeds of eleven other checks drawn on the account of the Mess Fund, 245th Coast Artillery (HD),

with The Sea Bright National Bank and executed by him as "Captain, 245th C.A. (HD)," "Captain - C.A.C. Custodian," or "Captain, 245th C.A. (HD) Adjutant." The amounts, payees and indorsements were as follows:

Spec.	Amount	Payee	Indorsement
3	$14.00	Book Service, Adjutant General's School	
4	37.50	Treasurer of the U.S.	
5	37.50	Treasurer of the U.S.	
6	125.00	Sea Bright National Bank	
7	59.80	Cash	Anthony Cardella
8	60.50	Cash	
9	37.50	Treasurer of the U.S.	
10	112.00	Cash	Deposit a/c Capt. Anthony Cardella
11	37.50	Treasurer of the U.S.	
12	41.50	A. Cardella	For Deposit only Anthony A. Cardella
13	10.00	Cash	Anthony Cardella

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

Specification: In that Major Anthony A. Cardella, Headquarters Harbor Defenses of New York (then Captain, Coast Artillery Corps) did, at Fort Hancock, New Jersey, on or about 27 Sept. 1942, feloniously take, steal, and carry away one (1) Colt automatic pistol, M-1911, serial number 808324, of the value of about $26.97, property of the United States, furnished and intended for the military service thereof.

The accused pleaded not guilty to each of the Charges and Specifications and was found guilty of all of them with the exception of Additional Charge III and the Specification thereunder of which he was found not guilty. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence, but remitted one year of the confinement imposed and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that by General Order Number 8, issued on 22 April 1943 by Headquarters New York-Philadelphia Sector, Fort Hamilton, New York, several elements of the 52nd Coast Artillery (Ry) were disbanded or redesignated and reorganized, and certain of their men were transferred to other units in the New York-Philadelphia Sector, including the 245th Coast Artillery of which the accused, then a

Captain, was the Adjutant. In that capacity it was his duty under the prevailing local policy to receive, distribute, or otherwise dispose of, all incoming mail other than that which was addressed to officers individually by name or that pertaining to personnel. Within the purview of his function were all letters to the Commanding Officer of the 245th Coast Artillery and to the commanding officers of its subsidiary organizations (R. 54-57; Exs. 1, 2, 3; R. 98, 131-132, 136-137).

On 30 April 1943 the effective date of General Order No. 8 the units comprising the 52nd Coast Artillery apportioned their battery funds among the various outfits to which their personnel had been assigned and transferred. Among those to whom a pro rata share was allocated were several battery funds of the 245th Coast Artillery. Thirty checks made payable to their order were executed, sixteen by Captain James L. McCallister, Jr., as Custodian of the Battery Fund of Headquarters Battery 52nd Coast Artillery, and the remaining fourteen by Captain Charles F. Spindler, as Custodian of the Battery Fund of Headquarters Battery, 3rd Battalion, 52nd Coast Artillery. Of those signed by Captain McCallister, six were for $20.82, three for $31.24, two for $62.47, two for $41.65, two for $10.41, and one for $52.06. Four of Captain Spindler's checks were for $10.08, two for $70.54, two for $50.39, two for $20.15, one for $110.84, one for $100.77, one for $60.46, and one for $40.31 (R. 58-76, 99-114; Exs. 4-19, 36-49).

In addition to the personnel transferred from the 52nd Coast Artillery, certain enlisted men of Companies A and B, 64th Signal Operations Battalion, were assigned in May 1943 to the 245th Coast Artillery. Two checks for their pro rata share of company funds were addressed to the Commanding Officer of the 245th Coast Artillery. One was in the sum of $37.02 and the other in the sum of $77.16 (R. 120-121, 124; Exs. 57, 60).

Captain McCallister's checks were placed in envelopes together with vouchers "in the form of a certificate" and mailed to the "Commanding Officers of the respective batteries to whom the men were transferred and to whose order the checks had been written as a pro rata share of the battery funds". The same or a like procedure was followed by Captain Spindler and also by First Lieutenants Robert J. Sommer and Alfred A. Beardmore, the respective custodians of the funds of Company A and Company B, 64th Signal Operation Battalion (R. 78, 95, 114, 122, 125).

All thirty-two checks were delivered to the accused for distribution by him to the designated addresses in accordance with the standing procedure of his organization. The certificates submitted by Captain McCallister were couched in the following language:

"I certify that I have received the sum of _____ from the Battery Fund, Hq. Btry 52nd C.A. (Py), (now inactive), for the purpose listed above."

The accused on or about 30 April 1943 signed and returned all of them. He did not execute the certificates prepared by Captain Spindler, but instead sent a letter stating that he had received the fourteen checks. As of 30 April 1943, though in fact some time later, he certified that he had "this date received for the 245th [sic] CA, Fort Hancock, New Jersey, the above mentioned pro rata share of the Company B, 64th Signal Operation Battalion". The remittance from Lt. Sommer did not arrive until 28 May 1943, and the accused did not append his signature to a letter or indorsement acknowledging receipt until 1 June 1943 (R. 131-132, 136-137; Exs. 20-35; R. 114, 118, 122, 125, 237-238; Exs. 102-103).

In the meantime on or shortly before 21 May 1943 he had become Custodian of the Regimental Fund, 7th Coast Artillery. On that date he opened a checking account for the Fund with The Sea Bright National Bank of Sea Bright, New Jersey, and deposited in it the sixteen checks from Captain McCallister, the fourteen checks from Captain Spindler, and the single check from Lieutenant Beardmore. This last instrument was indorsed by the accused as follows:

"Commanding officer 245 CA
pay to the order of Regt
Fund 245 CA (HD)
Anthony A. Cardella
Capt. CAC
Custodian"

The reverse side of all the others bore indorsements directing the respective battery fund payee to pay to "Regt Fund 7 CA (HD)". The deposit slip for the Beardmore check was in the name of the "Regt Fund 7 CA (HD)", and the check was consequently credited to that account. Since the accused had had a personal account with the bank since 17 February 1943, the conflict between the indorsement and the deposit slip was disregarded. In the words of the Cashier, the accused "was custodian of that [and] we did not question it. We thought that it was his desire that it should go to that fund". The check from Lt. Sommer was delivered to the accused on 28 May 1943 and was deposited by him in the Regimental Fund, 7th Coast Artillery, on 31 May 1943. It was indorsed in his handwriting as follows:

"Commanding Officer
245th C.A. Fort Hancock NJ
pay to the order of
the Regt. Fund, 7 CA
Anthony A Cardella
Capt. CAC
Custodian" (R. 144-165, 259; Exs. 117-118, 52, 54-60; R. 158, 161, 165; Exs. 62, 63).

The accused had assumed the duties of Custodian of the Regimental Fund, 7th Coast Artillery, by virtue of his designation immediately prior to 21 May 1943 as Adjutant of that organization. His predecessor in that office did not turn over the cancelled checks and the old fund, which totaled only $11.27, until 7 July 1943. The account opened by the accused with the Sea Bright National Bank had no connection whatsoever, prior to that date, with the former Regimental Fund of the 7th Coast Artillery. Pending the formal transfer of authority to him, he maintained a record of "all transactions" in "a temporary council book". This represented the amount on deposit for the months of May to be $24.76 (R. 256-259; Exs. 117-121).

Having funneled the proceeds of the thirty-two checks into a bank account subject to his control, the accused proceeded to draw against it for his own personal use and gain. Between 21 May and 1 July 1943 he wrote eight checks payable either to himself or to his creditors. They designated the following payees and were in the following amounts:

Date	Payee	Amount
21 May 1943	Anthony A Cardella	$30.00
22 May 1943	Govt. Employees Ins. Co.	23.05
2 June 1943	Treas. of the U.S.	37.50
2 June 1943	Gulf Oil Corporation	30.00
8 June 1943	Esquire	10.00
9 June 1943	Cash	22.29
9 June 1943	Anthony A. Cardella	858.89
1 July 1943	A. Cardella	194.80

The checks payable to cash or to the accused were all deposited in his personal accounts with either The Sea Bright National Bank or with the Great Neck Trust Company of Great Neck, New York. Two additional checks, each in the sum of $12.93, were drawn by the accused on 14 June 1943, one payable to Staff Sergeant Murray Todras and the other to Staff Sergeant Lyle Saville. Both amounts represented monetary allowances in lieu of rations. The accused indorsed the names of both payees, added his own indorsement, and deposited both checks in his personal account with the Sea Bright National Bank. Very shortly thereafter the accused paid the two sergeants the respective amounts due them by personal checks. By 7 July 1943, when the formal transfer of the Regimental Fund was effected, the account which the accused had established at the Sea Bright National Bank had been reduced to $24.76. This was the amount of a post exchange dividend which had been turned over to him on 21 May 1943. It was the only money lawfully deposited by him in the Regimental Fund (R. 164-178, 183-186, 252-255, 350-354; Exs. 61, 63-74, 77, 78, 106-115).

At no time was he ever authorized to receive any funds, or to execute a receipt, on behalf of the payees of any of the thirty-two checks. Prior to the institution of the original charges against him he made no attempt to deliver the amounts appropriated by him to their rightful custodians. When he ultimately turned over the Regimental Fund on 14 September 1943 to his successor as Custodian, it contained $50.72 (R. 265-347; Exs. 128-305).

After the original charges against him based upon the facts outlined above had been preferred, further investigation revealed other earlier peculations by him. By Special Order No. 1 dated 2 January 1943 he had been detailed as the Custodian of the 245th Coast Artillery Mess Fund. At a council meeting held on 16 February 1943 an appropriation was declared in the sum of $246.68, payable to the Recruit Center, 245th Coast Artillery. A check for that amount was executed by the Fort Hancock Exchange Officer and mailed to the Recruit Center. It came into the hands of the accused and was by him indorsed as follows:

"Recruit Center 245 CA
Anthony A. Cardella

Anthony A. Cardella
Captain 245th CA (HD)
Custodian."

It was on 23 February 1943 deposited in the Mess Fund account with the Sea Bright National Bank and commingled with the other funds therein. Although not delivered to the rightful payee, it was cleared and its face amount charged against the Post Exchange (R. 206, 230-231; Exs. 81, 83, 84).

Both before and after this misappropriation he executed some twelve checks against the Mess Fund account, all for his personal benefit and enrichment. Their dates, payees, and amounts were as follows:

Date	Payee	Amount
5 January 1943	A. Cardella	$85.00
28 January 1943	Book Service, Adjutant General's School	14.00
28 January 1943	Treasurer of the U.S.	37.50
4 February 1943	Treasurer of the U.S.	37.50
11 February 1943	Sea Bright National Bank	125.00
23 February 1943	Cash	59.80
1 March 1943	Cash	60.50
1 March 1943	Treasurer of the U.S.	37.50
4 March 1943	Cash	112.00
1 April 1943	Treasurer of the U.S.	37.50
2 April 1943	A. Cardella	41.50
1 May 1943	Cash	10.00

All of these withdrawals were of course charged against the Mess Fund. The checks payable to cash or A. Cardella were credited to the accused's personal accounts with the Sea Bright National Bank and the Great Neck Trust Company (R. 178-181, 187-189, 204-226; Exs. 75-78, 80, 85-100).

4. The accused, after he had been apprized of his rights relative to testifying or remaining silent, took the stand on the single issue raised by Additional Charge III and the Specification thereunder. As to all other Charges and Specifications he chose to remain silent. His statements need not be summarized or discussed here, for he was found not guilty of the 94th Article of War as alleged in Additional Charge III and the Specification under it. Other evidence relevant to Charge I, Additional Charge I, and Additional Charge II adduced on his behalf showed only that his character and reputation prior to the events herein narrated had always been excellent (R. 229, 386-388; Def. Exs. B, C).

Subsequent to the trial a letter recommending clemency "to the extent of remission of that part of the sentence pertaining to confinement" was written by defense counsel to the Commanding General, New York-Philadelphia Sector. Inclosed with it, among other things, were two certificates attesting to full restitution by the accused and a letter signed by him explaining his conduct. This last document stated that he was born of immigrant parents in the Harlem district of New York City; that he spent his childhood in poverty; that because of "financial conditions at home" it was necessary for him to terminate his academic education at the age of sixteen after completing only one year of high school; that between 1928 and 1933 he held various temporary positions; that his family "was forced to accept assistance from the Department of Welfare of New York City"; that in 1933 he obtained a clerical position with the Department of Welfare and two years later was promoted to Head Clerk; that in February of 1939 he was discharged because of his inability to pass certain civil service examinations; that for a time he was employed by the Civilian Conservation Corps; that he had previously enlisted and served with the New York National Guard; that on 4 April 1941 he was ordered to duty with the Army; that he was granted leave by the Civilian Conservation Corps; that he has been "constantly pressed for financial assistance from my family both directly and indirectly" (thru friends and relatives); that he has "always been haunted by the fear of the future in the event that I lost employment"; that he "feared the return of the impoverished conditions I have tried to leave behind"; that since

> "the CCC was eliminated by Congress I have not been able to think clearly regarding the future. I have only been able to see myself being let out of the service into the bread line and having no means of taking care of my family. Foolishly in my clouded mind I thought I saw a means of obtaining some funds

which would help me to avert the disaster I foresaw upon my release from service. I therefore misappropriated funds amounting to over $1900 * * * .

"Regarding my present offenses, true I am guilty of having converted certain funds to my own use, however, I have been charged with and found guilty of first stealing them and then embezzling the exact same funds. I then was charged and found guilty of forgery and uttering a forgery. I have never forged anyone's name to any document and a handwriting expert did not link the forged signature to my hand at the time of the trial, however, the court saw fit to find me guilty of this act due to circumstantial evidence and I cannot dispute the courts findings. I believe the court gave me a fair trial and based on the evidence produced could arrive at no other verdict than the one they arrived at."

5. Specifications 1 to 30 of Charge I allege that the accused on or about 24 May 1943 did "feloniously take, steal, and carry away" certain checks, the property of various battery funds. Specifications 31 and 32 allege that he on 21 May and 2 June 1943 did "feloniously take, steal, and carry away" certain checks, the property of the Commanding Officer, 245th Coast Artillery. Specifications 33 to 40 allege that between 21 May and 1 July 1943 he did "feloniously embezzle by fraudulently converting to his own use the proceeds of" certain checks, "the property of the battery fund of all batteries of the 245th Coast Artillery entrusted to him by the said batteries' battery funds." Specification 41 alleges that on or about 17 June 1943 he did "with intent to defraud falsely indorse the name of Lyle Saville on a certain check" which was "a writing of a private nature which might operate to the prejudice of another". Specification 42 alleges the same offense as 41 with respect to the indorsement of the name of one Murray Todras. All of these acts are charged in violation of the 93rd Article of War. Specification 1 and 2 of Additional Charge I allege the accused did on or about 17 June 1943 "with intent to defraud, willfully, unlawfully, and feloniously utter as true and genuine" the checks made payable to Lyle Saville and Murray Todras respectively, writings "of a private nature, which might operate to the prejudice of another which said [checks were], as [the accused] then well knew, falsely indorsed and forged. Additional Charge I states a violation of the 96th Article of War. Specification 1 of Additional Charge II alleges that the accused on or about 24 February 1943 "did feloniously take, steal, and carry away a certain check" in the sum of $246.68 payable to the "Recruit Center 245th C.A." and executed by the Fort Hancock Exchange, Fort Hancock, N.J. Specifications 2 to 13 of Additional Charge II allege that between 6 February and 3 May 1943 he did "feloniously embezzle by fraudulently converting to his own use the proceeds of "certain checks" the "property of the Mess Fund, 245th Coast Artillery (HD), entrusted to him by the said Mess Fund 245th Coast Artillery (HD)". Additional Charge II, like Charge I, sets forth a violation of Article of War 93.

The accused was appointed custodian of the Mess Fund of the 245th Coast Artillery on 2 January 1943. As is evidenced by his execution of a check for $85.00 payable to himself dated 5 January 1943, he almost immediately conceived a program of supplementing his Army income by misappropriating the monies entrusted to him. Although the design was apparently already formed, he hesitated to carry it into effect until 6 February 1943. He on that day executed and issued a Mess Fund check in the sum of $37.50 to the order of the Treasurer of the United States. The proceeds of the first check were finally converted by him to his own use on 11 February 1943. By 23 February 1943 he had withdrawn a total of $299.00 and was about to charge another $59.80 against the Mess Fund account for his personal enrichment.

When the post exchange check for $246.68 came into his hands, it must have presented him with a means of covering up his deficiencies. He followed the line of least resistance by indorsing the payees' name and depositing the instrument in the Mess Fund account. Subsequent to 23 February 1943 he proceeded to write six other Mess Fund checks to cash, to his own order, or to the order of his personal creditors. His withdrawals by 3 May 1943 aggregated $657.80.

Obviously the process of depleting the Mess Fund could not continue indefinitely. The arrival through the mails of the thirty-two checks representing the pro rata shares in various battery and company funds of personnel newly transferred to the 245th Coast Artillery provided a new field for criminal enterprise. The accused had converted the proceeds of one check by forging the indorsement and using his fiduciary account as a clearing agent. The device had succeeded once; it could succeed again.

His appointment on 20 May 1943 to Custodian of the Regimental Fund, 7th Coast Artillery presented him with a fortuitous opportunity. He established an account for the Fund with the Sea Bright National Bank of Sea Bright, New Jersey, and, as in the case of the Mess Fund, used it to clear the thirty-two checks for him. He then proceeded to avail himself of the entire proceeds by a series of withdrawals in various amounts.

In all of his transactions he left a clear and blazing trail behind him. Every deposit, every withdrawal, every defalcation was assiduously documented. There is no need to resort to circumstantial evidence or to inferential reasoning to conclude that the evidence is adequate to sustain the findings of guilty with the exceptions explained below. The record contains overwhelming proof of his peculations, and the admissions in his plea for clemency merely confirm what was already obvious.

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In view of the fact that he paid Staff Sergeants Lyle Saville and Murray Todras their monetary allowances in lieu of rations by personal check within a very short time after falsely indorsing their names to the checks to their order which he had issued against the Regimental Fund, the reasons for his forgery must remain obscure. There can be no question, however, but that he did commit the offenses of falsely indorsing and feloniously uttering the two instruments as alleged in Specifications 41 and 42 of Charge I and Specifications 1 and 2 of Additional Charge I. Although he denies in his plea for clemency that he was guilty of forgery, the evidence is indisputable that the indorsements were not those of the payees and that the proceeds were ultimately credited to the accused's personal account in the Sea Bright National Bank. The court-martial which tried this case determined that the accused had written both indorsements, and there is nothing to indicate that this finding was in any way erroneous.

The accused in his plea for clemency raises a point which is of greater merit. He states that "true I am guilty of having converted certain funds to my own use, however I have been charged with and found guilty of first stealing them and then embezzling the same funds". This contention is well-founded. The various acts of embezzlement alleged under Charge I were but different aspects of the several larcenies laid under the same Charge. In drawing against the account of the Regimental Fund for his own personal purposes, the accused was not committing an entirely new and independent crime. On the contrary, he was merely consummating the criminal design which he had formed when he first falsely indorsed the thirty-two battery and company fund checks. Their deposit in the Regimental Fund was only a means to an end, and that end was larceny.

It does not follow that the accused should not under the facts proved have been tried for both larceny and embezzlement. When sufficient doubt exists as to the facts or the law one transaction not only may but should be made the basis for charging two or more offenses (M.C.M., 1928, par. 27). The accused, however, should not be found guilty of inconsistent aspects of the same act or acts. The Regimental Fund had no interest or right in the thirty-two checks deposited in it. Their proceeds until the very last withdrawal by the accused always greatly exceeded the res of which he was the Custodian and were not indistinguishably commingled with or absorbed into it. They were deposited in it only to enable him to effectuate his theft. He should accordingly have been found guilty of Specifications 1 to 32, inclusive, of Charge I, but not guilty of Specifications 33 to 40, inclusive.

The policy against finding an accused guilty of inconsistent aspects of the same offense has as its corrollary the rule limiting the punishment to the most important aspect. As is said in Dig. Ops. JAG, 1912-1940, sec. 402 (2),

> "Accused was found guilty under separate specifications of wrongfully using cocaine and having this drug in his possession. Since these offenses were but different aspects of the same act, punishment, under paragraph 66 of the Manual for Courts-Martial

(par. 27, M.C.M., 1928), should have been imposed only with reference to the act in its most important aspect, which was possession of the drug. CM 156134 (1923)."

"Where a single unlawful act of an accused constitutes a felonious assault under A.W. 93 and also an assault upon his superior officer, then in the execution of his office, under A.W. 64, and the accused, upon proof of the unlawful act, is convicted, under appropriate charges and specifications, of both offenses, the latter offense is the more important aspect of the unlawful act for the reason that it includes the civil offense of felonious assault and, in addition thereto, a breach of military discipline and, under the policy of the War Department, punishment should be based on the latter offense. CM 153372 (1922); 184816, 185962 (1929)."

The same rule has been followed in I Bull. JAG, January-June 1942, sec. 402 (2), p. 16. In other words, where "the two offenses charged are integral parts of only one transaction", "the sentence may not exceed the maximum authorized punishment [for] the major offense" in the case: II Bull. JAG, April 1943, sec. 451 (2), p. 142.

Although the Court-Martial erred in finding the accused guilty of Specifications 33 to 40, inclusive, of Charge I, its sentence need not be reduced or otherwise modified. The table of maximum punishments does not apply to officers. Even if it did, the accused would have no grounds for complaint, for his sentence does not exceed the maximum prescribed for either the offense of larceny or embezzlement. Under the circumstances it must be assumed that the court was aware of the limitations upon its power to fix the punishment and that in imposing its sentence it considered only one of these crimes as alleged under Charge I and not both.

It should perhaps be pointed out that the prosecution has indulged in an unnecessary multiplication of specifications. The Manual for Courts-Martial, 1928, explicitly states in paragraph 149g that:

"Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification."

Thirty-one of the thirty-two battery and company fund checks were stolen by the accused on the same day. They could all have been adequately covered by one specification. The accused was, however, in no way prejudiced by the prosecution's overly lengthy pleading.

6. The accused is about 31 years of age. The records of the War Department show that the accused served in the New York National Guard as an enlisted man from 1927 to 1934; that he was commissioned a second lieutenant of Infantry in the Officers Reserve Corps on 16 January 1933; that on 26 October 1937 he was appointed a second lieutenant in the Coast Artillery Corps, Reserve; that he was reappointed a second lieutenant in the Coast Artillery Corps, Reserve as of 16 January 1938; that on 13 August 1938 he was promoted to first lieutenant in the Coast Artillery Corps, Reserve; that he had active service from 21 July to 3 August 1935, 5 July to 18 July 1936, 1 August to 14 August 1937, 19 August to 1 September 1938, 4 April to 31 August 1939; that he entered upon extended active duty on 1 April 1941; that he was promoted to the rank of captain as of 1 February 1942 and to the rank of major on 20 October 1943; and that since the last date he has been on active duty as an officer.

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 Specifications 33 to 40, inclusive, of Charge I, but legally sufficient to support all of the other findings and the sentence. Dismissal is authorized upon a conviction of a violation of Articles of War 93 and 96.

Abner E. Lipscomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

Gabriel H. Goldberg, Judge Advocate

SPJGN
CM 246523

1st Ind.

War Department, J.A.G.O., 23 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 Major Anthony A. Cardella (0-302720), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings that the accused embezzled $1206.53, which sum he was also found guilty of stealing (Specs. 33 to 40 incl., Chg. I); legally sufficient to support all the other findings and the sentence as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed, and that the United States Penitentiary, Leavenworth, Kansas, be designated as the place of confinement.

3. Appropriate consideration has been given to a plea for clemency submitted by the accused, addressed to the President and to the Secretary of War.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Plea for clemency submitted by accused.

(Findings of guilty of Specifications 33 to 40 inclusive, Charge I, disapproved. Sentence confirmed. G.C.M.O. 222, 29 May 1944)

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

SPJGQ
CM 246542

14 JAN 1944

UNITED STATES	PERSIAN GULF SERVICE COMMAND
v.	Trial by G.C.M., convened at Ahwaz, Iran, 9, 10, 11 November 1943. Dismissal.
Second Lieutenant HAL B. JAYNES (O-1549302), Ordnance.	

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 85th Article of War.

Specification: In that Second Lieutenant Hal B. Jaynes, Ord Dept, 327th Ordnance Company (MTS), was, at the Base Ammunition Depot, Ahwaz, Iran, on or about 12 September 1943, found drunk while on duty as Commanding Officer, Det 327th Ordnance Company (MTS), Ahwaz, Iran.

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

Specification: In that Second Lieutenant Hal B. Jaynes, Ord Dept, 327th Ordnance Company (MTS), did, at the Base Ammunition Depot, Ahwaz, Iran, on or about 12 September, 1943, wrongfully strike Private Lawrence A. McPartland, Det 327th Ordnance Company (MTS), on the face and body with his hand.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced during the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and stated in his action that "Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld". The record of trial is treated as though it had been forwarded for action under Article of War 48.

3. The evidence for the prosecution may be summarized as follows:

On 12 September 1943, and for sometime prior thereto, the 327th Ordnance M.T.S. Company, Vehicle Park Platoon, a part of the Ordnance Section, General Depot, Desert District Command at Ahwaz, Iran, was serving as a detachment to guard supplies at what was known as the British Ammunition Dump. The Ordnance Section was separated from the General Depot by several miles (R. 31, 32, 36). Captain Purcell commanded the 327th Ordnance M.T.S. Company, but he and the main body of the company were in the "Mountain District" and accused was in command of the detachment of 80 members of the company assigned to duty with the Ordnance Section of the General Depot (R. 40, 55). As such detachment Commander, and in the exercise of command authority, he signed the detachment morning reports (R. 52, 53; Pros. Ex. 2) and issued orders respecting guard duty (R. 34).

On the night of 11 September 1943 accused, having been at the Officers' Club (somewhere in the vicinity of Ahwaz) left the club at about 12:30 or 1 o'clock a.m. (Sunday, 12 September) taking several other officers home in his car, one of whom was Captain Albert L. Salm, M.C. of the 113th General Hospital. He testified that he had been at the club, had taken one drink and that although he had not seen accused take a drink at the club he "presumed that he had" because of "the jolly good mood he was in" (R. 22) and, notwithstanding he thought accused was under the influence of liquor, he believed accused was sober enough to drive him home and asked him to do so. On the way home he changed his opinion of accused's ability to drive safely because of the way he operated the car (R. 23).

First Lieutenant Frank P. Lintz - M.C., 113th General Hospital, arrived at the Officers' Club at about 8:30 or 9 o'clock p.m. on the same evening and had three drinks while there. These drinks in his judgment did not disturb his ability to observe and form an opinion as to another's sobriety. Accordingly, he testified that he believed accused was under the influence of intoxicating liquor that evening because his eyes were glazed and he spoke with a thick and hesitant tongue, although his speech was sensible (R. 24-26). He had seen accused drinking from a glass but did not know what the glass contained. However, had he known accused was going to perform any military duties that night, he would have advised him to go home (R. 24-26). While driving home he thought accused drove recklessly because he backed the car with too much speed, "got off to a real flying start" - upon leaving the club and later looked around as he talked to those in the back seat while the car was going down hill.

At about 2 o'clock a.m., Corporal Francis R. Kreft, a member of the detachment of the 327th Ordnance M.T.S. Company who was on duty as Corporal of the Guard, had just finished posting guard #5 when he noticed a car approaching along the fence surrounding the dump. He discovered that it was being driven by accused in company with Major Durward W. Yonkers. Accused asked the corporal what he was doing at Post #5 with the lights of

the guard truck showing. Inasmuch as it was customary to use lights in posting the guard because of the extreme darkness, the corporal was astonished at what he thought an unreasonable question and especially since accused had never before objected to the use of lights for such purpose (R. 17).

Accused, after taking Major Yonkers to his quarters, went immediately to the detachment orderly room where he inquired of Corporal Kreft why there was no guard on Post #9. The corporal had no knowledge of the matter as no one had told him about posting such a guard (R. 15). Accused then got out a map of the British Ammunition Dump and asked Kreft to tell him where every guard was posted, which the corporal proceeded to do (R. 14). Accused became angry, said there was supposed to be a guard at Post #9 and directed Corporal Kreft to get the Sergeant of the Guard, Corporal Powajba, who was acting as such (R. 15). Corporal Powajba also professed ignorance concerning Post #9 whereupon accused ordered him to get the First Sergeant. By this time it was about 2:45 a.m.. When the First Sergeant arrived, accused asked him whether he had notified the Sergeant of the Guard about the extra guard that night and the First Sergeant said he knew nothing about it, although accused insisted he had informed him about the matter. Thereupon the additional guard was posted. This "argument", as Corporal Kreft called it, appeared to have been "sensible", but accused seemed to be under the influence of liquor (R. 16). Accused's speech was not "fuzzy" or "blurred" but was just angry, "like 'blasting' someone out - hollering".

During the discussion accused had occasion to call Lieutenant Elam at Andimeshk on the telephone and when he failed to get him "he gave a calling down to the operator". Except for what followed, Corporal Kreft saw no indications of behavior or attitude, nor was anything said that led him to believe that accused was drinking. He "was not unsteady in any way" and Kreft had seen and heard accused speak in the same angry manner on other occasions in connection with his usual duties (R. 17).

At about 2:30 a.m., Private Lawrence C. McPartland, a member of the detachment, who had been relieved from guard duty at 2 a.m., "feeling ill", went to the orderly room and "was headed toward the medicine chest" to get some aspirin when accused saw him and called to him. McPartland turned and advanced toward accused who told him to "come to attention", "stand erect and put his heels together". McPartland obeyed and told accused he was sick and didn't feel well whereupon accused struck him on the nose causing it to bleed and said something about him being "a man or a sissy". At the time, accused "had an excited look about him" and appeared to be "in a poor frame of mind", though McPartland did not form any opinion as to whether accused had been drinking (R. 8, 9).

At this point, Corporal Kreft, who had gone to summon the Sergeant of the Guard was re-entering the orderly room, when he saw accused strike McPartland with his open right hand, and heard accused ask McPartland "if he was a sissy or a man". The blows appeared to be on the shoulder but "glanced from his shoulder to his face" (R. 14). Accused, after the first blow, asked Corporal Kreft for his gun which accused then put on (R. 15).

Sergeant Roland LeClair, acting First Sergeant of the detachment, testified that after he had gone to bed the Acting Sergeant of the Guard came and told him accused wanted to see him in a hurry. LeClair then ran to the orderly room where he was directed to put a guard on Post #9 (R. 20). After posting this guard the Sergeant returned to the orderly room to see what else was wanted. As he entered the room the second time he saw accused strike McPartland in the face with his open hand and heard him order Corporal Kreft to give him his pistol which accused then strapped to his waist. Thereafter he again struck McPartland. Just before accused dismissed LeClair from the room he grabbed him by the arm and asked him why he was not fully clothed to which the Sergeant replied that "he had run from the barracks upon being called" and had "just picked up the shirt he had on" (R. 19).

After accused had taken the gun from Corporal Kreft, he ordered McPartland to leave and shoved him as he was walking out. McPartland then went to his barracks to undress and hang up his clothes and the next thing he knew,

> "Lieutenant Jaynes was in back of me. I sat on the left side of the barracks. He said 'who put these God-damn lights on?' I said, 'I did, sir, I'm not feeling well'. He said something like 'I'm running this company, I'll blow your God-damn brains out'."

He went back to bed and accused put out the lights. Then later, Acting Sergeant of the Guard Powajba told him accused again wanted to see him. He then went back to the orderly room, got close to accused and could smell liquor on his breath. According to McPartland's testimony the following then took place:

> "He said 'I don't know anything about hitting you'. I said 'I think you owe me an apology, sir' and he said he would take off his shirt and go outside. I said 'No, sir, I was taught to respect an officer' and I merely asked 'If I would hit you back, what would happen to me?'. Then I asked him, 'Sir, can I smoke a cigarette' and I got permission." (R. 10, 13)

Neither Corporal Kreft or Sergeant LeClair knew of any reason why accused should have struck McPartland; nor did Sergeant LeClair know of any reason why McPartland should have been in the orderly room at that time of night (R. 15, 20). LeClair smelt liquor on accused's breath, thought he did not talk as he normally does (R. 19), and was not responsible for his actions (R. 20). He had "never seen or heard of Lieutenant Jaynes doing that before. He had been working very hard and didn't seem like himself, didn't seem natural." Accused "was not steady on his feet" and "wavered slightly" but his speech was not thick and the Sergeant could come to no conclusion that he was under the influence of liquor from the manner in which he spoke; nor could he form an opinion as to whether accused was drunk or sober (R. 19), though he did think "liquor was responsible" for accused's condition (R. 20, 21). Corporal Kreft, however, testified that

accused appeared "to be what you term a man drunk"; then, however, "I wouldn't say he was drunk. The argument seemed reasonable" (R. 16). At another time he stated "one time I believed he was drunk and there was a doubt * * *" followed immediately by the opinion "he was drunk" (R. 17).

The following sworn statement of accused, voluntarily made by him to the investigating officer, was introduced and received in evidence over objection of accused (R. 48, 49; Pros. Ex. 1):

"Having had my rights, under Article of War No. 24, fully explained to me, I make the following statement under oath. (Page 1)

"Upon security inspection Saturday morning, September 11, 1943, of the tire dump of Ahwaz General Depot, a place in the fence near tire pit A-10 that indicated unauthorized tires were being removed from the tire dump, was discovered by Lieut. Jaynes. After return to the office Sgt Robert L. LeClair, acting first sergeant, was ordered to post an additional guard at this point. Then Cpl Powajba, acting Sergeant of the Guard, was taken to show him the exact spot where tires were being removed.

"An acute need for more men has existed at the Tire Dump since approximately June 15, 1943, all through the hot summer months it often became necessary to post men on guard at night after having worked hard all day and me (Lt Jaynes) to drive a truck during the day as well as supervise activities and act as officer of the day at night, loosing considerable sleep, due to only one officer being present until recently. (Approximately 1st of Sept). My men and myself have both been under considerable strain during this period.

"Saturday night, September 11, 1943, I was invited to the Officer's Club at Quarry Camp by a former associate Company Officer. We had a few drinks and left the Club approximately 0130 Sept 12, 1943 for the tire dump. Upon arrival at the tire dump and dismounting from the vehicle I discovered I felt different but I also discovered no guard had been posted as ordered the previous day. Considerable confusion was caused in posting the guard. I have no knowledge of striking Pvt. McPartland or threatening to shoot any one.

"I would like to request permission to invite attention to the attached guard order and the fact that it was necessary to post a guard at this particular point due to a native being shot on this post the following night, September 12, 1943, admitting he had taken tires from the pit on previous occassions."

There was also introduced and received in evidence without objection a true extract copy of the morning report of "Det. 327th Ord. M.T.S. Co., Vehicle Park Platoon" covering "Remarks" from 1 to 16 September 1943, inclusive (R. 53; Pros. Ex. 2).

Therein it appears that the entries of 1 to 13 September inclusive, are initialed with the letters "H.B.J." while those of 14 to 16

September are initialed "D.W.Y.". The following entries, among others are found therein:

"Sept 14 Lt. Jaynes relieved of Command of Detachment * * * * * * * D.W.Y." and

"Sept 16 Major Yonkers Appointed Det. Commander as per Special Order #45 from Headquarters, General Depot, dated Sept 15 * * * D.W.Y."

The court took judicial notice of Special Order No. 45, Headquarters General Depot, Ahwaz, Iran, 15 September 1943 (R. 54; Pros. Ex. 3). This order appointed Major Yonkers as Detachment Commander, Detachment 327th Ordnance M.T.S. Company, Vehicle Park Platoon, vice Second Lieutenant Hal B. Jaynes, relieved.

4. For the defense, Major Durward W. Yonkers testified that he was senior Ordnance Officer attached to the staff of the Commanding Officer of the General Depot at Ahwaz, Iran, although his quarters were at the British Ammunition Dump (R. 31). He did not consider himself "in command" of the detachment of the 327th Ordnance M.T.S. Company at the time of the offenses charged against accused, but assumed accused was in command (R. 32).

On the evening of 11 September 1943, he and accused had left the dump at about 8 or 8:30 p.m. and gone to the Officers' Club where each "had a couple of drinks" (R. 28, 30, 31). Accused had "no liquor with him" at any other time during the evening (R. 30); but he did not know whether he had any after they parted at about 1:30 or 1:45 a.m. on the morning of 12 September 1943. Some time after midnight Major Yonkers, in company with Captain Salm, Lieutenant Festine and two other officers whose names were unknown to Major Yonkers, were taken home by accused in his car. After accused had taken all of the other officers to their quarters he and Major Yonkers proceeded to theirs. In doing so, as they approached the dump, they noticed lights along the fence surrounding the dump and Major Yonkers asked accused what could be the reason for them. Accused thereupon drove over to find out and they discovered it was caused by the guard truck which was used in posting the relief. Although this was a normal procedure, accused and Major Yonkers had been curious to learn the cause of the lights, inasmuch as some tires had been stolen prior to this occasion and they were merely checking to find out whether the lights were caused by "the guard truck or someone else". At the time, accused "mentioned something about a guard that was supposed to be posted on a new post"(R. 29) and Major Yonkers recalled being present in the detachment orderly room on the morning of 11 September 1943 when accused discussed with Sergeant LeClair the posting of a guard on a new post (R. 30). After the episode at the guard post along the fence, accused drove Major Yonkers directly to his quarters (R. 29).

In Major Yonkers' opinion accused, who was under his observation all evening, was not drunk nor was there anything in his attitude or condition to indicate he had been drinking. He had noticed nothing unusual in the manner in which accused drove his automobile, was of the opinion

that he backed the car away from the club in a normal manner and did not recall accused's turning to converse with passengers in the rear seat while going down hill, though Major Yonkers was sitting in the front seat with him (R. 31, 34). He did not consider it wrong for accused to leave the dump area to go to the club on this occasion although he felt that all were technically on duty 24 hours a day (R. 31).

Major James L. Phillips, Executive Officer of the General Depot at Ahwaz, Iran, testified that no officers were on duty 24 hours a day at the General Depot and because of the excessive amount of work the Ordnance Section had been obliged to perform, he had informed accused that, after conversation with Colonel Stoddard, the Depot Commander, he was authorized to advise accused that he was not restricted to the Ordnance area every night and "on special occasions when he wanted to go out, it was alright as far as the General Depot was concerned" (R. 37).

Major Truman Hienton, Director of Supply for the Desert District, testified that he was present at the Officers' Club on the evening of 11 September 1943, saw accused there and "talked to him for some time" at about 10 o'clock p.m., or later. When asked whether, in his opinion, he would say accused was drunk he replied: "I certainly would not". He had not seen accused drinking (R. 38, 39).

Major Madison M. Duncan, 187th Ordnance, Heavy Maintenance Battalion, the District Ordnance Officer, testified that he had seen accused at the Officers' Club on the evening of 11 September 1943, talked with him, observed his conduct, and while he would say that accused had taken one drink, he was not drunk. As Executive Officer of the battalion he would, upon accused's efficiency report, rate him as excellent in character and efficiency - notwithstanding the charges upon which he was being tried (R. 42).

Second Lieutenant Anthony Festine, 327th Ordnance M.T.S. Company, testified that he met accused at about 12:30 a.m. on the morning of 12 September 1943, at the Officers' Club, and was later taken home by accused in his (accused's) automobile. Lieutenant Festine had taken only one drink and that was with accused. During the trip home he noticed nothing unusual about accused's driving. In his opinion accused was not drunk but Lieutenant Lintz was. His opinion as to Lintz was based upon the fact that while playing the piano at the club he made mistakes, he was hesitant in his speech and when he walked out to the car "he had a little difficulty getting in."

Security Order No. 1, Headquarters, Ahwaz General Depot, Persian Gulf Service Command, Office of the Ordnance Officer, 22 July 1943, was introduced and received in evidence without objection (R. 34; Def. Ex. 1). This was an order prepared in the name of the General Depot Commander and signed by accused as Ordnance Supply Officer. In addition to providing for general security at the British Ammunition Dump it also set up a guard system for the area consisting of nine posts.

Special Order No. 159, Headquarters Persian Gulf Service Command, USAFINE, 1 August 1943 was likewise introduced and received in evidence

without objection (R. 41; Def. Ex. 2). This order placed Major Yonkers on detached service with the Headquarters of the Desert District as Assistant Ordnance Officer, Ordnance Section, Ahwaz General Depot.

5. Accused having elected to be sworn as a witness testified that, prior to the time Major Yonkers was assigned to the General Depot at Ahwaz as Ordnance Officer, accused was the only ordnance officer on duty in the depot area and the only officer with a detachment of 87 men, most of whom were in the hospital. Because of the small number of men and the nature of their duties it was necessary to work the men unusually hard; in fact, after working 12 hours during the day some men were obliged to go on guard at night, "sometimes as long as 30 days at a time" (R. 47, 50). Notwithstanding, accused never had any serious disciplinary troubles with the enlisted men of his detachment though acting First Sergeant LeClair frequently tried to persuade accused to modify what seemed to him to be harsh orders (R. 50). These discussions had led to arguments between accused and the Sergeant but "no real feeling" had been aroused thereby.

Previous to 11 September 1943 he had examined the area of the British Ammunition Dump with regard to the proper guarding of the valuable and essential tires stored there. This he had done because he had found automobile tracks along the fence and concluded there had been thefts (R. 47). A new post was determined upon and the acting First Sergeant had been told, in the presence of Major Yonkers, about posting the new guard (R. 46).

On the night of 11 September 1943 Major Yonkers had invited him to go to the Officers' Club and they went there together (R. 45, 48). While at the club accused had three drinks which, in his opinion, did not affect him mentally or physically in any way. When about to go back to quarters, Captain Salm requested accused to take Lieutenant Lintz and another officer back to the hospital which he consented to do. Major Yonkers, Captain Salm, Lieutenant Lintz and Festine and the other unidentified officer then left together in accused's automobile, no one making any objections to going along (R. 45). After taking Captain Salm and Lieutenant Lintz to the medical officers quarters, accused drove to the Foley Hotel where Lieutenant Festine had his quarters. Thereafter accused in company with Major Yonkers proceeded to Major Yonkers' quarters at the dump. In the words of accused:

"We proceeded to the railroad crossing, which is between Ordnance Section, Ahwaz General Depot. At this point we observed a light in the area near Post #5. The light was still; it wasn't moving. Previously I had discovered a place which looked as though tires were being taken out through the fence that was erected around the sub-depot. So that light immediately made us suspicious. So we drove over to investigate. We drove parallel to the fence to the main gate. The Corporal of the Guard met us. We asked him what he was doing with the truck at the fence with the lights on. He remarked that he had just posted his guard. As I drove down the fence I had had no challenge from the guard that was supposed to be posted there. I asked him why there was no guard on this post. He seemed to know nothing about it. I drove Major Yonkers to his quarters and then drove to the Orderly Room. At first I thought I would post the guard and let it go. But after I studied it over I called the Sergeant of the Guard. He said

nobody had given him orders. I sent for the Acting First Sergeant. He said he didn't have anyone to go on post. Finally I had to tell him if he didn't get a guard he would have to go to the guardhouse; eventually he went for the guard. The Sergeant of the Guard, the Corporal of the Guard and I sat down on one of the desks waiting for him to return with the guard to go on post. After awhile I walked back and observed Private McPartland in the Orderly Room and asked him what he was doing there. He said he was woke up. I told him to get out of the Orderly Room. I didn't want him in there. He came right back with a remark that "didn't he have the right to correct something?" I said "Go back to bed"; he said if he were a civilian he would do something about it. At that time I grabbed hold of him and pushed him. At this time the Sergeant and the Corporal of the Guard came back in. I thought they brought the sentry. I asked him for the pistol. He gave me the pistol and I noticed the guard wasn't down. McPartland was still in the room. I gave him another shove toward the door. He started walking out slowly. He wasn't going fast enough, so I gave him another shove. Then I turned to Sergeant LeClair and he said he had been down to get the sentry. I observed the lights on in Barracks #2 so I went down and turned them off. I went back to the Orderly Room and Private Settles came in and I went down and posted him and came back. I sent the Sergeant of the Guard after McPartland to tell him to come down and state his grievance; he stated his nose had been scratched; I talked to him a little while."

Some time while this was transpiring accused, wishing to request Lieutenant Elam at Andimeshk to bring a truck to the dump, called his headquarters on the telephone to direct the charge of quarters to give Lieutenant Elam the message (R. 47).

Accused denied striking Private McPartland but admitted pushing him and believes McPartland thinks he did strike him. He pushed McPartland several times and at the first push his hand slipped from the shoulder and came lightly in contact with McPartland's face. Accused also denied making threatening remarks against McPartland in the barracks later to the effect that he would blow his brains out, but he admitted he had gone to the barracks to turn off the lights at which time he did not see McPartland.

6. In the Specification of Charge I accused is alleged to have been drunk while on duty "as Commanding Officer, Det. 327th Ordnance Company (M.T.S.)..." and both the prosecution and defense took considerable pains to adduce testimony touching the question as to whether or not he was, in fact, the detachment commander. Obviously this matter is of no concern unless the gravamen of the offense is shown and consequently it is proper to first determine whether accused was drunk at the time and place specified. If he was not, there is no need to determine the capacity in which he was then acting.

For the prosecution three enlisted men of accused's detachment and a lieutenant of the Medical Corps testified as to the facts and circumstances surrounding both offenses charged against accused. Private

McPartland, whom accused is charged with striking, stated that accused had an excited look about him and appeared to be in a poor frame of mind. He formed no opinion as to whether accused had been drinking though he, at one time, smelled liquor on his breath. Corporal Kreft stated that accused seemed to be under the influence of liquor although his speech was sensible and neither "fuzzy"nor "blurred" but angry; nor was he unsteady in any way and, except for the fact that accused struck Private McPartland, Corporal Kreft saw nothing in his behavior or attitude nor in anything that he said which led him to believe accused had been drinking. He nevertheless, after wavering in his testimony regarding the issue, said accused was drunk. Acting First Sergeant LeClair smelled liquor on accused's breath, thought that he did not talk as he normally does and did not appear responsible for his actions. He was unsteady on his feet and wavered slightly but his speech was not thick. In the light of all the circumstances the Sergeant could form no opinion as to whether accused was drunk or sober but did think liquor was responsible for accused's condition. Lieutenant Lintz believed accused was under the influence of intoxicating liquor because his eyes were glazed, and though his speech was sensible he spoke with a thick and hesitant tongue. He also thought accused drove the car recklessly when he took him (Lintz) to his quarters.

On the other hand three majors and a second lieutenant testified as to accused's sobriety on the occasion in question. Major Yonkers senior ordnance officer, who was with accused from about 8:30 o'clock p.m. on the evening of 11 September 1943 until approximately 1:45 a.m. the next morning, stated that he was not drunk nor was there anything in his attitude or condition to indicate he had been drinking though he admitted he and accused had a couple of drinks at the Officers' Club that night. Major Hienton, Director of Supply for the Desert District, who saw accused and talked with him at about 10 p.m. or later on the night in question, said that accused was certainly not drunk. Major Duncan, District Ordnance Officer, who had talked with and observed accused's conduct at the club on the same evening said he was not drunk. Second Lieutenant Festine, who was one of the officers who was taken home in accused's automobile, had taken one drink with accused and in his opinion accused was not drunk at 1 a.m. on the morning of 12 September 1943. He did, however, cast considerable doubt upon the testimony of Lieutenant Lintz by saying he was drunk on the occasion. Thus there is a conflict of opinions as to accused's sobriety which can only be resolved by a careful comparison and weighing of the evidentiary facts by which such opinions can be justified, taking into consideration, at the same time, all other facts bearing upon accused's conduct and demeanor at the time and place in question.

Drunkenness, within the meaning of Article of War 85, is defined to be "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties" (par. 145, MCM 1928).

In determining the question in the instant case it would be both unfair and unreasonable to disregard the environment in which and the circumstances under which accused was placed at the time of the alleged offenses. For a considerable length of time he and a small detachment of men had been assigned to an isolated area in the Desert District of the Persian

Gulf Service Command where they worked long hours by day and did guard duty at night. Judicial notice may be taken of the intense and constant heat in this theater. The evidence shows that physical powers had been strained and nerves had become tense to the point where accused may well have been distraught and the men of his detachment dissatisfied and discontented with their lot.

There is nothing in the record to show that accused had sought the solace and comparative comfort of the Officers' Club of the General Depot on any other occasion than the one in question. Indeed, the evidence shows a remarkably constant devotion to duty on his part at the Ammunition Dump and a fixed opinion in the minds of some officers that they were on 24 hour duty. On the night of 11 September 1943, at the invitation of Major Yonkers, the ranking ordnance officer of the depot, accused went to the club and during the period from 8:30 p.m. to 1:30 the next morning had no more than three drinks after which they returned to the Ammunition Dump. At this point accused was confronted with a situation which undoubtedly influenced everything that transpired thereafter.

Being mindful of the valuable stores of critical rubber material, for the security of which his detachment was responsible, accused had determined on the morning of 11 September to post an additional guard at a new post and had so informed the acting First Sergeant in the presence of Major Yonkers. This the Sergeant denied but Major Yonkers corroborated. When, while returning from the club and after approaching the fence surrounding the dump to find out the cause of a light in the vicinity of this new guard post, accused discovered that there was no guard on duty at that point, he took Major Yonkers to his quarters and then immediately proceeded to the detachment orderly room where, in turn, he summoned the Corporal of the Guard, the Sergeant of the Guard and the acting First Sergeant in an effort to determine why his orders had not been obeyed. Each, in turn, denied any knowledge of such guard post, or guard, or receiving orders relating thereto and there was apparently some degree of insubordination on their part, because accused was obliged to threaten the First Sergeant with disciplinary action before the posting of the new guard was finally accomplished.

While this was going on, a private of the detachment, who claimed to be ill, was discovered wandering about in search of the medicene chest, and the offense alleged in Charge II was committed. From the testimony of the Corporal of the Guard and the acting First Sergeant, there appeared to be no good reason for the private's presence in the orderly room at the time and it seems reasonable to assume that private soldiers did not have free access to the medicine chest nor authorization to treat themselves with drugs obtained therefrom.

Meanwhile, recalling the need of a truck for some essential purpose during the ensuing day, accused made a telephone call to Andimeshk in order to convey a message to a lieutenant with whom he had made prior arrangements regarding the furnishing of the truck. That he had some additional provocation arising from difficulties incident to getting the telephone connection is also apparent from the testimony.

Thus, it appears that accused was confronted with a number of aggravating conditions which at that time of day and under the circumstances might well have upset the equanimity and composure of a perfectly sober and ordinarily calm and level minded person.

After a careful study of all the evidence and a comparison and weighing of the testimony of each witness, the Board is of the opinion that accused was not under the influence of intoxicating liquor to such extent that the rational and full exercise of his mental and physical faculties was impaired, but, on the other hand, with the exception of the untoward incident later discussed herein, was not only fully cognizant of his responsibilities, but comprehended every situation requiring his official action at the time and place, and fully and properly discharged his duties in regard thereto. The record of trial is, therefore, held to be legally insufficient to support the findings as to the Specification and Charge I.

While the offense alleged in the Specification of Charge II was committed under all the provocation and aggravations heretofore shown, it must be viewed in a different light than the offense alleged in the Specification of Charge I. Whatever fitness to be a commissioned officer a man may otherwise display it is fundamental that he should possess a mental poise and an equable temperament if he is to be safely entrusted with the leadership of other men. Indeed, though he possesses all else that will qualify him to be a good officer, if he lacks these virtues he will constitute a potential menace to the discipline and safety of those over whom he is given authority.

Long hours of duty, hard work and petty annoyances and provocations constitute no excuse for loss of temper and consequent bad judgment, for the nearer an officer draws to the scene of actual contact with the enemy, the more frequently will he be confronted with such distracting and aggravating circumstances and the real test of the tempermental fitness of an officer lies in how he will conduct himself when confronted by or subjected to them.

Anyone reading the record of trial in this case will feel a certain sympathy with accused because of the dull, unglamorous and monotonous tour of duty in which he was engaged; but nothing shown at the trial can justify his laying hands in anger upon an enlisted man of his command. The circumstances may be mitigating or extenuating but they do not constitute a defense.

It is not clear whether accused actually struck Private McPartland in the face with his open hand or whether he shoved him so roughly that his hand glanced from the shoulder and hit the private's face. In either event, he committed the offense alleged.

7. Attached to the record of trial are recommendations for clemency submitted by Colonel Homer B. Pettit, C.E., Commander of the Desert District, Persian Gulf Service Command; Major James L. Phillips, Executive Officer, and Major Truman E. Hienton, Director of Supply, both of the General Depot, Ahwaz, Iran; Major Charles D. Edmonson, Quarter-

master of the Desert District, the Investigating Officer; Captain Robert L. Purcell, Commanding Officer, 327th Ordnance Base Depot Company, and 1st Lieutenant Robert Kaitz, T.C., Defense Counsel. In substance, these officers submit that accused is a conscientious, hard working, and willing officer of excellent character and that he has displayed qualities of leadership, loyalty, initiative and personal integrity of the highest order. The Staff Judge Advocate, Colonel Milford F. Henkel, J.A.G.D., advised the reviewing authority that he had no power to commute the sentence but that commutation be recommended and that accused be restored to duty as soon as possible. Consideration was also given by the Board to a letter from Honorable J. W. Bailey, U.S.S. to the Adjutant General on 6 December 1943 in which letters from prominent citizens of Lenoir, North Carolina were enclosed and a plea for clemency was submitted; likewise to a communication from Honorable Robert R. Reynolds, U.S.S. to The Adjutant General on 6 December 1943, and also to a letter from Honorable R. L. Doughton, M.C., to The Adjutant General on 4 December 1943, enclosing letters from accused's mother, Mrs. B. C. Jaynes and requesting favorable consideration thereof if possible.

8. Accused is 29 years, 9 months of age. According to records of the War Department he was born in Lenoir, North Carolina, was graduated from the high school, studied higher mathematics by correspondence and attended a college course in radio communication for two months. He enlisted at Fort Bragg, North Carolina on 10 December 1936 and after serving two years with the 4th Coast Artillery at Fort Amador, Canal Zone, was honorably discharged on 30 March 1939 at Fort Moultrie, South Carolina with character "Excellent". He enlisted in the Regular Army Reserve at Fort Moultrie, South Carolina on 31 March 1939 and was called to active duty 7 February 1941 at Fort Bragg, North Carolina. After attendance at the Ordnance Officers Candidate School, Aberdeen Proving Ground, Maryland, he was discharged as a Technican, 5th Grade and commissioned a second lieutenant, Army of the United States on 19 September 1942 and assigned to Ordnance Officer Replacement Pool at Aberdeen Proving Ground.

9. The court was legally constituted and had jurisdiction of the accused and the offenses alleged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty as to Charge I and its Specification but is legally sufficient to support the findings of guilty of Charge II and its Specification and to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

William A. Pounds, Judge Advocate.

Earle W. Shum, Judge Advocate.

Herbert R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 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 Hal B. Jaynes (0-1549302), Ordnance.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty as to Charge I and its Specification but is legally sufficient to support the findings of guilty of Charge II and its Specification and to support the sentence and to warrant confirmation thereof. On the basis of pleas for clemency attached to the record of trial and set forth in the opinion of the Board of Review, in which I concur, and in view of extenuating circumstances apparent in the record, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 of his pay per month for six months.

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-Rec. of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of Action.

(Findings of guilty of Charge I and its Specification disapproved. Sentence confirmed but commuted to reprimand and forfeiture of $50 pay per month for six months. G.C.M.O. 168, 11 Apr 1944)

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

(95)

SPJGH
CM 246591

22 JAN 1944

UNITED STATES v. Second Lieutenant RAYMOND F. GRAHAM (O-1316637), Infantry.	)	84TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Claiborne, Louisiana, 15 December 1943. Dismissal and total forfeitures.

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 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 Raymond F. Graham, Company "F", 334th Infantry, did, without proper leave, absent himself from his organization at Camp Howze, Texas from about 2 September 1943 to about 6 October 1943.

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

Specification: In that Second Lieutenant Raymond F. Graham, Company "F", 334th Infantry, did, at Santa Fe, New Mexico, on or about October 31, 1943 present for approval and payment a claim against the United States by presenting to First Lieutenant M. M. Senerius, Class "B" Agent Finance Officer for Lieutenant Colonel D. S. Seaborn, F.D., Finance Officer, at Bruns General Hospital, Santa Fe, New Mexico, an officer of the Army of the United States, duly authorized to approve, allow and pay such claims, a duly executed "Pay and Allowance Account, W.D. Form No. 336", claiming the amount of about $342.70 for base pay and subsistence allowance for the months of September and October 1943 which claim was false and fraudulent in that he represented himself to be entitled to such pay whereas in fact he was not on a pay status from about 2 September 1943 to about 6 October 1943, during which period he was absent without leave from his organization.

He pleaded not guilty to and was found guilty of all Charges and Specifications with the following exceptions and substitutions: Specification, Charge I, guilty except the words "2 September 1943", substituting therefor the words "7 September 1943"; Specification, Charge II, guilty except the words "amount of about $342.70" and "about 2 September 1943", substituting therefor, respectively, the words "amount of about $353.20" and "about 7 September 1943". He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Specification, Charge I: An extract copy (Ex. A) of Paragraph 42, Special Orders No. 149, Headquarters Infantry Replacement Training Center, Camp Roberts, California, dated 24 June 1943, showed accused assigned to the 84th Infantry Division. It was stipulated that on his "release from Camp Roberts", the accused was "confined" in Hoff General Hospital, Santa Barbara, California on 20 August 1943. An extract copy (Ex. C) of Paragraph 6, Special Orders No. 213, Headquarters Hoff General Hospital, Santa Barbara, California, dated 31 August 1943, showed accused physically fit for duty and directed him to proceed to the 84th Infantry Division at Camp Howze, Texas. An extract copy (Ex. B) of the morning report, Detachment of Patients, Hoff General Hospital, Santa Barbara, California, dated 4 September 1943, showed accused released from the hospital to duty as of that date. An extract copy (Ex. D) of Paragraph 4, Special Orders No. 183, Headquarters 84th Infantry Division, Camp Howze, Texas, dated 21 July 1943, showed accused assigned to the 334th Infantry. A copy (Ex. E) of Special Orders No. 115, Headquarters 334th Infantry, Camp Howze, Texas, dated 22 July 1943 showed accused assigned to Company "F". An extract copy (Ex. F) of the morning report of Company F, 334th Infantry dated 24 September 1943, showed accused from en route to join from Hoff General Hospital, Santa Barbara, California, to "AWOL" as of 2 September 1943. It was stipulated that accused was apprehended and returned to military control at the station hospital, Camp Luna, New Mexico, on 6 October 1943. An extract copy (Ex. G) of Paragraph 3, Special Orders No. 289, Headquarters Air Transport Command Replacement Center, Camp Luna, dated 20 October 1943, directed accused to proceed on or about 22 October 1943, to Bruns General Hospital, Santa Fe, New Mexico for further observation and treatment and upon completion to proceed to his proper station. An extract copy (Ex. F) of the morning report of Company F, 334th Infantry, dated 1 December 1943, showed accused from Bruns General Hospital to arrest in quarters as of that date. First Lieutenant William H. Schulze, commanding Company F, testified on cross-examination that he arrived at the

date accused was marked "AWOL" from a communication received on 28 August stating that accused had been discharged from the hospital. He was told to allow four days travel time and if accused did not arrive within four days he would be "AWOL" (R. 7-14).

b. Specification, Charge II: First Lieutenant M. M. Senerius testified by deposition (Ex. H) that he was the Class "B" agent finance officer for Lieutenant Colonel D. S. Seaborn, Finance Department, finance officer at Bruns General Hospital, Santa Fe, New Mexico, and was authorized to pay claims for base pay and allowances claimed on War Department Form No. 336; that the accused, while a patient in the hospital, presented a claim for and received the sum of $353.20 covering base pay and allowance for subsistence for the months of September and October 1943; that he did not know at the time of payment that accused was not on a pay status from about 7 September to about 6 October 1943; and that he learned of the non-pay status from the hospital adjutant the day accused was to depart from the hospital. The cross-interrogatories (read to the court after accused had testified) showed that accused had previously submitted a claim for the month of November 1943, that upon learning of the non-pay status of accused during part of September and October Lieutenant Senerius notified the disbursing officer, and that he then informed accused of the seriousness of his false claim. He advised accused to make a report of his "AWOL time" to the finance officer at Camp Claiborne, Louisiana, upon his arrival. Accused assured him that he would do so in order that the proper deduction could be made on his next claim for pay and allowances. Lieutenant Senerius pointed out to him that if the claim for November was processed for payment, it would constitute a false claim, and stated that he would recall it for cancellation. Accused agreed and the claim was cancelled. Accused never denied to Lieutenant Senerius that he was on a non-pay status from about 7 September to about 6 October 1943 (R. 14-15, 26).

4. For the defense: Accused testified that he knew from his conversations with the doctors at Hoff General Hospital that his career as an Army officer was finished. Before leaving the hospital he was shown a communication from the Commanding General, 84th Infantry Division, which recommended his severance from the service, and was aware that everything he had accomplished up to that time had "gone up in smoke". He had enlisted in the Army, worked hard, and was a platoon sergeant at the time he entered "OCS". When he left the hospital at Santa Barbara, he was feeling "low" and was not in the state of mind for "any good judgment". He did not have reservations and as it was Labor Day week-end he was unable to obtain a seat on the train. He went to a hotel, bought a bottle of whiskey and did not know how long he "stayed on it". He was ill when he finally left Santa Barbara to go east. He had to change trains, got off at Las Vegas at three o'clock in the morning, feeling "rough and sick", and went to a hotel to clean up and get some rest. The train which had been running three hours behind schedule, left earlier that day, he had to "lay over", and it was the "same damn thing all over again" until "the Major" took him to the hospital at Camp Luna (R. 15-17).

With reference to the fraudulent claim (Spec., Chg. II), accused stated that he ran up a mess bill while in the hospital at Camp Luna and was without funds. He inquired about his status and "the doctor" told him to put in a voucher as he was "under no charges". At the suggestion of "the doctor" accused arranged with the mess officer to pay his account after he arrived at Bruns General Hospital. After his transfer to Bruns General Hospital accused was informed by a sergeant on duty in the finance office that it would be necessary to obtain copies of his active duty orders before submitting a voucher. The personnel officer wrote without success to the 84th Division for the orders, finally obtained copies from Camp Roberts, and a voucher was made out. Accused received the check about 20 November and sent a money order to Camp Luna to take care of his accounts. When he signed vouchers for September and October he was told to fill one out for November, but delayed doing so as he expected to leave and join the 84th Division. It was not until the end of the month drew near that he signed a blank voucher for November. Shortly after he signed the voucher, an officer from the 334th Infantry arrived and informed accused that they would leave next day for the 84th Division. While the officer was present, accused received a telephone call from the finance officer, asking about the "bad time" for which he had signed vouchers and the dates of his absence. Accused told him he did not know and the finance officer suggested that the "bad time" could be taken out of the November voucher. It was finally agreed that the November voucher would be cancelled and accused would submit a new voucher on his arrival at the 84th Division, where the amount of the "bad time" to be deducted could be determined. On arriving at the 84th Division accused was placed in arrest in quarters, had no opportunity to report to the finance officer, and did not attempt to file a voucher for the November period. Accused had no intention of defrauding the Government when he submitted the vouchers. The idea of "bad time" never entered his head. He had not been informed that he was carried on any morning report as "A.W.O.L." and the only reference made to his status was when he was told by the doctor at Camp Luna to put in his voucher as he was under no charges. He made a mistake in drawing pay for September and October but was always a month or so behind in his pay, and when he drew the money to pay bills the question of fraud never entered his mind (R. 17-21).

On cross-examination and examination by the court accused stated that his travel orders did not specify a date to report at Camp Howze but he knew he was to proceed by the best and fastest means possible. When he left Santa Barbara he purchased a ticket to Gainesville, Texas, the nearest station to Camp Howze. From 4 September to 6 October 1943 he stayed at the hotels in Santa Barbara and Las Vegas except for the time he

was on the train. He knew that he was not entitled to pay while "A.W.O.L.". (R. 21-26).

5. Captain Joe F. Boydstun, Finance Department, called as a witness for the court, testified that the authorized travel "by rail" from Santa Barbara, California to Gainesville, Texas, was 72 hours (R. 26-28).

6. a. Specification, Charge I: It is shown by the evidence that accused, without proper leave, absented himself from his organization from about 7 September to about 6 October 1943, the period of unauthorized absence being within the dates alleged in the Specification.

b. The evidence is uncontradicted that after accused arrived at Bruns General Hospital on 22 October 1943 he presented to the finance office for approval and payment a pay and allowance account, War Department Form No. 336, claiming base pay and subsistence allowance for the months of September and October 1943 and received $353.20. As accused was absent without leave from about 7 September to 6 October 1943, he was clearly on a non-pay status during that period. Accused admitted presenting the claim, and that he was not entitled to pay while absent without leave, but denied any fraudulent intent. He testified that he had been advised by a doctor at Camp Luna to put in a voucher as he was "under no charges", and that when he submitted a voucher to the finance officer at Bruns General Hospital the matter of his "bad time" did not enter his mind. The evidence sustains the falsity of the claim. Although accused knew that he had been absent without leave for about a month, and that he was not entitled to pay while absent without leave, he submitted a pay voucher covering the period of his absence without disclosing his true status to the finance officer. These circumstances sustain the inference that accused acted with a fraudulent intent.

7. The Specification, Charge II fails to allege that accused knew the claim was false and fraudulent. The Board of Review is of the opinion, however, that the Specification fairly informed the accused of the nature of the offense with which he was charged. Under the 37th Article of War this irregularity in the pleading is not fatal to the validity of the conviction (CM 202928, Cooley).

8. The accused is 35 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 20 September 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty, 7 April 1943.

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

The Board of Review is of the opinion that the record of trial is legally sufficient to support the 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.

Samuel M. Driver, Judge Advocate

Robert E. O'Connor, Judge Advocate

F. J. Lotterhos, Judge Advocate

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

1st Ind.

War Department, J.A.G.O., 3 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 Raymond F. Graham (0-1316637), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was absent without leave from his organization from about 7 September 1943 to about 6 October 1943 (Chg. I) and presented a false and fraudulent claim for pay covering the period of such absence (Chg. II). The records of the Office of The Adjutant General show that on a prior occasion accused claimed that he had experienced an attack of amnesia upon boarding a bus at Camp Roberts, California, on 28 June 1943 and that the next thing he remembered was "awakening" on a park bench in Long Beach three weeks later. The reports of two neuropsychiatrists of the Army Medical Corps who subsequently examined accused indicated that the amnesia was not bona fide. I recommend that the sentence to dismissal and total forfeitures 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 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 forfeitures remitted. G.C.M.O. 100, 10 Mar 1944)

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

SPJGK
CM 246607

27 JAN 1944

UNITED STATES v. Second Lieutenant GEORGE A. PATRIQUIN (0-1301677), Infantry.	CAMP ROBERTS, CALIFORNIA Trial by G.C.M., convened at Camp Roberts, California, 13 December 1943. Dismissal and total forfeitures.

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

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

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

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

Specification: In that Second Lieutenant George A. Patriquin, Company C, 84th Infantry Training Battalion, Camp Roberts, California, was, at Paso Robles, California, on or about 18 November, 1943, in a public place, to wit, Spring Street, between 13th and 14th Streets, a public highway, drunk and disorderly while in uniform.

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

Specification: In that Second Lieutenant George A. Patriquin, Company C, 84th Infantry Training Battalion, Camp Roberts, California, a prisoner lawfully in confinement in the Paso Robles City Jail At Paso Robles, California, did, at Paso Robles, California, on or about 18 November, 1943, wrongfully and unlawfully attempt to escape from such confinement.

He 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 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 relevant evidence.

Lieutenant Raymond A. Hohn, Company A, 84th Infantry Training Battalion,

and accused left Camp Roberts together at about 1730 on 18 November 1943 and went to Paso Robles by private car, which they parked upon their arrival. They went into a "store", made a few purchases, and had "3 or 4" glasses of beer, remaining there approximately one hour. From there they went to the cocktail lounge of the Taylor Hotel where they remained for another three quarters of an hour. Accused drank "3 or 4" cocktails (R.6,8,9). They separated about 7:30 in the evening, Lieutenant Hohn telling accused that he was going out to get something to eat. Accused did not accompany him (R.9,10). When Lieutenant Hohn had finished eating he went to their car. He stated that he had been sitting in it for "maybe a minute" when he looked up and saw accused in front of the Hollywood Photo Shop on Spring Street, opposite the hotel (R.10). Witness got out of the car, went over to accused, and asked if he had eaten yet. Accused told witness that he had not (R.10).

Mrs. Helen Peasley testified by a deposition, introduced as Prosecution's Exhibit B, that she was the manager of the Hollywood Photo Studio at 1319 Spring Street, Paso Robles, California (R.42, Deposition, 1). She stated that sometime between 7 and 9 that evening two lieutenants, whom she subsequently learned to be accused and Lieutenant Hohn, came into the shop and that accused asked if his picture could be taken (Deposition 2,3). A conversation took place between accused and another girl in the shop, in which Mrs. Peasley took little part, but eventually accused was not photographed, and he and Lieutenant Hohn walked to the door and out to the sidewalk in front of the shop (Deposition,3,4). Mrs. Peasley stated that it was her opinion that at that time accused "had had considerable to drink. I think he was * * * not himself" (Deposition,4).

As accused and Hohn walked out, a Mrs. Murnahan walked into the shop to pick up some pictures of her baby. She, Mrs. Peasley and the other woman clerk were talking together when they noticed through the large plate glass window in the front of the shop that accused and Lieutenant Hohn "were playing with the baby buggy" (Deposition,4,5,14, 15). One of them, she stated, "had hold of the baby buggy and * * * was motioning the other one to get in" (Deposition,6). They walked around to the front of the baby buggy; accused "very deliberately" sat on the edge of it, Hohn gave him a slight push on his shoulders, and "he [accused] went back full length into it" (Deposition, 7,14,15,20). The cross parts underneath the buggy were made of wood. They broke and the buggy collapsed so that the bottom of it rested flat on the sidewalk (Deposition, 7,10).

Lieutenant Hohn denied that he and accused were in the shop to inquire about being photographed and stated positively that they did not enter the shop until after the carriage was broken (R.17). He testified that after he got out of the car and went over to talk to accused, "there happened to be a baby buggy * * * right near where we were standing, and

* * * Lt. Patriquin leaned against the buggy - leaned back on it, and it gave way under his weight" (R.11). As accused got up out of the carriage, Mrs. Murnahan came out of the photography shop (R.12, Deposition,7). A conversation then took place among the three of them, Mrs. Murnahan requesting payment for the carriage and suggesting that it would cost about $16.50. Someone suggested that they step inside the store to make the settlement (R.11). All three entered the store (Deposition,7). Efforts there to make a settlement were unsuccessful. Lieutenant Hohn stated that the women in the store "kept interrupting" (R.12). Mrs. Peasley stated that accused was reluctant to write his name and address for Mrs. Murnahan (Deposition, 8). Someone suggested that they go outside again and they did (R.12; Deposition,9). Mrs. Peasley testified that accused was willing to pay for the repair of the buggy, but that Mrs. Murnahan claimed that this was impracticable because she was leaving town soon, and did not know whether it could be repaired. She demanded its full cost price. Accused was "argumentative" and would not pay this (Deposition, 9,12).

Lieutenant Hohn told accused that he would try to settle the matter, and accused walked down the street to where their car was parked, while Hohn remained in front of the shop. A civilian policeman Ben Richardson and Private First Class Harald P. Kahlert, Corps of Military Police, arrived upon the scene, and Mrs. Murnahan pointed out accused to Kahlert, who went to pick up accused (R.13).

Private Kahlert testified that he found accused standing looking in the window of a bowling alley between 13th and 14th Streets on Spring, about two doors north from the photo studio (R.25,26). Kahlert approached accused and saluted. Accused "stood there with his hands in his pockets" (R.26,27). Witness asked him "if he was too intoxicated to return the salute", and accused returned it (R.27,37,38). Accused then willingly accompanied Kahlert back to where the others were standing (R.27). Witness stated that accused appeared dazed and confused, and that he was weaving slightly on his feet, but witness "wouldn't say he was very drunk" (R.33,39,40). Richardson attempted to persuade accused to settle with Mrs. Murnahan, but was unsuccessful (R.14,27). He then told Kahlert to take accused to the police station, saying that he would take Mrs. Murnahan, and that they "would straighten it out down at the police station" (R.27). Kahlert testified that he was not arresting accused (R.36). Kahlert further stated that accused said that he was not going down there and that Richardson could not take him down there (R.27). Richardson attempted to take hold of accused and accused "pushed him away" (R.36). Richardson seized accused's arm, and since Richardson "was unable to handle him [accused] himself", Kahlert helped take accused to the station. Richardson twisted accused's right arm up behind accused's back, while Kahlert held accused's left arm with "a Japanese wrist-lock". Both used force (R.27,28,35,36,40). Lieutenant Hohn stated that he remained

on the sidewalk "maybe half a minute" after they left and did not see Richardson and Kahlert take accused to the station (R.14,21,22), while Mrs. Peasley testified that she came out of the shop after they passed the door and went up the street, and that she observed the military policeman, Richardson, and accused. Kahlert was on one side and Richardson on the other. They "were pulling him, more or less". Accused was "holding back". They "had his arms pinned behind him and were forcing him" (Deposition, 21,22).

The distance to the police station was described by Private Kahlert as "approximately a city block" - 100 feet to the intersection of Spring and 13th Streets and another 100 feet on 13th to the station. No crowd gathered during the argument, and it does not appear that anyone followed the party to the station (R.19,28).

Kahlert stated that when they reached the police station they took accused into the "shakedown room" and that Richardson told accused to stay there (R.14). The shakedown room was a room about ten by twelve feet in size, located right off the cell block, with a desk, three chairs, a table and a locker, and having two windows overlooking an alley in back of the Taylor Hotel (R.30,31). Kahlert and Richardson went to the front part of the station to talk to Mrs. Murnahan (R.28). While Mrs. Murnahan was being questioned, Lieutenant Hohn came into the reception room (R.14) and while the questioning was taking place someone discovered that accused was not in the shakedown room. No one had seen him leave the room through its front door (R.30). All ran outside to look for him (R.14,29,37). Lieutenant Hohn saw accused as he was being brought back into the police station, and though it was rather dark on the street, observed that "his mouth was bleeding a little bit" (R.15). Kahlert testified that he saw him about five minutes later in the shakedown room. There was blood all over his uniform, and he was receiving first aid for what appeared to be a broken nose (R.29,32). Upon investigation, witness found the window open above the place where accused was sitting. The screen was pushed out on one side, and there were fresh blood stains out in the alley (R.32,40).

Lieutenant Colonel Harry C. Hough, Field Artillery, Camp Roberts, testified that he was field officer for the provost patrol and saw accused about 2200 that evening at the police station. Accused's face was quite bloody and blood was streaming from his nose. Accused was reluctant to sit down when told to do so, and witness finally pushed him into a chair. After inspecting his identification card witness took accused out to the camp hospital in an ambulance, turned accused over to the physician for treatment of his nose, called an officer from accused's battalion to take charge of him, and turned accused over to that officer (R.46,47,48). He also placed accused in arrest (R.49,50).

It was not necessary to sign a release for accused's custody (R.50).

First Lieutenant Edmund C. Alberton, Medical Corps, Station Hospital, Camp Roberts, testified that he was on duty on the night of 18 November as admitting officer for the hospital, and that he cleaned and dressed the abrasions on accused's nose, while a Captain Larrabee reduced a fracture of it (R.53,55). He testified that he made a partial physical examination of accused, and a blood test. The latter disclosed "two hundred milligrams percent of alcohol", or "border-line level" intoxication. Witness stated that he believed that accused "was drunk to a mild extent" (R.54,55).

Lieutenant Hohn testified that accused was under the influence of liquor "to a slight degree", but that he was not noisy, not loud or boisterous, not belligerent and neither staggered nor attempted to fight with anyone (R.16,17). Kahlert testified that at the police station accused "seemed to be getting worse" than he was when on Spring Street; his speech was slightly thick and the pupils of his eyes dilated (R.33,34).

Colonel Hough testified that accused was intoxicated when he saw him and "was not in possession of his senses". He was neither "mildly exhilirated", nor "grossly drunk", but was obviously under the influence of liquor (R.51).

Evidence for the defense.

Lieutenant Hohn was recalled and testified as a witness for the defense. Part of Mrs. Peasley's testimony was read to him, and upon hearing it, witness again testified that he had never been in the photo shop prior to the time when he and accused went in with Mrs. Murnahan to discuss payment for the damage done to the buggy (R.57).

Major Richard G. Valentine, Infantry, Assistant Operations and Training Officer, Infantry Replacement Training Center, Camp Roberts, testified that he had known accused approximately one year and that his general reputation in their barracks was good, that his general reputation for sobriety was "all right", and that the men in the battalion liked him (R.23,24).

Accused was informed of his rights by the law member in open court, and elected to testify in his own behalf. He stated that he and Lieutenant Hohn had been on the range with their companies all week, and that about 1600 on 18 November they left the range, went to their quarters and showered and cleaned up. They were to go on a two-weeks' bivouac, so they decided to dress and go into Paso Robles for some Christmas shopping.

They left camp about 1800, drove into Paso Robles and parked their car about 20 or 30 feet from the photo shop. From here they went into a cigar store, where they bought some Christmas cards, talked to the owner, and "had a few beers" (R.61). They remained here an hour or so, then decided to go to the Taylor Hotel and have a cocktail before eating. Accused said that he and Hohn each bought a round, and that they were then joined by some friends of accused's, and he had two more drinks. Lieutenant Hohn excused himself, telling accused they would meet at the car (R.62). Later accused left to go to the Paso Robles Inn for a steak. He had not eaten any lunch on the range, and had had nothing that evening. When he reached the front of the photo shop he stopped. Lieutenant Hohn came up and joined him, informing him that he had already had something to eat. While they were standing there, accused stated, he stepped backwards and accidentally sat in the baby carriage which was in back of him. He had not seen it previously, and did not know that it was there. Hohn did not push him (R.62). Accused stated that then Mrs. Murnahan came out of the shop and said something about getting another carriage. Accused said that he "would be glad to help her in any way I could". He had cashed a check for $15 at the hotel earlier that evening, but Mrs. Murnahan said that the carriage had cost her $16.50, and accused knew that he did not have that much money. He testified that he then told her that he would write her a check or give her his address. They got inside the store, but the girls there started talking, and the question arose whether the buggy could not be fixed, since it was wooden. Accused seems to have told Mrs. Murnahan that if it could not be fixed he would pay her $16.50 (R.63). He testified that Hohn said, "Well, I have got enough money here to take care of it. You go down by the car". Accused walked down to the car, and was standing next to it when he noticed Kahlert, the military policeman, approaching. Kahlert said something (accused did not remember his exact words) about going back (R.63). Kahlert took him to the shop, holding accused's arm behind his back. They stopped there because accused was "pulling back" and trying to get his arm free of the grip which Kahlert had on it (R.69,70). Kahlert wanted to take him to the police station, but accused stated that he objected to the force which was being used on him, and refused to go, saying that he would go to the station willingly, but that he "did not like the idea of the bending my arm up over my back" (R.63,69). He told the policeman that Lieutenant Hohn was taking care of the matter and that he did not know why they wanted him to go to the station (R.63,64,69,70). They told him that he would have to settle it at the station (R.68).

Accused admitted that "when he did start shoving me across the street, naturally I fought back about it and I made the remark, 'If you will let go of my arm I will walk across with you'" (R.64).

When they reached the police station "they" told him to go into the

shakedown room and that "they would see what they could do with the lady about settling up the damages", and then Kahlert and Richardson left him in the room alone (R.64). He entered it by himself (R.71) and did not recall having been told to "stay there" (R.72). While he was in there he became somewhat sick. The window was wide open and if there was a screen on it he did not see it. Below the window and to the right of it there was a large desk. Directly underneath the window and to the left of the desk there was an ordinary office chair, about twenty inches high (R.64,65). Accused testified that due to his feeling sick at his stomach and his fear that he would vomit he went to the window and stood on the chair to lean out the window and get some fresh air (R.64,65,66, 67). He stated that he thought he stood on the seat of the chair, but might possibly have stepped on the back of it (R.74). Although the window was high enough in the wall that he could just about see out of it at his height of 5 feet and 8 inches, he was able to lean out of it when he stood on the chair, since then the bottom of the window came just about to his stomach. The ledge was about a foot wide. In leaning over this ledge his feet were extended out in the air (R.74).

Accused testified that in thus leaning out he lost his balance and fell out of the window (R.65). He claimed that he was not trying to get out of the window and get away, for the police already had his name, and Lieutenant Hohn was outside attempting to settle the matter of the damages (R.67,72,73). He stated further that he was not drunk, but "sick at" his stomach (R.67).

4. In brief recapitulation, the facts are as follows: Accused and another lieutenant left Camp Roberts in the evening of 18 November 1943, and drove into Paso Robles. Between 6 and (at the latest) 9 o'clock that evening accused drank four bottles of beer and four cocktails on an empty stomach. They may or may not have gone into the Hollywood Photo Shop to inquire about being photographed, but it is clear that a baby carriage which stood in front of it was unintentionally broken by accused. A dispute arose between accused and the woman who owned the buggy, which was interrupted by the appearance of a civil and a military policeman. When their efforts to prevail upon accused and his friend to settle with the owner were not successful, the two policemen took accused to the nearby police station. There is evidence that accused objected to the way in which he was handled by them and that he resisted somewhat their efforts to take him to the police station. It is clear, however, that accused was not boisterous, belligerent or profane, that he caused no scene or public commotion, and that he was at the time mildly under the influence of liquor.

He was not placed under military or civil arrest but was told to remain in a side room at the station while the police official questioned the owner of the buggy and continued to attempt to effect a settlement of

the damages with the other lieutenant. It was noticed that accused was missing and in a few minutes he was brought back into the station from outside, suffering from facial abrasions and a broken nose. Accused claimed that he grew nauseated while in the room, and that he stood on a chair and leaned out an open window in an effort to obtain a breath of fresh air, lost his balance, and fell out of the window.

5. The Board of Review is of the opinion that the record is legally sufficient to support only so much of the findings of guilty of Charge I and the Specification thereof as involves a finding of guilty of the Specification in violation of Article of War 96, and legally insufficient to support the findings of guilty of Charge II and the Specification thereunder.

There is evidence that accused was drunk in uniform on a public street. There was no evidence that he was grossly drunk or conspicuously disorderly within the meaning of Article of War 95. He was engaged in a bona fide controversy over payment for damage unintentionally done by him to private property, but he was at no time profane, insulting or boisterous. He was not belligerent, and did not stagger or fall down. His objections to going to the police station were based upon the arbitrary manner in which he was ordered to do so, and to the unwarranted force to which he was subjected by an over-zealous officer and military policeman. His conduct cannot be said to have violated Article of War 95, but only Article of War 96. (CM 226894, Peterson; CM 244815, Knighton.)

Accused's arrest, if actually he was arrested within the legal meaning of that term, was unwarranted and illegal. An analysis of the record shows that it was in effect the use of criminal process in order to enforce a civil liability. Accused was neither charged with, nor suspected of the commission of any felony. The record does not show that he had committed or was about to commit any misdemeanor in the presence of either the civilian or the military policeman. No arrest was authorized under Section 836, California Penal Code (Deering, 1941), and, in fact, the detention of accused was in itself a misdemeanor under Section 146 of that code.

It does not appear that either Richardson or Kahlert had any intention of arresting accused, a necessary element of an arrest (6 C.J. Sec. "Arrest", sec. 1b). His name was never entered upon the police blotter, and Lieutenant Colonel Hough was not required to sign any release for him.

There being, then, no arrest or lawful detention, accused violated neither civil nor military law in leaving the "shakedown room". In People v. Clark (231 P. 590 (Cal.)), the court said, quoting from People

v. Ah Teung (92 Cal. 421,425; 28 P. 577,578):

"But when the imprisonment is unlawful and itself a crime, the reason which makes flight from prison an offense does not exist. In such a case the right to liberty is absolute, and he who regains it is not guilty of the technical offense of escape * * *. There can be no escape, in the sense of the law, unless there was a lawful custody."

Discussing the offense of breach of arrest under Article of War 69, the Manual for Courts-Martial, 1928, says, at page 153:

"* * * A person can not be convicted of a violation of this article if the arrest or confinement was in fact illegal * * *." (See also CM 226282, Loring.)

Accused could not have been convicted of escape from confinement. He cannot, therefore, be convicted of an attempted escape from the same confinement, and did not violate Article of War 96.

6. There is evidence to support the finding that accused was drunk in uniform in a public highway in violation of Article of War 96. He had drunk four glasses (or bottles) of beer and four cocktails between 6:30 and 9 that evening on an empty stomach. Witnesses testified that he was unsteady on his feet, "not in possession of his senses", and "not himself". A medical examination made within three hours of the incident showed "border-line level" intoxication. These facts support a finding of drunkenness.

7. War Department records show that accused is 38-9/12 years of age, married, and a preparatory school graduate. He was an enlisted man from 20 January 1941 until his graduation from Infantry Officer Candidate School, Fort Benning, Georgia, on 27 November 1942, when he was commissioned a second lieutenant, Army of the United States. In recommending him for attendance at Officer Candidate School, his commanding officer stated that his qualities of leadership were outstanding and that his character was "satisfactory".

The records also show that on 15 April 1943 accused received punishment under Article of War 104 of forfeiture of seventy-five dollars of his pay and a reprimand from the Commanding General of the Infantry Replacement Training Center, Camp Roberts, California, for three days' absence without leave. They further show that in response to an inquiry by The Adjutant General on 19 July 1941, the Department of Public Safety, Bureau of Police of New Rochelle, New York, reported the following police record of accused: "Arrested New Rochelle, N.Y. July 19th, 1925 Burglary. Pleaded guilty, Placed on Probation for 6 months; arrested New Rochelle, N.Y. (traffic violation), September 14th, 1925.

Guilty, Sentence Suspended; arrested New Rochelle, N.Y. September 14th, 1925 (Speeding) Guilty, Sentence Suspended; arrested New Rochelle, N.Y. March 29th, 1929 (Unauthorized use of auto) on 3/30/29 Turned over to Pelham Manor Police Department; arrested New Rochelle, N.Y. (Disorderly conduct) On 12/3/38 Guilty, Fined $10.00; arrested New Rochelle, N.Y. Nov. 10th, 1938 (Vehicle and Traffic Law.) On 12/3/38 Guilty, Fined $10.00."

This record was received by and known to the War Department prior to accused's being commissioned in November 1942.

8. The court was legally constituted and had jurisdiction of the person and offense. Except as noted above no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and the Specification thereof as involves a finding of guilty of the Specification in violation of Article of War 96, legally insufficient to support the finding of guilty of Charge II and the Specification thereof, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized under Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.
7 FEB 1944

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 George A. Patriquin (0-1301677), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and the Specification thereof as involves a finding of guilty of the Specification in violation of Article of War 96, legally insufficient to support the findings of guilty of Charge II and the Specification thereof, 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. Consideration has been given to punishment received by accused under Article of War 104 six months prior to the offense of which accused was found guilty for a short absence without leave, to a civilian police record of offenses by accused prior to his induction into the Army, and to a report of a psychiatric examination of accused by Major Harry N. Roback, Medical Corps, Infantry Replacement Training Center, Camp Roberts, California, in which it is stated that accused is in a "Constitutional psychopathic state, manifested by inadequate personality, emotional instability, and chronic alcoholism".

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. ltr. for sig. S/W.
Incl.3- Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. G.C.M.O. 118, 10 Mar 1944)

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

SPJGN
CM 246615

3 FEB 1944

UNITED STATES	TANK DESTROYER CENTER
v.	Trial by G.C.M., convened at Camp Hood, Texas, 3-7 December 1943. Dismissal.
First Lieutenant DAVID M. PIGOTT (0-1821625), Company "A", Academic Regiment, T.D.S.	

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

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

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

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

Specification: In that First Lieutenant David M. Pigott, Company "A", Academic Regiment, Tank Destroyer School, did, without proper leave, absent himself from his organization and station at Camp Hood, Texas, from about 29 September 1943 to about 12 October 1943.

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant David M. Pigott, Company "A", Academic Regiment, Tank Destroyer School, did, at Camp Hood, Texas, on or about 4 September 1943, with intent to deceive his Commanding Officer, Major Park W. Bailey, Officially make a statement by written certificate delivered to the said Major Bailey that he, the said Lieutenant Pigott, had settled his outstanding debts, was operating on a cash basis, and would pay debts as they came due, which certified statement was known by the said Lieutenant Pigott to be untrue, in that the said Lieutenant Pigott owed

outstanding debts to the following parties in the respective amounts, when the false certificate was made: First Lieutenant Harry (NMI) Sherman, $16.00; First Lieutenant James H. Smith, $8.00; and Kyle Hotel, a corporation, Temple, Texas, $10.83.

CHARGE III: (Finding of not guilty).

Specifications 1-3: (Finding of not guilty).

ADDITIONAL CHARGE I: (Finding of not guilty).

Specifications 1-12: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and its Specification, and of Charge II and Specification 2 thereunder and not guilty of all other Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, adduced in support of the Specifications and Charges of which the accused was found guilty, shows that the accused's commanding officer in early July 1943, discovered that the accused had become lax in repaying his financial obligations and spoke to him about it. The accused agreed to promptly liquidate his indebtedness and later exhibited a list of his claimed debts. During the month of August 1943, the accused reported his progress in liquidating his debts and by letter asked for a transfer to Special Services which was disapproved pending his full settlement of outstanding obligations. Thereafter, on 4 September 1943, the accused advised his commanding officer that all his debts had been paid, delivered to him a signed certificate so certifying and requested the approval and transmission of his request for a transfer. Thereafter it was ascertained that the accused was still indebted to Lieutenant Harry Sherman in the sum of $16 which had been incurred some months previously, to Lieutenant James H. Smith in the sum of $8, likewise of long standing, and to Kyle Hotel, Temple, Texas, in the sum of $10.83, incurred during the preceding month of May 1943. These debts, except that due the hotel which had been paid prior to the trial were still unpaid upon the date of trial (R. 7-10, 11-13, 14-24, 25-32, 33-41; Ex. A).

The accused was granted a twelve day leave effective 16 September 1943 and on 27 September 1943, by telegram from Del Mar, California, requested a three day extension thereof, giving as his reason for the requested extension his intended marriage. The extension was not granted and the accused, not reporting back for duty upon the expiration of his leave, was shown "AWOL" on the organization's morning report as of 0001 o'clock 29 September 1943 until his arrest by military authority on 12 October 1943, and thereafter to arrest in quarters on 28 October 1943 after his return in custody to his organization. The organization's morning report was admitted in evidence showing his unauthorized absence

as above indicated and such absence was also established by the testimony of several officers (R. 41-44, 45-46, 47-49, 50, 51-52; Exs. B-I).

4. The evidence for the defense shows that the accused's commanding officer characterized accused's prior service as excellent but ascribed to him a bad reputation for the repayment of his debts. Another fellow officer similarly characterized his prior service but ascribed to him a reputation of honesty (R. 102-103, 104-105).

The accused, after explanation of his rights as a witness, elected to testify concerning the original charges only. He sought to explain the omission from his certificate of the hotel's account on the ground that he was under the impression that the certificate applied only to his debts at the post, the omission of the debt due Lieutenant Smith because it was small and he had simply forgotten about it and the omission of the debt due Lieutenant Sherman because it was not only small but also because he was not sure of its exact amount. He further testified that over a course of dealing of several months with the hotel it had been his custom to incur a bill and pay it the next time he registered at the hotel and that the hotel had been fully paid. He admitted his absence without leave as alleged and attributed it to his emotional upset caused by his unsuccessful attempt to prevail upon his sweetheart to marry him during his leave and his resultant excessive use of intoxicants in an effort to find surcease from his sorrow because of his continued state of celibacy. He had been attempting to complete arrangements to return to his organization when he had been apprehended and acknowledged the receipt of a telegram denying his requested extension of leave (R. 106-126).

5. The Specification, Charge I, alleges that the accused, without proper leave, absented himself from his organization and station at Camp Hood, Texas, from about 29 September 1943 to about 12 October 1943. The elements of the offense of absence without leave 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 by the testimony of several officers and likewise by the recitations of the organization's morning report competently and conclusively shows that the accused was absent without leave for the period of time alleged. Furthermore, the accused admitted in its entirety his commission thereof offering in extenuation an appealing but never-the-less defensively insufficient story of unrequited love and its disastrous consequences. The evidence, therefore, establishes beyond a reasonable doubt the guilt of the accused of the offense charged and amply supports the findings of guilty of Charge I and its Specification.

6. Specification 2, Charge II, alleges that the accused on or about 4 September 1943, at Camp Hood, Texas, with intent to deceive his commanding officer, officially made and delivered to him a false written certificate which recited that he, the accused, had settled his outstanding debts, was operating on a cash basis and would pay debts as they came due and which was known by the accused to be untrue in that he at such time had three unpaid and outstanding debts, to named creditors in specified amounts. "Knowingly making a false official statement" is violative of Article of War 95 (M.C.M., 1928, par. 151).

The evidence for the prosecution, in addition to the testimony of the accused's commanding officer, includes the original of the accused's certificate which reads as follows:

> "This is to certify that all my outstanding debts, both to individuals and the Post, have been settled. Furthermore, I am now operating on a cash basis and will pay debts as they occur".

It is dated 4 September 1943, signed by the accused and was by him delivered to his commanding officer not only pursuant to express direction but also as part of the accused's action in seeking to effectuate his transfer to another assignment. The testimony of the three named creditors conclusively shows that the certificate was false as alleged and the accused's attempted explanation of the falsity thereof again sounds in extenuation and not in defense. Although the omitted debts are small in both number and amount, they are not trivial and the principle requiring absolute veracity in official reports is one which cannot be violated even in small matters because otherwise reliance cannot be placed upon reports by the officers to whom they are made. It follows, therefore, that the evidence conclusively shows the guilt of the accused of the offense alleged by Specification 2, Charge II, and amply supports the findings of guilty thereof.

7. The accused is about 30 years of age. The War Department records show that the accused enlisted on 30 January 1941 since which date he had enlisted service until 16 October 1942 when he was commissioned a second lieutenant upon completion of Officers' Candidate School, that he had had active duty as a commissioned officer from the latter date and that he was promoted to first lieutenant on 1 July 1943.

8. 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 Charge I and its Specification and Charge II and Specification 2 thereunder and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

(On Leave), Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(120)

SPJGN
CM 246615

1st Ind.

War Department, J.A.G.O., 9 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 First Lieutenant David M. Pigott (O-1821625), Company "A", Academic Regiment, T.D.S.

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 of trial 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. G.C.M.O. 161, 7 Apr 1944)

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

SPJGQ
CM 246616

19 JAN 1944

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at
	)	New York Port of Embarkation,
First Lieutenant HENRY B.	)	13 December 1943. Dismissal,
HOLDSTOCK (0-449681),	)	total forfeitures and con-
Transportation Corps.	)	finement for two (2) 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: Violation of the 96th Article of War.

Specification: In that First Lieutenant Henry B. Holdstock, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, did, at New York City, New York, on or about 3 November 1943, wrongfully and unlawfully disclose to Mrs. Grace N. Shultz of 29 West 58th Street, New York City, a person not authorized to receive the same, classified information relating to the security of the military establishment of the United States, to wit: the name of a ship to be used in a troop movement, as well as the port of embarkation, the dates of embarkation and the probable date of departure of said ship, and the probable length of the voyage of said ship from departure to return to the United States, contrary to the provisions of Army Regulation 380-5.

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

Specification 1: In that First Lieutenant Henry B. Holdstock, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, did, at San Francisco, California, on or about 5 July 1943,

while acting as sales commissary officer on the Army Transport "Brazil", with intent to deceive the Commanding General, Second Service Command, Governors Island, New York, officially report to the said Commanding General, through Major Walter G. Meyer, Finance Department, Chief of Property Audit and Sales Audit Section, Fiscal Branch, Headquarters, Second Service Command, Governors Island, New York, as follows: that the net value of commissary stores received by the said First Lieutenant Henry B. Holdstock through the Quartermaster, Jersey City, New Jersey, on or about 15 May 1943, was $33,947.94; that the sales of commissary stores made through the sales commissary of the said Army Transport "Brazil" during the voyage covered by such report in the period 15 May to 28 June 1943, were made at prices authorized by the Superintendent, Water Division (then Superintendent, Army Transport Service), New York Port of Embarkation; that the amount realized on sales of commissary stores sold through said sales commissary between 15 May and 28 June 1943 was $33,894.79; that losses were incurred during said voyage for which he was entitled to a credit in the sum of $53.25; and that his report was in all respects complete and accurate, and represented a true account of the actual selling prices of all commissary stores and of the proceeds of sales for which he, the said First Lieutenant Henry B. Holdstock, was accountable, which said report was known by the said First Lieutenant Henry B. Holdstock to be untrue in that the net value of the commissary stores received by him from the Quartermaster, Jersey City, New Jersey, on or about 15 May 1943, was $34,626.18; in that sales of commissary stores made during the period from 15 May to 28 June 1943 were made at prices in excess of those authorized by the Superintendent, Water Division (then Superintendent, Army Transport Service), New York Port of Embarkation; in that the amount realized on sales of commissary stores sold through said sales commissary during the period aforesaid was $35,799.64; in that no loss was incurred during said voyage for which he was entitled to a credit in the sum of $53.25, or in any other amount; in that such report failed to disclose the expenditure of $2,304.49, belonging to the sales commissary funds, for the purchase of clothing and accessories from the Quartermaster in Panama Canal Zone; and in that such report failed to disclose a profit derived from the resale of the aforesaid clothing and accessories through the sales commissary in the sum of $335.61.

Specification 2: In that First Lieutenant Henry B. Holdstock, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, did, at New York City, New York, on or about 4 November 1943, while acting as sales commissary officer of the Army Transport "Brazil", with intent to deceive the Commanding General, Second Service Command, Governors Island, New York, officially report to the said Commanding General, through Major Walter G. Meyer, Finance Department, Chief of Property Audit and Sales Audit Section, Fiscal Branch, Headquarters, Second Service Command, Governors Island, New York, as follows: that the sales of commissary stores made through the sales commissary of the said Army Transport "Brazil", during the voyage covered by such report in the period 31 July to 26 October 1943, were made at prices authorized by the Superintendent, Water Division (then Superintendent, Army Transport Service), New York Port of Embarkation; that the amount realized on sales of commissary stores sold through said sales commissary between 31 July and 26 October 1943 was $41,143.18; that losses were incurred during said voyage for which he was entitled to credit in the sum of $395.51; and that his report was in all respects complete and accurate, and represented a true account of the actual selling prices of all commissary stores and of the proceeds thereof for which he, the said First Lieutenant Henry B. Holdstock, was accountable, which said report was known by the said First Lieutenant Henry B. Holdstock, to be untrue in that the sales of commissary stores made during the period from 31 July to 26 October 1943 were made at prices in excess of those authorized by the Superintendent, Water Division (then Superintendent, Army Transport Service), New York Port of Embarkation; in that the amount realized on sales of commissary stores sold through said sales commissary between the period aforesaid was $43,535.48; and in that no loss was incurred during said voyage for which he was entitled to credit in the amount of $395.51, or any other amount.

Specification 3: In that First Lieutenant Henry B. Holdstock, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, did, while acting in the capacity of sales commissary officer aboard the Army Transport "Brazil" from about 15 May to 28 June, 1943, wrongfully and unlawfully sell and cause to be sold

through the sales commissary of the said transport "Brazil", to authorized purchasers, goods, wares and merchandise at prices in excess of prices authorized by paragraph 21, AR 35-6660 and paragraph 3, AR 30-2290 and in excess of prices established by the price list issued by the Superintendent, Water Division (then Superintendent, Army Transport Service), New York Port of Embarkation, under date of 16 March 1943, which said price list fixed resale prices of items carried for sale in sales commissaries aboard transports operating under the jurisdiction of the New York Port of Embarkation.

Specification 4: In that First Lieutenant Henry B. Holdstock, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, did, while acting in the capacity of sales commissary officer aboard the Army Transport "Brazil", from about 15 May to about 28 June 1943, wrongfully and unlawfully convert to his own use and benefit the sum of about $2,491.58, lawful money of the United States, derived from the sales of goods, wares and merchandise through the sales commissary of the said transport "Brazil" at prices in excess of prices authorized by paragraph 21, AR 35-6660 and paragraph 3, AR 30-2290 and in excess of prices established by the price list issued by the Superintendent, Water Division (then Superintendent, Army Transport Service), New York Port of Embarkation under date of 16 March 1943, which said price list fixed resale prices of items carried for sale in sales commissaries aboard transports operating under the jurisdiction of the New York Port of Embarkation.

Specification 5: In that First Lieutenant Henry B. Holdstock, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, did, while acting in the capacity of sales commissary officer aboard the Army Transport "Brazil", from about 15 May to about 28 June 1943, wrongfully and unlawfully convert to his own use and benefit the sum of $335.61, lawful money of the United States, derived from the sale of clothing and accessories through the sales commissary of the said transport "Brazil" to authorized purchasers at prices in excess of the purchase prices of said clothing and accessories, the said clothing and accessories having been purchased by the said First Lieutenant Henry B. Holdstock from a Quartermaster, Panama Canal Zone, with funds of the said sales commissary.

Specification 6: (Nolle prosequi).

Specification 7: (Nolle prosequi).

Specification 8: In that First Lieutenant Henry B. Holdstock, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, did, while acting in the capacity of sales commissary officer aboard the Army Transport "Brazil" from about 31 July to about 26 October 1943, wrongfully and unlawfully sell and cause to be sold through the sales commissary of the said transport "Brazil", to authorized purchasers, goods, wares and merchandise at prices in excess of prices authorized by paragraph 21, AR 35-6660 and paragraph 3, AR 30-2290 and in excess of prices established by the price list issued by the Superintendent, Water Division (then Superintendent, Army Transport Service), New York Port of Embarkation, under date of 16 March 1943, which said price list fixed resale prices of items carried for sale in sales commissaries aboard transports operating under the jurisdiction of the New York Port of Embarkation.

Specification 9: In that First Lieutenant Henry B. Holdstock, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, Brooklyn, New York, did, while acting in the capacity of sales commissary officer aboard the Army Transport "Brazil", from about 31 July to 26 October 1943, wrongfully and unlawfully convert to his own use and benefit the sum of about $2,392.30, lawful money of the United States, derived from the sale of goods, wares and merchandise through the sales commissary of the said transport "Brazil" at prices in excess of prices authorized by paragraph 21, AR 35-660 and paragraph 3, AR 30-2290 and in excess of prices established by the price list issued by the Superintendent, Water Division (then Superintendent, Army Transport Service), New York Port of Embarkation, under date of 16 March 1943, which said price list fixed resale prices of items carried for sale in sales commissaries aboard transports operating under the jurisdiction of the New York Port of Embarkation.

Specification 10: (Finding of not guilty).

He pleaded not guilty to all of the Charges and Specifications. He was found not guilty of Specification 10 of the Additional Charge, but guilty of the remaining Specifications (adding the word "about" in front of the figure "$335.61" in Specification 5) upon which he was arraigned and the Charges. There was no evidence of any previous conviction. He

was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved only so much of the finding of guilty of Specification 4 of the Additional Charge as involves a finding of guilty of converting a sum of money in an amount unknown, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution may be summarized as follows:

a. The Charge and Specification.

On 25 January 1943, the accused was assigned pursuant to orders issued at Headquarters New York Port of Embarkation, to the United States Army Transport "Brazil" as Commissary Officer (R. 15, 16; Pros. Ex. 1). On 3 November 1943, the accused visited a Mrs. Grace N. Shultz at her home at 29 West 58th Street, New York City (R. 20). Accused and Mrs. Shultz had not met "for a long time". Accused explained to her that he had recently returned from a trip and that "he just got off the boat" (R. 20, 21). When Mrs. Shultz asked if accused was still on the same boat, accused replied, "Yes, the same boat" (R. 24-25, 61). Mrs. Shultz knew then that accused referred to the United States Army Transport Brazil, for she was aware that he had previously been on duty on that ship (R. 21, 24, 25, 61). Accused also told Mrs. Shultz, "I shouldn't tell you all this" (R. 25), but nevertheless then and there informed her that his ship was at Pier 32, North River, New York (R. 22, 23), and "probably would leave tomorrow or the day after" on "a short trip" (R. 22); that troops were being loaded, that loading of troops would continue on the next day and that a total of about 6700 troops would be embarked aboard her (R. 23). He specified that the prospective trip would be a short one, explaining that "he would be back around Christmas" (R. 23). Mrs. Shultz is not in the military service of the United States (R.33). The "Brazil" "is a War Shipping Administration Boat entirely allocated to the Army Transport Service for the purpose of carrying troops." She arrived in New York on 3 November 1943 and docked at Pier 32, North River (R. 27). The "Brazil" remained in the Port of New York but a short time and departed on 5 November 1943, carrying 4,965 troops who had been embarked on 4 and 5 November 1943 (R. 28). The "Brazil" "arrived back in the Port of New York on November 29, 1943" (R. 29). All facts relating to the movement of troops aboard the "Brazil" were classified as "Secret military information" (R. 31).

b. Additional Charge and Specifications thereunder.

Between 15 May 1943 and 3 November 1943, the USAT "Brazil" made two voyages during which accused acted as Commissary Officer. The first voyage (hereinafter referred to as "First Voyage") started at New York 15 May 1943 and terminated at San Francisco 28 June 1943. The second

voyage (hereinafter referred to as "Second Voyage") started 31 July 1943 at New York and terminated at the same port 3 November 1943. Prior to First Voyage there was delivered to the accused a mimeographed document issued by Colonel Hans Ottzenn, Superintendent, Army Transport Service, to all commissary officers, including accused, aboard transports under the jurisdiction of the New York Port of Embarkation, directing that the prices set forth in a price list of stores attached thereto would be effective on the first voyage after receipt of the list and would be used until further notice in all commissaries aboard transports (R. 18, Pros. Ex. 2). This price list will hereinafter be referred to as the "authorized" price list. On or about 15 May 1943, there was delivered aboard the "Brazil", to the accused as Commissary Officer thereon, certain stores or merchandise to be sold during First Voyage together with invoices thereof or "tally sheets" (R. 42). Among the stores thus delivered were 160 cases of candy described as "Peter Paul Mounds". The accompanying tally sheet erroneously described each case as containing 288 units when in fact they contained 360 units. The accused knew of this error (R. 44). It amounted in value to a difference of $678.24 (R. 94). During the first five or six days of First Voyage the commissary stores were sold at the "authorized" prices. While the Brazil was docked at Panama accused purchased from the local Army Quartermaster, for re-sale, articles of military clothing at a cost of $2304.49 (R. 51; Pros. Ex. 6), which were placed on sale in the ship's commissary and sold at prices fixed by the accused (R. 52). The profit from the sale thereof at accused's prices was estimated to be $335.61 (R. 92). The money used for the purchase of this clothing was commissary money and the proceeds of the resulting sale of this clothing were mingled with the commissary money (R. 72, 116). After the ship left Panama the accused raised the prices on the commissary stores on an undetermined number of items (R. 46). Gillette blades and toothbrushes, for example, were raised from eight cents to ten cents (R. 47). The commissary sergeant complained to the accused regarding the increase in prices (R. 67, 76). Accused stated that the increased prices were necessary in order "to protect himself", to which the sergeant replied that accused had money left over from a previous trip so that there could be no shortage and that the increased prices were unnecessary. Accused reminded the sergeant that it was none of his business and that he alone (the accused) was responsible (R. 77).

When the transport reached New Caledonia the accused turned over to the local Quartermaster commissary stores inventoried at $15,328.30. Included in this delivery were cases of "Peter Paul Mounds". The receipt taken by the accused from the local Quartermaster shows that the cases delivered contained 360 units (R. 56, Pros. Ex. 3, Voucher 20).

A few days prior to reaching San Francisco the commissary sergeant checked the commissary accounts, the tally sheets, the remaining stores on hand, and determined the amount of cash which should be on hand as a

result of sales figured at the authorized price list (R. 56-59). The monies derived from the sales were then counted and found to be "a little over $500" in excess of the amount necessary to make the account balance (R. 63-64). The proceeds of the commissary sales were again counted after the ship had docked at San Francisco but at that time the surplus previously discovered had vanished (R. 64-65).

The proceeds of sales at the commissary stores were delivered daily at the end of each day to the accused. The money was kept by the accused in a safe in his room and always remained in his custody, control and possession (R. 71-72).

The commissary sergeant prepared for the accused the account required by Army Regulations to be submitted at the end of every voyage (Pros. Ex. 3). In preparing the account at the end of First Voyage, no mention was made therein of the purchase and sale of the military clothing described above or of the profit derived therefrom (R. 65, 79). Furthermore, the accountant (the accused) charged himself with having received only 288 units in each case of "Peter Paul Mounds" (Pros. Ex. 3) and the prices quoted in the "authorized" price list was used as the basis of computing the total amount of the sales. During First Voyage after the boat left Panama the prices at which the stores were sold were established by the accused on a form, similar to Prosecution's Exhibit 5, but the prices were not in all cases identical with those in that exhibit. All of the price lists thus established and used during that voyage were destroyed and therefore no copy was available (R. 45, 46, 56).

Stores were again delivered to the accused aboard the "Brazil" at the commencement of the Second Voyage. There was immediately prepared under the direction of the accused a mimeographed "Commissary Requisition Form" which enumerated various items of merchandise on sale at the commissary aboard the "Brazil" as well as the price thereof. These prices were established by the accused and were those actually charged during the entire Second Voyage (R. 40-42, 78; Pros. Ex. 5). The form purported to be issued "By Order of Colonel GARZA" the transport commander, and was signed "Henry B. Holdstock", Sales Commissary Officer (R. 42; Pros. Ex. 5). Colonel Garza was not responsible in any manner for the operation of the commissary and in fact did not authorize the accused to charge prices in excess of the "authorized price list" (R. 118, 124, 125). A comparison of the "authorized" price list (Pros. Ex. 2) with the accused's price list (Pros. Ex. 5) shows increases of prices above the former of about 20 items.

At the end of Second Voyage the accused had prepared and submitted on Q.M.C. Form No. 390 to the Commanding General of the Second Service Command, through military channels, an account identical in

form to his account rendered in a similar manner at the end of First Voyage (Pros. Exs. 3, 4). Attached to the latter account and forming a basis of the accused's accountability for sale of stores is a price list which shows the prices to be the same as those on the authorized price list except for slight variations which made no difference in the final accounting (R. 101, 112).

In his account for First Voyage the accused claimed that he lost, on the sale of commissary stores, the sum of $53.25. In his account for Second Voyage he claimed that he lost in the sale of such stores, the sum of $395.59 (Pros. Exs. 3, 4).

A certified public accountant testified that if the accused used the price list issued by him (Pros. Ex. 5) in the sale of the stores sold during both voyages there would be no loss during either voyage but there should be a profit during First Voyage of $1770.09 and during Second Voyage of $1987.80 (R. 85, 88). It was stipulated that the witness's computation was mathematically correct (R. 88). The accountant testified further that if the accused had included in his account of First Voyage the actual profits made by him he would have had on hand $36,401.07 instead of $33,894.79 as appears in the account (R. 110; Pros. Ex. 3) and similarly with reference to Second Voyage he would have had $43,535.48 instead of $41,143.18 (R. 113; Pros. Ex. 4). The accountant admitted that he was unable to accurately compute the profit made on First Voyage because he did not have the complete price list used by the accused (R. 115).

It was conceded by defense counsel that Army Regulations require a commissary officer to file a complete, true, and accurate account of actual selling prices of all commissary stores and of the proceeds of sales thereof (R. 117).

4. The accused was properly advised of his rights by the court and elected to remain silent.

5. With reference to the Charge and the Specification, it was clearly shown that the accused did on the date and at the time specified, disclose to Mrs. Grace N. Shultz, a person not authorized to receive the same, the name of a ship to be used in the movement of U.S. troops in war time, as well as the port of embarkation and the probably date of departure of the ship and its probable length of voyage. Such military information is strictly confidential and should not have been disclosed to unauthorized persons by any military personnel. It was shown by competent evidence that the information was confidential and made such in accordance with AR 380-5. It accordingly follows that the accused's action or conduct was a flagrant violation of Army Regulations and in turn a violation of Article of War 96.

With reference to the Additional Charge and its various Specifications, it was established by the competent evidence of record recited above that the accused was the commissary officer during two voyages of the Army Transport "Brazil" commencing 15 May 1943 and 31 July 1943. At the commencement of each voyage certain stores were delivered to him to be sold by him during the voyage; at the end of each voyage he had on hand a small inventory of these stores; Army Regulations required him to give a full and complete accounting of his commissary sales on the ship. He was provided by the Commanding Officer, Army Transport Service, at the commencement of his First Voyage, with an authorized price list and directed to use the prices set forth thereon as the standards for the sale on shipboard of the stores. Instead of using that price list he had prepared one of his own naming prices for these same goods in excess of the authorized prices. In purported compliance with the requirements of Army Regulations he filed an account at the end of each voyage (copies of which are attached to the record and appear as Exhibits 3 and 4 thereof) in which he used, as a basis for his account, the authorized prices rather than the actual prices established and used by himself.

He is charged in general with having made a false account in that he failed to include all items of debit and failed to include or disclose certain profits consisting of (1) the sale of military clothing purchased with commissary funds and (2) the profits that would and did necessarily result from having sold such stores at an increased but unauthorized price.

The fact that he failed to properly charge himself with the full quantity of stores received was clearly shown by the erroneous tally sheet or invoice supplied him at the commencement of First Voyage regarding the contents of the cases of Peter Paul Mounds and the amount actually contained in the cases. That this error was known to the accused was shown by the testimony of his commissary sergeant (R. 77) and also by the receipt that the accused procured from the Quartermaster at New Caledonia wherein the correct number of units per case of Peter Paul Mounds clearly appears (R. 56). The evidence concerning the purchase and sale of military clothing is also convincing. The purchase of the clothing is evidenced by the sales slip (appearing as Prosecution's Exhibit 6) which contains in detail the quantity and value of clothing purchased and is signed by the accused. It was admitted by defense counsel that these articles were purchased with commissary funds, sold through the commissary store, and that the proceeds were turned into the commissary account. The only evidence of the price at which they were sold by accused on the Brazil appears in the testimony of the commissary sergeant. None of this clothing is accounted for in the final inventory

of the stores after the completion of the voyages, therefore, it may be assumed that they were all sold. The transaction does not appear in the accused's account of First Voyage. The court was justified in concluding, under these circumstances, that accused purposely omitted this transaction from his account so as not to disclose the profit made therefrom. It was clearly shown by the testimony of the accountant that if these articles were sold at the prices given by the commissary sergeant there would have been a profit of $335.61.

Proof that the accused sold the commissary stores at an increased price, over and above the authorized price, was clearly established by the production of the mimeographed price list prepared under the accused's direction and containing his own name (Prosecution's Exhibit 5). This particular price list was used during the entire Second Voyage. No written price list was available for First Voyage due to the fact that they had been destroyed. The commissary sergeant's testimony, however, supplies proof of the fact that the stores were sold at an increased price, commencing five or six days after the ship had started its voyage and continued until it completed the voyage in San Francisco. It is impossible to precisely estimate the exact profit, not only because the sergeant could not supply accurately the price of each and every article, but principally because an undisclosed amount of stores had been sold during the first five or six days of the voyage at the authorized prices and the amount of stores on hand when the increased prices went into effect was not shown. On this possible margin of doubt, the reviewing authority properly approved only so much of the finding of guilty of Specification 4 of Additional Charge, which pertains to this particular offense as involves a finding of guilty of converting a sum of money in an amount unknown. That there was a profit was shown not only by the increase in prices, no matter how slight, but also by the actual count of the money on hand after the store was closed and the ship was reaching its final destination. A finding that the accused embezzled an amount unknown is legal (CM 235010 (1943); Bull. JAG, Oct. 1943, p. 383).

Having established by competent evidence that the accused made a profit from the sale of stores during the two voyages and that he failed to disclose the profit in his official reports, but claimed a loss instead, it is a fair, logical and legally permissible inference, from these circumstances, that he converted to his own personal use the actual profit, when, as it was also shown, he was the only one who received the proceeds from the sale of such stores from day to day and kept them in his exclusive custody, possession and control.

The Board of Review is, therefore, of the opinion that the record is legally sufficient to support the findings of the court as amended by the reviewing authority and as otherwise set forth in the Specifications.

With reference to Specification 1 of the Additional Charge it was clearly established from the evidence related above that, as charged in this Specification, the accused did make a false official statement when he rendered his false account of First Voyage to his commanding officer in setting forth in the account that (1) the stores received by him amounted to $33,947.94, when in truth they totalled $34,636.18 because of the error in the tally sheet concerning the Peter Paul Mounds; (2) that the sales were made in accordance with the authorized sales list, when they were not so made; (3) that the amount realized from sales was $33,894.79, when in fact because of the increased prices used by the accused the amount actually realized was $35,799.64; (4) that there was a loss of $53.25 incurred during the voyage, when in fact there was no loss but a profit, and (5) that the account was in all respects accurate and true, when in fact he knew that it was false. The evidence does not support the exact averment that the amount realized from sales was $35,799.64, but will support the conclusion that it exceeded $33,894.79 to some unascertainable extent and therefore the real gist of the charge, that the figure in the account submitted by accused was false, is supported by the evidence.

With reference to Specification 2, Additional Charge, the allegations regarding the false particulars contained in the accused's account covering Second Voyage were amply supported by the evidence. There was no loss of $395.51 incurred during the voyage. The amount realized from sales was not $41,143.18, but, because of the use of the accused's price list the amount was approximately $43,535.48.

With reference to Specifications 3 and 8, Additional Charge, it was proven beyond a reasonable doubt, that the accused did not use the authorized price list during the voyages but devised and used one of his own on an increased scale of prices.

Specifications 4, 5 and 9, charge the accused with having wrongfully and unlawfully converted to his own use the respective profits made by him during these voyages. It was a fair and reasonable inference for the court to conclude that the accused, having made the profits shown, having collected and handled all of the money involved, having been officially in full charge of the stores and their sale, and having willfully and deliberately rendered false accounts in which he claimed losses instead of gains, wrongfully and unlawfully converted the difference to his own use and benefit. No reason appears why this finding should be disturbed.

The accused is not charged with larceny or embezzlement. Such a charge would require an allegation of ownership of the funds involved and some particularity as to the amount. The instant specifications charge a violation of the 96th Article of War as conduct prejudicial to good order and military discipline. A charge of this nature does not

require allegation of ownership nor particularity in the amount involved. In making his false account it was immaterial to what extent the figures were inaccurate. It was only necessary to prove that they were false. It was apodictic that the accused's conduct was prejudicial to good order and military discipline in that he not only ignored instructions given him to sell the stores at a certain price but also after establishing his own prices to the prejudice of the military personnel purchasing the stores, falsified his accounts and retained, for his own benefit, the profits derived from his improper conduct.

6. The accused was ably represented by civilian counsel who strenuously objected to the testimony of the certified public accountant on the grounds that his testimony constituted hearsay evidence. Analyzing the testimony of this witness it appears that he was used merely for the purpose of computing mathematically figures already supplied by a previous witness whose testimony was based upon actual knowledge of the facts and the figures contained in the voluminous accounts rendered by the accused. Such evidence is competent and admissible (MCM, 1928, par. 116a, page 119). A rule relating to the reception of such evidence is also stated in Section 831 of 20 Am. Juris. as follows:

> "The meaning of entries in books of account may be explained to the jury by those familiar with the subject. In the event complicated books of account are in evidence and elaborate computations are necessary to determine the results and amounts evidencedby the books, an expert may be called upon to make such computations and state them to the jury. However, the conclusions of the expert must not involve determination by him of controverted questions either of fact or law; and the assumptions of fact, if any, on which his computations are based must be clearly stated in his testimony, so that the jury can reject or modify his conclusions if they do not find as proved the facts upon which such results are based. Also, where books and papers are voluminous, a qualified witness may summarize and explain the facts shown by such books and papers when they are all in court, and the opposing counsel has full opportunity to cross-examine as to the correctness of the witness' testimony. * * *. The books themselves must be introduced as primary evidence and the testimony of the expert is secondary and explanatory only" (pp. 697-698).

7. The records of the Adjutant General show the accused to be 44 years of age. He was born in Canada and became a naturalized citizen by reason of the naturalization of his parents in 1917. He is married and prior to present active duty resided in Washington, D. C. with his wife. There are no children of the marriage. He served with honor as an enlisted man in the Infantry 28 March 1917 to 6 January 1919 and in the Marine Corps from April 1919 to August 1928. He was thereafter employed as Senior Clerk in auditing vouchers for the Quartermaster Department of the Marine Corps (1928 to 1934); as a freight rate examiner (1934-1937); and in research work in transportation and freight rates for the War Department (1940-1941). He graduated from McKinley Technical School in 1931, and from the George Washington University in Washington in 1939 with a degree of AB in Government, and attended for six months the University of Maryland. He was appointed first lieutenant, Corps of Military Police and assigned to New York Port of Embarkation 18 April 1942. The available records do not disclose when he was transferred from Military Police to Transportation Corps.

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

William A. Founds, Judge Advocate

Earle Stephen, Judge Advocate

Herbert L. Roderick, Judge Advocate

1st Ind.

War Department, J.A.G.O., 3 - 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 First Lieutenant Henry B. Holdstock (0-449681), 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 as by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution, and that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

3. The accused was properly advised of his rights by the court and elected to remain silent.

4. Consideration has been given to the attached memorandum from Colonel J. P. Dinsmore, of the Legislative and Liaison Division, quoting therein a letter from accused to Senator Robert R. Reynolds.

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

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 Executive action
4 - Memo. from Col. J.P. Dinsmore dated 13 Jan. 44

(Sentence confirmed. G.C.M.O. 134, 24 Mar 1944)

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

30 MAR 1944

(137)

SPJGH
CM 246686

UNITED STATES	)	65TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Shelby, Mississippi, 21 December 1943. Dismissal.
Second Lieutenant ELDRED BEASLEY (O-1181538), Field Artillery.	)	

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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that 2d Lieutenant Eldred (n) Beasley, 869 Field Artillery Battalion, did, at Lawton, Oklahoma on or about June 28, 1943 with intent to defraud, wrongfully and unlawfully make and utter to Mr. Jack Beasley, Lawton, Oklahoma a certain check, in words and figures as follows, to wit:

Killeen, Texas June 28, 1943 No._____
FIRST NATIONAL BANK

Pay to the
order of Jack Beasley $12.65
---- Twelve and 65/100 - - - - - - - - - - - Dollars
Hq 32d Bn /s/ Lt Eldred Beasley
01181538

he, the said 2d Lieutenant Eldred (N) Beasley, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank at Killeen, Texas for the payment of said check.

Specification 2: In that 2d Lieutenant Eldred (N) Beasley, 869th Field Artillery Battalion, being indebted to the City National

Bank, Lawton, Oklahoma in the sum of forty one dollars ($41.00), which amount became due and payable on or about September 1, 1943, did at Lawton Oklahoma dishonorably fail and neglect to pay said debt in full from on or about September 1, 1943 to about November 8, 1943 and until after the institution of an official investigation of the subject.

Specification 3: In that 2d Lieutenant Eldred (N) Beasley, 869th Field Artillery Battalion, being indebted to the Leaf Hotel, Hattiesburg, Mississippi in the sum of twenty three and 18/100 dollars ($23.18) for the balance of his hotel bill, and having failed without due cause to liquidate said indebtedness, and having on or about September 13, 1943 promised said Leaf Hotel, that he would on or about October 1, 1943 settle such indebtedness in full and having on or about October 18, 1943 again promised said Leaf Hotel that he would on or about October 19, 1943 settle such indebtedness in full, did, without due cause, at Hattiesburg, Mississippi, on or about October 1, 1943 and again on or about October 19, 1943 dishonorably fail to keep such promises until after the institution of an official investigation of the subject.

Specification 4: Similar to Specification 1 except that it alleges the check was dated 7 October 1943 in the sum of $13.04 and payable to and uttered to the Milner Hotel, Hattiesburg, Mississippi, on 7 October 1943.

Specification 5: Similar to Specification 4 except that it alleges the check was dated 9 October 1943 in the sum of $5.00, made with intent to deceive, and payable to, and uttered to J. B. Moore, 9 October 1943.

Specification 6: (Finding of guilty disapproved by reviewing authority).

Specification 7: Similar to Specification 5, except that it alleges the check was dated 16 October 1943 in the sum of $30.00, made at Camp Shelby, Mississippi, and payable to, and uttered to the City National Bank of Lawton, Oklahoma.

Specification 8: In that 2d Lieutenant Eldred (N) Beasley, 869th Field Artillery Battalion, being indebted to Milner Hotel, Hattiesburg, Mississippi in the sum of six and 12/100 dollars ($6.12) for three days' room rent at two and 04/100 dollars ($2.04) per day, which amount become due and payable on or about October 19, 1943, did, at Camp Shelby, Mississippi, dishonorably fail to pay said debt until after the institution of an official investigation of the subject.

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

Specification: In that 2nd Lt Eldred (N) Beasley, 869th Field Artillery Battalion did at Camp Shelby, Miss, on or about 19 October, 1943 with intent to deceive Lt Col Samuel A. Dickson, 869th Field Artillery Battalion, Camp Shelby, Miss, officially report to the said Lt Col Samuel A. Dickson that he, 2nd Lt Eldred (N) Beasley had mailed a check for Eleven Dollars ($11.00) to the City National Bank, Lawton, Oklahoma, on or about 18 October, 1943, in full payment for the balance due on his note, which report was known by the said Lt. Eldred (N) Beasley to be untrue.

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

Specification 1: Similar to Specification 4 of the Charge, except that it alleges the check was dated 10 October 1943, in the sum of $6.24, and payable to and uttered to the Hub Service Station.

Specification 2: In that 2d Lieutenant Eldred (N) Beasley, did, at Camp Shelby, Mississippi on or about November 1, 1943 and again on November 2, 1943 with intent to deceive Lt Col Samuel A. Dickson, 869th Field Artillery Battalion, officially report to the said Lt Col Samuel A. Dickson that he, 2d Lieutenant Eldred (N) Beasley, was on that date indebted to the Hub Service Station, Hattiesburg, Mississippi in the sum of about fifteen dollars ($15.00), which report was known by the said 2d Lieutenant Eldred (N) Beasley to be untrue in that on that date he was, in fact, indebted to the Hub Service Station in the sum of about ninety dollars ($90.00).

Specification 3: Similar to Specification 1, of Additional Charge II, except that it alleges the check was dated 21 October 1943, in the sum of $10.00 and payable to and uttered to E. F. Strange, Lighthouse Cafe.

Specification 4: In that 2d Lieutenant Eldred (N) Beasley, did, at Camp Shelby, Mississippi on or about 3 December, 1943 with intent to deceive Lt Col Samuel A. Dickson, 869th Field Artillery Battalion that he, 2d Lieutenant Eldred (N) Beasley, was in the 869th Field Artillery Battalion area all evening the night of December 2d-3d, 1943; that at about 2100 2 December, 1943 he sat down in an automobile near Service Battery, 869th Field Artillery Battalion and went to sleep; that he did not wake up until about 0030 or 0100, 3 December, 1943, at which time he went to his hut and went to bed, which report was known by the said 2d Lieutenant Eldred (N) Beasley to be untrue.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 6 of the Charge and so much of Specification 3 of the Charge as involves a finding of guilty of the words "and having on or about October 18, 1943, again promised said Leaf Hotel that he would on or about October 19, 1943, settle such indebtedness in full", and the words "and again on or about October 19, 1943"; approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Specification 1, the Charge: Jack Beasley, operator of a service station at Lawton, Oklahoma, testified by deposition (Ex. L) that he cashed a check (Ex. M) for accused in the sum of $12.65 dated 28 June 1943, drawn on the First National Bank of Killeen, Texas, and signed "Lt. Eldred Beasley", for which the accused received gasoline, oil and $10.00 in cash. He deposited the check in his bank and it was returned with a debit slip (Ex. N) attached stating the check had been returned unpaid marked "Ins. Funds". Mr. Beasley notified accused that the check had been returned for insufficient funds and accused replied that he was "broke" but would make the check good "when he could". Mr. Beasley later sent the check to the commanding officer of accused. Clarence R. Clements, cashier of the First National Bank, Killeen, Texas, testified by deposition (Ex. D) that between 28 June 1943, and 10 July 1943, the accused had a daily balance of $.08 in the bank. In response to cross-interrogatories Mr. Clements further testified that the accused had written checks on his bank in the past without having sufficient funds and that his mother furnished the money to make the checks good. The number of checks handled in this manner was "not less than five nor more than ten" (R. 16, 32).

b. Specifications 2 and 7, the Charge; Specification, Additional Charge: Robert B. McCoy, vice president of the City National Bank, Lawton, Oklahoma, testified by deposition (Ex. O) that on 20 August 1943, the accused borrowed $41.00 from the City National Bank and signed a promissory note (Ex. P) for that amount, payable on 1 September 1943. On 31 August 1943, the accused wrote the bank a letter (Ex. Q) stating "my pay won't be ready by the 1st" and requesting a "few days" grace. The bank made no immediate reply but on 21 September 1943 wrote the accused a letter (Ex. R) stating that more than "a few days" had elapsed and asking for an immediate report in order that they might know "what to expect". The accused replied (Ex. S) that he had not received a pay check since 1 August, but would send the money on "the 1st". Following receipt of a telegram (Ex. T) dated 5 October 1943, from the accused, stating that a check in payment of the note was in the mail, the bank on 11 October 1943 advised the accused by telegram (Ex. U) that the check had not been received. Around 16 October 1943 accused wrote the bank (Ex. V) that he was inclosing a check for the amount due on the note, $41.00. The letter contained a check (Ex. W) for $30.00, dated 16 October 1943, drawn by the accused on the First National Bank, Killeen, Texas. The check was forwarded through intermediate banks to the drawee bank for payment and was returned unpaid. On 27 October 1943, the

City National Bank notified accused by letter (Ex. X) that the check had been returned because of insufficient funds and the matter was being referred to the "Commanding General of Camp Shelby". Mr. McCoy further testified that on 28 October accused wired the bank the sum of $29.70, from which the interest due on the loan was deducted ($27.40 was applied on the principal as shown on the note) and an extension to 1 November for payment of the balance was granted. The obligation was discharged in full on 8 November 1943. Between 16 and 28 October 1943, accused had a daily balance of $1.08 in the First National Bank, of Killeen, Texas. It was shown by the Finance Department pay records that during August accused received $193 as partial pay for 23 days, $52.10 transfer pay from Fort Sill on 29 August, and $60.40 on 31 August, for a total of $305.50 (Ex. D, R. 16, 32-35).

Following receipt of a letter from the City National Bank, Lieutenant Colonel Samuel A. Dickson, battalion commander of accused, on 19 October 1943, questioned accused concerning his debts, after warning him "of his rights". With reference to the City National Bank indebtedness the accused told Colonel Dickson that he sent the bank a check for $30 the week before and had paid the balance "yesterday" by mailing them a check for $11. In discussing this debt again with Colonel Dickson, on 1 November 1943, the accused said that the $30.00 check had been returned because of insufficient funds, but that he had sent the bank two money orders, one for $29.70 and another for approximately $13, thereby discharging the obligation in full. Accused said nothing about the $11.00 check he previously claimed to have sent the bank (R. 35-36, 38-39).

c. Specification 3, the Charge: The accused and his wife registered at the Leaf Hotel, Hattiesburg, Mississippi, on 27 August 1943 and left on 13 September 1943. When he checked out on 13 September he offered Mr. William H. Sparrow, the manager, a check for his bill of $23.18, and requested that it be held until 1 October when he would reclaim it or it could be sent to his bank for payment. Mr. Sparrow accepted the check (Ex. A) and agreed to hold it. He did not see accused on 1 October and on 2 October went away on a vacation, leaving the check in the cash drawer after instructing his clerks to return the check to accused in the event the hotel bill was paid in his absence. He returned on 16 October and on 18 October received a letter (Ex. B) from accused who stated that there would be some delay in settlement because his account with the drawee bank had been closed, but that his father had made arrangements to take care of the check. When Mr. Sparrow received this letter he telephoned the accused who said he would stop by the hotel the following day. However, he did not do so. Captain James L. Latham, the battery commander of accused, questioned the accused on 20 October, concerning his indebtedness to the Leaf Hotel and another obligation. The accused was quite concerned about his obligations, and stated he would do "anything within his legitimate power" to get himself out of difficulty. He stated he would get the money

from home to pay the Leaf Hotel. On 22 October 1943, the account with the Leaf Hotel was paid in full (R. 10-13, 17-18).

d. Specifications 4 and 8, the Charge: On 7 October 1943, the accused gave the Milner Hotel, Hattiesburg, Mississippi, a check (Ex. C) for room rent in the sum of $13.04, drawn on the First National Bank, Killeen, Texas. The check was deposited for collection and about 25 October 1943 was returned unpaid. From 7 October to 28 October 1943, the accused had a daily balance of $1.08 in his account with the First National Bank (Ex. D). On 10 October 1943, the accused again registered at the Milner Hotel, and on 19 October 1943, left the hotel owing $6.12. Burkley H. Haselton, the manager of the hotel, did not know that the accused had departed until he received the maid's report sometime after 4:00 p.m. on 19 October. As far as he knew, the accused did not check out of the hotel. On 20 October the accused admitted to Captain Latham his indebtedness to the Milner Hotel and stated that he would secure money from home to settle it. The accused redeemed the check on 22 October and promised Mr. Haselton to pay the $6.12 the first of the following month. On 1 November 1943, the account was paid in full (R. 13-18).

e. Specification 5, the Charge: On 9 October 1943, J. B. Moore of Hattiesburg, Mississippi, cashed a $5.00 check (Ex. E) drawn by "Lt. Eldred Beasley" on the First National Bank of Killeen, Texas. Mr. Moore did not remember the transaction and "couldn't say" that accused wrote the check. Sometime prior to 23 October 1943, Mr. Moore received a telephone call from "Lieutenant Beasley", stating that the check might come back and requesting that Mr. Moore "hold it" until the first of the month. The check, which Mr. Moore had deposited in his bank, was returned unpaid. From 9 October to 28 October 1943, the accused had a daily balance of $1.08 in the First National Bank of Killeen. About the first week in December 1943, the accused paid Mr. Moore the amount represented by the check. Colonel Dickson testified that during an investigation of the financial matters of accused, he admitted writing this check (Ex. D, R. 19-27).

f. Specifications 1 and 2, Additional Charge II: On 10 October 1943, the accused gave the Hub Service Station a check (Ex. G) for $6.24 drawn on the First National Bank of Killeen, Texas. Mr. Franklin H. McRee, manager of the service station, testified the check was "probably" given for gas and oil. The check was presented for payment and was returned. From 10 October to 28 October 1943, the daily balance of accused in the First National Bank was $1.08 (Ex. D; R. 28-31).

Accused traded with the station during the month of October 1943, receiving gas, oil, soft drinks, parts, repairs and cash loans. Accused, around "the last of October", on "Sunday night before the 1st. Monday was the first" asked the amount of his indebtedness to the service station. Mr. McRee totaled up the charge slips (Ex. J; 1. to 14) and told accused his bill amounted to $90. Included in this amount was the returned check for

$6.24 and also a cash loan of $35 represented by a check (Ex. H) made by accused on 21 October, which he asked Mr. McRee to hold until "the first". Gas and oil purchases amounted to around $21. Colonel Dickson testified that on 1 November 1943 he talked to accused concerning his obligations and accused "tried to give me a full statement of his accounts". Accused stated that he owed the Hub Service Station about $15.00. The following day accused was called before Colonel Dickson and Brigadier General Leo T. McMahon, the division artillery commander, to see if a plan could be set up whereby accused could meet his financial obligations, and was asked to list his debts. Colonel Dickson testified that accused said he owed the service station about $15. General McMahon, testifying by deposition (Ex. K), stated that accused said he owed $15 for gas and oil to a filling station. General McMahon was "quite sure", after talking to the accused for two hours, that the accused was "not sure" of the complete amount of his total indebtedness (R. 28-31, 36).

g. Specification 3, Additional Charge II: Mrs. E. F. Strange, Lighthouse Cafe, Hattiesburg, Mississippi, testified that on 21 October 1943, she received a check (Ex. F), drawn on the First National Bank of Killeen, Texas, by "Lt. Eldred Beasley", payable to E. F. Strange and in the sum of $10. The check was sent "through the bank of Texas" and returned unpaid. From 21 October to 28 October 1943, the accused had a daily balance of $1.08 in the First National Bank of Killeen, Texas (Ex. D; R. 27-28).

h. Specification 4, Additional Charge II: Accused left camp at 7:00 p.m. on 2 December 1943 and accompanied by his wife, Private First Class Clifford F. Young and girl friend, went to the "Swing Club" in Hattiesburg where they remained for two or three hours. The group then went to the "Lighthouse Apartments" where accused resided. Accused was at the apartment when Young went back to camp, he did not know the time he left but he arrived at camp around "one". Sergeant Houston T. Adams, a resident of the "Lighthouse Apartments", saw accused at the apartment house between "twelve-thirty and one o'clock" on the morning of 3 December. Earlier in the evening, around seven p.m., Colonel Dickson had sent Corporal Jack J. De Atlee for accused but he could not find him. Later a search was made for accused through the 869th battalion area by Second Lieutenant Hollis E. Button and then by Colonel Dickson and "Major Willard" but accused could not be found. The following morning Colonel Dickson, after warning accused of his rights, asked him where he had been the preceding night. Accused stated he was in the 869th battalion area the entire evening; his wife had come out to see him at 6 p.m. and remained until 8 p.m.; he had a coca-cola in the post exchange shortly before 8 p.m. which made him sick and he had gone over to a car in the parking lot where he sat down and went to sleep; he awoke around midnight and went to his hutment to bed (R. 36-37, 39-46).

4. For the defense: Accused testified he was inducted 20 April 1942 at San Antonio, and sent to Camp Roberts where his wife joined him.

He remained there until September when he was transferred to Camp White. His pay was $21 a month until July when by reason of the pay raise he drew $28 a month, $22 going for an allotment. He was promoted to private first class in October and to sergeant in December so that on 1 January 1943 he was drawing $78 per month. His wife received her first allotment check in January 1943 amounting to $50 and in April she received accumulated allotments amounting to $250. Prior to receipt of this $250 check they had from time to time borrowed money from their folks amounting to $400 and out of the $250 allotment money they repaid about $100. From Camp White he was sent to Officer Candidate School at Fort Sill. He left Camp White owing around $115 to soldiers and others there. While stationed at Fort Sill a child was born to his wife on 14 February 1943 necessitating hospital and doctor bills as the child was not born in an Army hospital. He still owed the Lawton hospital $32. He graduated from Officer Candidate School 6 May 1943, received a second lieutenant's commission and thereafter drew $252 per month. During June 1943 they repaid their parents $80, in July $75, and in August $75. He was transferred from Fort Sill to Camp Shelby 23 August 1943. When he arrived at Camp Shelby he had a car on which he owed $514 and was paying $54 per month. This car he later sold for $330, the buyer assuming the mortgage, receiving $30 cash and a $300 check which was returned unpaid. A friend offered to take the $300 check as payment on another car and collect it, so accused, around the "middle of October", purchased another car for $600. He had paid nothing on this obligation. Accused testified his expenditures for the month of October were as follows: Apartment $32.50; care of baby $30; wife's trip home and back $40; paid Lawton bank $42; paid Leaf Hotel $23.18; paid Milner Hotel $20; mess bill $20; insurance $6.70; paid Warren Hotel in Lawton $32; Clayton Motor Company in Oregon $25; and in addition his "wife's meals in town". After paying his obligations he had on 5 October less than $50; on 5 November $50, and on 5 December he had nothing as he gave his wife $40 when she left for home on 4 December (R. 46-49, 54-56, 61-62).

Accused testified he gave a check to Jack Beasley in the sum of $12.65 (Spec. 1, the Chg.); a check to the Milner Hotel on 7 October 1943 in the sum of $13.04 (Spec. 4, the Chg.); a check to the Lawton Bank in the sum of $30 (Spec. 7, the Chg.); a check to the Hub Service Station about 10 October 1943 in the sum of $6.24 (Spec. 1, Add. Chg. II); and a check to E. F. Strange for $10 (Spec. 3, Add. Chg. II). When he wrote the Beasley check he had "to the best of his knowledge" sufficient funds in the First National Bank of Killeen, Texas, to pay it. He had no intention of defrauding Mr. Beasley. He did not know whether there were sufficient funds in the bank when he wrote the Milner, Strange and Lawton Bank checks. However, each time he wrote a check he called home and as a result of such conversations he assumed the money would be there to cover the checks. He had a "sort of understanding" with his

parents that they would cover his checks if he had insufficient funds, provided he let them know. When he learned that the Beasley check had been returned he told Mr. Beasley he was broke but would pay as soon as possible. When he found that the Milner and Strange checks were not paid he made arrangements to pay them. He paid the Milner check on 22 October. When he learned the $30 check to the Lawton Bank had been returned he made arrangements to pay it without any insistance from his battalion commander. He telegraphed the bank $29.70 and on 29 October mailed them a money order for $13.50 and ten cents cash (R. 49-52, 55, 59).

Accused stated that he had never denied his obligation to the Leaf Hotel of $23.18 (Spec. 3, the Chg.). When he gave the check for that amount he advised them it was no good and asked them to hold it. He had received a call from the Leaf Hotel about the 2nd or 3rd of October. He went in, found out Mr. Sparrow was away on vacation, and inquired of the clerk but he did not know anything about the obligation. The obligation was later paid in full. Accused was registered at the Milner Hotel from 10 October to 19 October (Spec. 8, the Chg.). He did not "run out" on the hotel but checked out around 6:30 in the afternoon telling the clerk on duty that he would settle the bill on the "first", which he did (R. 52, 54-55).

He had a conversation with Colonel Dickson on 19 October 1943 regarding his obligation to the Lawton Bank and made the statement that he had mailed a $11 check to cover the balance of that indebtedness (Spec., Add. Chg. I). He had written the check the night before, had given the letter to his wife the night before to mail and was under the impression she had mailed it. However, his wife had learned that his mother had not "covered" the $30 check to the Lawton Bank and consequently had not mailed the $11 check. This was the only time that accused had not called home prior to writing a check. He had no intention of deceiving Colonel Dickson (R. 52-53).

When accused talked to Colonel Dickson on 1 November 1943 concerning his indebtedness to the Hub Service Station (Spec. 2, Add. Chg. II) he told him he owed $15 for gas and oil. He did not know he owed more than this amount for gas and oil, and had never been told that he owed $92 or any other amount. The $35 check he gave the Hub Station was for cash and he had an agreement with them that if he did not redeem the check the "first of the month" they would take two extra tires he had on the car. He had not considered the $35 check, a $12 or $13 repair bill, or cash loans of $8 or $10 in estimating his obligation to the Hub Station, but only the gas and oil. He understood Colonel Dickson was trying to help him straighten out his financial affairs. Colonel Dickson called him in twelve or fifteen times, and each time insisted that accused pay each obligation as it came in. Concerning his statement to Colonel Dickson on 3 December that he had slept in a car in the battalion area the preceding night (Spec. 4, Add. Chg. II), accused testified it was a "misstatement"; he was confused, worried and it was the only thing accused could think of to keep Colonel Dickson "off

of my neck". Every time he was called in Colonel Dickson brought up everything he had brought up before. Accused had received so many reprimands he did not know whether he was "coming or going". He did not intend that Colonel Dickson should act officially on his misstatement (R. 53-54, 59-60).

On cross-examination accused stated that during the time he was paying back his parents he was also borrowing from them when he ran short. He had never paid off the Beasley check. He paid the Leaf Hotel $23.80 and the Milner Hotel $13.04 about 22 October. Before he wrote the $30 check to the Lawton Bank he had called home and his mother had said she would "cover" the check for him. He had previously called home about the Milner Hotel check and received the same assurance. When he called home about the Lawton Bank check he never asked about the Milner Hotel check. He found out the "$11 check had not been sent about two days after his conversation with Colonel Dickson on 19 October but he never said anything about it to Colonel Dickson. He wrote the "5 checks" shown him without knowing whether there was money in the bank to pay them. The bank never sent him a statement. In each case he relied on his "understanding" with his mother that she would put enough money in the bank to pay the check. Whether the check would be paid depended upon his mother depositing the money (R. 54-59).

During his conference with Colonel Dickson he was asked to give as many of his obligations as he could recall. He never told Colonel Dickson about the $35 check or the "seven or eight" dollar loans from the Hub Service Station although he "could have" remembered them. He only told him what he owed for gas and oil (R. 58-59).

Under examination by the court accused stated that at the time he was paying off his obligation to his parents, he was paying his living expenses and trying to pay off the bills he incurred before he was commissioned. It was necessary to pay his parents because his father worked part time and his mother all the time sending his sister through school and buying a home and "they needed every penny they got to meet their bills". When he listed his debts to Colonel Dickson he reported a $25 bill he owed in Oregon, a $32 hotel bill and a $9 overdraft in Fort Sill (R. 60-62).

Mrs. Delma Beasley, mother of accused, testified by deposition (Def. Ex. A) that her son had an account in the bank at Killeen and that "we" had an "understanding" with officials of the bank that if he wrote a check and his account had insufficient funds to pay it it would be charged to "our" account if there was any money in it. "We" also requested that if there was insufficient money in our account that "we" be notified so the check could be paid but this request was not always complied

with. Since 1 May 1943 accused had called or written several times asking that money be deposited to cover his checks. If the money was available he received permission to charge checks against their account. Mrs. Beasley could not recall any particular dates that accused had made these requests. She did recallthat around 15 October 1943, accused had requested that she cover a $30 check which she believed he said he had issued. She told him she did not have the money but would try and get it. She did not have an account in the bank at the present time. In reply to cross-interrogatories Mrs. Beasley stated she could not recall making a $13 deposit around 7 October but did make deposits of other amounts at about that time. She had made a $30 deposit in the account of accused around 1 November. She did not definitely recall a request by accused for a deposit of $10 on 21 October or what she did about it (R. 62).

5. a. Specification 1, the Charge: Accused, on 28 June 1943, made and uttered to Jack Beasley, Lawton, Oklahoma, his check on the First National Bank of Killeen, Texas in the sum of $12.65, for which he received gas, oil and $10.00 in cash. The check was deposited for collection and returned unpaid by reason of "insufficient funds". The day the check was written, 28 June 1943, and until 10 July 1943, accused had a cash balance of $.08 in his account. Accused never paid off the obligation.

Accused testified that when he wrote the check he had "to the best of his knowledge" sufficient funds in the bank to pay it and he had no intention of defrauding Mr. Beasley. He testified in connection with the making of this check and of the various other checks hereinafter referred to, that each time he called home and as a result of such calls he assumed the money would be there to cover the checks; and that he had an understanding with his parents that they would "cover" his checks if he had insufficient funds in his own account. The mother of accused testified that he had called home several times asking that money be deposited to cover his checks and if the money was available it was done. She further stated that "they" had an "understanding" with the bank to charge the checks of accused against their account if there was money in it and none in the account of accused. The cashier of the bank testified that the mother of accused had made good several checks written by accused when he had insufficient funds in his account.

The evidence shows that accused did not have sufficient funds in the bank to pay the check at the time he wrote it or for some time thereafter. He was chargeable, under the circumstances of the case, with knowledge of the state of his account (CM 202601, Sperti). His testimony that "to the best of his knowledge" he had sufficient funds in the bank to

pay the check at the time he wrote it, is not supported by the evidence. The writing and uttering for value of a check when there are insufficient funds in the bank for payment followed by the dishonoring of the check are usually considered indicative of an intent to defraud in the absence of considerations compelling a contrary conclusion. In this case the accused testified that in writing the checks set out in this and succeeding Specifications he relied on an "understanding" with his parents to "cover" them. Although his mother corroborated this testimony in some degree it is apparent that the "understanding" was that they would "cover" his checks if they were able to do so. The evidence shows them to be people of modest circumstances and their ability to help accused was uncertain. It is impossible to give credence to the testimony of accused that each time he wrote a check he called home and received assurances which warranted his belief that his parents would "cover" the check. The record shows that his parents were ever ready to help him when they were able and it is unreasonable to believe that they made definite promises to deposit money to take care of his checks and then did not do so. If accused actually called them on the various occasions, as he testified, it is more probable that he received nothing more definite than a promise to try and get the money such as his mother testified she promised concerning one particular transaction. In the opinion of the Board of Review accused had no grounds for any reasonable belief that his checks would be "covered". The writing of checks by accused under these conditions clearly indicates a want of good faith on his part and considered with the surrounding circumstances affords sufficient basis for the inference of intent to defraud. The Manual for Courts-Martial, in stating instances of violations of the 95th Article of War, includes giving a check on a bank where the drawer knows or reasonably should know there are no funds to meet it, and without intending that there should be (MCM, 1928, par. 151).

b. Specification 2, the Charge: Accused borrowed $41 from the City National Bank, Lawton, Oklahoma, on 20 August 1943 and signed a note for that amount payable 1 September 1943. On 31 August he wrote the bank for a few days grace stating his pay would not be ready by the first of September. Failing to hear anything further from accused, the bank, on 21 September requested further information from accused who replied that he had not received a pay check since 1 August but would send the money on "the 1st". Finance records showed that accused actually received $193 partial pay about 23 August, $52.10 on 29 August and $60.40 on 31 August. Accused wired the bank on 5 October that a check in payment of the note was in the mail. The check was not received and the bank so advised accused on 11 October. Around 16 October accused wrote the bank he was inclosing a check for the amount of the note, $41.00. The letter actually contained a check for $30.00, drawn on the First National Bank of Killeen, which was forwarded for collection and returned unpaid. The account of accused in the Killeen bank contained $1.08 between 16 and 28 October. The bank (Lawton) notified accused on 27 October that his check had been returned and that the matter

was being taken up with the commanding officer where he was stationed. The following day accused wired the bank (Lawton) $29.70 whereupon the time of payment of the balance was extended to 1 November. The balance was paid 8 November.

The foregoing evidence shows that around the due date of his note accused wrote the bank a letter which, while somewhat ambiguous in language conveyed the false impression that accused was not receiving his pay check on the regular date, by reason of which he asked for a "few days" extension of the time of payment. He did not pay in a "few days" and when the bank made further inquiry he falsely stated he had not received his pay and secured an extension of the time of payment of the note. After the new date which he had set for payment had passed he wired the bank, falsely, that a check for the debt had been mailed. Ten days later he wrote the bank he was inclosing a check for the amount of the note and actually inclosed a check for a lesser amount. The check was returned unpaid. When the bank wrote accused that the matter was being taken up with his commanding officer he paid part of the note and secured an extension of the time of payment of the balance which he did not discharge until after it was due.

The rule is well established that mere failure to pay a debt is not an offense either under the 95th or 96th Article of War. But where such nonpayment amounts to dishonorable conduct because accompanied by such circumstances as fraud, deceit or specific promises of payment, it may properly be deemed to constitute an offense (CM 221833, Turner; 207212, Thompson; CM 220642, Wilson). The evidence here shows a course of conduct on the part of accused in his dealings with the bank marked by false promises, misrepresentations and deceitful behavior and, in the opinion of the Board of Review, is sufficient to prove a violation of the 95th Article of War.

c. Specification 7, the Charge: As set out in the preceding paragraph, on 16 October 1943 accused sent the City National Bank of Lawton, Oklahoma, his check on the First National Bank of Killeen, Texas, in the sum of $30 as payment on a past due note given by accused for a loan from the bank on 20 August. Between 16 October and 28 October the account of accused in the drawee bank contained $1.08. The check was returned unpaid. Accused testified that at the time he wrote the check he did not know whether he had sufficient funds in the Killeen bank to pay it but he relied on an "understanding" with his parents, previously discussed, and that he called home prior to writing the check. His mother testified that about 15 October 1943 accused requested that she cover a $30 check which she believed he said he had issued and that she told him she did not have the money but would try and get it. The evidence shows that accused did not have sufficient funds in his account when he wrote the check and that he was aware of this fact as appears from his request to his mother that she "cover" the check, made, according to her recollection, after the check was written. For the reasons stated under paragraph 5a, supra, the Board is of the opinion that accused wrote the check in bad faith and with the "intent to deceive" the bank, as was alleged in the Specification because of the past consideration for the check. The Specification is proven.

d. Specification, Additional Charge: Lieutenant Colonel Samuel A. Dickson, battalion commander of accused, questioned accused on 19 October 1943, following receipt of a letter from the City National Bank of Lawton, Oklahoma, concerning the indebtedness of accused to the bank referred to in the two preceding paragraphs. Accused told Colonel Dickson that he had sent the bank a check for $30 the week before and had paid the balance the preceding day (18 October) by mailing the bank a check for $11. Accused admitted making this statement and that the check was never sent. He contended, however, that he had no intention of deceiving Colonel Dickson and that he actually had written the check and given it to his wife to mail but that she did not mail it because she had learned that his folks had not "covered" the $30 check he had written previously. Accused stated he did not learn that his wife had not mailed the check until two days after his conversation with Colonel Dickson. He admitted that he never said anything further about the check to Colonel Dickson.

The statement of accused that he had sent the bank a check for $11 was plainly false inasmuch as the check was never sent. Accused insists, however, that he had no intention of deceiving Colonel Dickson, that he had written the check and given it to his wife to mail but that she did not do so because she learned that his folks had not "covered" a previous $30 check. The Board considers the explanation as unworthy of serious consideration. The $30 check was written on 16 October and after it was written accused called his mother who told him she could not "cover" it but would try and get the money. The $11 check was supposedly written on 18 October. It is improbable that after sending the bank a check whose payment was so uncertain, accused, reckless as he was in such matters, would immediately follow it with another such check. Of even greater probative value is the fact that after making the false statement accused said nothing further to Colonel Dickson although supposedly learning two days later that the check had not been sent. His failure to so inform Colonel Dickson indicates either an intention that his statement should deceive or, as is more probable, that there was nothing to inform and the story a fabrication. The evidence sustains the finding of guilty of this Specification.

e. Specification 3, the Charge: When accused and his wife checked out of the Leaf Hotel, Hattiesburg, Mississippi, on 13 September 1943 he offered the manager a check for their room rent in the sum of $23.18 and requested that it be held until 1 October when he would either reclaim it or it could be sent to his bank for payment. The manager agreed but accused did not come in on 1 October. On 2 October the manager went away on a vacation, instructing his clerks to return the check to accused if it was redeemed during his absence. He returned 16 October and on 18 October received a letter from accused stating there would be some delay in settlement as his bank account had been closed but that his father would take care of it. Upon receipt of this letter the manager called

accused by telephone and he promised to stop in the following day but he did not do so. The battery commander of accused questioned him concerning this obligation on 20 October. Accused paid the bill on 22 October.

Accused testified he went in to see the manager about the check on 2 or 3 October, found out he was away and that the clerk knew nothing about it.

The evidence here shows a failure on the part of accused to pay his bill on the agreed date, 1 October, followed by his failure on 19 October to keep his promise to call on his creditor. However, he paid the obligation only three days later. The evidence under this Specification discloses what substantially amounts to a mere failure to pay and in the opinion of the Board is not sufficient to establish dishonorable conduct under Article of War 95 or an offense under Article of War 96.

f. Specification 4, the Charge: Accused, on 7 October 1943, gave the Milner Hotel, Hattiesburg, Mississippi, a check in the sum of $13.04 drawn on the First National Bank, Killeen, Texas, as payment for room rent. The check was deposited for collection and returned unpaid. From 7 October to 28 October accused had a daily balance of $1.08 in his account. Accused promised his battery commander on 20 October that he would secure money from home and pay the check. The check was redeemed two days later.

The testimony of accused in regard to this check was similar to that he gave concerning the other checks which he wrote. The Board having rejected his defense that he acted in good faith and relied on his parents to "cover" his checks, the finding of guilty of the Specification is sustained.

g. Specification 8, the Charge: Accused registered at the Milner Hotel, 10 October 1943, and left on 19 October owing $6.12. The manager of the hotel testified he did not know accused was gone until a maid reported it. As far as he knew accused did not check out. This obligation was paid on 1 November.

Accused testified he did not "run out" on the hotel but checked out telling the clerk on duty that he would settle the bill on the "first" which he did.

The evidence under this Specification tends to show but does not establish beyond a reasonable doubt that accused left the hotel without checking out. The Board is of the opinion that his failure to pay the bill on 19 October is not conclusively shown to have been accompanied by dishonorable conduct and that no offense is proven.

h. Specification 5, the Charge: J. B. Moore, Hattiesburg, Mississippi, on 9 October 1943, cashed a $5 check drawn by accused on the

First National Bank of Killeen, Texas. The check was deposited and returned unpaid. Accused had a daily balance of $1.08 in his account between 9 October and 28 October. About 23 October accused phoned Mr. Moore, saying the check might come back and requesting that he hold it until 1 November. Accused redeemed the check the first week in December.

The testimony of accused concerning the check is similar to his testimony concerning the other checks previously discussed. The Specification is sustained.

i. Specification 1, Additional Charge II: Accused gave the Hub Service Station, Hattiesburg, Mississippi a check, drawn on the First National Bank of Killeen, Texas, on 10 October 1943, in the sum of $6.24, for gas and oil. The check was presented for payment and returned. From 10 October to 28 October accused had a daily balance of $1.08 in his bank account.

The testimony of accused that he had an arrangement with his folks to cover his checks is applicable to this Specification also. The defense is considered of no validity and the Specification is sustained.

j. Specification 2, Additional Charge II: Colonel Dickson questioned accused concerning his obligations on 1 November 1943. Accused stated he owed the Hub Service Station about $15. The preceding day he had inquired the amount of of his bill of the station and had been told it amounted to $90. Included in this amount were $21 for gas and oil, $35 for a cash loan, about $10 for other cash loans, $6.24 on a returned check and about $13 for a repair bill.

Accused testified that he told Colonel Dickson he owed the Hub Service Station $15 for gas and oil, he did not mention any other items of indebtedness, had never inquired and did not know the total amount he owed.

If, as Colonel Dickson testified, accused stated, in the course of being questioned concerning his financial obligations, that he owed the Hub Station $15, knowing that he owed $90, he was guilty of making a false official statement with intent to deceive. On the other hand, if, as accused testified, he stated he owed the Hub Station $15 for gas and oil, knowing that he owed a much larger amount for other items to the same creditor, he did not make a fair and honest disclosure and his incomplete statement was likewise false. It is improbable that accused would remember only part of his account especially as he is shown to have been given the amount of the entire bill only the day before. The evidence is sufficient to sustain the findings of guilty of this Specification.

k. Specification 3, Additional Charge II: Mrs. E. F. Strange cashed a check for accused, drawn on the First National Bank of Killeen, Texas, on 21 October 1943, in the sum of $10 and payable to her husband, E. A. Strange. The check was deposited and returned unpaid. From 21 October

to 28 October accused had a daily balance of $1.08 in his account.

The testimony of accused in defense of his making and uttering checks is applicable to this Specification. For the reasons previously given the finding of guilty is sustained.

1. Specification 4, Additional Charge II: Colonel Dickson sent for accused on the night of 2 December 1943 but he could not be found in the battalion area. The following morning when Colonel Dickson asked where he had been, accused stated he had been in the battalion area all evening, he felt sick after drinking a coca-cola in the post exchange and sat down in a car in the parking lot, falling asleep, awakened around midnight and went to his hutment to sleep. Actually accused left camp at 7 p.m., went to Hattiesburg with his wife and friends to the "Swing Club" and later on to his apartment in Hattiesburg where he was seen after midnight. Accused admitted the falsity of his statement but defended his action as caused by his being confused and worried at the time.

The proof shows that accused knowingly made a false, official report to Colonel Dickson with the intent to deceive him. However, the Specification alleging the offense is defective in that it omits, apparently through typographic error, the words "officially report to the said Lieutenant Colonel Samuel A. Dickson", although it alleges the "intent to deceive Lt. Colonel Samuel A. Dickson", the nature of the report and that "the report" was known by accused to be untrue. In the opinion of the Board of Review the error does not require the disapproval of this Specification. The wording of the Specification together with the reasonable inferences to be drawn therefrom is considered sufficient to have apprised accused of the nature of the offense charged against him. No attack was made on the legal sufficiency of the Specification. It is apparent from the record that everyone concerned treated the Specification as charging the making of a false official report. Accused was charged with making two other false official reports, the Specifications concerning which were correctly drawn, and he testified specifically relative to each of the three reports. There is not the slightest indication that he was in any manner misled by the error. In view of the foregoing the finding of guilty of this Specification is sustained (Dig. Ops. JAG 1912-40, sec. 428 (8); JAG 250.401, 3 Dec. 1934).

6. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 20 April 1942; appointed temporary second lieutenant, Army of the United States from Officer Candidate School and active duty, 6 May 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 3 and 8 of the Charge; legally sufficient to support the findings of guilty of all other Specifications and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Drewry, Judge Advocate

Robert Lanier, Judge Advocate

F J Lotthokos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 11 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 Second Lieutenant Eldred Beasley (0-1181538), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 3 and 8 of the Charge (dishonorable failure to pay hotel bills), legally sufficient to support the approved findings of guilty of all other Specifications and the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. The accused with intent to defraud made and uttered four checks in the total amount of $41.00 (Specs. 1 and 4, The Chg. and Specs. 1 and 3, Add. Chg. II) and with intent to deceive, made and uttered two checks in the total amount of $35.00 (Specs. 5 and 7, The Chg.) all drawn on a bank in which he had insufficient funds; dishonorably failed to pay a debt of $41.00 (Spec. 2, The Chg.); and made false official statements to a superior officer with reference to the mailing of a check of $11.00 in payment of the balance of a debt (Spec., Add. Chg.), as to the amount of his indebtedness to a service station (Spec. 2, Add. Chg. II), and as to where he spent a particular evening (Spec. 4, Add. Chg. II). The conduct of accused throughout this series of transactions indicates that he lacks responsibility and does not measure up to the minimum standards of honor and honesty required of an officer. 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. ltr. for sig. S/W.
Incl. 3-Form of Action.

(Findings of guilty of Specifications 3 and 8 of the Charge disapproved. Sentence confirmed. G.C.M.O. 262, 6 Jun 1944)

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

SPJGK
CM 246776

5 APR 1944

UNITED STATES	MOBILE AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at Brookley Field, Mobile, Alabama, 26, 27, 30 November 1943. Dismissal.
First Lieutenant FRANK C. DITTMER (O-1640389), Signal Corps.	

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

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

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

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

Specification 1: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, formerly Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, did, at or near said Jackson Army Air Base, Jackson, Mississippi, on or about 9 March 1943, wrongfully borrow One Hundred and Fifty Dollars ($150.00) cash from Donald M. Miller, a civilian employee, Signal Section, said 47th Sub-Depot and under control and supervision of said Lieutenant Dittmer, which the said Lieutenant Dittmer has dishonorably failed to fully repay in its entirety, although due and payable.

Specification 2: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, formerly Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, did, at or near said Jackson Army Air Base, Jackson, Mississippi, on or about 9 March 1943, wrongfully borrow Sixty-Five Dollars ($65.00) in cash from J. P. Etheridge, a civilian employee in Signal Section of said

47th Sub-Depot and under control and supervision of said Lieutenant Dittmer, which the said Lieutenant Dittmer has dishonorably failed to repay although due and payable.

Specifications 3, 4 and 5: (Findings of not guilty).

CHARGE II: (Finding of not guilty).

Specifications 1-7, inclusive: (Findings of not guilty).

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

Specifications 1-4, inclusive: (Findings of not guilty).

Specification 5: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, formerly Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, having received $50.00, lawful money of the United States, from Second Lieutenant Kenneth G. Gregg, Air Corps, about 15 August 1943 for the purchase of a camera, did, at or near Jackson Army Air Base, Jackson, Mississippi, from about 15 August 1943 to 15 October 1943, wrongfully and dishonorably fail to deliver said camera or return said purchase money, although requested to do so by said Lieutenant Gregg.

Specification 6: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, formerly Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, having received $31.50, lawful money of the United States, from Lieutenant H. G. Von Oven, Royal Netherlands Air Force, about 4 August 1943, for the purchase of a watch, did, at or near Jackson Army Air Base, Jackson, Mississippi, from about 4 August 1943 to about 20 October 1943, wrongfully and dishonorably, fail to deliver said watch or return said purchase money, although requested to do so by said Lieutenant Von Oven.

Specification 7: Same as Specification 6 except that prosecuting witness is alleged to be Lieutenant J. Broekema, Royal Netherlands Air Force.

Specification 8: Same as Specification 6 except that prosecuting witness is alleged to be Lieutenant L. Van de Graaf, Royal Netherlands Air Force.

Specification 9: (Finding of not guilty).

Specification 10: Same as Specification 6 except that prosecuting witness is alleged to be Lieutenant G. Lugt, Royal Netherlands Air Force.

Specification 11: Same as Specification 6 except that prosecuting witness is alleged to be Louis G. White, the property is alleged to be films, the amount is alleged to be $10, and the time is alleged to be from about 28 September 1943 to about 20 October 1943.

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

Specification 1: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, then Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, and then Signal Corps Property Officer of said Sub-Depot, did, wrongfully, at or near Jackson, Mississippi, on or about 1 June 1943, fail to obey Sub-Paragraph 2 d, Army Regulations 600-10, June 2, 1942, by receiving from one Billy Perkins about $137.50, lawful money of the United States, for the purchase of radio tubes.

Specification 2: (Finding of not guilty).

Specification 3: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, then Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, and then Signal Corps Property Officer of said Sub-Depot did, at or near Jackson Army Air Base, Jackson, Mississippi, on or about 7 July 1943, wrongfully, fail to obey sub-paragraph 4 d, Army Regulations 380-5, dated September 28, 1942, by placing confidential radio set ABK-1 (SCR-595) in the Signal Corps Store Room of said Sub-Depot.

Specification 4: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, then Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, and then Signal Corps Property Officer of said Sub-Depot, did, at or near Jackson Army Air Base, Jackson, Mississippi, from about 7 July 1943 to about 6 October 1943, wrongfully, retain in the store room of the Signal Section of said Sub-Depot a certain confidential radio ABK-1 (SCR-595), after he had placed said confidential radio set on shipping ticket invoiced to Signal Supply Officer, Mobile Air Service Command, credit voucher S 1-44, dated 7 July 1943.

Specification 5: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, formerly Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, having received $50.00, lawful money of the United States, from Second Lieutenant Kenneth G. Gregg, Air Corps, about 15 August 1943 for the purchase of a camera, did, at or near Jackson Army Air Base, Jackson, Mississippi, from about 15 August 1943 to 13 October 1943, wrongfully, fail to deliver said camera or return said purchase money, although requested to do so by said Lieutenant Gregg.

Specification 6: In that First Lieutenant Frank C. Dittmer, Signal Corps, Signal Section, Headquarters, Mobile Air Service Command, Brookley Field, Alabama, formerly Signal Section 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi, having received $31.50, lawful money of the United States from Lieutenant H. G. Von Oven, Royal Netherlands Air Force, about 4 August 1943, for the purchase of a watch, did, at or near Jackson Army Air Base, Jackson, Mississippi, from about 4 August 1943 to about 20 October 1943, wrongfully, fail to deliver said watch or return said purchase money, although requested to do so by said Lieutenant Von Oven.

Specification 7: Same as Specification 6 except that prosecuting witness is alleged to be Lieutenant J. Broekema.

Specification 8: Same as Specification 6 except that prosecuting witness is alleged to be Lieutenant L. Van de Graaf.

Specification 9: (Finding of not guilty).

Specification 10: Same as Specification 6 except that prosecuting witness is alleged to be Lieutenant G. Lugt.

Specification 11: Same as Specification 6 except that prosecuting witness is alleged to be Louis G. White, the property is alleged to be films, the amount is alleged to be $10, and the time is alleged to be from about 28 September 1943 to about 20 October 1943.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 1 and 2, Charge I, excepting the word "wrongfully", and guilty of Charge I. He was found guilty of Specifications 5,6,7,8,10, and 11, Additional Charge I, except the words "although requested to do so"

by the persons named in the respective Specifications, and guilty of Additional Charge I. He was found guilty of Additional Charge II and Specifications 1 and 4 thereof; guilty of Specification 3 thereof, substituting the word "negligently" for "wrongfully"; and guilty of Specifications 5,6,7,8,10, and 11, except the words "although requested to do so" by the persons named in the respective Specifications. He was found not guilty of Specifications 3,4, and 5, Charge I; not guilty of Charge II and its Specifications; not guilty of Specifications 1,2,3,4, and 9, Additional Charge I; and not guilty of Specifications 2 and 9, Additional Charge II. No evidence of previous convictions was introduced. Accused was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Accused was the Signal Property Officer, 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi (R. 63,64). On or about 1 October 1943, he was transferred to "Mobile Air Service Command" (R. 40).

a. Specification 1, Charge I.

Donald M. Miller was a civilian employee in the Signal Section, 47th Sub-Depot, Jackson Army Air Base, Jackson, Mississippi. Accused was his supervisor. Miller loaned accused the following amounts on the dates specified, all in 1943:

28 March	$25
31 March	$10
6 April	$50
16 April	$30
Total	$115

When accused borrowed the money (Miller did not specify which loan), Miller told accused that he had been saving the money for his marriage and that if accused would pay it back before the marriage, "it would be all right". On 25 or 26 May, accused repaid $50. Miller married on 27 May. On several occasions Miller asked accused to make further payments. After one of these requests, made in July, accused repaid $25. Miller's final request for payment of the balance, or part of it, was made near the end of September. Accused told Miller that he was expecting some money from his father's insurance and that he would repay Miller in full upon the receipt thereof. In early November (apparently on the 6th), after charges had been preferred, accused sent Miller $25 in a letter, stating in the letter that this was all he owed. Miller believed that accused might have misunderstood the exact balance due (R. 12-14, 20,67,68; Pros. Ex. A).

Accused testified with reference to this Specification. He admitted borrowing the money, and testified that no date for repayment was set at the time of the loans. "Approximately a month later", Miller told accused that he had been saving the money in order to get married and that he would like to have the greater part of it back "at the time" (R. 77,78).

b. Specification 2, Charge I.

J. P. Ethridge was a radio mechanic in the Signal Section of the 47th Sub-Depot and was under the supervision of accused (R. 25). When accused first arrived at the depot, he told Ethridge that due to transfers he had not received his pay and he "continually" made the same statement thereafter (R. 24,26). Ethridge made the following loans to accused, all in 1943:

20 April	$25	
24 April	$20	
6 May	$20	
Total	$65	(R. 24-25;Pros. Ex. C).

Like the first loan, the second resulted from accused's saying that he had not received his pay (R. 24). The third loan arose from a statement by accused that he needed more money to go on a trip (R. 25).

On 6 November accused mailed a money order for $60 to Ethridge, which the latter received on 8 November (R. 25,67,68,70). Ethridge sent accused a receipt for payment in full of the obligation (R.25). An investigation of accused's affairs having disclosed that five dollars remained due, accused mailed a money order for that amount to Ethridge on 22 November 1943 (R.68,88).

Accused did not testify with reference to this Specification. For the defense, a letter dated 8 November 1943, from Ethridge to accused, was introduced in evidence, and it was stipulated that if Ethridge were present in court, he would "testify under oath, to the contents" thereof. In addition to acknowledging receipt of the $60 as payment in full, the letter conveyed the information that accused was well liked among his associates on the base. It also contained the following:

> "I want you to know that regardless of what has happened I am still your friend and from now on there will never be a day so dark for me but that I can remember the time I spent here with you and have a pleasant thought" (R. 70).

c. Specification 5, Additional Charge I, and Specification 5, Additional Charge II.

These Specifications relate to one and the same transaction, which is charged as a violation of both Articles of War 95 and 96.

About 1 August 1943, Second Lieutenant Kenneth G. Gregg, Air Corps, Operations Officer, Jackson Army Air Base, mentioned to accused that he needed a larger camera than the one which he owned. Accused offered to procure such a camera for Lieutenant Gregg from a friend in Chicago. Accused said that his friend, a professional photographer, was going into the Army and wanted to get rid of the camera, which "was about $350.00 camera". Later, accused showed Lieutenant Gregg a document purporting to be a telegram from the Chicago friend, listing the lenses and parts which were to be included in the sale. Some days after the original conversation, Lieutenant Gregg paid accused $50 for the purchase of the camera (R. 46). Accused said that the camera would arrive in a few days. About a week later, accused made a trip to Milwaukee. When he returned, he did not have the camera (R. 46,47). He claimed that his friend was putting it into good shape preparatory to delivering it. During the next few weeks Lieutenant Gregg called accused several times about the camera, but received no definite answer (R. 46). However, accused's father died and accused "was having lots of trouble". Although accused made a number of trips to his home in Chicago, without bringing back the camera, Lieutenant Gregg "excused" him because he "seemed so busy with other important things" (R. 47).

The last discussion about the camera occurred about 1 October, at which time accused told Lieutenant Gregg that the camera was undergoing a "lens correction" (R. 47). Lieutenant Gregg never received the camera (R. 46). On 24 November, accused mailed him a promissory note for $50 (R. 69). Lieutenant Gregg did not believe that accused was trying to mislead him, and did not ask accused for the return of his money (R. 47).

Accused testified with relation to this transaction (R. 71-76). According to accused, he told Lieutenant Gregg that he might be able to procure the camera from his friend "Archie Warren", formerly in the camera business in Chicago (R. 71,74), and that he imagined it would take "just several days" to get it (R. 75). Upon accused's communicating with Warren, he learned that the camera needed "some correction". Accused showed Lieutenant Gregg a telegram which he had received from Warren, and explained that the corrections and adjustments "shouldn't take so long", although he "wouldn't know definitely" how long. Accused "went ahead with the deal", and a couple of weeks later Lieutenant Gregg gave accused $50, despite accused's telling him that the money need not be paid to accused until the arrival of the camera (R. 71). At this time accused told Lieutenant Gregg that he did not know when he could get the camera and that it might be "a couple of weeks", in view of the lens and shutter corrections (R.75).

Accused testified further that about 29 September he was called to his home in Chicago by reason of his father's death. On his return to

the base, he called Lieutenant Gregg and asked whether the camera had arrived. Lieutenant Gregg replied that it had not, but that he was "still waiting faithfully". Subsequently, accused was sent to the hospital and was unable to communicate with Warren for awhile. Eventually, he instructed Warren to send the camera directly to Lieutenant Gregg (R. 72).

The defense introduced a letter dated 21 November 1943, from Warren to accused, and it was stipulated that if Warren were present in court, "he would testify under oath" to its contents. The letter stated that Warren had been through Jackson twice and had attempted to locate accused, but discovered that accused had been transferred to Mobile. It stated further that Warren had with him the camera "that you bought from me", but that he did not want to leave it with anyone except accused. The letter then stated that Warren would be at the Palmer House in Chicago "about the weekend of the 27th", and that accused could write Warren there as to whether accused wished the camera sent to him "or to that Lt. that you sold it to". Finally, the letter expressed Warren's regret that "it took such a long time to locate you and write to you" (R. 69).

d. Specifications 6,7,8, and 10 of Additional Charge I and of Additional Charge II.

The Royal Netherlands Military Flying School was located at Jackson Army Air Base (R. 28,82). A number of the Dutch personnel, most of whom were enlisted men at the time, but who later became officers and were referred to as the "Dutch officers", needed watches, and it was arranged that accused should procure them, he having suggested that he probably could do so. Included in the group were the Dutch officers named in the Specifications under consideration. The watches were to cost $31.50 each. The purchasers handed their money to Lieutenant Junior Grade Augustus A. Dreher, Dutch Navy Force, who delivered it to accused. However, in the case of Lieutenant Lugt (Specification 10), the transaction took place between Lieutenant Lugt and accused without an intermediary (R. 18,28,29, 30,33,34,35,37,38,39,48). There was some discrepancy in the testimony with reference to the date or dates on which accused received the money for the watches. Apparently, however, the money was turned over to him between the middle of July and the middle of August (R. 18,29,35,37,48).

Subsequently, the Dutch officers "would come" to accused's office inquiring about the watches. Accused told them that the shipment had been promised and that accused expected the watches to arrive "at any time" (R.19). About three weeks after the initiation of the transaction, accused told Lieutenant Dreher and some of the other Dutch officers that the shipment of watches was "frozen" and that the watches would not be sent for a long time. He said that the watches could not be delivered without a special permit from Washington (R. 19,28,29,39,49). According

to Lieutenant Dreher, the Dutch officers let the matter rest for a few weeks, after which accused stated that the watches would be shipped about 25 September (R. 29). During the latter part of September, accused's father died, and accused went to Chicago (R. 18,29). Before he left, accused told Miller that if the shipment of watches arrived during the absence of accused, Miller should deliver the watches to the respective Dutch officers (R. 18).

Although some of "the boys" inquired from time to time about the watches, they evidently had no doubt at the time about accused's good faith (R. 33,34,37,38). Lieutenant Lugt testified that accused always had a good excuse about the delay and repeatedly gave assurance that the watches would be delivered (R. 39,41). The Dutch officers never received the watches (R. 30,35,37,39,48). After charges had been preferred, the money advanced by the Dutch officers was returned to them by accused, evidently pursuant to arrangements prescribed by his superior officer (R.30,33-35,37,39,49,67,68).

The defense introduced a Government "limitation order" of 9 September 1943 (R.19; Def. Ex. 1). The order prohibited importers from selling, transferring, or delivering any watch released from customs after 1 January 1943, unless permission had been granted by the War Production Board. An "importer" was defined as any person having "a symbol or an identifying mark recorded with the Bureau of Customs * * * for the purpose of importing watches, * * * or any other person who in the course of his business, either directly or through an agent, brings watches * * * through customs into the continental United States". This definition appeared in an amendment dated 8 October 1943. The exhibit does not show the definition in its original form.

Accused testified as follows: He did not try to prevail upon the Dutch officers to buy the watches. They requested him to get them. He had a friend in Dayton, Ohio, through whom he thought it possible to procure them (R. 73). The purchase money was delivered to accused. Accused turned over about half of it to "Longene-Wittinauer" for the purchase of the watches (R. 84). Accused was unable to locate his receipt therefor (R. 85). For several weeks accused kept the rest of the money on his person, after which he deposited it in his personal account (R. 84,85). He did not spend any of the money (R. 85).

During the latter part of August, accused's friend telephoned and said that he would have the watches engraved, and about a week later he wired accused that the watches had been frozen; that he expected their release about 27 September; and that he would send them as soon as they had been released. Accused showed the telegram to some of the Dutch officers (R. 73).

Accused continued his testimony as follows: Out of his own pocket

he paid for telephone calls and telegrams in an endeavor to locate the watches. He did not intend to profit by the deal and actually lost money on it (apparently by reason of the above-mentioned expenses). On the day of his release from the hospital he went to see each of the Dutch officers before his return to Mobile. He and his commanding officer decided that the money should be refunded, and this was done (R. 84). In addition, accused wrote the Dutch officers from Mobile, stating that the watches could not be delivered; that he would prefer to return the money; and that when the watches arrived, they could pay him (R.73).

e. Specification 11 of Additional Charge I and of Additional Charge II.

These Specifications relate to one and the same transaction, which is charged as a violation of both Articles of War 95 and 96.

Lewis G. White, Jr., was a civilian employee in the 47th Sub-Depot, Jackson Army Air Base (R.43). On or about 29 September 1943, White gave accused a check for $10 to cover the cost of some film, which accused was to procure for White, accused having told White that he had worked for "Paramount" and "had connections" through which he could obtain the film. Accused told White that he could get the film in about ten days. About a week later, accused told White that he was going to Chicago and might be able to pick up the film while there. Upon accused's return from Chicago, he told White that the film would be shipped and should arrive on the following Saturday. The film never arrived (R. 44). Early in November (after charges had been preferred), accused sent White a money order for $9 (R. 44,67,68). Accompanying the money order was a letter in which accused wrote that the money order was sent "to cover refund for payment made by you for photo film". The letter continued: "On arrival of said item please forward check" (Pros. Ex. D). On 22 November, accused sent White a money order for $1 (R. 68). White testified that in accused's dealings with him, there was nothing which he would characterize as dishonorable, disreputable, or dishonest (R. 44).

Accused testified that he received $10 from White for the purchase of films, and that he repaid it in instalments of $9 and $1 (R.90).

f. Specification 1, Additional Charge II.

Billy Perkins was the owner and operator of the Jackson Appliance Service Company, Jackson, Mississippi. On or about 1 June 1943, accused entered Perkins' shop and asked him whether he would be interested in having accused purchase some radio tubes for him. Accused told Perkins that he had a friend who was in a position to procure tubes released for civilian use. Perkins expressed a desire to buy the tubes, and advanced $137.50 to accused for their purchase. Over several weeks no tubes

were delivered, although Perkins repeatedly spoke to accused about the matter. Accused offered "various and sundry excuses" for the nondelivery, which were "acceptable" to Perkins. On or about 25 August, Perkins told accused that he was afraid the tubes would not be delivered, and he requested a refund of the money advanced. By agreement, accused refunded $80 at the time, and the balance on 1 September. Perkins testified that he did not believe accused's motives to have been dishonorable, dishonest, or disreputable (R. 49,50).

"Sub-Paragraph 2 of Paragraph 2", Army Regulations 600-10, 2 June 1942, was read into the record (R. 50). The designation manifestly was erroneous, and it seems clear that paragraph 2e(2) is the one actually introduced. That paragraph states that -

> "* * * every member of the Military Establishment, when subject to military law, is bound to refrain from all business and professional activities and interests not directly connected with his military duties which would tend to interfere with or hamper in any degree his full and proper discharge of such duties or would normally give rise to a reasonable suspicion that such participation would have that effect. Any substantial departure from this underlying principle would constitute conduct punishable under the Articles of War."

Accused testified as follows: He thought that he proposed to Perkins that possibly he could buy Perkins some radio tubes in Chicago if they were available. He did not feel that this would interfere with his work as Signal Officer (R. 89). He accepted the money from Perkins, and subsequently repaid it in accordance with their agreement (R. 90).

g. Specifications 3 and 4, Additional Charge II.

The Signal Section, 47th Sub-Depot, was "located on a balcony" inside a hangar. There were three entrances to the hangar, each protected by an armed guard instructed to deny admission to everyone except authorized personnel. No unauthorized person was permitted in the hangar (R.65,66).

Accused was responsible for placing confidential radio equipment in a bombsight vault located on the base (R.20,66). Ordinarily, in case of a plane crash, accused and Miller removed such confidential equipment from the plane and put it in the vault (R.21). On or about 4 July 1943, accused and Miller recovered from a crashed plane a radio set designated as "ABK-1 (SCR-595)". This set was classified as "confidential" within the meaning of Army Regulations 380-5 (R.15,16; Pros. Ex. F). Accused placed the radio set on the shelf in the stock room and told Miller to leave it there. He also told Miller that he intended to ship it to

Mobile (R.16,21). There was evidence that "space was available" in the bombsight vault, although the witness so testifying did not refer to any particular date (R. 66).

On 6 October, Captain Gilbert Daniels, Signal Corps, saw in the stock room a radio set known as SCR-595 (R.15). (It is clear that the witnesses all referred to a radio set of the description given in the Specifications.) It was not within any locked vault and not guarded by an armed guard (R.15).

Miller testified that during the time in which the radio set was in the stock room, it was not guarded and not kept in a vault, but was left on the shelf (R.16).

Lieutenant Colonel M. N. Tutwiler, Commanding Officer, 47th Sub-Depot, also saw radio set SCR-595 in the Signal Corps property room at a time described as "when they first inventoried in the signal property room", and before the inventory made by "Mr. Riner". Lieutenant Colonel Tutwiler testified that the radio set should not have been kept in that room, since it was confidential (R. 64). During the period when "the shop" was open, no special guard was posted over the equipment, but there was always some authorized personnel in the room, and the equipment was never left alone. At all other times the door remained locked (R.65). In view of the guards at the hangar, Lieutenant Colonel Tutwiler felt that "any equipment handled" was "properly safeguarded" (R.66,67).

Robert H. Riner, Civilian Assistant Property Auditor, made an audit of "the stock records, inventory, etc., of the accused" (R. 51). Evidently the audit was made around the early part of October (R. 52). A shipping ticket, found in the stock record voucher file, was introduced in evidence (R.54; Pros. Ex. F). It showed accused as the consignor, and Signal Section Repair and Maintenance, Mobile Air Service Command, Brookley Field, Mobile, Alabama, as consignee. It was dated 7 July 1943 and listed the property to be shipped as one Model ABK-1 (SCR 595), consisting of various enumerated parts. It contained a signature purporting to be that of accused. A space for the signature of the recipient remained blank. Asked whether the shipping ticket indicated that the property had been shipped to the consignee, Riner answered, "Yes, this shipping ticket is executed and certified by the accountable officer that the property had been shipped" (R.55).

At the time of the audit, the equipment was not in a bombsight vault, but was on a shelf in the Signal Corps stock room. There was no guard over it (R. 54,55).

Accused testified that about 4 July he removed the "radar" from a crash and took it to the stock room, intending to call "Major Hudson" about its disposal, in view of its damaged condition. Major Hudson

told accused to make out a shipping ticket and ship the equipment to him if it was repairable. Around 10 or 12 July, accused called the Air Corps Supply Shipping Department of the 47th Sub-Depot with regard to "shipping it down there". He told "them" that the set was confidential equipment and would require a "sticker". He realized that there were shipping difficulties due to the volume of shipments. Accused called at least three times about the shipment. The Signal Section did not have shipping facilities, and it was necessary "to rely on the good nature of the Air Corps Supply Shipping Department". Due to the amount of business, the equipment was "more or less overlooked because it was back under one of our stock room shelves". About the middle of September, accused mentioned to Miller that the equipment had not yet been shipped and that they had better "get it out". No copy of the shipping ticket was sent from the Signal Section (R. 85,86).

Concerning the hangar, the guards, and the security measures in force, accused's testimony corroborated that of the prosecution (R. 74,85,87). He testified further as follows: The Signal Section was composed of a large radio repair room and a stock room. Access to the stock room could be gained only through the radio repair room. There was no door between the two rooms, although a door separated the Signal Section as a whole from the outside offices. Although people on official business were allowed in the repair shop, they were not allowed in the stock room, which was confined to employees authorized to be there (R. 73,74,87). The Military Intelligence Department investigated each "person" with reference to his competency to work on confidential equipment. Miller and Ethridge were authorized to handle confidential radios (R. 87,88).

Continuing his testimony, accused stated that whenever the Signal Section door was open, an authorized person (Miller, Ethridge, or accused) was always present, and an Army pistol was available (R. 73,86). During the absence of personnel, the Signal Section door remained locked, and Miller, Ethridge, and accused were the only people who had keys thereto (R. 74,86). Accused admitted the availability of bombsight vault space at the base and conceded that it would be more difficult to effect an entrance into the vault than into the stock room. However, in his opinion the property was "stored properly according to Army Regulations", by reason of the security afforded by the armed guards, the limiting of admission to authorized personnel only, and the other security measures (R. 86,87).

Paragraph 4d, Army Regulations 380-5, 28 September 1942, alleged in Specification 3 to have been violated, reads as follows:

> "Confidential military information will neither be discussed with nor disclosed to unauthorized persons. The contents or whereabouts of confidential documents, cryptographic devices, or materiel will be disclosed only to those persons in the Military Establishment whose duties require that they have such knowledge and to such other persons of especial trust who must be informed.

Those to whom confidential information is entrusted or disclosed are responsible for its safe custody and security."

Character of accused.

It was stipulated that Captain Daniels, whose testimony has been referred to previously, would testify that before 6 October 1943, the reputation of accused at Jackson Army Air Base for respectability, honesty, and credibility was excellent (R. 16). Miller and Lieutenants Gregg, Lugt, and Van de Graaf, all of whom were witnesses for the prosecution, testified to the good reputation and popularity of accused (R. 21,36,40, 47,48).

4. a. Recapitulating the situation relating to Specification 1, Charge I, we find that accused was charged with wrongfully borrowing $150 from Miller, a civilian employee under the control and supervision of accused, which obligation accused "has dishonorably failed to fully repay in its entirety, although due and payable". The court found accused guilty except for the word "wrongfully" before the word "borrow". By this finding the court determined that the borrowing was lawful, and the Board of Review must proceed in accordance with that determination. The borrowing being lawful, the finding amounts to a conviction of dishonorable failure fully to repay a debt.

Mere failure or neglect to pay a debt is not of itself an offense under the Articles of War (Winthrop, Military Law and Precedents, 2nd ed. rev., p. 715). The failure or neglect must be "dishonorable". No exact yardstick may be applied in determining the presence or absence of this essential element. We have examined a large number of authorities, and the result merely confirms the following principle announced by Winthrop:

"In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, etc., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable circumstances should characterize the transaction to make it a proper basis for a military charge" (Winthrop, p. 715).

In Fletcher v. United States (26 Ct. Cl. 541), the court, in discussing the offense of dishonorable failure to pay a debt under Article of War 95, pointed out that lying and deceit in failing to pay an indebtedness are as much a fraud as obtaining the money by false representations. The court continued:

"The gambler who throws away other people's money and the spendthrift who uses it in luxurious living instead of paying it back, cheat and defraud their creditors as effectually as the

knaves and sharpers who drift within the meshes of the criminal law. * * * In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of the criminal code."

Since each case must be decided upon its own peculiar facts, we proceed to an examination of the circumstances involved in the Miller loan. It is important to observe that Miller was a civilian employee under the supervision of accused. As a result of this relationship, factors were present which are no part of the ordinary loan, and which must be considered along with all the other circumstances. The loans were made between 28 March and 16 April, 1943, and totaled $115 (not $150, as alleged). Miller told accused that he had been saving the money for his marriage and that he wanted repayment before that event. Although accused testified that no time for repayment was fixed, and that Miller's remarks concerning his impending marriage and his request for repayment prior thereto, came after the loans had been made, Miller's version that he told accused the situation at the time of making the loans (albeit he did not specify which of the four loans) is more credible. Thus accused understood, when he borrowed the money, that Miller was making a very real sacrifice, and that it was well-nigh essential that the money be repaid on time. Instead, accused paid less than half of the debt before Miller's marriage, and, although importuned several times by Miller, made no further payment until the $25 instalment turned over in July. Thereafter, no further payments were made until November, after the investigation of accused's affairs and the preferring of charges. In response to Miller's final request, made toward the end of September, accused said that he was expecting some money from his father's insurance and would repay Miller in full upon receipt thereof. When, in November, accused sent a $25 payment, stating that this constituted payment in full, there actually remained $15 due. Although this miscalculation may have been unintentional, the fact that a similar shortage characterized the payment of the Ethridge loan and the repayment to White, points strongly toward the probability that accused was perfectly aware of the amount due.

Although accused testified with reference to this Specification, he presented no reason for his failure to meet the obligation, and he was significantly silent concerning the insurance money supposedly coming from his father's estate. Paragraph 77 of the Manual for Courts-Martial (1928) contains the following language at page 62:

"The failure of an accused to take the stand must not be commented upon; but if he testifies and if he fails in such testimony to deny or explain specific facts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may be commented upon."

Although the quoted passage refers to arguments by counsel at the trial, it applies equally to the deliberations of the Board of Review in a case in which the Board decides issues of fact as well as issues of law. This is such a case (MCM, 1928, p. 216).

From a careful consideration of the evidence, it is impossible to reach any other conclusion than that accused's conduct in connection with his debt to Miller was tainted with fraud, deceit, false promises, and evasion, and that, as a consequence, he was guilty of a dishonorable failure to pay, in violation of Article of War 95.

b. A recapitulation of the circumstances incident to the Ethridge debt (Specification 2, Charge I) points to the following: First of all, as in the Miller specification, the court excluded the word "wrongfully" before the word "borrow". Like Miller, Ethridge was a civilian employee under the supervision of accused. There were three loans, occurring between 20 April and 6 May, 1943. It is significant that the first Ethridge loan followed by a few days the last Miller loan, and that at the time accused borrowed from Ethridge, he had obligated himself to Miller to the tune of $115.

The first and second Ethridge loans were made as a result of accused's statement that due to transfers of station, he had not received his pay and needed money. It is very peculiar that no such technique was used in obtaining the earlier loan from Miller. After he had obtained the loans from Ethridge, he apparently made further remarks about his failure to obtain his pay, although the evidence is not clear as to how long he used this excuse. In any event, the whole tenor of the transaction gave rise to an implied understanding that as soon as the expected pay arrived, the debt would be liquidated. Yet there is no evidence of any effort whatsoever to make even a partial payment, despite the fact that accused assuredly did not go without pay from the beginning of May until the early part of November. The third loan resulted from accused's request for money to go on a trip. Whether he actually went on a trip at the time does not appear in the evidence.

Six months elapsed before he made a payment under the compulsion resulting from the investigation of his affairs and the preferring of charges. For aught that appears, he might never have paid the indebtedness in the absence of these circumstances. And when he did send Ethridge a money order, it was for $60 instead of $65, - a shortage similar to the one connected with the Miller loan.

No defense arises from Ethridge's letter to accused, containing avowals of continued friendship. Forgiveness by the victim does not absolve the culprit.

Looking to the conduct of accused as a whole, the Board of Review has

no hesitancy in concluding that his failure to pay the Ethridge debt was dishonorable and that, as a consequence, the conviction under Article of War 96 was proper.

c. Specifications 5,6,7,8,10, and 11, of Additional Charge I and of Additional Charge II, will be discussed together. Each of them relates to an alleged transaction whereby a person turned money over to accused for the purchase of a specified article, and accused, over a period of time, failed to deliver the article or return the purchase money. In each instance the court excluded the allegation "although requested to do so by said * * *". These words manifestly were excepted because there was no evidence of any request by the persons named in the respective Specifications.

Each transaction was charged twice. Under Additional Charge I, it was alleged that accused "wrongfully and dishonorably" failed to deliver the property or return the purchase money, in violation of Article of War 95. The corresponding Specification under Additional Charge II alleged a wrongful failure to deliver the property or return the purchase money, in violation of Article of War 96.

Referring first to Specification 11, it will be recalled that on 29 September, White delivered a $10 check to accused to cover the cost of some film which accused was to procure for White. Accused said that he could get the film in about ten days. About a week after their conversation, accused went to Chicago. On his return he said that the film would arrive on the following Saturday. No film ever arrived, and the money was not refunded until after the investigation and preferring of charges. Although accused testified with reference to this Specification, his testimony was limited to an acknowledgment of the receipt of the $10 for the purchase of the films and its eventual repayment in instalments of $9 and $1. It is highly significant that he made no mention whatever of any details. He did not even claim a bona fide intention to purchase any films. His silence with regard to this transaction, and the complete absence of any evidence on matters peculiarly within his knowledge, warrant a conclusion that his agreement to procure film for White was a mere ruse to obtain $10 for himself. Under the circumstances, accused was guilty of wrongfully and dishonorably failing to deliver the property or return the purchase money.

With reference to the transactions with the "Dutch officers" (Specifications 6,7,8, and 10), the evidence showed that between the middle of July and the middle of August, the money for the watches was delivered to accused. After about three weeks, during which the purchasers inquired frequently about the watches, accused reported that they were "frozen" and would not be shipped for a long time. Thereupon the purchasers let the matter rest for a few weeks. Then accused reported that the watches would be shipped about 25 September. When accused left for Chicago at the time of his father's death, he told Miller to deliver the watches in the event of their arrival during his absence. The watches never arrived. After

charges had been preferred, accused, in accordance with arrangements made with his superior officer, refunded the money. The purchasers testified that they did not doubt accused's good faith, at least prior to the investigation of accused's affairs.

A document introduced by the defense prohibited the transfer of imported watches without permission of the War Production Board. Accused testified that he turned over about half the purchase money to "Longine-Wittinauer" and kept, but did not spend, the balance. According to accused, his friend expected the release of the watches about 27 September.

It is important to note that even after the supposed "freeze" order had expired, which the evidence showed was about 25 September, nothing happened and no watches arrived, despite accused's assurance of shipment. Although accused testified with reference to these transactions, he made no attempt to explain the reason for the apparent cessation in the alleged performance of the contract. Furthermore, there were other gaps in his testimony. The freeze order referred to imported watches, but there was nothing to show that the watches in question were imported, although this matter was peculiarly within the knowledge of accused. Also, no reason was given for the failure to request permission from the War Production Board for the release of the watches. Although accused claimed to have turned over part of the purchase money to "Longine-Wittinauer" and to have deposited and kept the balance in his personal bank account, he failed to introduce any evidence to corroborate his testimony, and the court had the right to take this into consideration and to disbelieve the testimony of accused. For that matter, he did not even call as a witness the "friend" who, according to accused, made the arrangements for procuring the watches. In addition, the court had a right to consider all the transactions of accused in reaching a conclusion as to the honesty or dishonesty of his purpose. Viewing the evidence as a whole, it is our opinion that the court was entirely justified in its findings on the Specifications in question.

Referring to Specification 5, the evidence showed that shortly after 1 August 1943, Lieutenant Gregg delivered $50 to accused for the purchase of a camera, which accused had proposed to obtain for him from one Warren, a friend in Chicago. Accused told Lieutenant Gregg that the camera would arrive in a few days. He showed Lieutenant Gregg a telegram, purporting to be from the friend, relative to the sale. A week or so later, accused reported that his friend was putting the camera into condition. Thereafter, over a period of several weeks, Lieutenant Gregg asked accused several times about the camera; receiving no definite answer. However, Lieutenant Gregg "excused" accused because of his preoccupation with many matters, including his father's death. On 1 October, accused told Gregg that the camera was undergoing a lens correction. On 24 November, a promissory note for $50, signed by accused, was mailed to Lieutenant Gregg. In the opinion of the latter, accused was not trying to mislead him.

Accused's version was that at the time he received the money he told Lieutenant Gregg that he did not know when the camera would be delivered, and that it might be a couple of weeks, due to lens and shutter corrections. Accused's father died on 29 September, by reason of which accused went to Chicago. Upon his return to the base, he asked Lieutenant Gregg whether the camera had arrived. Lieutenant Gregg said that it had not, but that he was "still waiting faithfully". Subsequently, accused was sent to the hospital and could not communicate with Warren for awhile. Eventually he told Warren to send the camera directly to Lieutenant Gregg. A letter from Warren to accused, dated 21 November, stated that on two occasions Warren had attempted to deliver the camera to accused at Jackson, and then had learned of accused's transfer to Mobile. The letter also stated that Warren had the camera, and it contained an inquiry about whether he should deliver it to accused or to "that Lt." to whom accused had sold it.

Except for the letter from Warren, the situation regarding this transaction is on all fours with that in each of the others. Considered by itself, the letter tends to show that in fact accused had arranged for the purchase of a camera for Lieutenant Gregg and that at some undesignated time before 21 November and after accused's transfer to Mobile, Warren was prepared to make delivery. However, as noted, the letter bore a date several weeks after the preparation of charges against accused and more than a month after the final date alleged in the Specifications, and the evasive conduct of accused, coupled with the dishonesty which characterized his other transactions, justified the court in believing that he had no intention of delivering a camera and that the letter from Warren was part of a scheme to create a false appearance of good faith.

Added evidence of his dishonesty is revealed by the fact that he was unable to remit by cash, but was obliged to send a note. There was no evidence that he had delivered the $50 to Warren, and since apparently he did not have the money, it is reasonable to infer that he had converted it to his own use.

Considering all the circumstances, it is our opinion that the court's findings were warranted.

d. With reference to Specification 1, Additional Charge II, the evidence shows that Perkins delivered money to accused, with which accused was to purchase some radio tubes for Perkins. This transaction was charged as a violation of an Army Regulation prohibiting members of the Military Establishment from engaging in activities not directly connected with their military duties, which would tend to interfere with or hamper the full discharge of such duties, or "would normally give rise to a reasonable suspicion that such participation would have that effect". The Regulation provides that any "substantial" departure from "this underlying principle" will constitute conduct punishable under the Articles of War. It is impossible for the Board of Review to understand how the purchase by accused for Perkins

of some radio tubes would amount to a violation of the Regulation, which manifestly was not intended to subject to trial by court-martial every member of the military establishment who agrees to do an errand for a friend. In the opinion of the Board of Review, the record of trial is legally insufficient to support the finding of guilty with respect to this Specification, and no lesser included offense is involved.

e. Specifications 3 and 4, Additional Charge II.

It is deemed unnecessary to make a detailed recapitulation of the evidence. Accused placed and kept the radio in the stock room of the Signal Section, although a bombsight vault was available on the base. Despite the improbability of any unauthorized person's gaining access to the radio, the fact remains that it would have been much safer in the vault. Furthermore, there was direct evidence that it should not have been kept in the stock room. The radio set had been "placed on" a shipping ticket, as alleged in Specification 4, but nevertheless remained in the stock room as late as 6 October, although the shipping ticket was dated 7 July. There was testimony that the shipping ticket signified that the property had been shipped.

The testimony of accused with reference to the security of the radio set need not be repeated. With reference to Specification 4, he testified to some difficulty in getting the set shipped, by reason of the volume of shipments. However, after three unsuccessful calls, he overlooked the matter, and did not mention it again until September. His testimony does not sufficiently explain away his evident neglect in failing to ship the property within a reasonable time. The conviction on Specification 4 was proper.

The Army Regulation involved in Specification 3 in effect made accused responsible for the "safe custody and security" of the radio set. In view of the availability of the bombsight vault and the impropriety of keeping the set in the stock room, the Board of Review is of the opinion that the court was justified in its finding. It will be recalled that in its finding the court substituted the word "negligently" for the word "wrongfully".

5. As already noted, Specifications 5,6,7,8,10, and 11 of Additional Charge I and of Additional Charge II charge each of the respective transactions in duplicate; namely, as a violation of Article of War 95 and of Article of War 96. This technique is proper because 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 * * *" (MCM, 1928, par. 151). Of course, "the court should impose punishment only with reference to the act or omission in its most important aspect" (MCM,1928, par. 80a). But since dismissal is mandatory for violation of Article of War 95, and authorized for violation of Article of War 96, no question arises concerning the legality of the sentence.

The record contains several procedural errors, which were minor in nature and not deemed worthy of comment.

6. War Department records show that accused is 33 years old and a high school graduate. He served as an enlisted man from 30 June 1942 until 18 December 1942, when, upon graduation from the Signal Corps Officer Candidate School, he was appointed second lieutenant, Army of the United States. From 1 January 1943 until 13 February 1943, accused attended the Signal Corps Officers' Supply School, Dayton Signal Corps Procurement District and Depot, successfully completing a course entitled "Supply of Airborne Radio Equipment". On 25 August 1943, he was promoted to first lieutenant.

7. The court was legally constituted and had jurisdiction of the person and subject matter. Except as noted, 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 insufficient to support the finding of guilty of Specification 1, Additional Charge II; legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95 and authorized under Article of War 96.

Larry G. Egan, Judge Advocate.

John Wannemuehl, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 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 First Lieutenant Frank C. Dittmer (0-1640389), Signal Corps.

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, Additional Charge II; legally sufficient to support the findings of guilty of the remaining specifications and of the charges, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to a letter from Mrs. Carol S. Dittmer to the President. The letter is attached hereto.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. from wife of accused, 3 Apr. 1944.

(Finding of guilty of Specification 1, Additional Charge II, disapproved. Sentence confirmed. G.C.M.O. 332, 27 Jun 1944)

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

SPJGN
CM 246881

14 JAN 1944

UNITED STATES	)	103RD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Howze, Texas, 23 December 1943. Dismissal.
Second Lieutenant PERRY H. HALLETT (0-1174880), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, 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 Perry H. Hallett, Field Artillery, Headquarters One Hundred Third Infantry Division Artillery, did, without proper leave, absent himself from his organization at Camp Howze, Texas, from about 20 November 1943, to about 2 December 1943.

He pleaded guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence but recommended that it be commuted to a reprimand and a fine and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, shows that on 16 November 1943 the accused was relieved from assignment and duty with the 86th Division, Camp Howze, Texas, and assigned to the 103rd Division, Camp Howze, Texas, effective 20 November 1943. He failed to report to the 103rd Division and the adjutant of that division so testified and that the accused did not have leave of any kind. He was apprehended by the Provost Marshal of Camp Howze on 3 December 1943 at Dallas, Texas, and returned in arrest to Camp Howze on 4 December 1943. When peaceably apprehended he was sober, neatly uniformed and conducting himself as an officer. Appropriate extract copies of his organization's morning report showing his absence without leave as alleged were admitted into evidence (R. 5-7, 8-10; Exs. A-C).

4. The accused, after explanation of his rights as a witness, elected to make an unsworn statement through his counsel. The statement recites that from 1932 to 1935 he had served as an enlisted man and thereafter entered the United States Military Academy from whence he did not graduate because of academic failure only; that he had volunteered for service in the present war and had had no prior trouble whatsoever; that, when the 86th Division left Camp Howze, he was transferred to the 103rd Division and placed in charge of about six enlisted men with orders to turn them over on 20 November 1943, which he did, leaving to spend the week end at Dallas, Texas, as he had no further duties; that while in Dallas he incurred a hotel bill which he was unable to pay because he had lost his money; that he unavailingly wired his wife for funds and also wired his adjutant twice for leave which was refused; that his lawyer wired him about $75 and that he wrote a check for the same amount but spent most of it for other things and that when he was arrested he did not have sufficient funds to pay his hotel bill which, however, had been paid before the trial. He in effect admitted the offense alleged and invoked the mercy of the court (R. 10-13).

5. The Specification alleges that the accused without proper leave absented himself from his organization at Camp Howze, Texas, from about 20 November 1943 to about 2 December 1943. The elements of the offense and the proof required for conviction thereof, according to applicable authorities are as follows:

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

The evidence adduced by the prosecution conclusively supplements the accused's plea of guilty and establishes beyond a reasonable doubt his commission of the offense as alleged. His unsworn statement contains admissions which also constitute evidence of his guilt (MCM, 1928, par. 76). The evidence, therefore, fully supports the findings of guilty of the Charge and its Specification.

6. The accused is about 30 years of age. The War Department records show that he has had prior enlisted service from 1932 to 1934, that he was a cadet at the United States Military Academy in 1935, that he reenlisted on 19 May 1942 and was commissioned a second lieutenant upon graduation from Officer Candidate School on 17 December 1942, and that he has had active commissioned service 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.

(On Leave), Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 246881

1st Ind.

War Department, J.A.G.O., 11 MAR 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 Perry H. Hallett (0-1174880), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence 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.
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. 205, 26 May 1944)

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

SPJGQ
CM 246884

14 JAN 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 1 December 1943. Dismissal and confinement for one (1) year.
First Lieutenant VERNON T. BRUGGEMAN (O-1642337), 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that 1st Lieutenant Vernon T. Bruggeman, Signal Corps, 569th Signal Aircraft Warning Battalion, did, at Drew Field, Tampa, Florida, on or about 30 May 1943, feloniously embezzle by fraudulently converting to his own use the sum of thirty-seven dollars and fifty cents ($37.50), the property of T/4 Carlo J. Silvesti, Signal Corps, 569th Signal Aircraft Warning Battalion.

Specification 2: In that 1st Lieutenant Vernon T. Bruggeman, Signal Corps, 569th Signal Aircraft Warning Battalion, did, at Drew Field, Tampa, Florida, on or about 30 May 1943, feloniously embezzle by fraudulently converting to his own use the sum of eighteen dollars and seventy-five cents ($18.75), the property of T/5 Orville P. Philips, Signal Corps, 569th Signal Aircraft Warning Battalion.

Specification 3: In that 1st Lieutenant Vernon T. Bruggeman, Signal Corps, 569th Signal Aircraft Warning Battalion, did, at Drew Field, Tampa, Florida, on or about 25 August 1943, with intent

to defraud falsely signed the name of Elmer E. Berean, Jr., 569th Signal Aircraft Warning Battalion, as witnessing officer on a certain pay voucher, namely, D. O. Voucher No. 14232, dated 25 August 1943, in the amount of one hundred fifty-two dollars and twenty eight cents ($152.28), in the following words and figures, to wit: ELMER E. BEREAN, JR., witnessing officer, which pay voucher was writing of a public nature, which might operate to the prejudice of another.

Specification 4: In that 1st Lieutenant Vernon T. Bruggeman, Signal Corps, 569th Signal Aircraft Warning Battalion, did, at Drew Field, Tampa, Florida, on or about 25 August 1943, with intent to defraud falsely sign the name of Elmer E. Berean, Jr., 569th Signal Aircraft Warning Battalion, as witnessing officer on a certain pay voucher, namely, D. O. Voucher No. 14233, dated 25 August 1943, in the amount of sixteen dollars and ninety-two cents ($16.92), in the following words and figures, to wit: ELMER E. BEREAN, JR., witnessing officer, which pay voucher was writing of a public nature, which might operate to the prejudice of another.

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

Specification: In that 1st Lieutenant Vernon T. Bruggeman, Signal Corps, 569th Signal Aircraft Warning Battalion, being at the time Personnel Officer of the 569th Signal Aircraft Warning Battalion, did, at Drew Field, Tampa, Florida, on or about 25 August 1943, feloniously embezzle by fraudulently converting to his own use the sum of one hundred fifty-two dollars and twenty-eight cents ($152.28), the property of the United States, furnished and intended for the military service thereof, entrusted to the said 1st Lieutenant Vernon T. Bruggeman by Finance Officer, Lieutenant Colonel William F. Nye, Finance Department.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1 of Charge I except the words "on or about 30 May 1943" and the words "thirty-seven dollars and fifty cents ($37.50)", substituting for the latter words "eighteen dollars and seventy-five cents ($18.75)", not guilty of the excepted words, guilty of the substituted words and guilty of all other Specifications and the Charges. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

On 16 April 1943, accused was designated Bond Officer of the

569th Signal Aircraft Warning Battalion, Drew Field, Tampa, Florida, by virtue of paragraph 4, Special Orders No. 81, Headquarters 569th Signal Aircraft Warning Battalion of the same date (R. 4; Pros. Ex. A).

On pay day in May 1943, T/4 Carlo J. Silvesti, then a member of First Reporting Company of the battalion, handed $18.75 of his pay to his First Sergeant, Paul Bureau, for the purchase of a war bond (R. 5). By stipulation it was agreed that First Sergeant Bureau of the same organization would, if present at the trial, testify that he had received this money and turned it over to accused as the Bond Officer for the purpose stated (R. 8).

In the month of June, Silvesti, then a member of the Second Reporting Company of the same battalion, delivered to First Lieutenant Louis W. Manning, his platoon commander, the sum of $18.75 of his June pay for the purchase of a second war bond (R. 6). Lieutenant Manning received that amount for the purpose expressed, placed the money in an envelope and turned it over to First Sergeant Louis Vidovich, who placed the envelope in a safe (R. 9).

At that time the existing policy required officers to receive money from enlisted men who desired to purchase bonds. This money was then turned over to the company headquarters for transfer to battalion headquarters. Both Lieutenant Manning and Sergeant Vidovich received Silvesti's money under such arrangements (R. 9-12). By stipulation it was agreed that Captain Bates, commanding officer of the Second Reporting Company, 569th Signal Aircraft Warning Battalion, on or about 1 July 1943, took from the organization safe, envelopes containing money submitted by enlisted men for the purchase of bonds, and turned the same over to accused, as the duly designated Bond Officer of the battalion (R. 12).

On 30 May 1943, T/5 Orville P. Phillips, a member of the First Reporting Company, likewise delivered the sum of $18.75, out of his pay, to an officer of the company designated to receive money of enlisted men for the purchase of bonds (R. 13).

Although Silvesti had made several visits to accused and inquired about his bonds, neither he nor Phillips received them until the latter part of September or October when First Lieutenant DeWitt Hornor, under arrangements with accused, accomplished the delivery to both men (R. 6, 13, 19). Accused had shown to Silvesti one bond which apparently had been purchased for him with the funds delivered to accused in May. Accused, however, retained the bond because of some purported error therein with respect to the designation of the beneficiary (R. 6, 7).

It was stipulated that if Colonel William F. Nye, F.D., were present he would testify that on 24 August 1943 he was a lieutenant colonel of the Finance Department, and the accountable Disbursing Officer at Drew Field, Florida. As such, he had entrusted to accused, as his "Class A"

agent, the sums of $152.28 and $16.92 on Finance vouchers No. 14232 and No. 14233 (Pros. Exs. D, E), receipts for which were given by accused on F.D. Forms 45-A (R. 16, 26, 25; Pros. Exs. H, I).

First Lieutenant DeWitt Hornor, Intelligence Officer of the 569th Signal Aircraft Warning Battalion, was, on or about 1 October 1943, investigating the misapplication of certain funds within the battalion and in doing so, inventoried the contents of the adjutant's safe. He found approximately six slips of paper therein on which were printed the names and addresses of enlisted men and apparently the amount of war bonds to which they were entitled. Upon questioning the enlisted men it became evident that they had paid cash for war bonds which they had never received (R. 20).

Thereupon, Second Lieutenant Sidney L. Hirsch, 503rd Signal Aircraft Warning Regiment, was appointed investigating officer of the charges preferred against accused in this case (R. 2). Meanwhile, Lieutenant Hornor had gone to the Finance Office and checked over travel pay vouchers. One of these vouchers covered travel pay for 27 members of accused's organization and another covered 3 men. Hornor's investigation, in which he interviewed 25 of these men personally, and wrote to the commanding officer of 5 or 6 others, disclosed that none of them had received the travel pay due them under these vouchers (R. 20).

Technician Fifth Grade Orville P. Phillips, who was one of the enlisted men entitled to receive travel pay on voucher No. 14232 (R. 14), eventually received payment from Lieutenant Hornor in October 1943 (R. 14, 15, 27). It was stipulated that none of the other enlisted men whose names appear on voucher No. 14232 received any money due them for travel pay from accused, but that it was paid to them by Lieutenant Hornor, on or about 5 October 1943, in restitution on behalf of accused (R. 27).

In the beginning of the investigation, Lieutenant Hornor and Major Dunlap, Commanding Officer of the 571st Signal Aircraft Warning Battalion, had an interview with accused (R. 21). Although they then questioned accused about irregular travel pay vouchers and failure to deliver bonds paid for by enlisted men, they gave him no warning as to his rights for the reason that they were not convinced that he had done anything wrong and they were merely asking accused to help ascertain the facts (R. 22). Accused, in this first interview, admitted that the bond purchases of enlisted men had not been "properly handled" and that bonds paid for by enlisted men had not been delivered. He also admitted "certain irregularities" in the payment of travel pay to enlisted men in that he had received the money to pay the men but had failed to do so, using the money to defray his own expenses (R. 21).

On 8 October 1943, accused, having been fully warned of his rights (R. 22), in the presence of Lieutenant Colonel William L. McBride, First Lieutenant John T. Fort and Corporal William R. Anderson, made a statement in which he admitted that on or about 1 April 1943 he had become involved in financial difficulties and, being in need of ready

cash, he had used some of the money which enlisted men of his organization had paid for bonds and which came into his hands as Bond Officer. He also admitted that on 24 August 1943 he had received from the Finance Department, approximately $152 for the purpose of paying travel pay to 27 enlisted men but that he failed to pay any of them. He used this money for his own purposes and returned the voucher to the Finance Office with the forged name of Warrant Officer Elmer E. Berean, Jr., thereon as a witness to the purported payment of funds. He admitted doing likewise with another travel pay voucher concerning three enlisted men. He offered as extenuating circumstances that some time in the middle of August a cleaning detail had emptied the contents of a small wooden box in which, among personal papers, he had kept a lot of records pertaining to bonds which he had purchased and some war bonds which he had purchased for enlisted men, into the furnace along with trash and waste paper. He also stated that he was raising money with which to make restitution (R. 17; Pros. Ex. B).

On 14 October 1943, accused made an affidavit before Lieutenant Hirsch, the investigating officer, in which he reaffirmed his former statement dated 7 October 1943, except the part relating to restitution which he stated had now been made "as to all claims with my [his] knowledge" (R. 18; Pros. Ex. C).

Some time in October Lieutenant Hornor did receive $500 from accused for the purpose of making restitution and he expended $450 of this amount in paying for and delivering war bonds to 20 enlisted men to whom they were due, and also in paying travel pay due about 20 enlisted men (R. 19-21, 23, 24). Among those to whom bonds were delivered under these arrangements were T/4 Carlo J. Silvesti and T/5 Orville P. Phillips (R. 20, 21).

It was stipulated that accused had signed Finance Department voucher No. 14233 (Pros. Ex. E), and receipts for trust funds on 24 August 1943 (Pros. Exs. F, G) for $152 and $16.92, respectively (R. 26).

Finance Department certificates of "Return of Funds and Statement of Balance" for $152.28 (Pros. Ex. H) and $16.92 (Pros. Ex. I), respectively were introduced in evidence "for the purpose of showing that there was reimbursement, or restitution" on the part of accused (R. 26, 27).

It was also stipulated that if Warrant Officer Elmer E. Berean, Jr. were present he would testify that the signatures of his name appearing on Finance Department vouchers No. 14232 and No. 14233 (Pros. Exs. D, E) were not made by him.

4. Accused, having been informed of his rights, elected to be sworn as a witness. His testimony substantially confirmed the facts related by him in the sworn statement and affidavit he had given prior to trial. He further amplified these facts by explaining he was married and his wife was expecting a child within the next two weeks. In April 1943, he borrowed only a small amount of the bond money intending then to repay it. However, an automobile accident caused him to become more than ever

involved financially and he continued to borrow. His affairs never did seem to "straighten themselves out" and, as time went on, he used more and more of the bond money, intending always to make restitution. When the contents of the box, in which he kept some of his records and a few bonds, were accidentally destroyed, he found himself in a further "spot" because he had to use even more money to make up this loss. At about this time the travel pay for the enlisted men came into his hands. He felt that since these men had already waited three months for their money they would not mind waiting a few more weeks. Then he made another mistake by going on leave; for, when he returned the battalion was breaking up and the irregularities came to light (R. 29). He frankly admitted that he personally used the $18.75 paid to him by T/4 Carlo Silvesti on 30 June 1943 for the purchase of a war bond, and also the $18.75 which T/5 Orville Phillips had paid for a like purpose on 30 May 1943 (R. 29, 30). He also admitted that he used the money entrusted to him by the Finance Department vouchers No. 14232 and No. 14233, for his own purposes and that he forged the name of Warrant Officer Elmer E. Berean, Jr. as a witnessing officer on each (R. 30). He stated, however, that he had subsequently purchased the war bond for T/4 Carlo Silvesti, with the $18.75 given him on 30 May 1943 and this bond was, in fact, actually turned over to Silvesti in October 1943 by Lieutenant Hornor (R. 23, 29).

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). The proof required to establish guilt of a charge of embezzlement is (a) that accused was entrusted with certain money or property of a certain value by or for a certain other person, as alleged, (b) that he fraudulently converted or appropriated such money or property, and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent (id.).

Each offense of embezzlement alleged in the Specifications of the Charges on which accused was tried was fully established by the evidence of record and, although accused pleaded not guilty, his testimony at the trial was a full and complete confession of guilt as to each. In two instances, money, which he unlawfully converted to his own uses, came into the hands of accused as the trusted agent of enlisted men who were, thereby, entitled to receive war bonds therefor which they never received until accused's peculations were discovered; and, in the other instances, he received the funds, in trust, as the agent of the Finance Officer, who thereby delegated to accused the duty of paying money due to enlisted men for travel pay. In each case the fraudulent intent is clearly evident from the facts and circumstances to which accused testified under oath at the trial.

It is likewise abundantly evident from testimony of accused, as well as from independent evidence, that the name of a warrant officer was fraudulently and without authorization, signed by accused upon an instrument purporting to show that such warrant officer personally witnessed the transfer of funds which were never made. This was clearly forgery as alleged in Specifications 3 and 4 of Charge I.

Prior to the trial accused had made a statement which, because of failure on the part of superior officers to warn him of his rights, might have been deemed inadmissible in evidence at the trial. Subsequently, however, he reaffirmed what he had theretofore said after the investigating officer had informed him of his rights. Where an accused has been fully apprised of his rights after an inadmissible statement has been made by him, and before he subsequently reaffirms it upon a formal investigation, his reaffirmation, if made voluntarily, is admissible in evidence (Dig. Op. JAG, 1912-40, sec. 395 (10); CM 210693 Alexander; CM 245979 Williams).

After the trial had commenced, Specification 1, Charge I was amended at the direction of the convening authority, without objection on the part of accused, by adding the words "and on or about 30 June 1943". It developed in the trial of the case, that accused was not guilty of embezzling the sum of $18.75, paid by T/4 Carlo J. Silvesti for the purchase of a war bond on 30 May 1943. No doubt the trial judge advocate came to this conclusion prior to trial and thereupon requested authority to amend the Specification so as to allege that the embezzlement referred to in the Specification occurred on or about 30 June 1943. Adding the new date, without excepting the old one, resulted in the charging of two separate offenses within the same Specification. Advantage might have been taken of this duplicitous pleading but accused waived his privilege and the amendment was made without objection. Accused did not plead to the Specification as amended, but, since it expressly appears in the record that there was no objection, it may properly be assumed that accused intended the trial to proceed as though a plea of not guilty had, in fact, been entered. The court, by proper exceptions and substitutions, found the accused guilty of the embezzlement of $18.75 on 30 June 1943. It appears that accused was, throughout, fully aware of the purpose of the amendment and since the finding on this Specification cured the defect in pleading and is amply supported by the record, no substantial right of accused was injuriously affected thereby.

6. Attached to the record of trial are two recommendations for clemency, one presented by four members of the court and the other made by the trial judge advocate. A remission of that portion of the sentence imposing confinement is urged therein for these reasons: (1) by his acts of restitution and his cooperation with the investigating and prosecuting officials, accused showed a complete realization of the serious nature of his offenses and a readiness to be punished therefor; (2) dismissal will be sufficient punishment; (3) complete restitution has been made; (4) accused "is not of criminal character"; and (5) he is married and his wife is expecting her first child at an early date.

7. Accused is 24 years and 10 months of age and is married. Records of the War Department disclose that he was born in Casper, Wyoming, was graduated from Salt Lake City, Utah high school in 1936 and thereafter attended the University of Utah for 3 years. He had a course in basic training with the Reserve Officers Training Corps from 8 September 1934 to 6 June 1935. He was inducted 16 February 1942 at Fort Douglas, Utah.

On 18 February 1943, after attending Eastern Signal Corps School at Fort Monmouth, New Jersey, he was discharged as a Technician 5th Grade in order to accept a commission as a second lieutenant, Army of the United States on 19 February 1943. Thereafter he attended a school in Administration and Supply from 3 March to 27 March 1943 and was thereupon assigned to duty with the Third Air Force, Tampa, Florida. On 27 September 1943 he was promoted to first lieutenant.

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 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 a conviction of a violation of either Article of War 93 or Article of War 94.

William A. Pounds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Frederick, 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 First Lieutenant Vernon T. Bruggeman (0-1642337), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Clemency was recommended by four members of the court and the trial judge advocate. I do not concur in this recommendation, but recommend that the sentence be confirmed and carried into execution. I also recommend that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, 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. ltr. for sig. S/W.
3 - Form of action.

(Sentence confirmed. G.C.M.O. 131, 20 Mar 1944)

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

(193)

18 APR 1944

SPJGH
CM 246885

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 2 December 1943. Dismissal.
Second Lieutenant HOWARD L. TIPTON (0-802955), Air Corps.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Howard L. Tipton, 14th Fighter Squadron, 53rd Fighter Group, did, at Immokalee Airfield, Florida, on or about July 17, 1943, wrongfully violate Section I, Paragraph 1, AAF Regulation No. 60-16, dated September 9, 1942, by operating a military airplane in such a reckless manner as to endanger friendly aircraft on the ground.

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

3. The evidence for the prosecution: An extract copy of Operations Order No. 217, 14th Fighter Squadron, 53rd Fighter Group, Venice Army Air Field, Florida, 17 July 1943 (Ex. C), shows accused as flight leader of four "P 39" airplanes taking off at 10:30 a.m. on mission "T-5E" and returning at 12:00m. and 12:05 p.m. (R. 5).

It was stipulated that if Captain Avery J. Ladd, Hendricks Field, Sebring, Florida, were present he would testify as follows:

"It was on the 17th of July at about 11 o'clock A.M. I had landed in a B-17 at Immokalee and was taxiing back on the east west runway, headed west. These four (4) P-39 airplanes peeled off and buzzed the B-17 which I was in. The first three (3) cleared by approximately fifty feet (50'), but the fourth man almost mushed into the top of the B-17. The four (4) P-39's then climbed east of the field, turned and came down and made another attack from the rear. Then they climbed again and by that time I had turned and was taxiing south on the north-south runway and they made another attack down across the front of my ship. Then they climbed and peeled off and came down and made the fourth attack from the rear and the side. Then they climbed and circled the field and made an attack at the landing runway in the opposite direction of the traffic - one (1) peeling off and coming dangerously close to another B-17 on the approach. I was standing at the end of the take-off runway, awaiting clearance to taxi on the take-off runway at the time they made this last approach against traffic. I think these maneuvers of the four (4) P-39's were extremely dangerous to all of the B-17's that were flying at Immokalee and also to the P-39's themselves" (R. 5; Ex. D).

Section I, paragraph 1, Army Air Forces Regulation No. 60-16, 9 September 1942 (Ex. A), providing that "An air force pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground", was introduced in evidence. There was also placed in evidence an extract copy (Ex. B) of paragraph 4 of a memorandum to all squadron operations officers, issued by 53rd Fighter Group, Fort Myers, Florida, dated 31 March 1943, as follows:

"Immokalee Field is an auxiliary field of Fort Myers Army Air Field and may be used as such. It is also our ground straffing practice area. No attacks will be made to the west, and flight commanders are to ascertain that the airport is clear of airplanes and workers before attacking".

4. The accused testified that he was a member of the 14th Fighter Squadron, Venice Army Air Base, and that he had "only been assigned as an instructor about a week and up to that time we had gone down on single ground strafing missions, and made passes on the airplanes on the field, figuring that was part of the job to be done". He did "just what we had done before with these four men" and, in briefing, told them that they "shouldn't make dangerous passes on the ground lower than the flight leader". They left "Venice about 10:30 and were on a low level down there half an

hour. Half an hour was navigation, and half an hour was ground strafing. This airplane had landed, and it was taxiing around. At the time we made the pass I believe it was sitting still". Accused stated that it "seems the last man in the flight was low, and it looks like we were turned in". They "made a pass or two at the airplane, and two or three passes at the field, at the runways", and "would pick an object and go for it". This was his first ground strafing mission as an instructor, and he was only doing what he had been trained to do as a trainee. While he was a trainee he had been led into attack on this same field at least two or three times with B-17's on the field. They were "disappointed" if B-17's were not there when they would go on these missions, and accused "should say" that the policy was to strafe B-17's rather than the field (R. 6-7).

On cross-examination and examination by the court, accused stated that at the time he was not aware of "that memorandum" from Immokalee Air Field, and "wasn't exactly clear on all of it" but "knew approximately what it contained". At the time, he saw planes on the field. He was not sure of the direction of the attack. Accused had a "pilot's information file", and could not answer whether he was familiar with Army Air Forces Regulation No. 60-16, but thought it was "with regard to low flying". In briefing the flight before taking off he stated that they would strafe Immokalee, whether or not there were aircraft on the field. That had been the practice in the past (R. 7-8).

5. The evidence shows that prior to and on 17 July 1943, Immokalee Field, Florida was used as the ground strafing practice area of the 53rd Fighter Group. At about 11:00 a.m. on 17 July a flight of four P-39 airplanes "peeled off and buzzed" a B-17 plane which had landed at Immokalee Field and was taxiing back on one of the runways. The first three P-39's cleared the B-17 by about 50 feet, but the fourth one "almost mushed" into it. The four P-39's successively climbed and came down in three more simulated attacks on the bomber, and then made an attack on the landing runway. On that day accused, an instructor at Venice Army Air Field, Florida, was flight leader of four P-39's which took off at 10:30 a.m.

The evidence for the prosecution does not connect accused with this simulated attack on Immokalee Field, and the testimony of accused with respect to a similar attack led by him does not specify the date on which it was made. However, it seems clear to the Board that accused inferentially identified the incident as to which he testified as the same one referred to in the evidence for the prosecution. Therefore, the evidence further shows the following facts:

At about 10:30 a.m. on 17 July, accused led the flight of four P-39's referred to in the evidence for the prosecution, on a practice flight

from Venice Army Air Field. They spent a half hour on navigation, and then a half hour on ground strafing at Immokalee Field. Accused saw planes on the field, and they made a "pass or two" at one of them, and "two or three passes" at the field.

Accused had been a trainee prior to becoming an instructor, and this was his first ground strafing mission as an instructor. While he was in training he had been led into attack on Immokalee Field at least two or three times with B-17's on the field. In briefing the flight of 17 July, accused stated that the pilots "shouldn't make dangerous passes on the ground lower than the flight leader", and that they would strafe the field whether or not there were aircraft there. This had been the practice in the past and accused was only doing what he had been trained to do.

Accused was not charged with violating the 53rd Fighter Group memorandum of 31 March 1943, providing that flight commanders would ascertain that Immokalee Field was clear of airplanes before making practice attacks, which was introduced in evidence. Therefore, the question whether a violation was shown will not be considered. Accused was charged with violating section I, paragraph 1, Army Air Forces Regulation No. 60-16, 9 September 1942, providing, in part, that a pilot would not operate aircraft in a manner to endanger friendly aircraft on the ground.

Accused, flying a P-39 airplane, made a simulated attack on a B-17 on the ground, "peeled off and buzzed" it, and cleared the plane on the ground by about 50 feet. Although it appears that the accused had his plane under control and did not cause any damage to either plane, yet his act clearly created a situation fraught with danger to both planes. The court was justified in finding that the manner of operation of his plane by accused was such as to endanger friendly aircraft on the ground.

No intent is required as an element of the offense of wrongfully violating a regulation of this kind and therefore it is no defense that accused was engaged in a regularly scheduled practice flight including ground strafing, nor that on previous flights of this character while he was undergoing training he had been led on such practice attacks while planes were on the ground. The 53rd Fighter Group memorandum authorizing the use of Immokalee Field as a ground strafing practice area did not authorize such missions while planes were on the ground, but to the contrary forbade them. The sole question is whether accused was in fact authorized to do what the regulation prohibited. Such authority had not been given. In the opinion of the Board of Review the record of trial sustains the findings of guilty.

6. The court erroneously considered the stipulated testimony of an officer who observed the flight of accused over Immokalee Field, to the effect that he considered the maneuvers "extremely dangerous". The

conclusions or opinion of the witness did not constitute competent evidence. However, it does not appear that this evidence was prejudicial to the substantial rights of accused, since there can be no doubt that the simulated attack made by accused endangered the plane on the ground.

7. The accused is 27 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 14 October 1941; aviation cadet from 17 August 1942; appointed second lieutenant, Air Corps Reserve, Army of the United States, and active duty, 29 April 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record 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

Robert J. Clemor, Judge Advocate

F. J. Lotthuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 9 MAY 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 Howard L. Tipton (0-802955), 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, a pilot, while leading a practice flight over an air field designated as a ground strafing practice area, violated an Army Air Forces regulation by operating a military airplane in such a reckless manner as to endanger friendly aircraft on the ground.

Attached to the record of trial is a recommendation of clemency by the court, in which it is stated that the court "in accordance with the expressed policy of the Commanding General, Army Air Forces, sentenced this officer to be dismissed the Service" but unanimously requests that the sentence be commuted to restriction and forfeiture of pay. The reasons given by the court are as follows: an undue period of time elapsed from the date of the offense, 17 July 1943, to the date of trial, 2 December 1943; in the intervening four and one-half months the accused had been instructing students; considerable supervisory error existed on the part of senior officers, it had been common practice to make strafing attacks on the field while aircraft were there, as a student accused had been led in such strafing attacks, the offense was committed on his first flight as an instructor, and he repeated those tactics which he had been taught as a student. Also attached to the record is a letter from the immediate commanding officer of accused recommending clemency, in which it is stated that the practice of carrying out this type of mission and "buzzing" aircraft on the ground prevailed during the training course of accused, and that accused is a very capable officer and an excellent pilot. In a first indorsement to the letter, the group commander concurs in the recommendation, states that accused has exhibited outstanding qualities as an officer and pilot, and recommends "fullest clemency".

In his review the Staff Judge Advocate states that the delay from 17 July to 29 October 1943 in preferring charges was apparently due to the fact that the commanding officer of accused had no knowledge of the commission of the offense until several months after it had been committed, and much difficulty was encountered in definitely identifying the planes involved. He also states that the Third Air Force, by a letter dated 20 June 1943 which was given full dissemination throughout the command and was stressed especially to all newly commissioned flying officers, made it clear that it

would consider that dismissal is an appropriate punishment for an intentional violation of flying regulations.

In a memorandum to The Judge Advocate General dated 6 April 1944, by the Chief of the Air Staff, for the Commanding General, Army Air Forces, it is stated:

> "I have considered the evidence in the case of the above-named officer who was tried, found guilty, and sentenced to dismissal by a general court-martial for violation of flying safety regulations.
>
> "The accused, who was an instructor pilot, admitted that his flight made various passes at a plane on the ground and at the runway of an Army air field. Such dangerous maneuvers very often result in loss of life and the destruction of valuable property. The offense is as great, however, even when no lives are lost and no property damaged. The responsibility of an instructor is particularly great in such matters.
>
> "I am convinced that the best interests of the service require the dismissal of the accused in this case. Accordingly, I recommend that the sentence as adjudged be confirmed and ordered executed."

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.

4 Incls.
Incl. 1-Rec. of trial.
Incl. 2-Drft. ltr. for sig. S/W.
Incl. 3-Form of Action.
Incl. 4-Memo. to TJAG, 6 Apr. 1944.

(Sentence confirmed but execution suspended. G.C.M.O. 282, 10 Jun 1944)

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

SPJGK
CM 246895

22 JAN 1944

UNITED STATES v. Second Lieutenant LEROY F. SIMPSON (O-751849), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Deming Army Air Field, Deming, New Mexico, 9 December 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 Charges and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Leroy F. Simpson, Air Corps, did at Army Air Forces Bombardier School, Deming Army Air Field, Deming, New Mexico, on or about 17 November 1943, wrongfully take and use, without consent of the owner, a certain automobile, to-wit a 1937 Pontiac Convertible Coupe, Iowa License No. 85-8216, of a value greater than Fifty Dollars ($50.00), the property of Second Lieutenant Charles R. Miles.

Specification 2: In that Second Lieutenant Leroy F. Simpson, Air Corps, was, at Army Air Forces Bombardier School, Deming Army Air Field, Deming, New Mexico, on or about 17 November 1943, drunk in station.

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

Specification: In that Second Lieutenant Leroy F. Simpson, Air Corps, was at El Paso, Texas, on or about 13 October 1943, in a public place, to wit, White Way Tourist Court, 3906 Alameda Street, El Paso, Texas, drunk and disorderly while in uniform.

He pleaded guilty to all Specifications and Charges, but at the conclusion of the prosecution's evidence was permitted by the court to change his plea to Specification 1 of the original Charge to not guilty. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

a. Specifications 1 and 2 of the Charge.

At approximately 5 o'clock in the afternoon of 17 November 1943, Second Lieutenant Charles R. Miles, Air Corps, 321st Bombardier Training Group, Headquarters and Headquarters Squadron, Deming Army Air Field, parked his automobile on the east side of the officers' quarters at Deming Army Air Field, leaving the keys in the car. The car was a 1937 Pontiac convertible coupe, in good running order, and carrying Iowa license plates 85-8216. Lieutenant Miles had paid $475 for the car, had owned it approximately three years, and he estimated its present value at $350. At approximately 6 o'clock the next morning Lieutenant Miles observed that the car was gone. He did not see it again until about two o'clock of that afternoon. The car was then in the guardhouse area, and the transmission and the gears had been stripped. He had left in the car a flying suit, and, in the compartment of the car, his flashlight. When the car was recovered, the flashlight was missing. Lieutenant Miles gave no one permission to move or drive the car, and did not loan the flashlight to anyone. He identified as his the flashlight which was later introduced in evidence as Prosecution's Exhibit III (R.6-9,14,19).

Private Edward P. Norris, 909th Guard Squadron, Deming Army Air Field, was on guard duty on the night of 17 November, on Post Number 6. This was at the "end of the ramp", presumably in front of the plane hangars. At about 0400 in the morning he heard a car motor racing at the "end of the field", so he started to walk to the lower end of the ramp (R.10,11). Before he arrived there the motor "hushed", and he realized that it was a little off his post. He then walked on around to the lower end of the ramp and headed on to the upper end. A few planes were out on the runway, and he heard someone talking. He went from plane to plane and finally saw someone, whom he challenged by saying, "Who is there?" (R.11).

Witness stated that he was "at least 300 yards" from the person he challenged - "a little better than half way at the other end of the ramp behind a plane wheel". The challenged person replied in a loud voice,

"The commander of the field" (R.11,15). Witness then advanced within speaking distance and observed that it was not "Colonel Murphy" (R.11, 12). Although Norris stated that he did not learn who the challenged person was, and was unable in court to identify accused, it was subsequently established in the trial that accused was the man he found on the ramp (R.17,29).

Norris stated that accused spoke first, saying, "You want my name? What is this all about? Do you want to talk with me some?". Witness replied, "Yes, sir. This is a restricted area, and you shouldn't be out here at this time of the morning unless you have sufficient business" (R.12). Accused said, "Well, I am from the South, aren't you from the South?" and Norris answered, "Yes, sir". Accused asked, "What part?", to which witness replied, "Alabama". Accused then said, "We are friends", and wanted to shake hands with Norris, but Norris did not allow him to get close enough to do so, whereupon accused said, "I am supposed to have a woman around and be screwing, but now she got away from me somehow". He then asked witness, "Do you know how far it is to the bridge? * * * Call the M.P.'s and get them to come over and get me and take me to town". Witness replied, "I can't call the M.P.'s but I am going to call the Corporal of the Guard. * * * you will have to stay here until the Corporal of the Guard gets here" (R.12).

Norris stated that accused attempted to give him a flashlight (which witness identified as Prosecution's Exhibit III, R.14), saying, "Here is my flashlight. You can have it. It is burnt out, it won't shine" (R.13). Witness tried the flashlight, found that it would light, and returned it to accused (R.14). Then "a sergeant" opened a door of a little tool house just across the runway, and witness stated that accused wanted to go over there. Witness again told him that he would have to remain until the arrival of the Corporal of the Guard, but accused "went over anyway", and talked to the sergeant (R.12,13). When the acting Corporal of the Guard, Private James W. Lewis, arrived, Norris turned accused over to him, but was not present when accused told Lewis his name. Norris stated that accused's breath smelled of liquor, and that he had mud and dust all over his cap, coat, trousers and shoes. He "looked like he had been wallering in the hog waller". Witness was of the opinion that accused was drunk (R.10-15).

Private James W. Lewis, 909th Guard Squadron, Deming Army Air Field, stated that he was acting Corporal of the Guard on the night of 17 November, that he posted Private Norris on Post Number 6 at 0300 in the morning, that he next saw Norris "across from Post 6", and that Norris then had accused with him (R.16). Witness asked accused what was his business out on the ramp at that time in the morning. Accused did not answer Lewis immediately, but pulled out his money and identification card, showing them to witness (R.17).

Lewis said that he did not search accused, because the latter was an officer, and that he saw no flashlight at that time. He told accused that he would have to take him to the guardhouse and call the officer of the day. They went together to the guardhouse in the front seat of a reconnaissance car. When they reached the guardhouse and got out of the car, Lewis found on the front seat a flashlight which he identified as Prosecution's Exhibit III. He had not noticed it before. Witness had been driving the car since 10 o'clock that evening and had carried in it 5 men at the posting of each of the two reliefs, but he and accused were the only persons in it on the way from the ramp to the guardhouse (R.18-21).

Witness testified that accused's conversation was confused, that he smelled "alcoholic beverages" on accused's breath, and that "he wasn't walking straight. * * *He wasn't falling over or anything, but he was walking wabbly". In witness' opinion, accused was drunk (R.16-21).

Private Manuel Galvin, 909th Guard Squadron, and Private Lewis both testified that upon search for Lieutenant Miles' car, they found it about 2 o'clock in the afternoon at the east end of the field, west of Post Number 6, "right by the hangars". They started the motor, but the car would not move, and they eventually towed it with a "jeep" to the guardhouse area (R.21-27).

b. Additional Charge.

The prosecution introduced in evidence depositions of Mrs. Mary M. Jennings and Mrs. W. V. Hill, both of El Paso, Texas, as Exhibits I and II, respectively (R.5,6). Both lived with their husbands and small children in cabins at the White Way Tourist Court in El Paso. The court was a group of sixteen cabins surrounding a filling station and the court office, and fronting on Alameda Avenue. Accused was seen peering in the window of the office of the court by Mrs. Hill, and later someone informed Mrs. Jennings that he had broken the lock on the door of her cabin and entered the apartment. She sought him out, politely asked him why he had done so, and requested him to fix it. Accused "cursed" her, saying, "What difference does it make to you what cabin I break into?", and "It don't make a God damn to you what cabin I was in". He also told her that she "was not an American citizen and had no right to tell him what to do". Mrs. Hill and her six-year old daughter walked up, and accused said to her and Mrs. Jennings, "You are both damned whores and you make your living off drunk soldiers like me". He told them that he "was a Lieutenant in the Army and had plenty of money to back him up in what he did", and that "nothing can be done to me". To Mrs. Hill's statement that he had been peeping in a window a few minutes previously, accused replied, "No, you God damned whore, I wasn't peeping in any window" (Pros. Exs. I,II).

Accused called Mrs. Jennings' baby a "little bastard" and Mrs. Hill's daughter a "bastard". He then crossed the street and attempted to board a street car for town, but it failed to stop, and he was brought back to the filling station by Mr. Valenzuela, the operator of the court. In the presence of a crowd of twenty or twenty-five persons who had gathered, accused said to Mrs. Hill, "I haven't bothered you nor your damned daughter, the bastard", and said to an unoffending civilian bystander, "You are not an American citizen, and if it were not for my uniform I would slap hell out of you". To three El Paso policemen who had been called, accused said, "You are a bunch of 4F bastards; you are all Juareses". Later in the evening, in a cell at the El Paso police station, accused was yelling for "somebody to call the Commanding Officer at Deming and get him out of jail", and telling the police and Mrs. Hill and Mrs. Jennings that they "had better let him out". During all this time he was in the uniform of a Second Lieutenant in the Army (Pros. Exs. I,II).

Although Mrs. Jennings was "unable" to say whether accused was drunk or sober, Mrs. Hill stated that "when he crossed the street he was staggering and in his conversation he could not talk straight". In her opinion accused "was drunk; very drunk" (Pros. Exs. I,II).

Evidence for the defense.

Accused's rights were explained to him in court by the law member, and he stated that he wished to make a sworn statement (R.28). He testified concerning the alleged offenses in their chronological order, rather than the order in which they were charged. He stated that he had had trouble with his wife, to whom he had been married for about a year and a half, because of her "drinking and running around", and that about the 10th of October he had sent her home (R.29,30,31). About two and a half weeks later he learned that she had not arrived at their home; at the time of the trial he did not know her whereabouts (R.30,35).

He testified that, "after I sent her home, I was pretty discouraged and down-hearted, so I went to El Paso and I went to Juarez and I started drinking down there. I don't remember leaving Juarez and at that tourist court, I must have still thought I was in Juarez at the time. I don't remember calling those women all those names but I won't say I didn't do it because I was under the influence of whiskey and I don't remember for sure whether I did or not" (R.29).

Testifying as to the offenses alleged in Specifications 1 and 2 of the original Charge, accused stated that he had been drinking beer in the (officers') club about 9 o'clock that evening, and that he then

went "to town" and started drinking there (R.29). He testified that, "I don't remember coming back to the post at all and I don't remember taking Lieutenant Miles' car. The first thing I remember was when the guard hollered at me out on the ramp, but that is very hazy in my memory. I remember him calling the Corporal of the Guard, and he took me to the guardhouse and the O.D. brought me back to the barracks and I went to bed" (R.29).

Accused stated that he had been in the Army for two and one-half years, having spent 14 months as an enlisted man and 11 months as an aviation cadet. He had never been in trouble before, either as a civilian or as a soldier (R.29,30). He said that his wife did not drink before their marriage, and that after a year of marriage they both began to drink. Accused had been drinking heavily during the previous month and a half, but stated that he had never before been so drunk that he did not know what he was doing (R.31,32). He said that he did not remember telling Norris that he was commanding officer of the field, and thought that he might have said that he was a "member of the Field" (R.32). He did not remember being in an automobile on the field, and did not remember having Lieutenant Miles' flashlight (R.32).

4. Accused pleaded guilty to Specification 2 of the original Charge and to the Additional Charge, and there is ample evidence in the record to support the findings upon these offenses. Recapitulation of the evidence pertaining to the offense of wrongful use of the automobile (Specification 1, Original Charge) shows clearly that Lieutenant Miles parked his car next to his quarters late in the afternoon of 17 November, and did not use it again during the evening. He left in it his keys, and in the compartment his flashlight. He did not authorize anyone to use the car nor give anyone the flashlight.

It is also undisputed that Private Norris, while on guard duty at about 4 o'clock the next morning, heard a car motor being raced somewhere near Post Number 6, on the ramp near the hangars, and that as he approached the location of the noise, the motor "hushed". Norris found accused near that spot, with the same flashlight which Lieutenant Miles had left in his car, and the car was found near there the next afternoon. When all these facts are considered, the evidence of accused's guilt, though circumstantial, is compelling. It is reasonable and logical to infer that accused drove the car there.

5. War Department records show that accused is 25-4/12 years of age. He was inducted in June 1941, and served as an enlisted man until 1 September 1942. He was an aviation cadet from 7 September 1942 until 31 July 1943, when he was commissioned a Second Lieutenant, Air Corps, Army of the United States.

6. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized under Article of War 96.

Terry E. Gow, Judge Advocate.

(On Leave), 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 Leroy F. Simpson (0-751849), 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 of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that as thus modified the sentence 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. 127, 11 Mar 1944)

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

SPJGQ
CM 246905

12 JAN 1944

UNITED STATES v. Second Lieutenant STANLEY C. BOHLIN (0-1314992), Infantry.	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 2 Trial by G.C.M., convened at Fort Ord, California, 21 December 1943. Dismissal and total forfeitures.

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

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

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

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

Specification: In that 2nd Lt. Stanley Carl Bohlin on 7 September 1943 borrowed the sum of Three Hundred Dollars ($300.00) from Cpl. Joseph J. LaPlace, Company "A", 262nd Infantry, Camp Joseph T. Robinson, Arkansas, an enlisted man.

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

Specification: In that 2nd Lt. Stanley Carl Bohlin, an officer, being indebted to Corporal Joseph J. LaPlace, Company "A", 262nd Infantry, Camp Joseph T. Robinson, Arkansas, an enlisted man, in the sum of Three Hundred Dollars ($300.00) due on or about 14 September 1943, dishonorably failed and neglected to pay said debt.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of all the Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of the prosecution shows that on 7 September 1943 accused, a second lieutenant in the Army of the United States stationed at Camp Robinson, Arkansas, borrowed from Corporal Joseph J. LaPlace, an enlisted man in the same military organization as the accused, the sum of $300 for the purpose of purchasing an automobile and with the understanding that the money was on its way to the accused from his home and the accused would repay the borrowed money within five or six days (deposition of Corporal J. J. LaPlace, Exhibit 1, R. 7). The money was not repaid within the time specified and had not been paid to the day of this trial. The accused was transferred from Camp Robinson to a Port of Embarkation and Corporal LaPlace asked for payment prior to his departure. The accused promised to send the money to him after he reached the Port of Embarkation. This he failed to do (Pros. Ex. 1).

On 23 November 1943 the accused voluntarily made a written statement (Pros. Ex. 2) in which he admitted to First Lieutenant Robert L. Henning, Adjutant of the Officers School, after being properly warned, that he borrowed $300 from Corporal Joseph J. LaPlace and told him that he would pay him back within a week. He used $200 of this money to purchase an automobile. The remainder was used for his wife and child. He was unable to repay the money at the time specified and told Corporal LaPlace that he would pay him back as soon as he could. He also admitted that when he was transferred he told Corporal LaPlace that he would pay him back as soon as he arrived at his new station. "To this date I have made no attempt to pay Cpl. LaPlace."

4. The accused having been advised as to his rights regarding testifying on his own behalf elected to testify. He stated that he borrowed the $300 from Corporal LaPlace for the purpose of buying an automobile for the sum of $200 and of using the other $100 for his wife and child who had been ill (R. 10). He had been unable to repay the money because of expenses in moving his family from place to place and the illness of his 15 month-old child (R. 11). He intended to repay Corporal LaPlace as soon as he could get the money. On 25 November 1943 accused arranged for an allotment of $50 of his pay, per month, to start the first of January payable to Corporal LaPlace. He claimed that he did not know, or realize, that it was improper to borrow money from an enlisted man, nor did he know that an allotment may not be properly made on an officer's pay for the purpose of paying a debt (R. 13, 19).

The car that he purchased with the borrowed money was a 1936 model Lincoln Zephyr. It was still at Camp Robinson. He was unable to drive it away because of need of motor repairs and tires (R. 13). He promised to repay Corporal LaPlace within five or six days after he had borrowed the money because he expected to receive the money from his mother and father who lived in Seattle, Washington, but when he asked them for the

money they were unable to supply it (R. 16). He admitted that at the end of September he received $250 pay and for the month of October he received $115 but made no effort to use any of this for the purpose of repaying Corporal LaPlace (R. 17).

5. With reference to Charge I and its Specification, the accused not only pleaded guilty to the commission of the offense alleged therein, but also admitted on the witness stand that he did, as charged, borrow the sum of $300 from Corporal Joseph J. LaPlace, an enlisted man, at the time and place specified. It was shown by the evidence that the accused and the corporal were members of the same military organization, namely Company "A", 262nd Infantry.

The mere act of an officer borrowing money from an enlisted man is an offense under Article of War 96: CM 122920 (1918); 130989 (1919); Dig. Op. JAG, 1912-1940, sec. 543 (5).

The Specification of Charge II alleges that the accused dishonorably failed and neglected to repay the money borrowed from Corporal LaPlace in violation of Article of War 95. The mere failure of an officer to keep his promise to pay a debt is not a dishonorable act in violation of Article of War 95 unless the promise to pay is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment: CM 220760 (1942).

The evidence shows that the accused was in financial difficulties in his efforts to support his wife and child and borrowed from the enlisted man for the purpose of paying some of his living expenses and to purchase an automobile. He assured the enlisted man at the time that he would pay him within five or six days as the money was being forwarded to him by his parents. The court was justified in concluding from his subsequent action in ignoring not only his promise to pay within the time specified but also subsequent promises, in spite of having received, in the interim, his monthly pay for several months, that his original promise to repay was made with a false or deceitful purpose. His subsequent conduct as outlined above was also sufficient to support the conclusion that he dishonorably evaded payment. It is the opinion of the Board of Review, therefore, that the evidence of record is legally sufficient to support the findings of guilty of Charge II and its Specification.

6. The record shows the accused to be 22 years of age. He attended high school for 3½ years in Seattle, Washington. He worked as a mechanic, as a carpenter's apprentice, and had two years experience as a landscape architect. He was inducted into the service 9 September 1942 and subsequently attended OCS, Fort Benning, Georgia, from which he graduated

10 March 1943 and on the same date was commissioned second lieutenant and assigned to Camp Wheeler. Three weeks later he was assigned to the 66th Infantry Division at Camp Blanding, Florida. After arriving at AGF Replacement Depot No. 2, Fort Ord, California, the accused requested that he be "reclassified" into another branch of the service.

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

William A. Pounds, Judge Advocate

Earle Deghum, Judge Advocate

Herbert R. Frederick, 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 Stanley C. Bohlin (0-1314992), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures 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. ltr. for sig. S/W.
3 - Form of action

(Sentence confirmed but forfeitures remitted. G.C.M.O. 96, 10 Mar 1944)

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

SPJGH
CM 246928

29 JAN 1944

UNITED STATES	MOBILE AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at Municipal Airport, Memphis, Tennessee, 20 December 1943. Dismissal and total forfeitures.
Second Lieutenant WILLIAM R. MONTGOMERY, JR. (O-670410), Air Corps.	

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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Second Lieutenant William R. Montgomery, 26th Ferrying Squadron, Municipal Airport, Memphis, Tennessee, did, without proper leave, absent himself from his station at Municipal Airport, Memphis, Tennessee from about 23 November 1943 to about 27 November 1943.

Specification 2: (Finding of guilty disapproved).

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

Specification: In that Second Lieutenant William R. Montgomery, 26th Ferrying Squadron, Municipal Airport, Memphis, Tennessee, having received a lawful order from First Lieutenant Lamar W. Anderson to report to said First Lieutenant Lamar W. Anderson at 0800 hours on 29 November 1943, the said First Lieutenant Lamar W. Anderson being in the execution of his office, did, at Municipal Airport, Memphis, Tennessee on 29 November 1943 wrongfully fail to obey the same.

He pleaded guilty to Specification 1, Charge I and to Charge I; and not guilty to Specification 2, Charge I, to the Specification, Charge II and to Charge II. He was found guilty of all Specifications and Charges. Evidence of one previous conviction by general court-martial of absence without leave for about five days, in violation of Article of War 61, was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due and to be confined at hard labor for six months. The reviewing authority disapproved the finding of guilty of Specification 2, Charge I, approved only so much of the sentence as provides for dismissal and total forfeitures, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution: Extract copy (Ex. A) of the morning report of the 26th Ferrying Squadron, Municipal Airport, Memphis, Tennessee, showed accused from duty to absent without leave 23 November 1943. Extract copy (Ex. B) of the morning report of the same organization showed accused from absent without leave to duty 27 November 1943 (R. 12).

First Lieutenant Lamar W. Anderson, Adjutant of the 26th Ferrying Squadron, testified that he had charge of administrative work in the squadron and had been instructed by Captain Edward S. Bovee, the acting commanding officer of the squadron, to handle all matters pertaining to absences without leave. Accused, who had been carried on their records as absent without leave, reported to "Operations" Saturday afternoon, 27 November 1943 and was referred to Lieutenant Anderson. He had a talk with accused and told him, "Lieutenant, you are to report in this office to me at 8 o'clock on Monday morning". He "definitely" told accused "8 o'clock on the morning of the 29th". Lieutenant Anderson was in his office at the appointed hour but accused did not report. Accused did not appear in his office at any time on 29 November or 30 November (R. 6-11).

4. For the defense: Captain Edward S. Bovee testified that he was Operations Officer of the 26th Ferrying Squadron on or about 27 November 1943. He was also acting commanding officer in the absence of the commanding officer and of the executive officer of the squadron. He had not received any written instructions to this effect from higher authority. He was the ranking pilot officer present for duty to the best of his knowledge (R. 14-18).

Accused testified that he called the squadron Tuesday morning, 23 November, and told them he would be late. He had some friends in town the night before and had been out late. He came out intending to report for 11 o'clock roll call but fell asleep in the bachelor officers' quarters and did not awaken until late afternoon. "That was on Tuesday. Then I reported about 1500 on Saturday afternoon". He reported to Lieutenant Anderson, his superior officer, who told him he was under arrest and not to

leave the post, that "he would have my order of arrest written out" and for accused to report back to him. "I don't remember the exact time". The following day, Sunday, he called the squadron, talked to an officer in "Operations", he believed it was "Lieutenant Ware", told him he was at the Officers' Club and where he could be located. In response to his inquiry Lieutenant Ware told accused he was not wanted for anything. Accused did not leave the post on Sunday or Monday but did not report back to the squadron until Tuesday morning (R. 23-26).

5. The evidence shows and the pleas of guilty admit that accused was absent without leave from 23 November 1943 to 27 November 1943.

As to the Specification, Charge II, the evidence shows that on the termination of his absence without leave accused reported to First Lieutenant Lamar W. Anderson, the Adjutant of the 26th Ferrying Squadron, who had been designated by the acting commanding officer of the squadron to handle cases involving absence without leave. Lieutenant Anderson informed accused that he was under arrest, warned him not to leave the post, and directed him to report back to Lieutenant Anderson in his office at 8 o'clock, Monday morning, 29 November 1943. Accused did not report to the adjutant at the appointed time.

Accused admitted in his testimony that he was ordered by Lieutenant Anderson to report back to him but stated he did not remember any specific time. He testified that he called the squadron Sunday morning, 28 November, from the Officers' Club and informed an officer in "Operations" where he could be located. Accused stated that he inquired whether he was "wanted for anything" and received a negative answer. He did not leave the post either Sunday or Monday but did not report back to the squadron until Tuesday morning.

In the opinion of the Board of Review the evidence shows that accused wrongfully failed to obey an order given him by Lieutenant Anderson, the squadron adjutant, to report to him at a specified time. Lieutenant Anderson was the superior officer of accused and gave the order in the execution of his office inasmuch as he acted under the authority of his superior, the acting commanding officer of the squadron to which accused belonged. The failure of accused to obey the order given him constituted, under the circumstances proven, a neglect to the prejudice of good order and military discipline, in violation of the 96th 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 20 March 1942; Aviation Cadet from 13 May 1942; appointed second lieutenant

Officers' Reserve Corps, Army of the United States, and active duty 14 January 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 approved 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 the 96th Article of War.

Samuel M. Driver, Judge Advocate

Robert C. McEnnor, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

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

5 FEB 1944

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William R. Montgomery, Jr. (0-670410), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the approved findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was absent without leave from his station for about four days and failed to obey a lawful command of his superior officer. He has one prior conviction by general court-martial of being absent without leave for about 5 days in October 1943 for which he was sentenced to forfeit $50 of his pay for one month and to be restricted to the limits of his post for two weeks. The report of investigation states that the character of the service of the accused prior to the offenses charged was "unsatisfactory". I recommend that the sentence to dismissal and total forfeitures 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 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 forfeitures remitted. G.C.M.O. 114, 10 Mar 1944)

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

SPJGK
CM 246929

9 MAR 1944

UNITED STATES	)	ANTILLES DEPARTMENT
v.	)	Trial by G.C.M., convened at APO 846, c/o Postmaster, New York, New York, 25-26 November 1943. Dismissal.
Second Lieutenant RICHARD J. DEDHAM (0-1080530), Coast Artillery 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 85th Article of War.

Specification: In that Second Lieutenant Richard J. Dedham, 36th Coast Artillery, was, at or near APO 851, c/o Postmaster, N.Y., N.Y., on or about 4 October 1943, drunk while on duty, namely, while detailed to make an investigation of an insular police report and to witness payment of damages occasioned by a soldier of his command, a duty which also entailed the dispatch of three enlisted men with a weapons carrier as a means of government transportation.

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

Specification: In that Second Lieutenant Richard J. Dedham, 36th Coast Artillery, was, in and about the metropolitan area, at or near APO 851, c/o Postmaster, N.Y., N.Y., on or about 4 October 1943, drunk and disorderly in diverse public places, to wit, the Pan American Provision, and in the vicinity of Stop 15, in the presence of and in company with military inferiors of his command.

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

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

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification, guilty of the Specification of Charge II except the words "and disorderly" (of the excepted words, not guilty) and not guilty of the Charge but guilty of a violation of Article of War 96, and guilty of Charge III and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Charge III and its Specification, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

Testimony for the prosecution was offered by Captain Plinio Otero, Coast Artillery Corps, APO 854, Master Sergeant Eric A. Smith, Battery A, 36th Coast Artillery, APO 854, Private Herberto Fortier-Cintron, Battery B, 35th Coast Artillery, APO 851, Private Alejandro Pujals-Colon, Headquarters Battery, 36th Coast Artillery, APO 854, Major Thomas M. Bond, Coast Artillery Corps, APO 851, and by Severo Baez and Manuel Ramon Santiago, both civilians from nearby localities.

Accused was the executive officer of his battery. About 0900 on 4 October 1943, he was directed by Captain Otero to go from their camp at P——— S——— to the nearby town of B——— to investigate a civilian police report and to witness the payment by Master Sergeant Smith for damages which had been done to window glass in that town. Captain Otero directed accused to take with him, besides Sergeant Smith, Privates Fortier and Pujals, as driver and assistant driver of a weapons carrier, and to go through Fort (APO 846) on errands at the laundry, the gasoline station, and the Provost Marshal's office there. He did not otherwise prescribe the route to be followed, nor any specific time to be back. He did not, however, authorize accused to go to S——— J——— or to S———, which were other places some distance east of the neighborhood. At that time accused was "in normal condition" (R. 9, 10, 22, 24, 32, 33, 46).

The errands en route to B——— were satisfactorily performed, and they arrived there about 1000, going to the local police station in order to obtain directions to the home of Mr. Juvenal Conception, prospective payee of the damage money (R. 24, 33, 46). Accused and Smith left Fortier and Pujals in the carrier, and were gone for about an hour, in an unsuccessful attempt to find Mr. Conception. When they came back they went into the police station for a while, then returned, and accused gave Pujals and Fortier $1 for their lunch. Smith testified that he and accused had previously had something to eat and had "had a few beers". While the two privates were eating, accused got a shave in a nearby barber shop, then went with Smith to the restaurant in which Pujals and Fortier were eating. Here accused drank a "rum and coke" (R. 24, 25, 33, 34, 46, 52).

After this, accused, Smith, the policeman, and the two privates drove to the town of V----- B----- (which, according to a standard atlas is about 14 miles distant from B-----), where they were told they would find Mr. Conception teaching school. Upon arriving they found that Mr. Conception would not be there until about 1400, so they then drove to the "Bar Paris", a restaurant in the center part of the town of V----- B-----. Here accused, Smith, and the policeman "got something to eat"; and accused granted Fortier permission to drive to the nearby town of T----- to see his father. Fortier and Pujals were gone about thirty minutes or an hour, then returned, picked up accused, Smith, and the policeman, and returned to the school. Mr. Conception received his money and gave a receipt for the payment, thus finishing the business upon which the party had originally been sent. The time was fixed by Pujals at about 1400 and by Smith at about 1600 or 1630 (R. 24, 26, 34, 38, 46, 47).

Fortier again drove them to the "Bar Paris", where they "had something to eat and to drink" (R. 34). Up to this time accused's manner of walking and speech were normal (R. 39), but upon leaving here about 1500 or 1515 Fortier observed that accused was drunk (R. 37). They drove back to B-----, where the policeman left them. Pujals testified that at this time accused "did not look very normal, but * * * he didn't look very drunk" (R. 49). From B----- the party left for their own base and battery area, which was roughly twelve miles to the north. About seven miles along the route which they had come in the morning was Fort (APO 846) where they had stopped on the way in (R. 10, 11, 37, 47, 49).

When they passed the gateway of Fort (APO 846), through which they had come when on their way to B----- in the morning, and through which it appears that they would normally have gone to return to their own area, accused said that he was hungry. Smith suggested that they drive on to R----- P-----, where there was "a good place". After some discussion they continued towards R----- P-----, which was about seven miles east of B-----, and, together with the town of S-----, a suburb of the large city of S----- J-----. They stopped at a drinking establishment, at "Stop 15", near S-----. This establishment had a bar, into which Smith and accused entered. They had a sandwich and a drink of rum. Smith stated that here accused was "perfectly all right * * * just as normal as usual". From there they went to the nearby Pan-American Provision Company, a public grocery store. Accused had one "beer with alcohol", and Smith had a beer. Fortier testified that accused "walked all right" here. Mr. Santiago and Mr. Baez, employees of the store, testified that accused drank only one small cup of his beer, that he "seemed somewhat dizzy", that he swayed a little as he walked towards witness Santiago, and that he was "tipsy" or "under the effects

of liquor". His conduct was not, however, of such a nature as to draw attention of any of the customers to him (R. 24, 26, 27, 29, 34-36, 38, 47, 51, 67-70, 70-76).

They emerged from the Pan-American Provision Company and were driven to the Continental restaurant at "Stop 15". Smith gave Fortier and Pujals some more money for their food, and accused and Smith went in to the bar. They were inside for "about an hour". A taxi driver went in, sat down at accused's table, and accused bought him "a beer". Evidence is conflicting as to his condition. Pujals stated that he was "bacilon", which was alternately translated to mean "tipsy" or "gay". Smith and Fortier testified that when accused came out to get into the driver's taxi he did not stagger and that his "drunkenness was passing". Accused, Smith and the taxi driver departed together in the taxi (R. 30, 36-38, 40, 48, 50).

The driver took Smith and accused to "a private place" near "Stop 26½" in S——. Besides Smith and accused, there were "four or five girls there and also two other men". Smith testified that it was "not an unlawful house", though accused, in testifying later in his own behalf, indicated that it was probably a house of prostitution. They remained here "about two hours". Accused drank beer, and Smith stated that accused "wasn't feeling so good at that time". At length Smith suggested that it was getting late, and that it was time to leave. Accused finally agreed to do so. From here they went back to "Stop 15", where they had left the weapons carrier and the two enlisted men. The latter had waited vainly for about three quarters of an hour for accused's return, and then had telephoned their base for instructions. They had been ordered by Captain Otero to return to the post. After driving about S—— J—— in a last attempt to find accused and Smith, Fortier and Pujals did so. They arrived about 1830. Failing to find them, accused and Smith took a bus to S—— J—— and got there "sometime before dusk" (R. 24, 28, 29, 31, 39, 40, 49).

Major Bond, Captain Otero and a "Lieutenant Price" started out from their camp in a command car, with Fortier as the driver, about 1900, to search for accused. After considerable search they found him and Smith at the ferry dock in S—— J——, which was about sixteen miles northeast across a bay from their battery area at P—— S——. It was now about 2100. Accused and Smith rode in the front seat of the command car with Fortier on the way home. Captain Otero testified that "it was a little dark over there, but it looked to me that he (accused) was a little sleepy, or dozing. He was seated on the front seat of the car, * * * and his eyes were just closed * * *". After riding eight or ten blocks Major Bond noticed that accused "wasn't sitting up straight in his seat". He was afraid accused would fall out, so he ordered accused and

Smith to change places on the seat. Eventually accused went to sleep with his head on Smith's shoulder. Outside the gate of their post Major Bond aroused accused, told him to straighten up, and to put on his hat, which had fallen to the floor. Accused did so, and they drove inside, to accused's hutment area. Here Captain Otero offered to help him in alighting, but accused rejected assistance, saying, "I don't need any help". He walked somewhat unsteadily a distance of 25 or 30 feet to his own quarters, over some rough and broken ground. Captain Otero stated that he smelled alcohol on accused's breath at that time, but would "not say that accused was completely drunk or grossly drunk or passed out * * *". Major Bond did not subject him to a sobriety test, but stated that he would not have detailed accused to a military duty "unless an emergency existed" (R. 9, 10, 12, 13, 15-18; 53-60). Neither would Captain Otero have done so (R. 22).

Captain Otero testified that accused had completed his mission satisfactorily and had delivered to him the proper receipts. Duty hours in their organization were from 0730 to 1600, and an officer could go any place he wished after that time if he had no specific duties to perform. It was the rule, however, that after an officer had completed a mission he must return to the organization. He was not allowed extra time for personal errands (R. 17, 22, 23).

Captain Otero also stated that accused was an experienced and efficient officer, that he would give accused a "superior" rating, and that he had thrice recommended accused for promotion. Accused's general reputation in the detachment was that "he used to drink too much", or as stated by Major Bond, he had a reputation for being "in other than a normal condition more often" than other officers in the command (R. 18, 21, 66).

Evidence for the defense.

Eladio C. Flores, the policeman who accompanied the party from B---- to V---- B----, testified that he was with accused from 1030 to 1500, that they had a drink of beer the first time in B----, and that accused had a "coke" on his second visit to the Bar Paris, but nothing to drink on his first visit there. During all the time that he was with accused, accused "was in perfect shape", and witness did not observe that he was drunk (R. 90-92).

Juvenal Conception, the school teacher to whom the money was paid, testified that he saw accused about 1345 at the school; that accused's attitude, appearance and conduct while in witness' presence were "like a gentleman; like a person who behaves very well and who is in perfect shape". Witness smelled no alcohol and accused was not drunk (R. 93, 94).

Second Lieutenant Robert H. McWilliams, Battery B, 35th Coast Artillery, testified that he was in bed, reading, in their hutment when accused entered at approximately 2100. Accused came in in a normal condition, and in witness' opinion, was not drunk. He also stated that he had known accused for eleven months, and that accused's general reputation in their organization was that he was "the finest officer that an organization has ever had" (R. 42, 43).

First Lieutenant Louis G. Maglio, Coast Artillery Corps, APO 851, the assistant adjutant with the Coast Artillery Command, and the custodian of accused's officer's qualification card, testified that from 12 November 1942 to 21 April 1943, accused had been Battery Officer of the 52nd Coast Artillery and had received a "superior" rating; that from 22 April 1943 to 19 May 1943 he had been Battery Officer of Battery F, 245th Coast Artillery, receiving a rating of "excellent", and that from 24 June 1943 to 1 August 1943, he had been Battery Officer for the 813th "A.M.T.B." battery, but received no rating upon the performance of this duty, having been on actual duty for only four days of this period (R. 95). Witness stated of his personal knowledge that the reason for this was that accused had been under restriction during that time (R. 129). He stated also that accused was highly respected by their group as a good artillery officer (R. 126).

Accused's rights were correctly explained to him by the law member, and he testified in his own behalf. His testimony corroborated in almost all material respects that of the witnesses for the prosecution. He took his first drink between 1030 and 1100, after picking up the policeman. This was one bottle of beer. He had one drink at the "Bar Paris" in V—— B——, but "couldn't honestly say" whether he had a drink the second time he was there. He could remember "everything that happened" on the road from B—— to the gate of Fort (APO 846). Passing through this gate was only one of the ways to reach their own camp. He had a pair of sunglasses at the Officers' Service Quarters in S——, and was going to pick them up. The duties of the day were over at their base at 1600, and while officers could not leave the fort without permission during the week, and he did not have Captain Otero's permission to do so, nevertheless it "had been Captain Otero's policy" that if they were in the vicinity of S—— J——, they might attend to personal matters. "We would call in and notify them". He stated that he had tried to call but could not get through then. He thought that Captain Otero would not object if he took care of his personal business before he returned to the post. After he got to the place near "Stop 15" he "just forgot about it" (R. 103-108, 111, 118, 119). He used a taxi to go there because he was not then on official business and did not wish to use Government transportation. They went to the Pan-American Provision Company because Smith said that he had some very good friends there whom he wanted accused to meet. They spent only a few minutes there. He could not "intelligently give an explanation" of his going to the house at "Stop 26½". It "had all the 'ear marks' of being a house of prostitution". He was there "for an hour or an hour and a half", and paid for the beer which was drunk, but denied buying any drink for the taxi-driver (R. 105, 108, 109, 112, 113, 116).

He and Smith walked back to "Stop 15" and found that the drivers had gone with the weapons carrier. He did not think it unusual to have left them there without any orders. "They knew they had taken me from P—— S—— that morning and that it was their duty to take me back * * * " (R. 109). In reply to a question, accused stated, "I don't know * * * if I had been completely sober and had nothing to drink whether I would have told the driver to wait there" (R. 110). He thought it best to go back to camp without official transportation, so they went by bus to

the ferry (R. 106, 110). "I felt my responsibility for them had stopped and I would consider that as off duty" (R. 121).

Accused stated that while riding back to camp in the command car he "removed my cap and relaxed". After he got out of it, on his way to his quarters, the ground was rough, with obstacles such as a big ditch with dirt piled about (R. 106, 110). He admitted having had four drinks, three of beer and one of rum, during the day. He stated that he had had thirteen and one-half years of military service, thirteen months of it in commissioned status, and that he had never been court-martialled before (R. 117).

4. The evidence shows clearly that accused was detailed to take three enlisted men in a weapons carrier on several errands, which took him eventually to two towns some distance from camp. During delays encountered, accused had two or three drinks, but did not become intoxicated, and satisfactorily performed the errands. After completing them he indulged in some more drinking. He did not return to camp at the conclusion of his duties and at the hour past which personnel were expected to be there unless they had permission to be absent, and visited several more public and private drinking establishments, one of them probably a disorderly house. In going to the latter, he left his two drivers without instructions, and they eventually returned to camp without him. He was found sometime after 1900 in a nearby city, some sixteen miles from camp, on his way home by ferry boat. While no longer "drunk", his condition was such that his commanding officers would not have placed him on duty under ordinary circumstances.

5. There is no doubt that accused was drunk within the meaning of Article of War 85. "Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of Article of War 85" (CM 247456, Thomas). Accused's conduct in leaving the drivers without instructions, his visit even for the sole purpose of drinking, to a house of questionable reputation, his falling asleep with his head on Smith's shoulder, and his general condition as evidenced by his superiors' comment that he was not fit for ordinary duty, and his own admissions, are indications that the full exercise of his mental and physical faculties was impaired.

The Board of Review is of the opinion that under all the circumstances accused was still on duty within the meaning of the word as used in the article, even though his specific tasks had been completed. He was in charge of and responsible for the enlisted men and the weapons carrier. He himself was due back in camp as soon as possible after the completion of his mission. He admitted that he did not consider himself off duty until he returned Private Smith to P—— S——. The evidence fully substantiates the court's findings with respect to Charge I and its Specification.

The court likewise properly found accused guilty of Charge II and of its Specification with exceptions. At a time when accused was under the obligation to complete his mission and return promptly to his base with the enlisted men and the government vehicle detailed to him, he allowed himself to become intoxicated, the intoxication extending over a

considerable period of time and geographical area. Much of it was in public places and in the presence of enlisted men. The Board of Review is of the opinion that these circumstances constituted a separate offense from the one under Article of War 85, and that there has been no multiplication of charges against accused.

6. Considerable irrelevant testimony was admitted, but it is clear that such errors as occurred in this respect were beneficial rather than prejudicial to accused.

7. War Department records show that accused is 31-9/12 years of age and married. He graduated from Revere, Massachusetts, High School, in 1929, and from Cambridge Military Academy, Cambridge, Massachusetts, in 1934. He served enlistments in the Massachusetts National Guard (non-Federal) from 6 June 1930 to 5 June 1933, from 6 June 1933 to 5 June 1936, from 6 June 1936 to 5 June 1939 and from 6 June 1939 until his organization, the 241st Coast Artillery, was called into service on 15 September 1940. He attended the Coast Artillery School, Fort Monroe, Virginia, and was commissioned a Second Lieutenant, Coast Artillery Corps, Army of the United States, on 30 October 1942. In the review of the Staff Judge Advocate which accompanied the record of trial it is stated that on 24 July 1943 accused "was disciplined" for drunkenness under Article of War 104.

8. The court was legally constituted, and had jurisdiction of the person and the offenses. 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 mandatory upon conviction of an officer of violation of Article of War 85 in time of war, and is authorized upon conviction of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 MAR 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 Richard J. Dedham (0-1080530), 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. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer.

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

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

(Sentence confirmed. G.C.M.O. 290, 13 Jun 1944)

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

SPJGN
CM 246973

UNITED STATES	6 APR 1944 THIRD AIR FORCE
v.	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 2 December 1943. Dismissal.
Second Lieutenant NEWTON H. SMITH (O-794517), Air Corps.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Newton H. Smith, 98th Fighter Squadron, 337th Fighter Group, did at Boca Raton, Florida, on or about 28 September 1943, operate a military aircraft in a careless and reckless manner in violation of Paragraph 1, Section 1, Army Air Forces Regulation No. 60-16, dated 9 September 1942, thereby endangering the lives of persons and property on the ground.

Specification 2: In that Second Lieutenant Newton H. Smith, 98th Fighter Squadron, 337th Fighter Group, did at Boca Raton, Florida, on or about 28 September 1943, wrongfully and unlawfully violate Paragraph 3, Memorandum 62-10, Headquarters Third Air Force, dated 9 September 1943, by flying a military airplane below five hundred (500) feet above the ground.

He pleaded not guilty to and was found guilty of the Charge and its 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 Army Air Forces Regulation No. 60-16, dated 9 September 1942, prohibited reckless or careless operation of aircraft and that memorandum No. 62-10, Headquarters Third Air Force, of like date, prohibited operation of aircraft below 500 feet above the ground except upon specifically ordered or scheduled missions. On 28 September 1943 the accused, pursuant to Operations Orders Number 271 of the 98th Fighter Squadron, was the flight leader for six P-40's which he was directed to take on a training flight from Sarasota Army Air Base, Sarasota, Florida, to Boca Raton Field, Florida, and return. No low altitude navigation was authorized for the flight. Having arrived at Boca Raton Field, the planes were prepared for the return flight and, prior to leaving, the accused called the operations tower, asking if it was customary to buzz the field or would he be reported. He was advised to stand by while the Operations Officer was called and he replied, "Be sure and find out, right. I don't want to be reported." The tower then advised him that he had permission to buzz the field but not to buzz too low and to be careful. This permission and instruction was given by the Assistant Operations Officer who also testified that formerly on certain occasions such permission had been given to transient aircraft by the field's operations officer (R. 4-5, 7, 9-10, 11-12; Pros. Exs. A, B, C).

The testimony of several witnesses shows that the six planes took off in three elements of two ships each, that they climbed to an altitude of about 1500 feet and formed a six-plane "V" formation, that the accused's plane was leading and was followed by two planes on one side of the "V" and three planes on the other, the "heavy" side, and that the formation then buzzed the field by heading directly toward the control tower, which was cleared by 10 or 15 feet, and clearing the field itself by less than 50 feet. On the upswing the last plane on the "heavy" side tore the tail off of the immediately preceding plane which then climbed to an altitude of about 600 feet where its pilot safely bailed out and the plane crashed off the field. The last plane on the "heavy" side made a "dead" landing on the field and its pilot was also uninjured. The extent of the damage to the two planes or other property was not shown (R. 6, 9, 13-14).

4. The evidence for the defense, elicited from the testimony of the accused who, after explanation of his rights as a witness, elected to testify, shows that while at Boca Raton Field he became conscious of the field having a distinctly "buzzing nature", that he felt that "buzzing" was "condoned" at the field and that he therefore called the operations tower asking "if it were standard practice for fighter aircraft to be cleared to buzz this field". He was cleared by the tower to buzz the field but cautioned not to come in too low and to be careful, which were normal cautions. Since the tower was the highest object on the ground that had to be considered, he centered his plane on the tower, cleared it and buzzed the field so that nothing thereon would be hit and nothing was hit. After the "buzz" was completed and the field had been cleared, the two planes collided. He had habitually contacted the operations tower when leaving a field and followed its instructions and he did not know "but

what this regulation had been stopped, or perhaps this field had a different policy". Upon cross-examination he admitted that his plane belonged to the Third Air Force, that he was aware of the Army Air Forces Regulation and the Memorandum of the Third Air Force prohibiting low flying, and that he did fly below the minimum altitude prescribed thereby (R. 14-17; Def. Ex. 1).

5. Specifications 1 and 2 of the Charge allege respectively that the accused on or about 28 September 1943 at Boca Raton, Florida, operated a military aircraft "in a careless and reckless manner in violation of Paragraph 1, Section 1, Army Air Forces Regulation No. 60-16, dated 9 September 1942, thereby endangering the lives of persons and property on the ground" and that on the same occasion he did "wrongfully and unlawfully violate Paragraph 3, Memorandum 62-10, Headquarters Third Air Force, dated 9 September 1943, by flying a military airplane below five hundred (500) feet above the ground". "Disobedience of standing orders" is conduct prejudicial to good order and military discipline (MCM, 1928, par. 152a).

The evidence conclusively shows that the Regulation and Memorandum described in the Specifications were in existence and that accused's operation orders on the flight involved did not instruct or authorize him to engage in low navigation. Consequently, he was governed thereby and he admits full knowledge and violation thereof which is also shown by other ample evidence. His guilt of the offenses alleged is, therefore, shown beyond a reasonable doubt unless he is relieved therefrom by the "permission" granted him by the Operations Officer through the control tower at Boca Raton Field. Implicit in the record of the accused's conversation with the control tower and in the accused's entire testimony is knowledge on his part that "buzzing" is prohibited because in requesting "permission" to buzz the field he stated that he did not want to be reported. It is also material to note that "permission" only as distinguished from an order or direction was granted which, in the absence of any showing of authority of the local officers at the field to supersede the standing regulation and memorandum, was ineffectual for any purpose whatsoever, certainly not to the extent of obliterating offenses or acts condemned by the regulation and memorandum. The "permission" granted to buzz the field is, under the circumstances, mere extenuation and does not operate as a defense to the offenses alleged and proved. The accused's guilt of the offenses as alleged is, therefore, conclusively established by competent evidence which fully supports the findings of guilty of the Charge and its Specifications.

6. The accused is about 27 years old. The War Department records show that he has had enlisted service from 20 March 1942 until 13 December 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.

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 Specifications 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.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 246973

1st Ind.

War Department, J.A.G.O., 12 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 Second Lieutenant Newton H. Smith (0-794517), 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 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.
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. 241, 30 May 1944)

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

(237)

SPJGQ
CM 246974

14 JAN 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 14 December 1943. Dismissal.
Second Lieutenant CHARLES P. BARRETT (0-811840), Air 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Charles P. Barrett, 438th Fighter Squadron, 53rd Fighter Group, Ft Myers Army Air Field, Ft Myers, Florida, did at Parker Field, Arcadia, Florida on or about 3 November 1943, wrongfully and unlawfully fly a type AT-6 military airplane, at an altitude of less than 500 feet above the ground, in violation of Paragraph 3, Third Air Force Memorandum 62-10, dated 22 March 1943.

Specification 2: In that Second Lieutenant Charles P. Barrett, 438th Fighter Squadron, 53rd Fighter Group, Ft Myers Army Air Field, Ft Myers, Florida, did on or about 3 November 1943, at or near Parker Field, Arcadia, Florida, wrongfully and unlawfully violate Section 1, paragraph 1, AAF Regulation No. 60-16, dated 9 September 1942, by operating a military airplane in such a careless manner as to endanger friendly aircraft in the air.

He pleaded not guilty to Specification 2 and guilty to Specification 1 and the Charge. He was found guilty of the Specifications and the Charge. No evidence of previous convictions was introduced at the trial. 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 may be briefly summarized as follows:

On 3 November 1943 accused was operating a Government airplane Type AT-6A, Squadron Number P-0 on Mission 6b, taking off at 1445 and landing at 1555, in compliance with Operations Orders No. 102, Operations Office, 438th Fighter Squadron, Army Air Forces, located at Fort Myers Army Air Field, Fort Myers, Florida, and dated 3 November 1943 (R. 9; Pros. Ex. C).

At approximately the same time John B. Lyons, instructor at Dorr Field, Florida, was giving students instructions in takeoffs and landings on Parker Field, an auxiliary field six miles from Dorr Field. During the course of instruction at about 3:30 p.m., he was flying a plane accompanied by Aviation Cadet Otto F. Pirl. According to his testimony,

> "* * * we had been practicing landings at Parker Field and were in the air when an AT-6 with the letters P.O. dived down towards the field and climbed back up approximately 1500 feet, then turned and headed back in practically on our tail. Of course, he was some distance back then. We were down about 400 feet, so I looked back and kept watching him, and the student turned to land and he continued right on in at us, so I took the plane and dived more or less to the field, figuring he would go on away. The AT-6 didn't make any effort to turn and I wasn't sure whether he had seen us or what was on his mind. I continued on across the field and got down to approximately 20 feet and made more or less a steep turn to the left. This ship continued to follow us right on around, right on our tail. He had to turn in on a climbing turn. This was dangerous for two or three reasons. If he had got us in his propwash, we would have gone right on in and there was some danger of collision as close as he was." (R. 5).

Lyons testified that he was flying his plane "at approximately 20 feet and not over 50 feet when he (accused) went by" in the AT-6A plane which "was possibly just a few feet above" - "approximately 100 feet and that would be a long leeway." The situation was such that Instructor Lyons considered that accused's ship endangered the one he was flying (R. 4-6).

Aviation Cadet Pirl corroborated Instructor Lyons in all respects except that he thought accused's plane came to within 300 feet of the training plane although it did go as low as 50 feet from the ground (R. 7, 8).

A true and correct copy of an extract of Memorandum No. 62-10, Headquarters Third Air Force, 9 September 1943, was admitted in evidence. This memorandum, entitled "Flying Safety" contained, among other things, the following:

"3. RESTRICTIONS. Aircraft assigned to the Third Air Force will not be flown at an altitude below five hundred (500) feet above the ground or water except:

a. On specifically ordered missions involving skip-bombing or low altitude gunnery while actually engaged in bombing or gunnery releases on the range.

b. Missions may be scheduled below five hundred (500) feel when:

(1) It is a specifically scheduled minimum altitude mission published in operations orders in compliance with training or other directives, and

(2) Squadron or higher commanders have predetermined the course and have assured themselves that minimum hazards to minimum altitude flight exist on that course; and the course avoids cities, towns and villages, and

(3) All pilots participating are briefed in the course, terrain, and minimum altitude procedure." (R. 8; Pros. Ex. A).

A true and correct copy of an extract of Army Air Forces Regulation No. 60-16, War Department, 9 September 1942, was admitted in evidence. This contains in Section I thereof, pertaining to "General Flight Rules", the following provision:

"1. Reckless Operation. An air force pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground." (R. 9; Pros. Ex. B).

There was also admitted in evidence the above-mentioned Operations Orders No. 102, Headquarters 438th Fighter Squadron, Army Air Field, Fort Myers, Florida, 3 November 1943, under which accused was performing the mission prescribed at the time of the offense alleged (R. 9; Pros. Ex. C).

4. Accused, having been advised of his rights, elected to be sworn as a witness in his own behalf and testified as follows:

"Sirs, I am guilty of flying below 500 feet and I know the reason that severe punishment is coming is because the Air Corps is losing too many pilots and men and have to do something about it, but at the time of the offense I didn't know it was possible to be dismissed from the service. That day I buzzed Parker Field once and was returning to buzz it again, and at no time while flying was I under 500 feet. The first time I buzzed the field at not over 200 feet. I didn't know that the primary training was there. I went down across the field, approached it and saw the trainees when I got to the field and when I saw that I went away. I turned enough away so I didn't black it out but still turned away from the plane and not toward it. I don't think in my own mind that I endangered the other aircraft and although I flew below 500 feet, I know I am guilty there, I don't feel that I am guilty of endangering other aircraft. I know I didn't endanger my own life in my own mind."

He admitted that he saw the craft in which Instructor Lyons and Aviation Cadet Pirl were flying and recognized it as a training ship and he himself was a trainee pilot at the time of the incident (R. 10, 11).

5. Since accused, in his sworn testimony at the trial, admitted guilt under the first Specification, comment upon the legal sufficiency of the record to support a finding of guilt both as to this Specification and the Charge is not required.

However, since the offense alleged in Specification 2 is of a graver character and was denied not only by the plea of accused but by his testimony as well, it is necessary to examine the testimony and determine whether the manner in which accused operated the plane in question at the time and place alleged was so careless as to actually endanger friendly aircraft then flying in the vicinity.

The operation of aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground is specifically forbidden by Army Air Forces Regulations.

Airplanes are not only highly valuable property from a monetary standpoint but in time of war are critical and essential material, the loss of any portion of which cripples the war effort to that extent. At the same time, the personnel required to man and successfully operate aircraft for military purposes are required to undergo long and costly training and are, therefore, immeasurably valuable in the successful prosecution of the war. Since an airplane is recognized as an exceedingly dangerous instrumentality when taking off, flying and

landing, it should hardly have been necessary to publish rules, regulations, orders and directives inviting attention to the hazards incidental thereto and forbidding careless and reckless behavior in connection therewith.

Yet Army Air Forces Regulations, of which the court will take judicial notice and, in so far as accused is concerned in the instant case, Memorandum No. 62-10, Headquarters Third Air Force, clearly indicate what shall not be done in order to overcome the hazards and prevent accident and injury to both airplanes and personnel. It is an inescapable conclusion that flying below the minimum altitude fixed by the memorandum must, in the light of primary regulations, be deemed prima facie evidence of careless operation; for according to paragraph 3, subsection b, flying missions may only be scheduled beneath the minimum height when (1) specifically scheduled in compliance with training or other directives, (2) with the precautions that squadron or higher commanders have predetermined the course and assured themselves that the hazards of lower flying are minimum and the course avoids cities, towns and villages, and (3) all participating pilots have been briefed in the course, terrain and minimum altitude procedure.

While it is not shown that accused had ever seen or been advised of these regulations he was asked whether, at the time he reported to the 53rd Group, he had not read and initialed certain "flying safety files" and he admitted that he had. What these files contained is not disclosed but may readily be inferred and it would be absurd to say that a "trainee pilot" engaged in "advance flyer training" was unaware of the basic rules prescribed for the safe operation of a plane.

But, irrespective of the clear import of the written guides by which accused must be presumed to have been governed when he undertook to fly a military airplane he is likewise presumed to have had in mind the exercise of such care as an ordinarily prudent man would have exercised under like circumstances.

It did not require special training and expert skill to recognize another airplane flying in the same area and it did not demand any extraordinary powers of judgment to conclude that if one plane was flown close to another there was an imminent probability of collision.

The facts conclusively show that this episode was not one of unfortunate and unavoidable circumstances but the product of deliberate intention. Accused, knowing he was violating the minimum height restrictions, twice "buzzed" the field upon which an instructor was teaching takeoffs and landings to aviation students. He testified

that he saw the PT-17 plane piloted by the instructor and recognized the type of craft; he knew it was a training ship and that a trainee might be in it; yet the evidence is clear that he not only failed to avoid endangering the craft and its occupants but recklessly and with utter disregard of his own safety as well as theirs, deliberately chased the other plane around the field and came within 200 or 300 feet of it while he was flying at greater speed than they were and at one time was no more than 50 feet off the ground. The performance was a foolish, reckless and exceedingly dangerous demonstration of bravado and clearly constituted the offense charged in Specification 2.

6. Accused is 21 years of age and unmarried. Records of the War Department disclose that he was born in Klamath Falls, Oregon. There is no information regarding his education. From 22 April 1941 to 16 September 1942 he was employed by the Southern Pacific Railroad in San Francisco, California, as a clerk in apportioning the revenue of inter-line passenger traffic to the various participating railroads. He enlisted as an air cadet on 17 September 1942, was classified at Nashville, Tennessee, received his pre-flight training from 28 October 1942 to 29 January 1943 at Maxwell Field, Alabama, primary training from 1 February 1943 to 30 April 1943 at Helena, Arkansas, basic training from 1 May 1943 to 1 July 1943 at Walnut Ridge, Arkansas, and advanced training from 2 July 1943 to 30 August 1943. On the latter date he was commissioned a second lieutenant, Army of the United States, and was assigned on the same day to active duty at the Army Air Force Pilot School, Napier Field, Alabama. The record of trial discloses that on 3 November 1943 he was serving with the 439th Fighter Squadron, stationed at Dale Mabry Field, Tallahassee, Florida.

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 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 96.

William A. Founder, Judge Advocate.

Paul B. Hoffman, Judge Advocate.

Herbert B. Fredericks, 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 Charles P. Barrett (0-811840), Air Corps.

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

3. It is noted that in his review of the record of trial in this case the Staff Judge Advocate made the following observations:

> "After thorough study and consideration, and in an effort to reduce such violations as shown by this record, the Commanding General of the Army Air Forces has determined that dismissal from the service is the appropriate and indicated sentence in cases of willful violation of flying regulations. The dismissal of a few pilots will certainly tend to impress upon all pilots the necessity of observing flying regulations and thus in the long run tend to preserve many lives and much material that otherwise would be needlessly destroyed. The policy of the Army Air Forces in regard to dismissal of officers for intentional breaches of flying regulations is also an enunciated policy of the Third Air Force. By letter dated 20 June 1943 it was made clear that dismissal from the service was considered to be an appropriate sentence in court-martial cases involving such breaches of flying regulations. This letter was given a complete circulation and was brought to the attention of all flying personnel."

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

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

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

(Sentence confirmed. G.C.M.O. 138, 27 Mar 1944)

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

(245)

21 JAN 1944

SPJGH
CM 247015

UNITED STATES	)	4TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, 26 December 1943. Dismissal and total forfeitures.
Second Lieutenant RAYMOND P. LEWIS, JR. (0-1176702), Field Artillery.	)	

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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Raymond P. Lewis, Jr., 42nd Field Artillery Battalion, did, at Fort Jackson, South Carolina, on or about 20 December 1943, wrongfully write upon a postcard and leave lying about unsecured in his quarters, a postcard containing classified military information, to wit: "The outfit is hot and it won't be long now before we go across." "We go out on maneuvers almost every day." "All new clothing and equipment is being issued and we're getting ready to change stations."

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for six months. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures, recommended that the sentence be commuted to a reprimand, and forwarded the record of trial for action under the 48th Article of War.

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

The Commanding Officer of the 42nd Field Artillery Battalion, stationed at Fort Jackson, South Carolina, called his officers together about 5 December 1943, announced a possible change of station or movement of the division, and told them "it was classified information and would not

be revealed". The officers present, including accused, were warned to keep the matter quiet and not to discuss it with their families, relatives or anyone else. Security lectures were given the officers several times. On 19 December 1943, a mail clerk at the battalion message center discovered a post card, without an addressee, in the outgoing mail. The post card (Ex. A), bearing at the top of the message side the name of accused and his organization, contained a message of a personal nature in which the following statements were made: "* * * The outfit is hot and it won't be long now before we go across. We go out on maneuvers almost every day. All new clothing and equipment is being issued and we're getting ready to change stations. * * *" The card was returned to the battery mail clerk and then brought to the attention of the battery commander of accused, who in turn sent it to battalion headquarters for appropriate action. The battalion commander summoned accused and after he had "warned him of his rights" asked if he had anything to say. Accused stated that he wrote the card and, not having mentioned anything definite about time or movement, it had not occurred to him that there was anything wrong with it. Accused said nothing about mailing it (R. 5-10, 16-17).

The investigating officer in the case testified that he talked to accused in the course of his investigation and accused, after he had "warned him of his rights", stated that he had not realized the "seriousness of the information" contained in the post card. Accused made no statement at that time with reference to mailing the card but on the following day got in touch with the investigating officer and made an additional statement to the effect that he had not intended to mail the card but had left it in his room with other mail and an orderly mailed it (R. 11).

4. For the defense: Accused testified that he wrote the card hastily one night and then realizing that he should not divulge the information, did not address it because he intended to write again to the same person and destroy the card. He left the card on a table, and while he was in the field, as he later discovered, an orderly picked the card up with other letters and mailed it. He had not returned to his room prior to being summoned by the battalion commander for an explanation and consequently was unaware that the card had been mailed. Accused further testified that he had made a grave mistake and hoped it had not jeopardized his position with the division (R. 12-14).

The orderly for another officer in the hut in which accused lived testified that he had mailed the card after finding it on a table with other mail. He had not been instructed by accused to mail it (R. 14-16).

5. The evidence shows that accused, having received information from his battalion commander concerning a prospective movement of his division, despite warnings that it was classified information and not to be revealed, wrote a post card containing the following statement: "* * * The outfit is hot and it won't be long now before we go across. We go out on maneuvers almost every day. All new clothing and equipment is being issued and we're getting ready to change stations. * * *". The name of accused and his organization were written across the top of the card. Accused did not address the card but left it on a table in a hut which he and another officer occupied. An orderly picked up the card with other letters on the table and mailed it. The absence of an addressee was noted by the battalion mail clerk, who returned it to the battery of accused, where the nature of the message was discovered. Accused testified that, after writing the card, he decided not to mail it.

In the opinion of the Board of Review the evidence clearly establishes an infringement of security regulations, in violation of Article of War 96. The offense was committed when, under the circumstances, accused wrote information with respect to a prospective movement of his organization on a card and left the card exposed on a table in a room occupied by himself and another. The message was subject to the scrutiny of anyone who might enter the room, whether accused intended to address and mail the card or to destroy it later.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from July 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty, 28 January 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 96th Article of War.

Samuel M. Driver, Judge Advocate

Robert O'Connor, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 3 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 Raymond P. Lewis, Jr. (0-1176702), 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. The accused wrote upon a post card information to the effect that his organization would soon go overseas and left the card lying unsecured on a table in his quarters. In view of all of the circumstances, and the recommendation of the reviewing authority that the sentence be commuted to a reprimand, I recommend that the sentence to dismissal and total forfeitures be confirmed but commuted to a reprimand and that, as thus modified, the sentence be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 91, 26 Feb 1944)

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

SPJGK
CM 247055

12 FEB 1944

UNITED STATES v. Private First Class BERNARD J. MASON (32328185), 435th Engineer (Dump Truck) Company.	)	UNITED STATES ARMY FORCES IN THE MIDDLE EAST PERSIAN GULF COMMAND Trial by G.C.M., convened at Camp Amirabad, Teheran, Iran, 7 December 1943. Dishonorable discharge, total forfeitures, and confinement for life. Penitentiary.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Bernard J. Mason, 435th Engineer (Dump Truck) Company, Kazvin Post, Kazvin, Iran, did, at Kazvin Post, Kazvin, Iran, on or about 26 October 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private James (NMI) De Santos, 435th Engineer (Dump Truck) Company, Kazvin Post, Kazvin, Iran, a human being by stabbing 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, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Deceased died as a result of stabbing wounds inflicted upon him in the orderly room of the 435th Engineer (Dump Truck) Company, at Kazvin Post, Kazvin, Iran, shortly after 10 o'clock on the night of 26 October 1943. Present at the time were First Sergeant Derrick G. Hamilton,

Corporal Herbert D. Henry, Private (then Corporal) Lloyd Price, Private Maxie Williams, Private George J. Taylor, deceased, and accused, all of whom were members of that company (R.10,11,15,16,17,32). Hamilton, Price and Taylor testified for the prosecution.

Price testified that he and deceased came into the orderly room together about 10 o'clock in the evening. They had been in the town nearby since 8:30, visiting a few cafes (R.17,18). Taylor and a "Private Reese" came in about the same time, and all joined in a conversation which centered about Sergeant Hamilton's desk (R.10,11,15,18). In the next five or seven minutes accused came in (R.18). He appears to have taken no part in the general conversation about the evening's activities in the town, but rather to have been "fumbling as if he was looking for his pass", in order to turn it in. According to Sergeant Hamilton, the only witness who saw the altercation start, deceased turned to accused and said, "If you can't find it, I will help you" (R.11). Taylor testified that he heard accused and deceased talking, but paid no particular attention to them (R.15). Hamilton stated that accused did not answer deceased, but continued to search for his pass. Deceased told some of the men who were standing around "to step aside, that he was going to assist Mason [accused] to find his pass". The men did so, still not paying much attention, and went on talking (R.11,13). Deceased then gave accused a rough and violent push with both hands, driving him a distance of five or six feet, and causing accused to fall against Hamilton's desk, on which Taylor was just then depositing his own pass. Accused went down on one knee, then rose to his feet (R.11,13,16). He and deceased were then about five or seven feet apart, facing each other (R.11, 12,13,19). Hamilton testified that accused continued to go through his pockets, "fumbling for his pass", and that he said to deceased, "I thought you were playing, De Santos". Deceased stood with his hands at his sides (R.12,13). Accused stood looking at deceased for a length of time estimated by Hamilton as "three or four minutes" and by Taylor as "forty five seconds to one minute" (R.14,17). Then he walked towards deceased, who made no move, according to Hamilton, although Taylor testified that deceased was "heading out the door" (R.12,14,16).

Taylor testified that accused raised his right arm, his knife in his fist, to the level of his head, and struck deceased two blows in the chest, saying, "Fuck with me, will you?". Hamilton testified that accused struck three blows (R.14). Both witnesses described the knife used by accused as being similar to fishing knives sold at the Post Exchange, having a blade approximately six inches long. They stated that it was similar in appearance to the knife introduced by Prosecution as its Exhibit "1" (R.12, 16). Witnesses said that deceased seemed to be trying to defend himself, but did not grab hold of accused or strike him (R.14,19). Deceased fell on his face on the floor, behind "Lieutenant McKee's" table, in the far corner of the room, saying "Wait a minute, Mason", as he fell (R.13,17,19,20).

Price seized accused's right arm, but let go quickly when his own hand grazed something in accused's hand. Then he turned deceased, who was groaning, over on his back. Accused walked out the door with the knife in his hand (R.14,19-21).

Witnesses stated that they knew of no quarrels or encounters between accused and deceased prior to the actual push which deceased gave accused in the orderly room (R.13,17,21).

Staff Sergeant Eugene Riccio and Technician 5th Grade Kenneth E. Merindorf, both of the Medical Detachment, 68th Ordnance Battalion, were summoned and arrived about 10:30 o'clock. Deceased lay on his back in a corner of the room. He had little or no pulse. Riccio examined the body and found two wounds on the chest, which "looked as if they had been made by some sharp, pointed instrument". About five minutes later, Major A. L. Hertz, Post Commander, and Captain Leonard G. Miragliuolo, Medical Corps, Post Surgeon, arrived (R.25,27).

Private Lewis A. Boykin, 435th Engineer Company, testified that he and a "Private Hennessey", who were on guard duty, were detailed by the Sergeant of the Guard to look for accused and place him under arrest. They found him in his quarters in the barber shop in the front of the barracks, and took him with them. On their way from the barracks they stopped at the southeast corner of the company mess hall, near a mop and broom rack, to allow accused to light a cigarette. Boykin stated that they remained there "not more than a minute" (R.22).

In the meantime, Major Hertz and Technician Merindorf had set out to find the knife with which deceased had been stabbed, and they came upon Boykin, Hennessey, and accused standing beside the mess hall (R.7, 23). Major Hertz told Boykin and Hennessey to take accused to the guardhouse, after which they too returned to search for the knife (R.23). Merindorf testified that in his search he found a knife on the mop rack at the (south) east corner of the mess hall, that he ran to get Major Hertz, and that as they came back Boykin had arrived and was picking up the knife. Major Hertz' and Boykin's testimony in effect corroborated this (R.9,23,24,27,28). Major Hertz testified that the knife was a hunting knife with a blade about six inches long, with red stains and a number of parallel scratches on both sides of the blade. Boykin, who positively identified prosecution's Exhibit 1 as the knife he picked up, stated that it was blood-stained, and had rough surface gashes and a dent on the cutting edge of the blade (R.9,23).

At Major Hertz' orders accused was searched, apparently after he had been taken to the guardhouse. He was made to remove all his clothes, but the only weapon found was a leather scabbard on his belt just in front of his left hip, similar to those sold at the Post Exchange for holding a knife with a blade about five or six inches long (R.8).

Captain Miragliuolo testified that deceased was dead when witness examined him upon arrival in the orderly room. Deceased's body bore three wounds: one was an incised wound about 1 to 1-1/2 inches long on the chest, perpendicular to the body directly at the mid-line thereof at about the level of the clavicle. The second wound ran horizontally, level with the fourth rib, and slightly to the right of the mid-line of the body. The third, which witness believed to be a continuation of the second, was an incised wound crossing the right forearm about one and one-half inches from the elbow. Witness testified that blows of considerable force would have been required to inflict both wounds, that a post mortem examination made within an hour showed that the perpendicular wound had penetrated a total distance of four or five inches, into the left ventricle of the heart, and that death resulted therefrom (R.29-31).

Evidence for the defense.

Corporal Herbert D. Henry, 435th Engineer Company, testified in accused's behalf. He testified that he had been sitting in the orderly room talking with Sergeant Hamilton when accused and deceased came in a few moments apart, in order to turn in their passes. Witness stated that immediately upon entering, the two started to argue, that someone said, "take the argument the hell out of here", and that the argument continued. Deceased told accused "to put his pass down and get the hell out", and shoved accused vigorously, causing accused to fall on the floor on his side under the first sergeant's desk. Accused picked himself up almost immediately and felt over his clothes, while witness got up from where he was sitting, righted the desk, and said to both, "I did not think that you were so angry at one another", and to deceased, "You did not have to push him that hard" (R.32,33,35).

Witness stated that as he was righting the desk, accused and deceased moved "four or five feet" towards each other, deceased moving about a foot or two of the way; that he (witness) saw "their hands flying, striking at one another", and that deceased fell down in a corner. Witness heard him groan and saw a pool of blood. Accused stood over deceased for "about a couple of seconds", but witness said he saw no weapon in accused's hands. He testified that he had never heard accused and deceased quarreling about anything before (R.35,36).

Evidence for the prosecution (Recall).

Sergeant Hamilton testified upon being recalled that he saw accused rise from the floor, was able to and did observe both accused and deceased, and that deceased neither moved towards nor raised his hands to strike accused (R.37). Private Taylor stated that although he had not seen the push, he saw accused rise from the floor. He testified that he could not see whether deceased moved towards accused, but that deceased was "heading for the door" (R.38).

Evidence for the defense (Recall).

Captain Miragliuolo testified that he talked to and examined accused at the guardhouse after the incident, and that accused made the statement, "DeSantos [deceased] hit me", pointing to the soft part of his chin. Witness examined the soft part and the bony section of accused's jaw and found no symptoms of any injury or pain. Witness again examined accused at 10 o'clock the next morning, at which time accused pointed to a spot on his chin and said, "this place hurts". Witness found a small swelling no more than an inch in diameter, and testified that "Hypothetically I would say the man fell down and hit something" (R.39,40,42).

Accused did not take the stand or make an unsworn statement (R.36).

4. Briefly recapitulated, the facts are as follows: Without provocation by accused, deceased pushed accused roughly a distance of five or six feet, causing him to fall against a desk and to the floor of their company orderly room. Accused got up, stood still for a moment, advanced upon deceased, and struck him two or three blows with a knife, causing almost instant death. Accused walked from the scene, was apprehended a few minutes later, and was permitted by his guards to stop and light a cigarette near a mop rack on the wall of the mess hall. A few minutes after that a knife resembling that used in the stabbing was found on the mop rack.

5. It is not the function of the Board of Review in this case to weigh evidence or determine controverted questions of fact, but rather, to decide whether there is sufficient evidence in the record to support the findings of guilty. The Board is of the opinion that there is such evidence. There is no doubt that accused killed deceased, and the only question is whether the facts are such as to reduce the crime to manslaughter as a matter of law. The Board is of the opinion that the facts do not as a matter of law require the court to find accused guilty of manslaughter only.

Speaking of provocation, Winthrop states:

> "In any case where the provocation, though material, is not excessive, as where * * * the person is assailed but not seriously, * * * the law will in general hold the killing to be not manslaughter but murder" (Winthrop, Military Law and Precedents, 2nd ed. rev., p. 675).

It was not error for the court to conclude that the push administered by the deceased to accused fell short of the provocation necessary to reduce the homicide to manslaughter.

6. The charge sheet shows that accused is 30-8/12 years of age and was inducted into the service 30 April 1942. The papers accompanying the record of trial contain a statement by First Lieutenant Gerald L. Goodstone, Medical Corps, that he performed a psychiatric examination upon accused which revealed accused to be "of dull normal intelligence".

7. 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. A sentence either of death or of imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder recognized as an offense of a civil nature and so punishable by penitentiary confinement by Title 18, sections 452 and 454, United States Code.

(On Leave), Judge Advocate.

Wm Wansell, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

SPJGN
CM 247111

22 JAN 1944

UNITED STATES	)	SIXTH SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, 1-2 December 1943. Dismissal.
	)	
Second Lieutenant CHARLES J. GRANNELL (0-1896187), 3601st Service Unit.	)	

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

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

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

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

Specification 1: In that Second Lieutenant Charles J. Grannell, AUS, attached unassigned to the 3601st Service Unit, Reassignment Unit, Sixth Service Command, did, at Joliet, Illinois, on or about 30 October 1943, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Joliet, Ill., 10/28 1943 No.105

THE FIRST NATIONAL BANK IN JOLIET 70-59

Pay to the order of C. J. Grannell $50 00/100

Fifty and no Dollars

Member
7 Federal Reserve 7
System

Hugh M. Bryce

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

Specification 2: Same form as Specification 1 except for date of check which is 1 November 1943.

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

Specification 1: In that Second Lieutenant Charles J. Grannell, AUS, attached unassigned to the 3601st Service Unit, Reassignment Unit, Sixth Service Command, did, at Joliet, Illinois, on or about 30 October 1943, with intent to defraud willfully, unlawfully and feloniously utter as true and genuine a certain check in words and figures as follows:

Joliet, Ill., 10/28 1943 No. 105

THE FIRST NATIONAL BANK IN JOLIET 70-59

Pay to the order of C. J. Grannell $50 00/100

no Fifty and Dollars

Member 7 Federal Reserve 7 System

Hugh M. Bryce

a writing of a private nature which might operate to the prejudice of another, which said check was, as he the said Second Lieutenant Charles J. Grannell then well knew, falsely made and forged.

Specification 2: Same form as Specification 1 except for date of check which is 1 November 1943.

CHARGE III: Finding of not guilty.

Specification: Finding of not guilty.

CHARGE IV: Finding of not guilty upon motion therefor.

Specification 1: Finding of not guilty upon motion therefor.

Specification 2: Finding of not guilty upon motion therefor.

CHARGE V: Finding of not guilty upon motion therefor.

Specification: Finding of not guilty upon motion therefor.

He pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and its Specifications and of Charge II and its Specifications and not guilty of the remaining 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, adduced by the prosecution under the Charges and Specifications of which findings of guilty were made, shows that prior to 30 October 1943 the accused had been directed to appear before a reclassification board in Chicago, Illinois, by approximately 1 November 1943. On 30 October 1943 and again on 1 November 1943 he presented to the Joliet Currency Exchange, operated by Paul and Clarence Lipman, in Joliet, Illinois, a check for $50 drawn on the First National Bank in Joliet payable to himself and signed "Hugh M. Bryce". He on each occasion indorsed the checks and received cash therefor less a fee of 20 cents. The first check was deposited in due course with the exchange's bank and was dishonored by the drawee bank because neither the accused nor Hugh M. Bryce had an account there. The cashing of the second check aroused the suspicion of the operators of the exchange who telephoned the drawee bank and received advice that the first check had been dishonored for the above mentioned reasons. The police were notified and Clarence Lipman, accompanied by a police officer, secured the first check from the exchange's bank and then both checks were presented to the drawee bank with the same result. The police officer then had photostatic copies of the checks made and delivered the originals into the possession of the two Lipman brothers who, a few days later, mailed them to the accused upon receipt from him of $100 by Western Union telegram. Over the objection of the defense the photostatic copies of the two checks were identified, attested as true copies and admitted into evidence. An officer of the drawee bank testified about the reason for the checks' nonpayment and it was stipulated that, if Hugh M. Bryce were called as a witness, he would testify that he had neither signed the two checks nor authorized the accused or anyone else to sign his name thereon as the maker thereof (R. 9-10, 37-45, 46-50, 50-54, 54; Pros. Ex. 1-2).

Pursuant to direction given the accused on 1 November 1943 by the Recorder of the Reclassification Board, the accused reported back to the Recorder on 4 November 1943. The Recorder, having learned about the two checks, warned the accused as prescribed by Article of War 24 and the accused admitted forging and uttering the first check and probably the second concerning which his recollection was hazy because of intoxication. He explained that he intended to redeem the two checks upon receipt of his October pay which he expected within a few days. A handwriting expert testified that both checks had been written by the same person who wrote the indorsements thereon (R. 55-60, 67-75).

4. The evidence for the defense shows that a fellow officer considered the accused an excellent officer who had had a long period of prior enlisted service. The accused, after explanation of his rights as a witness, elected to remain silent but an affidavit executed by him was

identified and admitted into evidence. The affidavit relates his previous service, denys previous disciplinary action against him, expresses a desire to make the Army a career, states that, when he was notified of the reclassification proceeding, his wife had left him which caused him to take a few drinks and requests a recommendation that he be retained in the service (R. 79-81, 82-84; Def. Ex. 2).

5. Specifications 1 and 2, Charge I, allege respectively that the accused on or about 30 October 1943 and 1 November 1943 at Joliet, Illinois, with intent to defraud falsely made in their entirety two checks on the First National Bank in Joliet in the amount of $50 each payable to his own order and signed with the name of Hugh M. Bryce which were writings of a private nature, which might operate to the prejudice of another. The offense alleged is that of forgery which is defined as follows:

> "Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice (Clark)" (MCM, 1928, par. 149j).

The evidence shows beyond a reasonable doubt that the accused fabricated both of the checks in their entirety and unauthorizedly affixed the name of Hugh M. Bryce thereto as the maker thereof. This, he admitted to the Recorder of the Reclassification Board and it is further conclusively shown by the testimony of the handwriting expert. The accused's fraudulent intent is demonstrated by his acts of cashing the two checks. The offenses alleged are therefore complete because "signing another's name to a check with intent to defraud is forgery as the instrument purports on its face to be what it is not" (Id.). The evidence, therefore, establishes the guilt of the accused of the offenses alleged and sustains the findings of guilty of Charge I and its Specifications.

6. Specifications 1 and 2, Charge II, respectively allege that accused on or about 30 October 1943 and 1 November 1943 at Joliet, Illinois, "with intent to defraud willfully, unlawfully and feloniously" uttered as true and genuine the two forged checks described in the Specifications of Charge I which he then well knew were falsely made and forged. Knowingly uttering a forged instrument is certainly conduct of a nature to bring discredit upon the military service and therefore violative of Article of War 96. (CM 181657, 182433, 182706 (1928) and 159081 (1924) Dig. Ops. JAG, 1912-40, Secs. 454 (96) and (98).)

The accused fabricated the two checks and consequently is charged absolutely with the knowledge of their false and forged character. When he, therefore, with such knowledge cashed them as conclusively shown by the testimony of the person actually cashing the checks, he committed the offenses alleged. The objection by the defense to the introduction into evidence of the photostatic copies of the two checks is wholly without merit because the original checks were shown to have been delivered into the

accused's possession from whence they were not forthcoming. Secondary evidence thereof was unquestionably admitted most properly. The offenses having been committed, restitution does not accomplish their obliteration. The evidence, consequently, establishes beyond a reasonable doubt the accused's guilt of the offenses alleged in Specifications 1 and 2, Charge II and amply supports the findings of guilty thereof.

7. The accused is about 37 years of age. The War Department records show that he has had prior enlisted service from 17 September 1935 to 16 September 1938 and from 10 July 1939 until 30 June 1943 when he was commissioned a second lieutenant upon completion of Officers Candidate School and that since the latter date he has had active duty as an officer.

8. 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 Charges I and II and the Specifications thereunder and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

Gabriel N. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 - 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 Charles J. Grannell (0-1896187), 3601st Service Unit.

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. 144, 30 Mar 1944)

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

SPJGQ
CM 247158

21 FEB 1944

UNITED STATES v. First Lieutenant GEORGE L. McCUNE (0-559263), Air Corps.	)	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Sioux Falls, South Dakota, 7 and 8 December 1943. Dismissal, total forfeitures and confinement for five (5) years.

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

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

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

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

Specification 1: In that First Lieutenant George L. McCune, Air Corps, 23rd Academic Squadron, AAFTTC, being at that time Class "A" Agent Officer for the 23rd Academic Squadron, did, at Technical School, Army Air Forces Technical Training Command, Sioux Falls, South Dakota, on or about 30 September 1943, feloniously embezzle by fraudulently converting to his own use, United States currency in the amount of Forty-Six Dollars Ninety-Four Cents ($46.94), the property of the United States, furnished and intended for the military service thereof, entrusted to him by Major C. P. Law, Finance Department, for the payment of the salary of Sergeant Harold A. Durand, for the month of September 1943.

Specifications 2-9 inclusive are identical in form with Specification 1 except for the amounts alleged to have been embezzled and the names of the soldiers for the payment of whom the money was intended, which sums and names are, respectively, as follows:

(262)

Specification	Amount	Name
2	$42.62	Corporal Emory H. Dixon
3	69.15	Staff Sergeant Lester L. Bennett
4	74.55	Sergeant Larry O. Foss
5	42.15	Sergeant Lincoln P. Rosay
6	72.45	Sergeant Robin T. Lacy
7	49.30	Sergeant Robert F. Stein
8	75.04	Sergeant Alexander G. Wilcox
9	24.30	Private First Class Harry A. Eizen

Specification 10: In that First Lieutenant George L. McCune, Air Corps, 23rd Academic Squadron, AAFTTC, being at that time Class "A" Agent Officer for the 23rd Academic Squadron, did, at Technical School, Army Air Forces Technical Training Command, Sioux Falls, South Dakota, on or about 10 October 1943, feloniously embezzle by fraudulently converting to his own use, United States currency in the amount of Fifty-Seven Dollars Ninety-Five Cents ($57.95), the property of the United States, furnished and intended for the military service thereof, entrusted to him by Captain John D. Howie, Finance Department, for the purpose of payment of the salary of Corporal Billy L. Barnes, for the month of September 1943.

Specification 11 is identical in form with Specification 10 except that the amount alleged to have been embezzled is $1.50 and the name of the soldier for whom the payment was intended is "Private First Class Russell L. Arnold."

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

Specification 1: In that First Lieutenant George L. McCune, Air Corps, 23rd Academic Squadron, AAFTTC, did, at Technical School, Army Air Forces Technical Training Command, Sioux Falls, South Dakota, on or about 10 September 1943, wrongfully convert to his own use without the consent of the owner, United States currency and coins in the amount of Forty-Five Dollars and Twenty-Five Cents ($45.25), the property of the United States intended for payment of Private Hildegardo M. Martinez, for the month of August 1943.

Specifications 2-4 inclusive are identical in form with Specification 1 except for the dates of the offenses, the amounts involved and the names of those for whom the payments were intended, which are as follows:

Specification:	Date:	Amount:	Name:
2	31 Oct. 1943	$92.60	Staff Sergeant Lawrence V. Tickus
3	31 Oct. 1943	54.40	Sergeant Irwin Meltzer
4	31 Oct. 1943	128.05	Staff Sergeant Francis W. Stout

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 may direct, for a period of ten (10) years. The reviewing authority approved only so much of the sentence "as provides that the accused be dismissed the service, forfeit all pay and allowances due or to become due, and be confined at hard labor for five years" and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

Accused is a first lieutenant of the Air Corps, and was on duty with the 23rd Academic Squadron, stationed at Technical School, AAFTTC, Sioux Falls, South Dakota, during the months of August, September and October 1943 (R. 20, 31, 69).

By Memorandum No. 42, Headquarters, Technical School, dated 26 August 1943 accused was appointed Class "A" Agent for Major Charles P. Law, F.D., the finance officer at accused's station, for the payment of regular and supplemental payrolls for the month of August 1943 and any partial payroll for the month of September 1943 (R. 19; Pros. Ex. 7). By Memorandum No. 46, same headquarters, dated 24 September 1943, accused was likewise appointed Class "A" Agent for the same officer to make payment of regular and supplemental payrolls for the month of September 1943 and any partial payroll for the month of October 1943 (R. 18; Pros. Ex. 6). Major Paul G. Wible, AC., was appointed Class "A" Agent under the same authority for the payment of the regular October 1943 payroll (R. 19; Pros. Ex. 8) and accused was witnessing officer for Major Wible in the payment of this roll (Pros. Ex. 5A).

The charges against accused involve only the supplemental payroll for August 1943, the regular payroll for September 1943, the supplemental payroll for September 1943 and the regular payroll for October 1943.

While the normally prescribed procedure for handling these payrolls was described at the trial, it is only pertinent in the consideration of this case in the following details:

The regular payrolls were prepared by the unit personnel office of the station about the middle of each month and were then sent to the organizations for signature by the members thereof (R. 9). All members shown to have been present for duty on the date when the payrolls are thus prepared were included therein (R. 10). The men so listed were required to sign the payroll and the names of those who did not sign were stricken from the roll by the Finance Officer to whom the payroll was returned (R. 14).

On the last day of each month the finance officer furnished to his Class "A" Agents money sufficient to discharge the sums due to enlisted men whose names appeared on the completed roll, together with a copy of the payroll and the agent officer executed a receipt for both (R. 13, 14). The agent finance officer then assembled the men listed on the payroll and, presumably in the presence of a witnessing officer, paid to them the amount shown after their names to be due them on the payroll (R. 20,33). Normally a considerable number of men who had signed the payroll would fail to appear on pay day because they were then in hospitals, on furlough, on detached service or had been transferred. Consequently the money provided for the payment of such men remained in the hands of the agent officer at the conclusion of paying operation (R. 10, 49, 50, 52, 53, 55, 57, 59, 65).

In accused's organization it was the practice to use pay envelopes into which the money due each man was separately placed, his name and the amount it contained being indorsed thereon. Thus, after all men present for payment had been actually paid, the agent officer would still have on hand the envelopes of those men who had not appeared in the pay line (R. 21, 24, 33-34, 70). Thereafter an examination of the company records was made to ascertain, if possible, the whereabouts of the absentees. Pay due soldiers in hospitals or other places where they could be personally reached, was delivered to them immediately after the men in the pay line had been paid. The sums due those who could not be located, or who were absent from the station, were to be returned to the finance officer with the accomplished payrolls (R. 75, 76).

Before returning this unpaid money to the finance officer, the names of those soldiers who were not present in the pay line or who were not otherwise paid on the pay day were "red-lined" on the payroll, marked "not paid", and such entries were initialed by the witnessing officer. In accused's organization this "red-lining" was accomplished by comparing the names on the undelivered pay envelopes with the names on the payroll (R. 9, 14, 21, 23, 27, 78, 80). The completed payroll was then certified by the witnessing officer as a correct record of the payment witnessed by him or of the nonpayment therein indicated, was further certified as correct by the agent finance officer and the remaining funds were thereafter delivered, with the payrolls, by the agent officer to the finance officer (R. 9, 14, 24, 30, 77, 78; Pros. Ex. 15). The finance officer thereupon caused the payrolls thus returned to be checked with the amounts returned and issued a receipt for such funds to the agent officer who had turned them back (R. 9, 13, 14), the transaction constituting his clearance. Although some of the payments made in accused's organization on pay day were not actually made in the presence of a witnessing officer, nevertheless a commissioned officer of the organization would certify that he had witnessed the payments to the men who were shown on the payroll to have been paid (R. 20, 34, 39, 64; Ex. 1a, 2a, 3a, 4a, 5a).

The method and routine procedure, as above outlined with respect to regular payrolls, applied, in almost every respect, to the preparation, payment and disposition of the supplemental payrolls (R. 10, 15).

Accused was agent finance officer designated to handle the supplemental payroll of his organization for August 1943 (Pros. Ex. 7). Private Hildegardo Martinez was a member of the organization. His name had been "red-lined" upon the regular August payroll because he had failed to sign it correctly upon the roll (R. 65, 66). His name was, therefore, entered upon the supplemental payroll for August and although his purported signature was placed thereon irregularly, by a friend, it was apparently acceptable. About 10 September 1943, the finance officer at the station issued funds to accused for the payment of Martinez and others. The completed supplemental payroll returned to the finance officer by accused showed Martinez to have been paid the sum of $45.20 (Ex. 4a, p. 36, line 13). Martinez, in fact, was not paid at that time, nor was he ever paid by accused. He subsequently received his August pay, presumably from the station finance officer, on 28 November 1943 (R. 66, 67).

Accused was also Class "A" Agent Finance Officer of the regular September 1943 payrolls of his organization (Pros. Ex. 6). As such, he received funds from the finance officer of his station sufficient to pay the sums shown by the payrolls to be due the members listed thereon. After the completion of the pay process, accused returned the completed payrolls to the finance officer, duly certified by the witnessing officer. These rolls represent that the following soldiers had been paid the amounts set opposite their names:

Name	Amount	Record Reference
Sgt. Harold A. Durand	$46.94 (Sp.1)	Exhibit 1a, p40, line 4
S/Sgt. Lester L. Bennett	69.15 (Sp.3)	Exhibit 1a, p2, line 16
Sgt. Larry O. Foss	74.55 (Sp.4)	Exhibit 1a, p42, line 12
Sgt. Lincoln P. Rosay	42.15 (Sp.5)	Exhibit 1a, p64, line 6
Sgt. Robbin T. Lacy	72.45 (Sp.6)	Exhibit 1a, p50, line 22
Sgt. Robert F. Stein	49.30 (Sp.7)	Exhibit 1a, p68, line 3
Sgt. Alexander Wilcox	75.04 (Sp.8)	Exhibit 1a, p70, line 21
Pfc. Harry S. Eizen	24.30 (Sp.9)	Exhibit 2a, p10, line 24

None of these men were, in fact, paid on the date indicated, which was 30 September 1943. None were present at the station on that date, although all had been present and signed the payroll on or about 15 September 1943. Durand was absent on emergency furlough signed by accused (R. 40, 43); Sergeants Bennett, Foss, Rosay and Stein were on detached service in Philadelphia (Pros. Ex. 11; R. 49-51, 53); Sergeants Lacy and Wilcox were on detached service in New York City (R. 52, 54, 55); and Private First Class Eizen had been transferred to Goldsboro, N. C. (Pros. Ex. 14). It was shown that, on this occasion, as usual, the envelopes of men who failed to appear in the pay line were left in the possession of accused at the conclusion of the pay operations (R. 34, 35).

Accused was also Class "A" agent finance officer for the payment to his organization of the amounts set forth in the supplemental payroll for September 1943 (Pros. Ex. 6). Payment on this roll was made on or about 10 October 1943. Corporal Emory H. Dixon had signed the regular September payroll but his name had been "red-lined" thereon for some reason not apparent in the record (R. 45). He later signed the supplemental payroll for September, and, inasmuch as his name was thus certified thereon for payment, funds were furnished to accused as agent finance officer for the payment to Dixon of the sum of $42.62. The completed supplemental payroll returned to the finance officer shows payment to Dixon (Pros. Ex. 3a, p.10, line 7). Dixon was not paid the amount stated and, in fact, was not even present on the supplemental pay day for the reason that this pay was distributed on his day off and while he was then absent from the station (R. 45). When Dixon was paid his October pay on 31 October 1943 he complained that his September pay was not included (R. 46). He then protested to accused who first said he would investigate the matter. Dixon later returned and stated to accused he had meanwhile discovered that the records showed he had been paid when, in fact, he had not. Accused then admitted that he knew Dixon had not been paid and asked him to return later after he (accused) had time to look into the matter. Dixon was not paid the September pay until 2 December 1943 when he received his money from an officer in the finance office (R. 46, 47).

On the same supplemental payroll there also appeared the name of Corporal Billie L. Barnes who was shown thereon to have due him the sum of $57.95 for his September pay. The completed payroll when delivered by accused to the finance officer showed this sum to have been paid Barnes on or about 10 October 1943 (Ex. 3a, p.8, line 17). Barnes testified that he had signed the regular September payroll but had been "red-lined" because he had signed on the wrong line. He had not signed the supplemental roll for September at all and never received his September pay from the accused but was paid by the finance officer on 2 December 1943 (R. 57, 58).

Also on the September supplemental payroll was the name of Russell L. Arnold to whom $24.70 was shown as due and owing. The completed payroll as returned to the finance officer showed that this sum had been paid to him on or about 10 October 1943. Arnold testified that he had signed the regular September payroll but did not appear in the pay line on the pay day (30 September) because he had been admitted to the hospital early on that date and therefore was not paid. He signed the supplemental payroll for September but again failed to answer the payroll because he was still in the hospital and he, therefore, was not paid at this time (R. 58, 59). He personally told accused he had not been paid for September, and accused replied that confusion and the shifting of personnel in the organization would delay the matter for a few days but, if he would wait, he would arrange to get his pay for him (R. 60). Arnold returned a few days later and told

accused he would wait until pay day (31 October) and on that date Arnold appeared in the pay line and was paid, but received pay for the month of October only (R. 60, 61). He protested to accused, who thereupon took him to his office where he produced cash in the amount of $23.20 from a cloth bag which he removed from a safe and gave this sum to Arnold (R. 61). Accused consulted some records before paying Arnold and the amount he then paid was $1.50 less than the amount shown to have been previously paid on the payroll submitted on 11 October 1943 (R. 59, 60, 61).

Major Paul G. Wible, Air Corps, was Class "A" agent finance officer for accused's organization for the payment of the regular payroll for the month of October 1943, paid on 31 October 1943 (Pros. Ex. 8). Each of the following men signed the same and were shown thereon to be entitled to receive the sums set opposite their names as their pay for the period:

Name	Amount	Record Reference
S/Sgt. Lawrence V. Tickus	$92.60 (Ch.II, Sp.2)	Exhibit 5a, p54, line 16
Sgt. Irwin Meltzer	54.40 (Ch.II, Sp.3)	Exhibit 5a, p60, line 25
S/Sgt. Francis W. Stout	128.05 (Ch.II, Sp.4)	Exhibit 5a, p52, line 14

The completed payroll as returned to the finance officer showed each of these soldiers named thereon to have been paid the respective amounts opposite their names on 31 October 1943. Accused who had acted as witnessing officer in this instance, certified on this roll that the payments had been made in his presence (Ex. 5a, p.1). However, none of the men named thereon had been paid anything since none was present at the station on the pay day. Staff Sergeant Tickus and Sergeant Meltzer signed the payroll but were transferred to Salt Lake City, Utah, before the date of pay (Pros. Ex. 16, 17, 18, 19). Staff Sergeant Stout signed the payroll but was transferred to Jefferson Barracks, Missouri, before pay day (Pros. Ex. 20, 21).

The usual procedure of the squadron for preparation of pay rolls and actual payment thereon, as outlined above, was substantially followed in making the payments by Major Wibel, except that, in this instance, accused, who acted as witnessing officer, was actually present throughout the paying process. Major Wibel had received from the finance officer funds in an amount sufficient to discharge all payments due according to the payroll as submitted. The envelope system was employed as usual, and the usual number of men entitled to pay failed to appear in the pay line. This resulted in a number of the envelopes containing pay money being set aside for disposition later. The money furnished to Major Wibel had remained in his possession or sight from the time he received it until the "turn backs" or unclaimed envelopes were collected for later use in checking the payroll for "red-lining" at the conclusion of the paying process. These envelopes were then gathered up by Major Wibel and taken to his office where he was accompanied by accused (R. 69-75).

The envelopes for men shown to be in the station hospital were given into the custody of accused for payment and he performed that function (R. 75). Upon return from the hospital he asked Major Wibel whether he should proceed with "red-lining" the names of those whose pay had not been delivered and was told to do so. Accused thereupon took the remaining envelopes and the contents to his own office and "red-lined" and initialed the entries so stricken (R. 75, 76, 80). He likewise certified the payroll copy as witnessing officer and then returned the payroll, together with the envelopes, to Major Wibel (R. 76). After comparing the names on the envelopes so returned with the payroll and the morning report, Major Wibel made a list of the names of men who had been "red-lined" and delivered the list, the payroll and the balance of the money then in his hands to the finance officer (R. 77, 78, 80).

It was customary, after paying men who appeared in the pay line, to retain the empty envelopes which had contained their pay. This Major Wibel did and the envelopes which had held the money paid to the men who appeared before him on this occasion were tied in a bundle and at the end of the day were placed in a filing cabinet (R. 81). Notwithstanding the fact that the names of Sergeants Tickus, Meltzer and Stout appeared upon the payroll and were neither "red-lined" nor marked "not paid", and although Major Wibel made a thorough search for them, no empty envelopes containing the names of these men were found among those retained (R. 81-82).

On or about 1 November 1943 accused directed a clerk in the payroll department of his organization to prepare certain individual pay vouchers for accused's signature, giving him a list of names for the purpose (R. 92, 93; Pros. Ex. 22). This list contained the names of Private Martinez and 7 of the soldiers hereinbefore shown to have been unpaid on 30 September 1943 although the payroll reflected that they had been paid on that date (Pros. Exs. 1a, 2a, 4a). After the clerk made a comparison of this list with the pay records of the organization he discovered that the men so listed were either then absent from the station or had, apparently, already been paid. He, therefore, did not prepare the vouchers as directed (R. 92) but turned over the list given him by accused to a board of officers which was at that time investigating discrepancies in the payrolls of the organization. About 9 November 1943, while this investigation was still in progress, accused approached the clerk and asked him whether the vouchers had been prepared. Being given a negative reply, accused told the clerk to destroy the list that he had given him (R. 93).

Accused, after proper warning (R. 99, 100, 104, 105), made three statements in writing, each one supplementing the other (Pros. Exs. 23, 24, 25). By these statements accused admitted that there were discrepancies in the payroll for September 1943, though he did not know the amount. Knowing that these discrepancies would be his responsibility "so far as clearing the financial end of the payroll" and that he "didn't have enough money to cover these discrepancies

when they would be brought to light", he took the pay money of Sergeants Tickus, Hart and Meltzer at the time Major Wibel gave him the payroll with the remaining pay envelopes for the purpose of "red-lining". He hoped to accumulate enough money to pay for the discrepancies, knowing, at the time, that they would eventually be found. He was fully aware of the fact that these men were absent from the station when he took the money. He was in hopes of not leaving until he had enough in his personal fund "to reimburse" the Government. He also admitted withholding the amount of $46.25 due Private Martinez on the supplemental payroll for August 1943 and stated that he had held this sum in his desk awaiting Martinez' call for the same, but turned the money over to the finance officer at the same time he made "restitution" of the sums he had taken from the envelopes of Tickus, Meltzer and Stout. Accused specifically admitted knowledge of nine other discrepancies in the payrolls of his organization but denied knowing who got the money shown to be missing, insisting that he did not. He acknowledged full responsibility for these shortages, admitting that he was the agent finance officer for the regular and supplemental payrolls for September 1943 and that he had received Government funds for the discharge of the same. He specifically admitted that he and no one else was "responsible" for the discrepancies in connection with the transactions alleged in all of the Specifications and Charges on which he was being tried but added that he "did not use the money for personal use"(Pros. Exs. 23, 24, 25).

4. Accused, after appropriate instructions as to his rights, elected to be sworn as a witness and testified as follows: He repudiated his previous admission regarding the taking of the Tickus, Meltzer and Stout pay monies and stated that his previous statement in that respect was false (R. 131). He claimed that his original statement had been made to an officer who was not called as a witness by the prosecution on the trial and that officer had represented to him that court-martial charges could be avoided if he made a confession (R. 130, 131). He did not, however, say that any such representations were made to him when he made the later statements introduced in evidence at the trial, but denied that such statements were the truth. He testified that the organization pay of 30 September 1943 was made by him in the manner described in the prosecution's evidence but stated that he was assisted by three noncommissioned officers who had equal access to the money provided for the payroll and to the envelopes remaining on hand after the pay was completed. He stated that the payroll checked out short after a comparison of the unclaimed envelopes with the payroll and thereupon he and his assistants checked through the payroll, drawing upon their collective recollections as to who had been present in the pay line, attempting thus to adjust the shortage confronting him. After this was done there was still a shortage of $13 which he made up out of his pocket (R. 122-124, 138-143).

He admitted that Private First Class Arnold complained to him on 26 October 1943 that he had not been paid for September and stated he then paid Arnold the amount in cash which the records showed had been due

him on 31 October 1943. That the amount so paid him happened to be $1.50 short was caused by a discrepancy in the records. He said that he had kept the money for Arnold in his field desk ever since Arnold had failed to appear on 10 October 1943 (R. 125, 126). He likewise admitted withholding since 10 September 1943 the pay due Private Martinez on the supplemental payroll of August and that Martinez had not called for it up to 2 December 1943 when he turned the money over to the finance officer. This he claimed to have done because of a "ground rule on this post" to the effect that the pay of any man shown to be on duty on a pay day was to be held for him, in the squadron, whether or not he appeared in the pay line (R. 126, 127). Accused further testified that he had asked his payroll clerk to prepare individual pay vouchers for the men whose names appear on a list prepared by accused (Pros. Ex. 22), but gave as a reason that he wanted to get those men paid until a definite check could be made to ascertain "if anyone was taking the money" as well as to satisfy himself "as to the total number of men who had not been paid, whether a discrepancy appeared on the payroll or not". He had placed Martinez's name on the list because "if a voucher was made for Martinez and Martinez signed it, then I would be in a position to give him the money that was in my office at the time" (R. 129-130). Accused repeatedly spoke of "restitution" (R. 131, 134, 135, 137). He stated that he had made restitution of $320.30 representing the pay due Martinez, Tickus, Meltzer and Stout on 11 November 1943 (R. 134), and that he made a further payment to the finance officer on 1 December 1943 in the sum of $555.95 to cover the balance of discrepancies (R. 136,137; Def. Exs. A, B). Accused maintained that these payments were made by him because he was advised by a Lieutenant Lee that it would be the best policy and that it would eliminate the possibility of a court-martial (R. 134), and further because he wanted to clear the discrepancies on the payroll and get them straightened out as soon as possible (R. 135), inasmuch as Captain Howie was holding him responsible as the Class "A" agent officer and he (accused) wanted to "complete that restitution". (R. 137). He had been in the Army for six years and was commissioned a second lieutenant 2 December 1942 (R. 137). Subsequently he served as a Unit Personnel Officer from 17 June 1942 to 15 August 1943 during which time he supervised the preparation of all payrolls up to and including March 1943 (R. 133). He had known that he was personally responsible as Class "A" agent officer for all funds coming into his hands from the finance office (R. 137).

There was introduced in evidence a bank statement of accused which purported to reflect transactions of his with a local bank. This failed to disclose any substantial deposits other than those identified as his army pay and allowances (R. 120; Def. Ex. C). He did admit, however, that he has always made it a practice to carry about large amounts of cash on his person (R. 150). He detailed at length the sources from which he derived the money with which to make these "restitutions" and these in no wise related to, or had any connection with, the offenses here charged (R. 136, 149)

In rebuttal, the prosecution recalled one of the noncommissioned officers who had assisted the accused during the pay operations on 30

September 1943 who testified that he had assisted accused throughout the handling of the pay but that no conferences with respect to discrepancies in the payroll, as testified by accused, ever took place (R. 157, 159). First Lieutenant Stedman when recalled also denied a statement of accused that he had discussed with Lieutenant Stedman certain discrepancies in the payroll early in October 1943 (R. 159, 160).

5. Accused is charged in eleven specifications with embezzlement of Government funds in violation of the 94th Article of War (Charge I), in four specifications with wrongful conversion of private funds in violation of Article of War 96 (Charge II). Because of circumstances surrounding the transactions and the nature of the proof adduced to support the allegations certain of those specifications may be discussed in groups while others must be treated individually. For convenience, also, the alleged offenses will be considered chronologically rather than in their numerical sequence.

Specification 1, Charge II

The offense charged herein is misappropriation by accused on or about 10 September 1943 of Government funds intended for the payment of Private Hildegardo Martinez. The uncontradicted testimony shows that accused was entrusted with Government funds sufficient to pay this soldier the amount alleged. Martinez did not appear in the pay line on the pay day specified and, therefore, did not receive his money.

Accused prepared the payroll for return to the finance officer and in doing so failed to "red-line" the name of Martinez, thus indicating that, as agent finance officer, he had actually paid Martinez; and the signature of the witnessing officer thereon purports to corroborate that the payment was made. When Martinez later called upon accused to inquire about his pay he received no satisfaction and although he was present in the pay line on 30 September 1943 for the payment of the sums due on the regular payroll of September, he did not receive any of the previous amount due him.

On or about 1 November 1943 accused directed his payroll clerk to prepare a number of individual pay vouchers for men whom accused had listed on a slip which he gave the clerk and Martinez' name appeared on this list together with the amount due him for the omitted payment. Accused maintained that when he failed to appear in the pay line on 10 September 1943 he had kept the sum of money due Martinez awaiting Martinez' call for the same and asserted that he had the cash on hand at all times until an investigation of payroll irregularities developed when he paid the amount to the station finance officer.

True, the evidence as to this offense is purely circumstantial and, as such, should, to support a finding of guilty, exclude every reasonable hypothesis of innocence. As will appear later, no other conclusion than that of guilt could reasonably be entertained. In this instance accused had, in his possession, the funds entrusted to

him for the payment of Martinez. His failure to deliver this money together with the false representation that the payment was made are sufficient, prima facie, to give rise to an inference of conversion in the absence of any satisfactory explanation. No credible explanation was offered. Personal notice to accused on 4 September 1943 that Martinez had not received his August pay; the failure to receive the August pay when Martinez appeared before accused in the September pay line; the direction to prepare an individual voucher for the payment to Martinez of overdue pay, while accused was still in possession of the money given to him for the purpose; accused's failure to mark Martinez "not paid" when he returned the payroll to the finance officer and especially his failure to locate Martinez and pay him before the money was returned by accused to the finance officer after an investigation had started, all point with unerring directness to the guilt of accused.

It has been held by The Judge Advocate General that money delivered to a company commander for payment of salaries of the members of his company still remains the property of the United States; and, when there is no evidence that any enlisted man had agreed to constitute the accused his agent for the collection or the custody of his pay and the evidence shows that the money for such pay was delivered to the accused and that certain enlisted men whose pay accused received, failed to receive the same, and there is no explanation by accused as to the disposition of the money, the evidence is sufficient to constitute a prima facie case of embezzlement (C.M. 122562; Dig. Ops. JAG 1912-40, Sec. 452 (3)). By analogy this principle of law is applicable to a charge of wrongful conversion and the evidence in the instant case is legally sufficient to support the finding upon this specification.

Specifications 1, 3, 4, 5, 6, 7, 8 and 9 of Charge I

The facts and circumstances established by the proof of the offenses alleged in these specifications are virtually identical. Again, it is not disputed that accused was entrusted with Government funds with which to pay enlisted men whose names appeared on the regular payroll of September 1943.

None of the soldiers named was present at the station on pay day and none received his pay; yet the returned payroll showed that each had been paid and the money provided for the payments was not returned to the finance officer. Accused had physical possession and actual custody of the money at all times during the paying operations. He required production of identification tags and the pay book by each soldier before delivering his pay to him and all unclaimed pay envelopes were left in his physical custody. The final preparation of the payroll to reflect payments and nonpayments was made by accused who failed to strike the names of the soldiers named in the specifications.

Directions were given by accused for the preparation of individual pay vouchers for seven of these soldiers when they returned to their station, notwithstanding the fact that he had personally indicated

on the returned rolls that they had been previously paid for the same period and without making any effort to ascertain whether any of them had been paid elsewhere, as some of them were. Finally, when investigations were being made into payroll irregularities, and it became obvious that this irregularity would inevitably come to light, he ordered the list of names of the men for whom individual vouchers were to be made, to be destroyed.

Here, again, it is apparent that the evidence is purely circumstantial and for this reason should be sufficiently definite and clear to exclude every other hypothesis save that of guilt. One of the possibilities suggested by evidence on behalf of the defense is that some one may have impersonated each of the soldiers absent from the pay line and thus obtained their pay without the connivance or cooperation of accused. This possibility is fully negatived by the evidence. Not only would the impostor have been obliged to know who would be absent but he would have been required to secure the identification tags and pay books of the absent parties. Such a situation, with respect to a number of men absent at the same time, is inconceivable. The other possibility is that one of the noncommissioned assistants at the pay table may have appropriated the missing envelopes. This the assistants themselves deny and all of them place the custody of the money at all times in the hands of accused. More impelling, however, in refutation of this theory, is the fact that accused made no report of shortages which he may have found immediately following the pay process but, instead, made preparations to have certain men paid on individual vouchers when he himself had prepared and submitted the final accounts showing them all paid. The coincidence of identity between the names on the list delivered by accused to the pay clerk for preparation of individual vouchers and the names on the payroll of men not paid on 30 September cannot have been the accident of chance. When followed by instructions to destroy the list at a time when it could be dangerously embarrrassing to accused, the chain of events leads to an inescapable conclusion of guilt.

For the reasons given the record is deemed legally sufficient to support the findings as to these specifications on the same authority above cited.

Specification 2, 10 and 11, Charge I

The proof adduced in support of these alleged offenses, while quite similar in almost every respect with those heretofore discussed, concerns the payment of the supplemental September payroll on or about 10 October 1943. In these instances the soldiers affected by nonpayment made repeated demands upon accused for their pay and one of them, Private First Class Arnold, received all but $1.50 thereof from accused.

The facts and circumstances in each of these cases are sufficiently identical with those held sufficient above to warrant the application of the same principles and to justify similar holdings.

(274)
Specification 2, 3 and 4, Charge II

In these cases, the circumstances differ substantially from those proved in support of the earlier offenses. Here the misappropriations were not of funds entrusted to accused by the finance officer but of monies coming into the hands of Major Paul G. Wible as agent finance officer and, by him, in turn, entrusted to accused who was his witnessing officer.

Major Wible was shown to have had actual custody and possession of the funds at all times between his original receipt of the same and his final return of the payroll and the balance of the fund, except when they were in accused's hands for about an hour.

As witnessing officer, accused himself kept the record of those men who were paid as well as those who were not. He alone prepared the payroll for return to the finance officer and purported to "red-line" the names of all men whose names appeared thereon but who were not paid. The three men named in the specifications did not receive their pay neither was it returned to the finance officer with the completed rolls and the balance of funds in the hands of the agent. The money was missing. Major Wible said he did not get it and the envelopes which had contained the pay of these soldiers could not be found when he made a search for them though such envelopes were customarily retained for a final check in the "red-lining" process.

In written statements, introduced at the trial, accused admitted taking the money charged to have been misappropriated in these specifications. He gave a plausible reason therefor when he said he took the money in order to cover previous discrepancies in former payroll accounts for which he was responsible. True, he denied the other misappropriations alleged, though he admitted many discrepancies in his payroll accounts, acknowledged his responsibility for the money shortages involved in each specification of the charges and spoke of payments made to the finance officer in discharge of his pecuniary responsibility therefor as "restitutions". To these admissions he added the cryptic remark that he "did not use the money for personal use".

At the trial accused sought strenuously to destroy the effect of the statements by testifying under oath that they were false and made under promise of favor. According to accused he had been importuned by Lieutenant Lee of the Intelligence Branch of the squadron to make a statement to the effect that he (accused) took the money found missing in an investigation of payroll discrepancies and would pay it back. Lieutenant Lee told him, at the time, but without warning him of his rights, that if he did so he "would be much better off"; that he would then "cancel the board of officers that had been appointed to investigate the discrepancies noted at that time" and "eliminate a court-martial".

Later, on the same and a subsequent day, accused made three sworn written statements to Major Flota, the post judge advocate, after having been fully warned of his rights on each occasion and these statements were admitted in evidence.

The burden of accused's contention with regard to these is that they were merely a reiteration of what he had told Lieutenant Lee and were made on the assumption that the promises held out to him had been given effect.

The testimony does not bear out this strained construction of what the statements contain. The only substantial matter which could be deemed a confession rather than an admission is the acknowledgement that he misappropriated the monies as alleged in Specifications 2, 3, and 4 of Charge II. All other facts and circumstances detailed by him are, at the most, admissions and, as such, admissible irrespective of failure to have given him proper warning of his rights.

Accused, by his own testimony, had been in the Army for six years and was a first lieutenant. He had been a personnel officer and had experienced training in the preparation and handling of payrolls. Repeatedly in his testimony at the trial accused admitted sole responsibility for the shortages of payroll funds and spoke of his payments to the finance officer as "restitutions". This was hardly an accidental misuse of the word. Therefore, since there appears to be no definite and precise testimony of an overreaching in obtaining the statements their voluntary character is not seriously impeached.

"Facts indicating that a confession was induced by hope of benefit or fear of punishment * * * inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is * * * evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the relations of the parties involved * * * casual remarks or indefinite expressions need not be regarded as having inspired hope or fear; and an intelligent, experienced, strong-minded soldier might not be influenced by words and circumstances which might influence an ignorant, dull-minded recruit" (Par. 114a, MCM 1928).

In the light of this test it is doubtful whether any statement made by accused to Lieutenant Lee could be deemed inadmissible because it was involuntarily made. However that may be (and it is not an issue), surely there were no reasons to impel accused to rely upon the false hope of favor nor to act upon the fanciful fear of punishment when Major Flota warned him of his rights and accused repeated the facts he had disclosed to Lieutenant Lee. Major Flota made no representations to accused and made no mention of any which Lieutenant Lee may have made; nor did accused tell Major Flota of the hope he was harboring because of Lieutenant Lee's promise to him. The statements thus made were given after fair and full warning on each occasion and there is no evidence other than accused's own self serving declarations, that he was coerced into making them.

Both the statement containing the confession and his testimony at the trial were under oath and the court had the right to determine

what part, if any, of his evidence they would believe. It was within their province to reject some and accept the rest and they undoubtedly chose to believe that portion of his statements which he later said was false.

It does, indeed, comport with the other independent testimony from which his guilt might, otherwise, be circumstantially inferred and was, therefore, the most reasonable conclusion open to the court.

Much else could, but need not, be said. It is apparent that, as to these offenses, at least, there is positive and direct evidence of guilt and the record is therefore amply sufficient to support the findings.

6. According to records of the War Department accused was born in Walsenburg, Colorado, is 22 years and two months of age and is not married. He attended the public schools and was graduated from high school in 1939. He was employed as an accountant until he enlisted on 12 August 1940 from which enlistment he was, on 11 May 1942, discharged in the grade of staff sergeant in order to accept a commission as second lieutenant, Army of the United States. He was assigned to A.C.T.T.C., Army Air Forces, Scott Field, Illinois, on the same day and thereafter joined the technical school, Army Air Forces Technical Training Command, Sioux Falls, South Dakota. On 3 December 1942 he was promoted to first lieutenant.

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 during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized and there is no limit to the period of confinement which may be imposed upon conviction of a violation of either Article of War 94 or Article of War 96.

William A. Rounds, Judge Advocate.

Earle Stephen, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

(277)

War Department, J.A.G.O., 9 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 First Lieutenant George L. McCune (0-559263), 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 but that because of the youth of accused and his previous good record, the period of confinement be reduced to two years, and that the sentence as thus modified be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Careful consideration has been given to a plea for clemency submitted by the Commanding Officer of Lieutenant McCune's station who states that he has salvage value; and, also, to the attached communications, one from the Honorable J. Edgar Chenoweth, M.C., and the other from Lieutenant McCune's mother, each addressed to the Commanding General, Army Air Forces Central Technical Training Command, and forwarded by him to this office. Consideration has also been given to the attached letter from the Honorable J. Edgar Chenoweth addressed directly to The Judge Advocate General.

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

Myron C. Cramer

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

6 Incls.
1 - Record of trial.
2 - Dft. ltr. for sig. S/W.
3 - Form of action.
4 - Ltr. from Hon. J. Edgar Chenoweth, to Commanding General, AAFCTTC, dated Jan. 1/44.
5 - Ltr. from Mrs. James McCune to Commanding General, AAFCTTC, dated Jan. 2/44
6 - Ltr. from Hon. J. Edgar Chenoweth to JAG dated Jan. 12/44

(Sentence confirmed but confinement reduced to two years. G.C.M.O. 146, 30 Mar 1944)

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

SPJGK
CM 247161

22 FEB 1944

UNITED STATES	SEVENTH AIR FORCE
v.	Trial by G.C.M., convened at APO Number 953, 4-5 October 1943. Dismissal.
Second Lieutenant GAINES B. BRADFORD (0-1587850), 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Gaines B. Bradford, Quartermaster Corps, Detachment, 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, was, at Army Air Base, APO #964, on or about 13 August 1943, found drunk while on duty as Officer of the Day.

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

Specification 1: In that Second Lieutenant Gaines B. Bradford, Quartermaster Corps, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, did, at Army Air Base, APO #964, on or about July 28, 1943, conduct himself in a manner unbecoming an officer and a gentleman, in the presence of enlisted men, by giving intoxicating liquor to, and drinking intoxicating liquor with, said enlisted men.

Specification 2: In that Second Lieutenant Gaines B. Bradford, Quartermaster Corps, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, did, at Army Air Base, APO #964, on or about August 12, 1943, conduct himself in a manner unbecoming an officer and a gentleman, in the presence of enlisted men, by acting in a disorderly manner before them and by giving intoxicating

liquor to, and drinking intoxicating liquor with, said enlisted men.

Specification 3: In that Second Lieutenant Gaines B. Bradford, Quartermaster Corps, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, did, on Oahu, T.H., on or about July 16, 1943, while traveling in a government vehicle and during the course of said trip, wrongfully give intoxicating liquor to and drink with an enlisted man, to wit, Sergeant James W. Sefried, Quartermaster Section, Detachment 17th Base Headquarters & Air Base Squadron (Special), APO #964, who was then on duty as the driver of said vehicle.

Specification 4: In that Second Lieutenant Gaines B. Bradford, Quartermaster Corps, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, did, on Oahu, T.H., on or about August 11, 1943, while traveling in a government vehicle and during the course of said trip, wrongfully give intoxicating liquor to and drink with an enlisted man, to wit, Corporal Daryl D. Zimmerman, Quartermaster Section, Detachment 17th Base Headquarters & Air Base Squadron (Special), APO #964, who was then on duty as the driver of said vehicle.

Specification 5: (Withdrawn and substituted as Specification 1, Charge III, with consent of court and defense counsel).

Specification 6: (Withdrawn and substituted as Specification 2, Charge III, with consent of court and defense counsel).

Specification 7: In that Second Lieutenant Gaines B. Bradford, Quartermaster Corps, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, did, during the period from on or about August 1, 1943 to on or about August 11, 1943, at Army Air Base, APO #964, conduct himself in a manner unbecoming an officer and a gentleman in the presence of enlisted men, when on several occasions at night time during the said period, he awakened said enlisted men after they had retired and gave intoxicating liquor to and drank intoxicating liquor with said enlisted men.

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

Specification 1: In that Second Lieutenant Gaines B. Bradford, Quartermaster Corps, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, did, at Schofield Barracks, Territory of Hawaii, during the period from

on or about July 12, 1943 to on or about July 15, 1943, wrongfully borrow from an enlisted man, to wit, Technical Sergeant John D. Ferdinand, Quartermaster Section, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, the sum of thirty dollars ($30.00).

Specification 2: In that Second Lieutenant Gaines B. Bradford, Quartermaster Corps, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, did, at Schofield Barracks, Territory of Hawaii, on or about May 20, 1943 wrongfully borrow from an enlisted man, to wit, Corporal Robert L. Peck, Quartermaster Section, Detachment 17th Base Headquarters & Air Base Squadron (Special), Army Air Forces, APO #964, the sum of ten dollars ($10.00).

Before pleading to the Charges and Specifications, accused's counsel moved to strike Specifications 5 and 6 of Charge II, on the ground that the offenses stated therein did not constitute violations of Article of War 95. The court granted this motion. The prosecution then moved to amend the Charge Sheet to allege Specifications 5 and 6 of Charge II as Specifications 1 and 2 under a new Charge III, in violation of Article of War 96. This motion was also granted by the court, counsel for accused agreeing thereto. Accused then pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification, guilty of Specifications 1,2, and 7 (treated by the court as having become Specification 5) of Charge II, except the words "unbecoming an officer and a gentleman" and substituting therefor, "to the prejudice of good order and military discipline", of the excepted words, not guilty, of the substituted words, guilty; guilty of Specifications 3 and 4 of Charge II, and not guilty of Charge II, but guilty "in violation of the 96th Article of War"; guilty of Specifications 1 and 2 of Charge III, excepting the words, "at * * * Barracks, Territory of * * *," and substituting therefor, "on the Island of * * * , Territory of * * *," of the excepted words, not guilty, of the substituted words, guilty, and guilty of Charge III. 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. Summary of the evidence.

a. Charge I and Specification.

Testimony that accused was drunk while on duty as officer of the day on 12-13 August 1943 was offered by Lieutenant Colonel Grant H. Edwards, Air Corps, executive officer of accused's station, by Major Byron L. Gifford, Medical Corps, 17th Base Hospital and Air Base Squadron, by Captain Willard A. Hesse, Medical Corps, 204th General Hospital, APO 952, by Corporal Robert L. Peck, Private Joseph P. D'Ambrocia, Private Jack

A. Bernstein, and Sergeant (then Corporal) Robert E. Nall, all of the Quartermaster Section, 17th Base Headquarters and Air Base Squadron, APO 964, and by Private Clarence B. Highsmith, Air Corps Section Detachment, of the same organization.

Colonel Edwards testified that he placed accused, who was then base motor maintenance officer, on duty as officer of the day at the base at 1100 on 12 August 1943, at which time the old officer of the day was relieved. Accused's tour of duty was to continue until the same hour of the next day (R.10,11,13).

Corporal Peck and Private D'Ambrocia (then Corporal) were dispatchers at the base motor pool, and usually slept at the dispatchers' shack there. Early in the evening of 12 August, accused arrived at the shack in a jeep driven by Sergeant Nall, apparently accompanied by a "Corporal Haley". Accused called Peck and D'Ambrocia out of the shack and offered them a drink from a bottle of Five Island gin, which he took from the glove compartment of the car. Neither witness accepted, but accused and Nall both drank from the bottle. It also appears from Nall's testimony that prior to their arrival at the shack accused had had "a few" drinks and he (Nall) had had "a couple of drinks" out of the same bottle (R.16,17,20, 27,28,32,44,45). Then accused and Nall left in the "jeep" (R.28). Peck testified that it was his opinion at that time that accused "had been drinking" (R.17).

Accused returned about 9 o'clock in a vehicle driven by Private Highsmith, who was on motor patrol. He also "had a few more of the boys with him", to whom he offered drinks. While parked outside the dispatchers' shack in the "jeep", accused and Highsmith had "not over three" drinks of the gin together. A "Private Burroughs" also took a drink (R.17,29,38,40). Accused and Highsmith then went inside the shack; Peck, D'Ambrocia, and Privates Sidney Brown and Jack A. Bernstein were already in the building. Prior to entering the shack accused had been handling his .45 pistol in a careless manner, and continued to do so after being inside. He pointed it at all the men inside, telling Brown that "if he mentioned a word of it he would shoot him on the spot". He also pointed it at Peck, telling him "he would blow my brains out". He stated that "he would make one of the fellows [D'Ambrocia] dance". During these threats accused was removing and replacing the pistol in its holster, repeatedly cocking it, and waving it about. It was loaded at this time (R.17,29,36-38).

Peck protested accused's careless handling of the weapon. Accused stepped into another room of the shack with Corporal Haley, and while he was in there the pistol was discharged. The bullet made a hole in the wall and roof of the building, but injured no one. Accused threw the

gun down on a table, saying, "Damn, it was an accident". Accused then put the pistol back in the holster, loaded and cocked. Highsmith came in, asked accused to let him have the gun, took it from accused, removed the round from the chamber, replaced it in the clip, and handed it back to accused. Accused then commenced to argue with Peck again, saying he would shoot him on the spot. Peck warned accused not to point the pistol at him again. Accused several times moved his hand to it, but "never pulled it out", due to Peck's warnings. Thereafter accused left, telling them they "would regret that day" (R.17,18,29,30,36,39).

Accused returned some time between 2300 and 0200, when Peck, D'Ambrocia, and Brown were in bed. He wakened them, telling them to "get the hell out of bed". The apparent purpose of this visit was to ask Peck for some matches. Further argument ensued when Peck said he had none, but accused finally left, telling Peck, "Just forget the whole incident. Just forget it" (R.19,29).

Accused made a total of "five or six" visits to the dispatchers' shack during the evening. All who testified concerning them stated that he was drunk. His face was flushed, he could not stand or walk straight, his eyes were glassy, and his speech uncertain. He used profanity in the presence of enlisted men several times during the evening (R.17-20, 30,31,36,37,40).

About 0900 the next morning, D'Ambrocia was called by accused out to his "jeep". Accused was still under the influence of liquor, his face was flushed, and his speech was broken. At approximately 1020 accused was called into Colonel Edwards' office. When he presented himself his face was flushed and he staggered and rendered a "sloppy" salute. Colonel Edwards relieved him of his weapon and of his duties as officer of the day, and placed him under arrest in charge of two fellow officers, whom he directed to take accused to his quarters and then to the Base Surgeon (R.12,13,31).

Major Gifford testified that he made a medical examination of accused at about 1100, and that he observed that accused's eyes were bloodshot and that there was an alcoholic odor on his breath. Accused was unable satisfactorily to repeat "tongue-twisters" or to walk a track on the floor in a normal manner. In the opinion of witness, accused was intoxicated (R.59).

b. Specification 1, Charge II.

Corporal Walter Mihalik, 17th Base Headquarters and Air Base Squadron, testified that at about 8 o'clock in the evening of 28 July 1943, accused invited Sergeant Nall, "Private First Class Whitmore" and himself "to have

a few drinks" in a command car in front of the dispatchers' shack. Accused brought out of the glove compartment of the car a partially empty bottle of Five Island gin, told him to "stick around", and said that he would go and get another bottle. The enlisted men and accused drank part of the bottle which accused brought back, leaving the rest for accused's use next morning, as instructed by him. The men helped accused into the dispatchers' shack, where he lay down on the table and went to sleep (R.41,42). Sergeant Nall corroborated the testimony of Corporal Mihalik and added that accused and the enlisted men consumed the contents of the first bottle (R.43).

c. Specification 2, Charge II.

The testimony concerning this offense, acting in a disorderly manner before, giving intoxicating liquor to, and drinking with enlisted men, may be found in the testimony describing the facts constituting the Specification of Charge I.

d. Specification 3, Charge II.

Sergeant James W. Sefried, Quartermaster Section, 17th Base Headquarters and Air Base Squadron, testified that on 16 July 1943 he drove accused to the nearby city of H ------, leaving their base at 0900. They stopped en route at the North Shore Officers' Club, into which accused went and returned in about 10 minutes with a fifth of a gallon of Five Island gin. He also had a pint of "mainland whiskey". They continued on their way, consuming together all of the whiskey and part of the gin. Witness stated that he had two drinks. They also drank during the evening at the home of some acquaintances of accused's, "down a road from L * * ". They returned from this trip about 0230 on 17 July, and witness and D'Ambrocia had to put accused to bed (R. 46-49).

e. Specification 4, Charge II.

Sergeant (then Corporal) Daryl D. Zimmerman, Quartermaster Section, 17th Base Headquarters and Air Base Squadron, testified that on 11 August 1943 he drove accused in a Dodge 1/2 ton pick-up vehicle from their base to the North Shore Officers' Club, thence to B------- Field, and back to the base. They stopped at the club to allow accused to get two bottles of gin, out of which accused gave witness two or three drinks during the course of the trip. Accused also "had liquor to drink". No one was with them, but the drinking was done during the daytime along a travelled road. Witness stated that accused was not drunk on this occasion. They returned to the base at 0100 on 12 August (R.51-54).

f. Specification 7 (now 5), Charge II.

Peck and D'Ambrocia testified that they slept at the dispatchers' shack during the period of 1-11 August ~~1943~~, and that "almost every night"

accused would come in at 0200 or 0300 in the morning, awaken them, get them out of bed, rebuke them about the conduct of the motor pool, and then offer them a drink of Five Island gin. Occasionally they accepted the liquor, "just to please him and keep him quiet". Accused drank with them, and he was drunk on these occasions. He usually kept them awake about an hour or an hour and a half, after which he would either go to sleep with his head on the desk, or in the truck, or would be put to bed in the shack by Peck and D'Ambrocia (R.20,21,26,27,31-33,35).

g. Specification 1, Charge III (originally Specification 5, Charge II).

Technical Sergeant John D. Ferdinand, Quartermaster Section, 17th Base Headquarters and Air Base Squadron, testified that he was with accused on 12 July 1943, and that as they came out of "the S* * * Bank", accused asked witness if he could loan accused some money. Witness loaned him $20, which accused promised to repay "around pay day". Ferdinand stated that about the 15th and 16th of July accused asked him for another $20, but that he had only $10, which he loaned to accused. This was to be repaid on pay day. Witness stated that neither amount had been repaid (R.54-56).

h. Specification 2, Charge III (originally Specification 6, Charge II).

Corporal Peck testified that about 20 May 1943 accused asked him if he had any money, saying that "he would like to go to town or something". Peck had none, but went to the Post Exchange, borrowed $10 from a friend, brought it back, and gave it to accused. Accused promised to repay it on pay day and told Peck not to say anything about it. Peck testified that it had not been repaid. He requested payment once, and accused said "that he would get it" for him (R.22).

Evidence for defense.

Sergeant Wayne A. Bovers, 17th Base Headquarters and Air Base Squadron, APO 964, testified that he was with accused on the morning of 13 August from 0830 to 1015, having seen accused shortly after he got up. Witness "would not say the man was drunk". Accused made out reports, signed his name, filled out the guard book, was perfectly steady on his feet, had no intoxicating liquor, and took no drinks. He knew what he was doing (R.71-75).

Captain Hy S. Plaine, Signal Corps, APO 964, testified that he and "Lieutenant Sidenspinner" took accused to the medical officer about 45 minutes after accused was placed in arrest on 13 August 1943. He testified that accused's voice was "muddled" and that he was not perfectly steady on his feet at all times, but that he did not stagger. Witness "would not say that" accused was drunk, though "he may have been drinking" (R.76-78).

First Lieutenant Rudolph I. Bernstein, 17th Base Headquarters and Air Base Squadron, APO 964, testified that one day some time "about the first or second week of August " he passed accused's room in their barracks, noticed accused in his room, and entered. Standing within 5 or 6 feet of accused, he noticed no evidence of liquor on accused's breath. Accused "seemed to be sick". He was shivering and sweating at the same time, appeared to have great difficulty in controlling himself, "and * * * his body seemed to be red". Witness asked accused whether anything was the matter, and accused said, "No, nothing. I will be all right". Witness stated that he had observed accused similarly affected upon one occasion after he (witness) and other officers had been detailed to stand guard over him (R.79,80).

Captain S. B. Meyerson, Medical Corps, 76th Station Hospital, testified that he was ward officer in the psychiatric section of the hospital, that he had approximately 11 years of civilian experience in criminal psychiatry, and that he had examined and cared for accused from 14 August to 22 August. He stated that during this time accused "showed symptoms of severe anxiety. He was very shaky, nervous, irritable and apprehensive. He slept very poorly, tossed about, mumbling in his sleep, as though he was having nightmares". He also showed a marked depression, and was worried about the past and future. During his hospitalization, his condition improved, which witness attributed to "relaxation of responsibility in the hospital situation, the general nursing and care that he received there, and the discussion and ventilation of his difficulties with the psychiatrist". Witness diagnosed accused's condition as "psychoneurosis, mixed, severe", stating that this was a combination of anxiety and depression. He defined "psychoneurosis" as "a borderline mental disturbance occurring in emotionally unstable individuals", and stated that for a person so constituted, drinking liquor "would be a form of escape from a distressing situation". He stated that accused had received maximum benefit from his hospitalization, and that he was sane and legally responsible for his acts (R.81-84).

Accused made an unsworn statement. Testifying with respect to Charge I and its Specification, he stated that though he was no longer transportation officer at the time he was officer of the day, nevertheless he "had a certain amount of authority over the dispatcher" as such, in the absence of "Major Goguen". His purpose in going to the office was to check up on the day's dispatch records and trip tickets, because "there had been quite a bit of illegal use of transportation by different individuals", whose identity no one had been able to determine. He stated that Corporal Peck was "impudent in his reply" to his questions, saying that he (accused) "had no right to look over the records", but that he disregarded this. He went back about 2200 to remind the men of blackout regulations, asked Peck if all vehicles were in, and warned him against unauthorized use of vehicles. He stated that Peck seemed "very upset

about something" at the time (R.85-87).

The clip in the pistol which had been issued to accused as officer of the day was defective, and he tried to substitute for it one of those in the drawer of the desk in his former office. While he was trying other clips in the gun, he walked into the main office, and Peck twice remarked that he "should be careful with that gun that somebody might get hurt". He had not pointed the gun directly at any one, and told Peck "to shut up. I didn't want to hear any more about it". In manipulating the gun to see if shells would pass from the new clip into the chamber, he allowed the gun to fire once, due to bandages on his second and index fingers (R.82).

When Colonel Edwards placed him under arrest about 1100 on the next day, he had no knowledge of and was not informed of the reason for it. He was not informed until the 16th, by the investigating officer, at the hospital. He thought then that it might have grown out of his argument with Peck. He denied being drunk or seriously under the influence of liquor while officer of the day, denied taking a drink of liquor anywhere near the dispatchers' office, and denied having offered any man there a drink of liquor. He admitted having drunk during the twenty-four hour period "not more than three or four ounces, at the most". He stated that he walked a straight line at the hospital "in what I thought was a reasonably satisfactory manner", considering the fact that he had not had more than an hour's unbroken sleep during the night, and stated that "I had difficulty with tongue-twisters all the time, anyway"(R.87-90).

With respect to Specification 7 (5), Charge I, accused denied being in the dispatcher's office except upon official business, and denied offering any man there a drink during the times alleged. He attributed the testimony of witnesses on this Specification to "two occasions where certain of this personnel tried to have me ousted as transportation officer". This in turn he attributed to bickering "among the noncoms. Everybody wanted the other man's privilege" (R.88,89).

He denied any financial transactions with the enlisted men. He stated that Peck had unsuccessfully tried to borrow money from him and from Sergeant Zimmerman, with accused as surety, and stated that Sergeant Ferdinand had once intended to purchase his watch, but had "sent it back" (R.92).

4. The record is sufficient to support the findings of guilty upon all Charges and Specifications. Accused neither testified nor offered evidence to contradict the prosecution's testimony concerning Specifications 1,3, and 4 of Charge II, and there is no reasonable doubt that

he committed these offenses. He admits having had at least four ounces of liquor during the twenty-four hours in which he was officer of the day, and one of his own witnesses testified that accused was unsteady on his feet even after having been relieved of duty. The evidence on all the other Specifications is so overwhelming, and accused's explanations so unconvincing, that there is no reasonable doubt of his guilt.

5. Two minor errors during trial require comment. Major Gifford and Captain Hesse were permitted to testify concerning the results of two blood alcohol tests (Charge I and Specification) taken in the morning and afternoon of accused's arrest. Neither was able to state of his own knowledge that the blood tested had been taken from accused. The results of the tests were, therefore, hearsay evidence, and the court should have been instructed to disregard this testimony. There is, however, other and compelling evidence to support the findings, and no substantial error was committed.

Likewise, the court erred, and unnecessarily complicated the record, in amending the Charges to strike Specifications 5 and 6 from Charge II (Article of War 95) and set them up as Specifications 1 and 2 of a new Charge III, in violation of Article of War 96. If, as claimed by defense counsel, the offenses charged in these Specifications did not constitute violations of Article of War 95, but violations of Article of War 96, the court, without any amendments, could have so found. The court's action, however, was favorable to accused in that violation of a less stringent Article was charged. The error can not be said to have prejudiced accused.

6. War Department records show that accused is 30-3/12 years of age and single. He finished the 11th grade, but did not graduate from high school. He operated his own electrical contracting business for three years before enlisting in the Army in October 1940. At the time he was sent to Officer Candidate School at Camp Lee, Virginia, he was a staff sergeant, and was commissioned a Second Lieutenant, 12 February 1943.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of an officer for violation of Article of War 85 in time of war, and is authorized under Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____ Judge Advocate.

1st Ind.

War Department, J.A.G.O., 25 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 Gaines B. Bradford (0-1587850), 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 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. 164, 11 Apr 1944)

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

SPJGN
CM 247163

14 JAN 1944

UNITED STATES v. Second Lieutenant WILLIAM G. SIMPSON (0-1821923), Adjutant General, Branch Immaterial Replacement Pool.	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort George G. Meade, Maryland, 29 December 1943. Dismissal and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, 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 58th Article of War.

Specification: In that Second Lieutenant William G. Simpson, Adjutant General, Branch Immaterial Replacement Pool, Fort Washington, Maryland then of 603rd Tank Destroyer Battalion, did at Camp Hood, Texas, on or about 23 June 1943, desert the service of the United States and did remain absent in desertion until his return to military control at Baltimore, Maryland, on or about 7 December 1943.

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

Specification 1: In that Second Lieutenant William G. Simpson, Adjutant General, Branch Immaterial Replacement Pool, Fort Washington, Maryland then of 603rd Tank Destroyer Battalion, Camp Hood, Texas, did at Washington, D. C. on or about 10 September 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Ambassador Hotel, Washington,

D. C., a certain check, in words and figures as follows, to wit:

AMBASSADOR
H O T E L
14th and K Streets
Washington, D.C.

Sept. 9, 1943

Pay to the
order of Ambassador Hotel $20.00
Twenty and no/100 dollars

1st National Bank of Temple
Temple, Texas

I hereby represent that the amount drawn for in this draft is on deposit to my credit, free of any claims, and acknowledge that this amount has been paid to me upon my presenting of such facts.

Signature William G. Simpson
Street 603rd T.D. Bn.
City Camp Hood, Texas

and by means thereof, did fraudulently obtain from the Ambassador Hotel, Washington, D. C., the sum of $20.00, he, the said Second Lieutenant William G. Simpson, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Temple, Temple, Texas, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on Temple National Bank, Temple, Texas, dated 10 September 1943, payable to order of and made and uttered to same hotel, at same place and fraudulently obtaining thereby $20.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank as in Specification 2, dated 13 September 1943, payable to order of and made and uttered to same hotel, at same place, and fraudulently obtaining thereby $20.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank as in Specification 2, dated 15 September 1943, payable to order of and made and uttered to same hotel, at same place, and fraudulently obtaining thereby $25.

Specification 5: Same form as Specification 1 but alleging check drawn on same bank as in Specification 2, dated 16 September 1943, payable to order of and made and uttered to same hotel, at same place, and fraudulently obtaining thereby $20.

Specification 6: Same form as Specification 1, but alleging check drawn on same bank as in Specification 2, dated 17 September 1943, payable to order of and made and uttered to same hotel, at same place, and fraudulently obtaining thereby $18.50.

He pleaded to the Specification, Charge I, guilty except the words "Camp Hood, Texas", "desert" and "in desertion", substituting therefor respectively, the words "Camp Shelby, Mississippi", "absent himself without leave from", and "without leave", of the excepted words not guilty, of the substituted words guilty; to Charge I, not guilty of a violation of the 58th Article of War but guilty of a violation of the 61st Article of War; to all Specifications, Charge II, guilty; and to Charge II not guilty of a violation of the 95th Article of War but guilty of a violation of the 96th Article of War. He was found guilty as he pleaded 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 may direct for one (1) year. The reviewing authority approved only so much of the sentence as provides for dismissal from the service and confinement at hard labor for one (1) year and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution was adduced by agreed stipulations and shows that on or about 23 June 1943 the accused absented himself without leave from his organization, the 603rd Tank Destroyer Battalion, until he returned to military control on 7 December 1943 at Baltimore, Maryland, that between 9 and 17 September 1943 he drew and cashed the checks described in the six Specifications, Charge II, at the Ambassador Hotel, Washington, D. C., which were forwarded to the banks upon which they were drawn in regular course of business and returned by such banks unpaid and marked "Unable to Locate", and that the cashiers of such named banks would, if present, testify that, at the time of the presentation thereof, the accused did not have nor thereafter have an account with such banks. It was further stipulated that on 27 December 1943 the Ambassador Hotel was reimbursed in full for the six checks (R. 9-10; Ex. A).

4. The evidence for the defense shows that between 8 December 1943 and the date of trial the accused had been examined by competent physicians who found him sane and physically qualified to perform his duties even if ordered to extended field service (R. 10).

The accused, after explanation of his rights as a witness, testified that he had had about seven years of prior enlisted service before 29 June 1937, that he was inducted on 23 March 1942, and was graduated from Officers Training School on 30 October 1942 when he was commissioned a second lieutenant, and that he had asked for extended field duty. His organization has been alerted for an extended period but he had been ordered to report to the Special Troops, Headquarters Third Army, Louisiana, on or before midnight of 20 June 1943, which he did, for a week's training as a maneuver umpire. On 23 June 1943 he was afflicted with a severe toothache and absented himself without leave for several days while securing dental treatment and attempting to secure relief from the pain caused thereby. Upon the pain subsiding he partially realized that he was absent without leave and commenced drinking which he continued daily thereafter during his entire absence of about 5½ months, but denied any intention to desert the service. He professed ignorance of all his actions during such period by reason of intoxication and claimed that he met his expenses, without drawing a pay voucher, with $250 in cash which he had upon his person and by drawing checks upon the two banks at Temple, Texas, to which city his checks had formerly been sent directly and where such two banks by arrangement with the Camp Fiscal Agency at Camp Hood, Texas, would honor them regardless of upon which bank they were drawn. He had no source of income except his pay and denied any knowledge of the condition of his bank account. Upon cross-examination, he admitted that his return to military control had been occasioned by his arrest by civil authorities, that he made no deposits to his account during the 5½ month period, thinking that he had funds there, and that he had no recollection of what he did or where he went during such period. Upon examination by the court he disavowed prior disciplinary measures of any kind having been taken against him and strenuously asserted a desire to be afforded an opportunity to remain in the service and to have extended field service (R. 11-22).

5. The Specification, Charge I, alleges that the accused at Camp Hood, Texas, on or about 23 June 1943 deserted the service of the United States and remained absent in desertion until on or about 7 December 1943. By exceptions and substitutions he was found guilty of absence without leave from Camp Shelby, Mississippi, for such specified period of time and not guilty of a violation of Article of War 58 but guilty of a violation of Article of War 61 as he had pleaded. The elements of the offense of absence without leave 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" (M.C.M., 1928, par. 132).

The evidence for the prosecution amply shows the commission of the offense of absence without leave for the period of time specified as found by the court and supplements the accused's plea of guilty thereof. The accused by his own testimony also admits the commission of the offense as found by the court. The evidence, therefore, conclusively supports the findings of guilty, by appropriate exceptions and substitutions, of the offense of absence without leave for the period of time specified, in violation of Article of War 61.

6. Specifications 1-6, Charge II, allege that the accused on specified dates between 9 and 17 September 1943 "with intent to defraud, wrongfully and unlawfully" made and uttered to the Ambassador Hotel six checks, drawn upon designated banks in named amounts whereby he fraudulently obtained from such hotel the cash therefor when he knew that he did not have and not intending that he should have sufficient funds in such designated banks for the payment thereof. He was found guilty thereof, not in violation of Article of War 95 as charged, but in violation of Article of War 96 as by him pleaded. Making and uttering checks under the circumstances alleged in the Specifications violates Article of War 96 (CM 202027 (1934) Dig. Ops. JAG, 1912-40, Sec. 453 (22)).

The evidence for the prosecution amply supplements the accused's plea of guilty to the Specifications and his plea of guilty to a violation of Article of War 96, all as found by the court. His own testimony conclusively demonstrates his guilt as by him pleaded and as by the court found. The evidence, consequently, beyond a reasonable doubt supplements his plea of guilty and supports the findings of guilty of Specifications 1-6, Charge II, in violation of Article of War 96 as found.

7. The accused is about 33 years old. The records of the War Department show that he has had about five years enlisted service prior to 29 June 1937, receiving honorable discharges both in 1932 and 1937, that he was inducted on 24 March 1942 and was commissioned a second lieutenant on 30 October 1942 upon completion of Officers Candidate School and that he has had active duty since the latter date as a commissioned officer.

8. 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, as found by the court, 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. Lipscomb, Judge Advocate

(On Leave), Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 247163

1st Ind.

War Department, J.A.G.O., - To the Secretary of War.
7 FEB 1944

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William G. Simpson (0-1821923), Adjutant General, Branch Immaterial Replacement Pool.

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 as approved by the reviewing authority 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.
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. G.C.M.O. 143, 30 Mar 1944)

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

SPJGQ
CM 247294

UNITED STATES	)	44TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 28 December 1943. Dismissal.
	)	
First Lieutenant GEORGE M. AITKEN (0-1294007), Corps of Engineers.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant George M. Aitken, Company C, 63rd Engineer Battalion (Combat), did, at Fort Lewis, Washington on or about 14 November 1943 wrongfully order Technician Grade V Edward A Strunk to sign the name of First Lieutenant Norman Mendleson, then duty officer of the 63rd Engineer Battalion (Combat) on a Driver's Trip Ticket and P. M. Service Record War Department Form 48, neither the said First Lieutenant George M. Aitken nor Technician Grade V Edward A Strunk being authorized to sign the name of said First Lieutenant Norman Mendleson on said Driver's Trip Ticket and P. M. Service Record.

Specification 2: In that First Lieutenant George M. Aitken, Company C, 63rd Engineer Battalion (Combat) did at Fort Lewis, Washington, on or about 14 November 1943, wrongfully take and use, without authority, a 1/4 ton truck #20254673, property of the United States, of a value of over fifty dollars ($50.00).

Specification 3: In that First Lieutenant George M. Aitken, Company C, 63rd Engineer Battalion (Combat) did, on or about 15 November 1943 at Fort Lewis, Washington appear before his Commanding officer in such a state of intoxication that he was physically unfit for duty, to wit: taking command of his company in a move into the field with his battalion, and did remain unfit for duty through on or about 18 November 1943.

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

Specification: In that First Lieutenant George M. Aitken, Company C, 63rd Engineer Battalion (Combat), did, without proper leave, absent himself from his station at Fort Lewis, Washington from on or about 2 December 1943 to on or about 7 December 1943.

ADDITIONAL CHARGE II: Finding of not guilty.

Specification: Finding of not guilty.

He pleaded not guilty to all the Charges and Specifications. He was found not guilty of Additional Charge II and its Specification, but guilty of the remaining 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 the prosecution shows that accused was on 14 November 1943 a first lieutenant in command of Company "C", 63rd Engineer Battalion, stationed at Fort Lewis, Washington. At noon that date accused telephoned from nearby Tacoma to Corporal E. A. Strunk, a member of the same organization and assigned as driver to 1/4 ton truck #20254673, property of the United States, (commonly known as a "jeep"), and instructed him to bring the jeep to meet him (the accused), and also to sign Lieutenant Mendleson's (First Lieutenant Norman Mendleson) name to the driver's trip ticket. In compliance with this order Corporal Strunk signed Lieutenant Mendleson's name to the trip ticket and drove the "jeep" to accused's home in Tacoma whence he first brought accused back to camp but later drove him back to Tacoma (R. 9-11; Pros. Ex. 1). First Lieutenant Norman Mendleson was Officer of the Day during 14 November 1943 (Sunday) and did not sign the trip ticket nor did he delegate anyone else to sign for him (R. 12-13). It was stipulated of record that the motor vehicle described had a value at the time of over $50 (R. 8).

On 15 November 1943 the accused met Lieutenant Colonel John R. Botsford "around the corner of the building" in Fort Lewis and told him that he wanted to be relieved from duty and transferred overseas. Colonel Botsfort noticed that accused was "very tired, his eyes were bloodshot, he seemed to be exhausted, and he had a strong odor of alcohol on his breath and he was unfit for duty. So I placed him in arrest in his quarters." In his opinion the accused was intoxicated (R. 15-16). The accused remained in his quarters from that time until 19 November 1943, a period of four days, when he was paroled in order to accompany the battalion on maneuvers (R. 16). From the 15th to the 18th of November accused "was a pretty sick man" and confined to his bed. Sergeant E. G. Aronis brought his meals to him but could not tell whether accused was intoxicated. He smelt no liquor nor did he see any evidence of drinking. The accused talked sensibly but was sick (R. 18-19).

On 2 December 1943 the accused could not be found in the Battalion area (R. 20). The accused was absent without proper leave (R. 26) from that date until 7 December 1943 (R. 21-25).

4. The accused, having been advised regarding his rights as a witness in his own behalf, elected to testify (R. 37) regarding the Additional Charges and their Specifications. In view of the finding of not guilty of Additional Charge II and its Specification his testimony pertaining thereto is omitted. In explanation of Additional Charge I and its Specification he related that he had been drinking heavily about 2 December 1943 and, therefore, could not recall leaving Fort Lewis on that date (R. 38-39). He was worried at the time concerning the charges that were being made against him (R. 39). He admitted that he must have departed from Fort Lewis because during his absence he visited his home in Long Beach, California for two or three days. Due to his condition his memory was hazy regarding the details of his absence. He was on his way back to Fort Lewis when he surrendered voluntarily to a military policeman on the train. He could not explain why he surrendered nor exactly where (R. 39). He produced the unused portion of his railroad ticket which appears to be the return portion of a furlough ticket good for one passage from Los Angeles to Tacoma, Washington (R. 38, Def. Ex. 2).

Defense counsel recalled all of the witnesses produced by the prosecution to testify as to the good character and military ability and value of the accused prior to 14 November 1943. Colonel Botsford expressed as his opinion that he was an excellent officer (R. 31), that accused's Qualification Card (Def. Ex. 1) showed his past manner of performance of his duties to be "Excellent" (R. 31), and that the accused's former commander, a Colonel Nelson, stated to the witness that from October 1942 to November 1943 accused had a clear record and was an excellent officer (R. 33).

Major H. E. Arnold considered accused one of his battalion's best company commanders (R. 34). First Lieutenant B. Czapszys, who was placed in command of Company "C" when accused was relieved of command, gave his opinion that as an officer "they don't come any better than Lieutenant Aitken" (R. 34). Corporal E. A. Strunk and Sergeant E. G. Aronis were of the opinion that accused was a capable company commander and one of the finest and they would be willing to submit to his authority at any time (R. 35-36). Lieutenant Norman Mendleson always thought accused was a very good officer (R. 37).

5. With reference to the Charge and its three Specifications it was clearly established, without contradiction, that the accused on 14 November 1943 ordered Corporal E. A. Strunk to sign the duty officer's name to a driver's trip ticket, without that officer's authority, for the purpose of taking out of the camp the "jeep" to which the corporal had been assigned as driver, and, on the same date, made personal use of the "jeep" which was the property of the United States, then having a value of over $50. Such was the purport of the testimony of Corporal Strunk and the duty officer. Judicial notice may be taken of existing War Department policy concerning the operation of its motor vehicles and it may be inferred that the use of one of its vehicles for purposes other than official business is wrongful. The same inference may be drawn from the signing of another's name without his knowledge or consent. There is no e idence in the record that the signature or name of the duty officer was required on the driver's trip ticket for any purpose. It may be inferred, however, from the circumstance of using Government property for an improper purpose that the instruction to sign the duty officer's name to the driver's trip ticket was given to further this improper use and was, for that reason alone, wrongful. The proof that the signing or the instruction to sign, was wrongful would have been more clearly supported if the prosecution had shown that the signature or approval of the duty officer on the trip ticket was necessary in order to drive the vehicle from the camp. However, without such additional evidence, the Board is of the opinion that the record is legally sufficient to support a finding that the acts clearly shown were wrongful under the circumstances.

It was also clearly shown by Colonel J. R. Botsford, who saw the accused and described his condition, and the sergeant who waited upon him daily, that accused was on 15 November 1943 in such a state of intoxication that he was unfit for duty and was so sick as a result that he remained unfit for duty from that date until about 18 November 1943. Such evidence is legally sufficient to support the finding of guilty of Specification 3 of the Charge.

With reference to Additional Charge I and its Specification two officers of accused's organization testified that accused was absent from his organization without authority from 2 December 1943 until 7 December 1943. The accused admitted on the stand that he was absent during that period of time and voluntarily surrendered while returning to the camp on 7 December 1943. Proof of this offense was, therefore, ample and the finding thereon legally sufficient.

6. The records of the Adjutant General show the accused to be 28½ years of age, married, and the father of one child. His residence was Long Beach, California. He attended high school for 2½ years, worked as a pile driver in bridge construction for 3 years, as manager of sales of sporting goods for one year, and as superintendent of oil drilling for 3 years. He enlisted in the service 26 December 1941, served as a radio operator in a field artillery battalion until he attended OCS at Fort Benning, Georgia, where on 28 September 1942 he was commissioned second lieutenant, Infantry. His performance of duty was rated as excellent from that date until he was promoted to first lieutenant, 5 May 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 Articles of War 61 and 96.

William A. Rounds, Judge Advocate

Charles Schlum, Judge Advocate

Herbert R. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O. 3 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 First Lieutenant George M. Aitken (O-1294007), 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 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. 94, 10 Mar 1944)

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

(305)

24 FEB 1944

SPJGH
CM 247302

UNITED STATES	)	93RD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Clipper, California, 21-22 December 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant CORNELIUS J. COMPTON, JR. (O-1172808), Field Artillery.	)	

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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Second Lieutenant Cornelius J. Compton, Jr., 596th Field Artillery Battalion, having received a lawful command from Captain Henry M. Gibbs Jr., his superior officer, to be duty officer for Battery C, 596th Field Artillery Battalion for the week-end of 6 November 1943 to 8 November 1943, did at Camp Clipper, Essex, Calif. on or about 6 November 1943, fail to obey the same.

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

Specification: In that Second Lieutenant Cornelius J. Compton, Jr., 596th Field Artillery Battalion, did without proper leave absent himself from his battery at Camp Clipper, Essex, California, from about 1630, 6 November 1943 to about 0500, 8 November 1943.

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

Specification 1: In that Second Lieutenant Cornelius J. Compton, Jr., 596th Field Artillery Battalion, did at Camp Clipper, Essex, California, on or about 8 November 1943, with intent to deceive Captain Henry M. Gibb Jr., officially state to

the said Captain Henry M. Gibb Jr., that he left the Battery Area Saturday afternoon to play poker at Division Artillery Headquarters Battery with Lieutenant Frosh and Captain O'Kelley and played poker with them Saturday night, which statement was known by the said Second Lieutenant Cornelius J. Compton Jr., to be untrue.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and II and of the Specifications thereunder; guilty of Specification 1, Charge III; not guilty of Specifications 2 and 3, Charge III; and not guilty of Charge III, but guilty of a violation of the 96th Article of War. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence but remitted the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution:

a. Specification, Charge I: First Lieutenant Ellis J. Diggs, Executive Officer, Battery C, 596th Field Artillery Battalion, at the request of Captain Henry M. Gibb, the battery commander, informed accused about 1245 Saturday, 6 November 1943, that accused was battery duty officer for the weekend. Accused merely replied, "Am I?" and began talking about another subject. Lieutenant Diggs was serious, and said nothing to lead accused to believe he was "kidding". He was satisfied accused understood the order. Captain Gibb saw accused in the battery orderly room at about 1545 that day, and said "I understand you are going to hold down the fort this weekend". Accused replied, "I have heard words to that effect". Captain Gibb then said, "Since you will be the duty officer of the Battery, I want you to see that certain things are done * * *"; "I want you to see that the barrack bags are marked, and I want you to keep a close watch on the Battery because it is pay day". He was positive accused understood him. Accused left the orderly room and Captain Gibb did not see him again until the following Monday morning. Captain Gibb attempted to locate accused around 1630 Saturday afternoon, looked in his tent, the motor pool and the post exchange, but could not find him. He made no further attempt to find accused and left the battalion area at 1700. On Sunday morning about 0930 he called accused at camp from his home in Boulder City and, as accused could not be found, he asked "Lt. John D. Kleck" to put a note on the cot of accused to call Captain Gibb. Accused did not call. The note (Ex. B) was on the cot of accused on Monday morning (R. 7-15, 31, 42-44).

Second Lieutenant George M. Murphy, 594th Field Artillery Battalion, met accused around 1730 Saturday, 6 November 1943, and accompanied him to "Captain Mason's" tent in the 594th Field Artillery Battalion area where they played poker as long as the lights were on and then for a short time by flashlight. Lieutenant Murphy did not leave camp that weekend. He saw accused Sunday morning in front of his, Lieutenant Murphy's, tent (R. 24-27).

When Captain Gibb saw accused on Monday morning, 8 November 1943, he asked how everything had been over the weekend. Accused replied, "Everything was alright, although I wasn't here Sunday". In response to further questioning accused stated that he had played poker Saturday afternoon, slept in the 594th Field Artillery Battalion area Saturday night, had gone to Needles, California, with Lieutenant Murphy at about 0800 Sunday, had not signed out, and had asked "Lt. Readus" to watch the battery for him. Accused admitted to Captain Gibb that there was no question in his mind that he had been designated battery duty officer. On Monday morning accused also stated that they were working on the marking of the barracks bags (R. 7, 10, 12-13, 43-44).

Captain Gibb testified that no duty roster of officers on duty on weekends was kept in the battery and the officer selected for duty was notified by the executive officer or by himself. Specific instructions were given to officers assigned that duty. Duty hours for the weekend commenced at 1600 Saturday. A duty officer could leave the battery area and go any place within a short distance, such as the "595th", provided he left word where he could be located. Duty officers could exchange places with other officers with Captain Gibb's permission. Accused had been with the battery for six or seven weeks. Captain Gibb was positive accused had served as duty officer previously although he could not say whether accused had "drawn" Sunday duty with Battery C. The standard operating procedure was explained to accused when he came to the battery (R. 8, 12-13, 30-32).

b. Specification, Charge II: Duplicate copy (Ex. A) of the morning report of Battery C, 596th Field Artillery Battalion, for 8 November 1943, at Camp Clipper, California, shows accused "fr. dy to AWOL 1800 dtd 6, Nov 43 to 0530 8, Nov 43". Captain Gibb identified his signature on the morning report and stated he had personal knowledge of accused being absent during the period stated. However, on cross-examination he stated that he had not tried to locate accused after 1630 Saturday, 6 November 1943, knew accused was not in the battery area at 1630, but had no personal knowledge of the period from 1630 Saturday until 0700 Monday (R. 6, 9-11, 31).

c. Specification 1, Charge III: When Captain Gibb questioned accused on Monday morning concerning the events of the weekend he asked accused, "Where were you Saturday afternoon?". Accused replied, "I was down at Division Artillery Headquarters playing poker with Lt. Frosh and Captain O'Kelley". Captain Charles E. O'Kelley, 595th Field Artillery Battalion, had not played poker Saturday, 6 November 1943. First Lieutenant Vollie E. Frosh, Artillery Headquarters Battalion, left camp at about 1800 Saturday, 6 November 1943, and had not played poker with accused in the afternoon of that day. However, he had played poker with accused Friday night, the game lasting until 0300 Saturday, 6 November 1943. Captain Gibb talked to the officers named, then summoned accused and told him what he had learned. Accused then said he had made a mistake and that he had played poker with these officers Friday night instead of Saturday night (R. 7, 15-20, 44).

4. For the defense: Sergeant Harvey Lee MacKintosch, motor sergeant, Battery C, 596th Field Artillery Battalion, testified that accused was battery motor officer. He saw accused in the battery motor park around 1700 Saturday, 6 November 1943. Accused gave him an errand to perform and stated he was going to see a certain lieutenant, Sergeant MacKintosch could not remember the name, in the "594th" and could be reached there if anyone asked for him. No one inquired for accused except the charge of quarters and Sergeant MacKintosch told him where accused could be located. He next saw accused Monday morning at reveille. Reveille is not held on Sunday (R. 28-30).

Second Lieutenant Frank Readus, 596th Field Artillery Battalion, testified that he was battalion officer of the day on Saturday, 6 November 1943 and that accused "did mention something about looking out for his Battery". Lieutenant Readus "merely" told accused "Yes", meaning that "if anything came up concerning his Battery, that I would straighten it out". Accused did not state where he could be located. If anything "comes up" in a battery and no officer is present the battalion officer of the day is sent to take care of it. As battalion officer of the day it was his duty to inspect the battery areas and to check the battery officers of the day at reveille. Accused reported to Lieutenant Readus as Battery C officer of the day at 0615 Monday, 8 November 1943 (R. 32-34).

Second Lieutenant Julian Dawson, Jr., Battery B, 594th Field Artillery Battalion, testified that he played poker with accused in Captain Mason's tent from about 1830 to about 2230 Saturday, 6 November 1943. The tent is in the area "right across from the E. P. in the 594th Field Artillery". It is not in the 594th Field Artillery Battalion area. Captain O'Kelley and Lieutenant Frosh were not in the game. Lieutenant Dawson also saw accused Sunday morning (R. 35-36).

Lieutenant Diggs, recalled as a defense witness, stated that it was "possible for duty officers to transfer duty without asking the Battery Commander for permission". However, it was the general practice to ask permission of the battery commander and for all parties to agree on the change. He did not know of any case where it was done without such permission and he personally had always requested permission whenever someone had taken duty officer in his place (R. 41-42).

Accused testified that he was commissioned 5 November 1942, and had prior service in the National Guard from 1 November 1939. On 6 November 1943 Lieutenant Diggs, who slept in his tent, came in and said, "I hear that you are duty officer for the weekend". Accused thought he was "kidding" and the only reply he made was, "Am I?". Accused went to the orderly room at about 1545 and Captain Gibb asked him if they had finished marking the barracks bags. Accused said they had and Captain Gibb then stated, "There is nothing further to be done". Captain Gibb did not give him any duties to perform over the weekend. Accused then went to the motor pool, sent Sergeant MacKintosch on an errand over to Battery A, and told MacKintosch that if anyone wanted him he would be in the 594th Battalion area. Inasmuch as he was the only officer of his battery in camp that weekend he asked Lieutenant Readus to look after the battery for him. He went to the 594th area and played poker in Captain Mason's tent. After the game broke up he went to Lieutenant Murphy's tent, where he slept that night. The following afternoon he went to Needles, California, had dinner at Lieutenant Murphy's house there and returned to the battalion area Monday at about 0430. As he was the only battery officer up Monday morning, he "took" reveille. Accused did not know at any time during the weekend that he was duty officer. He denied that he had received a definite order to be duty officer. He had been duty officer previously but did not know any of the "functions" and had never made any inquiries. "When you are assigned duty officer, if there is anything to be done, you do it" (R. 36-41).

Accused admitted that he told Captain Gibb that he had played poker with Captain O'Kelley and Lieutenant Frosh on Saturday. This was a "mistake" and he did not intend to deceive Captain Gibb. He often played poker with Captain O'Kelley and Lieutenant Frosh. (R. 39).

5. a. Specification, Charge I: First Lieutenant Ellis J. Diggs, executive officer, Battery C, 596th Field Artillery Battalion, informed accused at 1245 Saturday, 6 November 1943, that accused was battery duty officer for the weekend. Captain Henry M. Gibb, the battery commander, saw accused later, at about 1545, and said "I understood you are going to hold down the fort this weekend"; "Since you will be the duty officer of the Battery, I want you to see that certain things are done * * *"; "I

want you to see that the barrack bags are marked, and I want you to keep a close watch on the Battery because it is pay day". Duty hours for the weekend commenced at 1600 Saturday. Around 1700 that day accused left the area of Battery C, after informing a non-commissioned officer of the battery where he could be located, and went to an officer's tent in the 594th Field Artillery Battalion area where he played poker until approximately 2230. He saw the battalion officer of the day and requested him to look after Battery C during his absence. He slept that night in an officer's tent in the 594th Field Artillery Battalion area and on Sunday left camp and went to Needles, California. He returned to camp Monday morning at about 0430.

The foregoing evidence clearly establishes that accused was ordered by the commanding officer of his battery to act as duty officer for the weekend of 6 November 1943, that he left his battery and camp during the weekend, and accordingly failed to obey that order. Although the actions of accused in leaving his battery, going to another battalion area, playing poker there and remaining overnight to sleep, appear wholly inconsistent with his proper performance of such duties as might have been given him or which might have arisen in the course of events, his actions may have been permissible in view of the testimony of his commanding officer that a duty officer was privileged to go to another battalion area provided he left word where he could be located. Whatever doubt may be entertained in this regard, the actions of accused in leaving camp on Sunday and remaining away until Monday morning constitute such a complete and unequivocal abandonment of duty as to establish the commission of the offense beyond question. Accused conceded that he did not serve as duty officer, claiming that he did not know he had been assigned to that duty.

The testimony of accused that he did not know he had been designated duty officer and that he thought Lieutenant Diggs was "kidding" when he informed accused that he had been so designated, his denial that Captain Gibb had given him any duties to perform, his professed ignorance of the "functions" of a duty officer, and his explanation of the reasons why he asked the battalion officer of the day to "look out" for the battery in his absence and why he, accused, "took" reveille on Monday morning, are not impressive.

b. Specification, Charge II: The morning report of Battery C shows accused absent without leave from 1800 on 6 November 1943 to 0530 on 8 November 1943. Captain Gibb, the battery commander, who signed the morning report, admitted on cross-examination that he had no personal knowledge whether accused was in the battery area from 1630 Saturday to

0700 Monday. It is obvious from the nature of the duty orders which Captain Gibb gave accused and the surrounding circumstances that Captain Gibb did not contemplate being present for duty in the battery over the weekend. His testimony that he left the battalion area at 1700 Saturday and that he called the battery on Sunday morning from his home in Boulder City, indicates that he was not present in the battery during the weekend and confirms his statement that he had no personal knowledge concerning the presence or absence of accused for duty at that time.

Aside from the morning report it is shown by the testimony of accused, his admissions and other corroborating evidence that accused, while acting as battery duty officer, left his battery in the 596th Battalion area around 1700 Saturday, went to the 594th Battalion area where he played poker that evening and slept that night, left camp on Sunday and did not return until about 0430 Monday morning. In view of the testimony previously referred to, that a duty officer could go into another battalion area provided he left word where he could be reached, and the testimony that accused did leave word with a non-commissioned officer of his battery when he went to the 594th Field Artillery Battalion area, the evidence is considered insufficient to establish beyond a reasonable doubt that accused was absent without leave on Saturday, 6 November 1943. The unauthorized departure of accused from camp on Sunday, 7 November 1943, during the period in which he had been ordered to serve as duty officer in his battery, is sufficient, however, to establish accused as absent without leave on that date. The exact time of his departure is not shown by the evidence. The Board, accordingly, is of the opinion that the evidence is legally sufficient to sustain only so much of the findings of guilty of the Specification, Charge II, as involves a finding of guilty of absence without leave from 7 November 1943 to about 0430 on 8 November 1943.

c. Specification 1, Charge III: Accused was questioned by Captain Gibb on Monday, 8 November 1943, concerning events of the preceding weekend. Captain Gibb asked him, "Where were you Saturday afternoon?" and accused replied, "I was down at Division Artillery Headquarters playing poker with Lt. Frosh and Captain O'Kelley". These officers had not played poker with accused Saturday afternoon. Captain Gibb ascertained this fact and so informed accused who then stated he had made a mistake and that he had played with these officers Friday night. It was shown that on Saturday afternoon and evening accused had played poker with Lieutenant Dawson, Captain Mason and other officers in a tent in the 594th Field Artillery Battalion area.

The statement made by accused to his commanding officer in the course of questioning concerning the performance of his duties was an

official statement. While the Specification does not allege wherein the statement was false, the evidence shows that although accused had played poker at the time stated he had not played with the officers named or at the place named and that in these particulars the statement was false. The materiality of these particulars is not apparent from the evidence in the case. It would appear relatively unimportant whether accused played poker with Captain O'Kelley and Lieutenant Frosh, as he stated, or with Lieutenant Dawson and Captain Mason, as was proven. Whether the game was played in the division artillery headquarters or in Captain Mason's tent in the 594th Field Artillery Battalion area might conceivably be of importance as indicating the distance accused had gone from his own battery area. The record, however, is devoid of any evidence bearing on this point. In its absence it must be concluded that the place where the game was played is also of no importance.

The evidence, therefore, shows that in the course of official questioning, to which on the whole, it may be noted, the accused replied with candor, he made a statement which was false in two unessential particulars. Accused subsequently explained the misstatements as simply a mistake. Inasmuch as nothing to the contrary is indicated by the evidence the Board accepts this explanation. The allegation of the Specification, that the false statement was known to be untrue, is accordingly, not substantiated by the evidence and for this reason, as well as the lack of any competent evidence supporting the allegation that the false statement was made with intent to deceive, the Board is of the opinion that the findings of guilty of Specification 1, Charge III, should not be sustained.

6. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 6 January 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty, 5 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 of the Specification, Charge I, and of Charge I; legally sufficient to support only so much of the findings of guilty of the Specification, Charge II, and of Charge II, as involves a finding of guilty of absence without leave from his battery at Camp Clipper, Essex, California, from 7 November 1943 to about 0430 on 8 November 1943; legally insufficient to support the findings of guilty of Specification 1, Charge III and of the substituted Charge; and legally sufficient to support the sentence and to warrant confirmation of the

sentence. Dismissal is authorized upon conviction of a violation of the 61st or of the 96th Article of War.

Samuel M. Drew, Judge Advocate

Herbert Cuthbert, Judge Advocate

H. Lotterhos, Judge Advocate

1st Ind.

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

25 FEB 1944

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Cornelius J. Compton, Jr. (0-1172808), 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 of the Specification, Charge I, and of Charge I; legally sufficient to support only so much of the findings of guilty of the Specification, Charge II, and of Charge II, as involves a finding of guilty of absence without leave from his battery at Camp Clipper, Essex, California, from 7 November 1943 to about 0430 on 8 November 1943; legally insufficient to support the findings of guilty of Specification 1, Charge III (there were findings of not guilty as to Specifications 2 and 3, Charge III), and of the substituted Charge; and legally sufficient to support the sentence and to warrant confirmation thereof.

The accused failed to obey a lawful order of the commanding officer of his battery to act as battery duty officer over the week-end (Spec., Chg. I) and was absent without leave from his battery for about one day (Spec., Chg. II). The records of the Office of The Adjutant General show that on 2 March 1943 the immediate commanding officer of accused in the 92nd Infantry Division recommended reclassification board action based on allegations of unreliability and lack of a feeling of responsibility; that on 22 July 1943 a reclassification board, after a hearing, found that the allegations were partially substantiated, but not to an extent indicating that accused should be separated from the service, and recommended that he be reassigned to duty with the Field Artillery; and that by special orders dated 13 August 1943 accused was reassigned to the 93rd Infantry Division. The conduct of accused as disclosed in the record of trial indicates that he has not changed his attitude as a result of his reassignment. I recommend that the approved 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.

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-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. G.C.M.O. 200, 26 May 1944)

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

SPJGK
CM 247303

28 JAN 1944

UNITED STATES	)	95TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 95, Los Angeles, California, 21 December 1943. Dismissal, total forfeitures, and confinement for one (1) year.
First Lieutenant WILLIAM P. PRATTSMITH (O-1285299), Infantry.	)	

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

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

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

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

Specification: In that First Lieutenant William P. Prattsmith, Headquarters Company, Three Hundred and Seventy-Ninth Infantry, did, unlawfully, at Coxcomb, California, on or about the 3rd day of December 1943, knowingly and willfully apply to his own use and benefit one tire, 600 x 16, and tube, value about $7.02, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that First Lieutenant William P. Prattsmith, Headquarters Company, Three Hundred and Seventy-Ninth Infantry, did, at Desert Center, California, on or about the 27th day of November, 1943, wrongfully and unlawfully direct and cause an enlisted man under his command to remove one tire and wheel from a United States 1/4 ton, 4 x 4 truck, and transport the same from Desert Center, California, to Coxcomb, California.

He pleaded guilty to Charge I and its Specification and not guilty to

Charge II and its Specification. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Charge I and Specification. At the times hereinafter referred to, the accused, a first lieutenant, Army of the United States, was serving as Company Commander, 379th Infantry, 95th Infantry Division (R.49).

Technician Fourth Grade Frank Bumgardner, Regimental Headquarters, 379th Infantry, 95th Division, testified that after retreat on 3 December 1943 accused called him into the company orderly room and told him to take a spare tire, which was in the orderly room, down to the motor pool; to get one of the tires from the maintenance tent, put it on accused's wheel, and after it was mounted to take it back to accused's car. Accused gave witness the keys to the car (R.29,30). Witness carried out these instructions. The tire which he removed from accused's wheel was "worn out and completely unfit to use", and he left it in the maintenance tent. When he and his helper had finished, he placed the tire in the trunk of accused's car, locked the trunk, and returned the keys to accused (R.29, 30,33,34,36,37). Witness stated that accused told him not to mention the incident to anyone (R.30).

Charge II and Specification.

Private Michael J. Galandak, Regimental Headquarters Company, testified that on Saturday, 27 November, after the organization had moved to its APO address, he, accused, and Private Gale Simpson (then a staff sergeant) drove from their camp to the nearby town of Indio in a Government jeep - a 1/4 ton, 4 x 4 type vehicle. Witness was driving. They left Indio at approximately 7:30 in the evening, picking up two other enlisted men of the 379th Infantry on the way, and stopped en route at about 9 o'clock at a place called Desert Center, where they parked the vehicle in a Government parking lot. While Simpson and the other two enlisted men were in a restaurant, accused pointed to a "jeep" standing next to theirs and asked witness how long it would take him to remove the spare tire from the other vehicle. Witness stated that he answered, "About three minutes", to which accused replied, "Get it" (R.9-12).

Witness "fumbled around and took the tire off the jeep" as accused had directed. Accused told him to put the tire "in the front" of their

jeep, but it appears from the evidence that witness put it in the back seat. He and accused then went into the restaurant, had a cup of coffee, returned with the three enlisted men, and the party proceeded to their station. When they arrived there accused told witness to put the wheel and tire in the company mechanic's tent. Witness did so, but did not know what afterwards became of it (R.11-13).

Captain Henry P. Weiss, Inspector General's Department, Headquarters 95th Infantry Division, testified that he had made an investigation of the charges against accused on 8 December 1943, at which time he had read to accused Article of War 24, and had explained to accused his rights to remain silent or make a statement subject to its being used against him (R.38,42,46).

Captain Weiss stated that during the investigation accused admitted to him the possession of a military tire in his private automobile at Camp Polk and on the trip to their APO address, but that accused denied that the tire had ever been used on his car. Accused also admitted to witness that, at Desert Center, on 27 November 1943, without authority or permission to do so, he ordered Private Galandak to take a military tire from another Government vehicle, and that on 3 December he ordered Technician Bumgardner to mount a military tire on the spare wheel of accused's private automobile. Captain Weiss and Staff Sergeant Andrew P. Lancey, Military Police, 95th Infantry Division, testified that in the course of the investigation they found in the trunk of accused's car, mounted on a rim which resembled the other rims on accused's car, a Lee tire, "600 x 16", bearing serial number W-170480. It was stipulated between prosecution and accused and his counsel that this tire and its tube (Prosecution's Exhibit A) had a value of $7.02 (R.38-42,44,45).

Evidence for the defense.

Accused was fully advised of his rights by the law member and elected to testify (R.47). He stated that about three days before the organization moved from Camp Polk he found that there was one extra military type "mud and snow" tire in the motor shed of the 379th Infantry. He did not know how it got there. He was told that it was an "overage tire". It was brought from Camp Polk to the present station in accused's private car, driven by three enlisted men, along with miscellaneous Government equipment which could not be crated in time for shipment. He stated that he had not made any report of this tire to the regimental motor transport officer. On their arrival at Camp Coxcomb the tire was removed and placed in the motor maintenance tent of his company (R.53,54,56). Accused stated that on 27 November he, Private Galandak, and Simpson went to Indio. They left Indio about 7:30 p.m., and on their way back stopped at Desert Center after picking up two enlisted members of the 379th Infantry. They parked in the lot about 200 yards from the cafe and the three men went

into the cafe, while accused and Galandak remained outside. Accused stated that he asked Galandak how long it would take to remove the spare tire which was attached to the rear of a 1/4 ton Army vehicle parked nearby; that Galandak replied, "About three minutes, sir", and that accused told him, "Take it off and put it in front of our vehicle". When Galandak had done this, both went into the cafe, got coffee, returned with the other men, and continued back to their station. This tire was a mud and snow type tire identical to the tire brought from Camp Polk in accused's automobile (R.57,58,61).

The next Sunday accused told Staff Sergeant Robert W. Thorman, 379th Infantry, to bring a trailer "from Company 'H'" to Headquarters Company to remove from it two ordinary, commercial tread tires, to place them on accused's car, and to replace the trailer tires with the mud and snow tread tires which were in the mechanic's tent of accused's company (R.58, 59,62). He had both tires on the trailer changed because it would be impractical to use one civilian and one military tire on it (R.51,60). On the first Sunday in December accused called Technician Bumgardner into the company orderly room, where accused had his own spare tire, mounted on his rim, and upon obtaining Bumgardner's opinion that the treads were showing and that it was of no use as a spare, ordered Bumgardner to take it to the motor shed, remove it from the rim, and put on it instead one of the tires "in the motor shed". Accused testified that he instructed Bumgardner to use accused's new inner tube, which would be found in the rear of accused's car, to return the tire, tube and rim to the orderly room, and to keep the old tire so that accused could use it to get a new tire from the ration board when he got back from his leave. He denied telling Bumgardner or any enlisted men "to keep quiet" about anything (R.59). He stated that he never did use the tire, since Bumgardner put it in the rear of the car (R.51). Accused admitted that he had caused the tire to be removed from the Government car at Desert Center with the idea of making the change on the trailer (R.60,61). Accused stated that his motive for his acts was that he had obtained a three-day leave to go home and see his three-weeks old child. His own spare was in such condition that he was afraid he might be stranded on the 650-mile journey. He stated that he did not intend to use the tire other than on this trip (R.51). Accused testified that he had enlisted in the regular Spanish Army, serving for 18 months in combat during the Spanish Civil War. He stated that he was twice wounded and was decorated for bravery in action. He was honorably invalided out of the Spanish Army and granted a pension, which he did not receive due to the fall of that government (R.50,55). He later volunteered for service in and was accepted by the United States Army, serving as an enlisted man from 4 March 1941 until 12 July 1942, when he was graduated from Officer Candidate School at Fort Benning, Georgia. He had been, successively, Battalion Communications Officer, Regimental Communications Officer, Headquarters Company Executive Officer and Company Commander, and had received efficiency ratings of "Superior"

and "Very Satisfactory" (R.48,49).

Lieutenant Colonel Aubrey W. Aikin, Major Tobias R. Philbin, Captain Robert S. Trotti, Captain Lawrence T. Purdick and First Lieutenant (Chaplain) George C. Farmer, all of the 379th Infantry, testified in accused's behalf. They had known accused for periods ranging from four months to over a year, and all testified that his reputation for truth and veracity was "very good" and "excellent", and that prior to the incidents involved he had always conducted himself in a manner creditable to the service and that he had been an excellent officer (R.64-72).

4. Accused pleaded guilty to Charge I and its Specification, alleging that he knowingly and willfully applied to his own use a tire and tube belonging to the United States, so no recapitulation of the evidence on this charge is necessary. All elements of the offense were proved beyond reasonable doubt.

With respect to Charge II and its Specification, alleging that accused wrongfully and unlawfully directed an enlisted man under his command to remove a wheel and tire from another Government vehicle and that he transported the same to his station, the facts in support of this offense were clearly proved by testimony of the enlisted man to whom the directions were given by accused's statements to the investigating officer, and by accused's own testimony. There is no reasonable doubt that he committed the offense, and there is ample authority for characterizing it as a violation of Article of War 95.

"Abuse of authority over soldiers * * * by requiring or influencing them to do illegal acts", is cited by Colonel Winthrop at page 716, Military Law and Precedents, 1920 Reprint, as a violation of the Article.

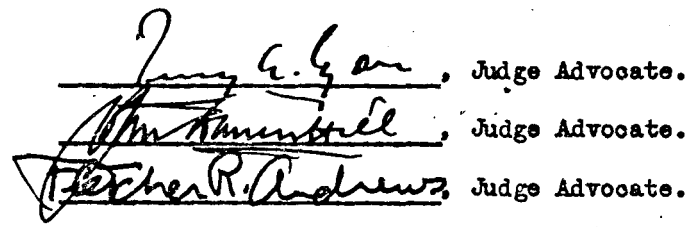
6. Attached to the record of trial is a recommendation of clemency signed by Captain Woodrow J. Wells, a member of the court, recommending that the sentence imposed be suspended during the pleasure of the President.

7. War Department records show that accused is 29 years of age. He did not attend a college but was privately tutored. He served in the army of the Spanish Republic during the recent Spanish civil war. He entered the military service of the United States 6 February 1941 and attained the grade of technical sergeant. He was graduated from the Infantry School, Fort Benning, Georgia, 12 June 1942, on which date he was commissioned Second Lieutenant, Infantry, Army of the United States. He was promoted to the grade of First Lieutenant, Infantry, 16 November 1942. In recommending him for appointment to Officer Candidate School, his company commander referred to his character as excellent and stated:

"Based upon my observations of the past eight months, this man is one of the three most outstanding candidates I

have ever known. In my opinion, his personal qualifications indicate he would make a superior officer. Efficiency rating: Superior."

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 96 and mandatory under Article of War 95.



, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 11 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 First Lieutenant William P. Prattsmith (O-1285299), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, but in view of accused's previous good record I recommend that the confinement and forfeitures be remitted, and that the execution of the sentence as thus modified be suspended during the pleasure of the President.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the 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 confinement and forfeitures remitted. Execution suspended. G.C.M.O. 139, 27 Mar 1944)

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

SPJGN
CM 247317

11 FEB 1944

UNITED STATES	)	13TH AIRBORNE DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 8 December 1943. Dismissal and two (2) years confinement.
First Lieutenant JACK W. McDEVITT (O-1305955), Parachute Infantry.	)	

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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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant JACK W. McDEVITT, Headquarters Second Battalion, 513th Parachute Infantry did at Fort Bragg, North Carolina on or about 28 November 1943 feloniously take, steal and carry away the following among other items of property:

One "A" Gasoline Ration Book issued to and the property of Captain J.H. SPEARS, 513th Parachute Infantry, value unknown; two pairs of dice, one bottle of whiskey (brand "Johnnie Walker Black label"), one case for sunglasses and several shoulder patches for 13th Airborne Division, value together in excess of $15.00, property of Second Lieutenant GEORGE B. NEWELL, 513th Parachute Infantry; approximately $40.00 lawful money of the United States, property of Mr. ROBERT W. STEMPLE, Fort Bragg, North Carolina; one "A" Gasoline Ration Book issued to and the property of G.B. NICHOLSON, value unknown and one Waltham wrist watch, value in excess of $20.00, property of one not presently identified: approximately $10

lawful money of the United States, the property of Captain Robert A. Eddy, 222d Airborne Medical Company; approximately $28 lawful money of the United States, the property of 1st Lieutenant George B. Nicholson, 190th Glider Infantry; approximately $23 lawful money of the United States, the property of 2d Lieutenant Harry E. Reafleng, 409th Airborne Quartermaster Company; one "Packard" electric razor, value in excess of $15, and approximately $33 lawful money of the United States, the property of 1st Lieutenant George E. Duncan, 222d Airborne Medical Company.

He pleaded not guilty to and was found guilty of the Charge and its Specification except the words "one bottle of whiskey (brand 'Johnny Walker Black Label')", and except further the words "value together in excess of $15.00", and substituting therefor the words "value together approximately $1.00"; and except further the words "one Waltham wrist watch, value in excess of $20.00, property of one not presently identified", and except further the words "one 'Packard' electric razor, value in excess of $15", substituting therefor the words "one 'Packard' electric razor, value approximately $7.80"; of the excepted words "Not guilty", of the substituted words "Guilty". He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that at about 2100 on 27 November 1943 the accused, carrying a quart bottle of whiskey, accompanied two officers of his organization - a lieutenant colonel and a captain - to a night club in Fayetteville, whence, at about midnight, having consumed approximately half the accused's liquor, the three adjourned to another "night spot" known as Andy's. There the accused had taken one or two drinks, when, at 2 o'clock, his original companions departed, leaving him in the company of three other officers whom he had encountered at Andy's. The accused was then "slightly intoxicated", but apparently in perfect control of his faculties; notably, he was capable of conversing intelligently and he was not staggering.

The accused's quarters were in his Regiment's Second Battalion B.O.Q. - Building T2-24 - at Fort Bragg. At 4:30 on the morning of 28 November 1943, he was observed in the First Battalion B.O.Q. - Building T9-26 - entering an officer's room from the hall, whither he had been surreptitiously followed by another First Battalion officer whom he had inadvertently awakened while rifling the empty pockets of the uniform which this supposedly sleeping officer had removed before retiring. However, the ensuing search for the accused in all of the rooms in Building T9-26 proved futile.

At 5:30 the same morning, Robert W. Stemple, American Red Cross Assistant Field Director, who lived in barracks Building T9-40, across Butner Road and about 200 yards from Building T9-26, was awakened by an intruder, who ran down the hall when Stemple called, "Stop". Having immediately investigated and found $39.00 gone from his pocketbook, Stemple looked out

of his window and saw a person running from T9-40 across Butner Road toward T9-26. He shouted to the guard across the street that "that man had stolen his money". The guard observed that the fleeing figure wore a trench coat. Pursuing the fugitive into T9-40, the guard found the accused in the custody of several aroused officer occupants, who, discounting his explanation that he was in the wrong barracks, had knocked him down three times, taken his trench coat from him, and emptied its pockets of an alarm clock, an electric razor, two packages of Dentyne chewing gum, "one of those ranger knives", an empty spectacle case, a pair of dice, several 513th Parachute Infantry regimental patches, a gas ration book belonging to Captain John H. Spears, quartered in Building T9-26, $32 in currency, and seventy cents in change. The accused appeared to have been drinking but was not intoxicated.

The guard arrested the accused, escorting him to the sidewalk near Building T9-40, where a crowd of officers and guards were gathered. There the sergeant, summoned from the Provost Marshal's office, found the accused, under guard, with his mouth bleeding, exuding an alcoholic aroma and mumbling, in rather a thick voice, that someone had hit him. Upon arrival of the officer of the day, the accused was taken into Building T9-40, where he voluntarily produced his identification card and offered to submit to a search. After some questioning, he was driven at about 6 a.m., to the station hospital for a drunkenness test, which showed a blood and urine alcoholic content which would ordinarily indicate a condition characterized as "under the influence of alcohol" rather then drunkenness.

The accused was then driven to division headquarters and thence to the prison office for search. At division headquarters, fifty-six dollars in crumpled currency was found on the floor of the vehicle which was still being used for the transportation of the accused. Various items of personal property were removed from the accused's boots and trousers, and forty dollars in bills and $5.17 coins from his pockets. Among the items recovered from the accused were the following, mentioned in the Specification, and, unless stolen by the accused, unaccountably missing from their respective owners' possession on the morning in question.

(1) One "A" gasoline ration book, value unknown, issued to and the property of Captain J. H. Spears; 513th Parachute Infantry, Building T9-26, Fort Bragg, N.C.

(2) Two pairs of dice, value 20 cents; one case for sun glasses, value 25 cents; four 13th Airborne Division shoulder patches, value 32 cents; all, the property of Second Lieutenant George B. Newell, 513th Parachute Infantry, Building T9-26, Fort Bragg, N. C.

(3) Currency consisting of one $20 bill, one $10 bill, one $5 bill and four $1 bills belonging to Robert W. Stemple, Building T9-40, Fort Bragg, N. C.

(4) One gasoline ration book, value unknown, and $23.00 in cash belonging to First Lieutenant George B. Nicholson, 190th Glider Infantry, Building T9-27, Fort Bragg, N. C.

(5) Two $5 bills belonging to Captain Robert A. Eddy, M.A.C., Building T9-40.

(6) One $10, two $5, and three $1 bills belonging to Second Lieutenant Harry E. Reafling, QMC (by inference a resident of Building T9-40).

(7) A $20 and a $10 bill, also a black Packard razor with a cord attached (the latter not discovered missing until the following morning), belonging to 1st Lieutenant George E. Duncan, M.C., Building T9-40.

4. The evidence for the defense showed that the accused's regimental commander regarded his military record as excellent; his general reputation for truth and veracity, good; and, as far as his personal affairs were concerned, fair to good, basing his final rating on the accused's notorious association with a woman not his wife. A former company commander of the accused, who, at one time, lived in the same house with the accused and his family, testified that the accused's general reputation was good; and, with reference to truth and veracity, that it was all right, adding that the accused never made an untrue statement to the witness or "to anyone". Another officer who encountered the accused at both the night clubs which he visited on the night of and in the early morning hours preceding the commission of the alleged offense, saw the accused take about 3 drinks of whiskey at the first, 4 at the second; in his opinion, the accused was drunk. This same officer testified that the accused's reputation for truth and veracity was good. Still another officer of the accused's organization testified that, at Andys', he was in a group at the same table with the accused, whom he saw imbibe two or three drinks of whiskey and a bottle of beer. The accused held his liquor better than most people. He was talking sensibly and not staggering when, at 4 o'clock, he left Andys' with the witness, who drove him to Fort Bragg, parking his car behind the barracks in which both the witness and the accused were quartered. After alighting, the accused was last seen going toward his own car, parked nearby.

Medical testimony, adduced on behalf of the defense, shows that when the accused was escorted to the station hospital, shortly after his apprehension, for blood and urine tests, his demeanor was not such as to indicate that he was intoxicated. The blood test showed five-tenths miligrams of alcohol per CC of blood and two miligrams of alcohol per CC of urine. The blood content was not a strong concentration. It was enough to indicate that a person had been drinking, but not necessarily that he was drunk. The accused's experiences during the hour preceding the test - being pursued, caught, knocked down, searched, and driven, bareheaded, for several miles in an open jeep on a cold morning - would have a sobering affect on an intoxicated person.

5. The accused, after having his rights as a witness duly explained to him, elected to take the stand under oath. He testified that he had been in the armed forces since 3 March 1941; that prior to that time he worked for McKesson and Robbins, Wholesale Drugs, in Los Angeles, California; that he graduated from Los Angeles High School; that he entered Officer Candidate School at Fort Benning, Georgia September 30, 1942 and graduated December 29, 1942 as a second lieutenant and was promoted to first lieutenant June 8, 1943; that he was transferred to Fort Bragg, North Carolina November 16, 1943; that on 27 November 1943 he was living in Second Battalion Officers Quarters (R. 91).

On the evening of 27th of November, before going to Fayetteville, North Carolina accused had two drinks of whiskey with Lieutenant McGee and some more whiskey with Lieutenant Rydesky; that he went to Villanova Officers' Club with Colonel Willis and Captain Jessee; that he took one quart of whiskey with him. After drinking whiskey and beer at Villanova accused went with Colonel Willis and Captain Jessee in Colonel Willis' car to Andy's; that he recalled having some drinks there but did not remember coming back to Fort Bragg and did not recall with whom he returned. Accused had $118 in cash with him but recalled paying no checks. He did not recall being in one of the barracks buildings in the early morning of 28 Nov. nor being hit by anyone nor going to the hospital and having blood drawn there. He stated he did not remember anything that happened that night and when he woke up the next morning in 13th Airborne Stockade he was still partially intoxicated. He was a Christian Scientist, but when he searched his pockets upon awakening he found therein a Catholic rosary. Accused had a Sunbeam Shavemaster electric razor, an electric alarm clock, sufficient division insignia; he couldn't chew gum as he had a plate in his mouth. He had an Allotment, Class E, $214.30 for his wife and baby, several pairs of parachute wings, a Midar watch, his own personal property, and a Waltham watch issued to him by the Government. He added that he owned an automobile but had plenty of gas ration coupons; that he possessed a GI jump knife and had no need for others; that he had a clothes brush and a case for sun glasses. Accused stated that he had never intentionally taken or stolen anything that belonged to anyone else; and that he had no recollection of entering any room on Fort Bragg Military Reservation after leaving Andy's.

Upon cross examination accused testified in substance that he went out with a woman other than his wife and that she gave him the five twenty dollar bills he had in his wallet that night. He stated he was aware that property had value and could be pawned and that electric razors were valuable.

Upon recross examination accused stated that a check drawn

by him was returned marked "insufficient funds"; that the check was drawn the night before he left Fort Benning, Georgia; his account had been withdrawn and he forgot about it. A five-dollar money order was forwarded to the bank by accused to make the check good (R. 93-101).

6. The Specification alleges the felonious theft of money and personal effects belonging to named persons quartered in barracks at Fort Bragg, surreptitiously entered by the accused between 4:30 and 5:30 a.m. on the date in question. The accused was caught "red handed"; the only substantial defense asserted is intoxication so aggravated as to deprive him of the capacity of harboring the requisite criminal intent. The evidence adduced in an effort to establish the degree of the accused's intoxication shows merely that, after a night of apparently routine Saturday-night carousal, during which, over a period of seven hours he, who held his liquor "better than most", had imbibed eight or ten drinks of whiskey and probably several glasses of beer, as well, the accused left a night club with other officers of his organization, conversing intelligently and not staggering, and alighted with them from a car at the barracks where they all resided. Instead, however, of going to his quarters, the accused proceeded to neighboring barracks where he committed the thefts of which he was accused. Detected in the last of these, he fled, was pursued, promptly apprehended and roughly handled by the victims of his thievery, to whose unvarnished accusations he responded by offering to be searched. His loot was found crammed in his boots and pockets, and on the floor of the jeep in which he was transported to the station hospital for blood and urine tests which revealed a relatively low alcoholic content, indicating merely "that the accused had been drinking", as contradistinguished from intoxication.

> "'It is a general rule of law that voluntary drunkenness * * * may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense'. It is certainly true that the intent permanently to deprive the owner of his property is an element of larceny (MCM, page 171). It is directed by the Manual as to drunkenness, however, that (page 136): 'Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.'
>
> The question, therefore, is whether the weight of this evidence shows that accused was so drunk as not to have had an intent permanently to deprive the owners of their property (see Dig. Op. JAG 1912-40, page 325; Bull. JAG, Jan-June, 1942, Sec. 451,40; Bull. JAG, Jan 1943, Sec. 451,40)."

The brashness of the offense itself, as well as the apparent uselessness to the accused of several of the stolen articles, imparts an aspect of irrationality to the accused's actions, for which intoxication, in the degree claimed, might have furnished a logical explanation. This irrationality however is no proof - certainly not satisfactory proof - of such intoxication. Such probative force as it may be conceded to possess is cancelled and wholly superceded by the abundant, direct and fully corroborated evidence in the record, compelling the inference that the accused was not intoxicated to such a degree as to deprive him of the capacity of harboring the necessary criminal intent. The evidence weighs heavily against the accused's contention, amply sustaining the findings of guilty.

6. War Department records show that the accused is 26 years of age, having been temporarily appointed second lieutenant, AUS, 29 December 1942, ordered to active duty on the same date and temporarily promoted to the grade of first lieutenant 8 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. A sentence of dismissal is authorized upon conviction of a violation of Article of War 93.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Goldem, Judge Advocate.

(330)

SPJGN
CM 247313

1st Ind.

War Department, J.A.G.O., 18 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 First Lieutenant Jack W. McDevitt (0-1305955), Parachute Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed and that the United States Disciplinary Barracks, Greenhaven, New York, 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.

(Sentence confirmed. G.C.M.O. 182, 19 May 1944)

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

SPJGN
CM 247381

22 JAN 1944

UNITED STATES	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, 28 December 1943. Dismissal and total forfeitures.
	)	
First Lieutenant HUGH M. STEELE, JR. (0-1290684), 12th Infantry.	)	

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OPINION of the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, 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: In that First Lieutenant Hugh M. Steele, Jr., 12th Infantry, did, at Camp Gordon Johnston, Florida, on or about 31 October 1943, wrongfully borrow from 1st Sergeant Otto C. Knoblau, Company C, 12th Infantry, the sum of fifty dollars ($50.00) and did thereafter from about 31 October 1943 to about 25 December 1943, dishonorably fail and neglect to pay said debt.

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

Specification: In that First Lieutenant Hugh M. Steele, Jr., 12th Infantry, did, without proper leave, absent himself from his organization and station at Fort Jackson, South Carolina, from about 18 December 1943 to about 20 December 1943.

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification, Charge I, except the words "and did thereafter from about 31 October 1943 to about 25 December 1943, dishonorably fail and neglect to pay said debt" of which excepted words he

was found not guilty, not guilty of Charge I but guilty of a violation of the 96th Article of War and guilty of Charge II and its Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due from date of trial and to be confined, at such place as the reviewing authority may direct for a period of six (6) months. The reviewing authority approved only so much of the sentence as involved dismissal and forfeiture of all pay and allowances to become due, recommended that the sentence be commuted to a reprimand or the execution thereof suspended and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused on 31 October 1943 borrowed $50 in cash from the first sergeant of his company which on the date of trial had not been repaid. The money was borrowed immediately before the accused went on leave and no specific date had been agreed upon or designated as the date for repayment. The sergeant, although having seven years prior service, had never before made a loan to an officer and although one pay period had elapsed, while he thought the accused was still on leave, he had not discussed the matter of repayment with the accused and was confident that he would be repaid (R. 5-7).

Shortly after lunch on 18 December 1943 the accused approached his company commander and asked if he could have the remainder of the afternoon and all of the next day, Sunday, off. The company commander said he could, "provided he go to Regimental Headquarters and received permission". The accused was not seen thereafter by his company commander until about 0800 o'clock on Monday, 20 December 1943. The accused on 15 December 1943 had made application for a two day leave which had been approved by the Regimental Headquarters but which was returned disapproved by the Division Headquarters between 1500 and 1600 o'clock on the afternoon of 18 December 1943, subsequent to the accused's departure. The accused, however, according to the 12th Infantry's adjutant did not contact the adjutant's office on the afternoon of 18 December 1943 at any time prior to his departure either to secure permission as directed by his company commander or to ascertain what disposition had been made of his request of 15 December 1943 for leave. The accused's application for leave, showing the disapproval thereof, and his organization's morning report showing his absence without leave as specified were admitted into evidence (R. 7-10, 10-12, Ex. A-B).

4. The evidence for the defense shows that four officers, all past company commanders of the accused, rated the accused as "superior" in efficiency (R. 12-13).

The accused, after explanation of his rights as a witness, elected to testify and admitted borrowing the $50 from the first sergeant which he, at the time, urgently needed to assist him on his leave but stated that no repayment date had been agreed upon and that it was his firm intention to repay it promptly. He expressed regret that he had not repaid it

before and that press of other obligations had impelled him to pay other creditors instead of the sergeant. The transaction had been the only one in which he had ever borrowed from an enlisted man and at the time it was had, no one else was present except the sergeant and himself. He did not testify concerning the alleged absence without leave and was not cross-examined thereon (R. 14-16).

5. The Specification, Charge I, alleges that the accused on or about 31 October 1943 wrongfully borrowed from a non-commissioned officer of his organization the sum of $50 which he thereafter from about said date to about 25 December 1943 dishonorably failed and neglected to repay. He was found guilty by appropriate exceptions and substitutions of the offense of wrongfully borrowing from an enlisted man only in violation of Article of War 96 and not in violation of Article of War 95 as charged. The mere act of an officer in borrowing money from an enlisted man is prejudicial to good order and military discipline and is violative of Article of War 96 (CM 117782 (1918) and 130248 (1919), Dig. Ops. JAG, 1912-40 Sec. 454 (19)).

The evidence for the prosecution clearly shows that the accused borrowed a sum of money from the first sergeant of his company as alleged and the accused, likewise, in his testimony admits securing the loan and not having made repayment. All the evidence, however, shows that the date for repayment had neither been stipulated nor agreed upon and that the lender felt no anxiety about its ultimate repayment which the borrower earnestly professed an intention to make at an early date. The court, therefore, found him guilty of the Specification appropriately excepting therefrom the words "and did thereafter from about 31 October 1943 to about 25 December 1943, dishonorably fail and neglect to pay said debt" of which excepted words he was found not guilty and found him guilty not of a violation of Article of War 95 but guilty of a violation of Article of War 96. Manifestly, one cannot dishonorably fail and neglect to repay a debt upon which no date for repayment has either been stipulated or agreed upon unless the debt has remained unpaid for such a length of time that a reasonable date for its repayment under all the circumstances surrounding it and its creation would arise by implication of law. Certainly in the instant situation less than 60 days cannot be considered an unreasonable time. The evidence, therefore, amply supports the findings of guilty of the offense of wrongfully borrowing from an enlisted man by an officer and establishes the guilt of the accused of that offense which is violative of Article of War 96, all as found by the court.

6. The Specification, Charge II, alleges that the accused without proper leave absented himself from his organization and station at Fort Jackson, South Carolina, from about 18 December 1943 to about 20 December 1943. The elements of the offense of absence without leave 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 shows the commission of the offense of absence without leave for the period of time as alleged. The accused, in effect, had requested his company commander for a VOCO for a period of time in excess of 24 hours. The request was refused by the company commander who enjoined the accused to secure appropriate permission or leave from the Regimental Headquarters. This the accused wholly failed to do and his absence, therefore, was without the sanction of authorization which was clearly shown by the testimony of the company commander, the Regiment's Adjutant and the evidence furnished by the organization's morning report. The evidence for the prosecution beyond a reasonable doubt supports the findings of guilty of Charge II and its Specification.

7. The accused is about 27 years of age. The War Department records show that the accused has had enlisted service from 3 February 1941 until he was commissioned a second lieutenant upon completion of Officers Candidate School on 19 August 1942 since which date he has had active duty as an officer and that on 10 June 1943 he was promoted to first lieutenant.

8. 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, as found by the court, 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. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGK
CM 247381

1st Ind.

War Department, J.A.C.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 First Lieutenant Hugh M. Steele Jr. (0-1290684), 12th 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. In view of the recommendation of the reviewing authority I recommend that the sentence be confirmed but commuted to a reprimand 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,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 122, 10 Mar 1944)

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

SPJGQ
CM 247391

22 JAN 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Sarasota Army Air Base,
Second Lieutenant ROBERT	)	Sarasota, Florida, 11 Decem-
A. JEFFREY (0-813167),	)	ber 1943. Dismissal and
Air Corps.	)	total forfeitures.

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

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

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

CHARGE I: Finding of not guilty.

Specification: Finding of not guilty.

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

Specification: In that 2nd Lt. Robert A. Jeffrey, 42nd Fighter Squadron, 54th Fighter Group, did, at the corner of Madison and Franklin Streets, Tampa, Florida on or about 0030, 18 November 1943 behave himself with disrespect toward 1st Lt. Guy Taylor, Air Corps, his superior officer, by saying to him, "You are a M. P. son-of-a-bitch" or words to that effect.

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

Specification: In that 2nd Lt. Robert A. Jeffrey, 42nd Fighter Squadron, 54th Fighter Group, was, at corner of Madison and Franklin Streets in Tampa, Florida, on or about 0030, 18 November 1943 drunk and disorderly in uniform in a public place.

Accused made a motion to strike the Specification of Charge III, because it did not sufficiently describe the place where the offense was alleged to have occurred. The motion was denied. He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification, but was found guilty of Charges II and III and their Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

First Lieutenant Guy M. Taylor was a first lieutenant in the Air Corps and was assistant provost marshal in the Tampa, Florida, area at the time the events, which are the basis of this prosecution, transpired (R.6). The accused was at the time a second lieutenant (R. 19). Both were wearing the insignia of their rank (R. 11, 19).

At about 12:30 o'clock on the morning of 18 November 1943, Lieutenant Taylor, accompanied by Sergeant Tom J. Papudis and Private First Class Clifford C. Lawson, of the military police, was engaged in making a routine check up in the city of Tampa, "checking curfew passes and other things". While he was checking the curfew passes of three officers, at the corner of Franklin and Madison Streets and upon which Child's Restaurant is situated, he saw accused crossing Franklin Street toward the restaurant (R. 7). Being himself engaged, Lieutenant Taylor instructed Sergeant Papudis to stop accused and to tell him that he (Taylor) wanted to check his pass (R. 7, 12, 23). Sergeant Papudis approached accused, saluted (R. 15, 23) and informed him that Lieutenant Taylor, the assistant provost marshal, would like to check his curfew pass (R. 15, 7). Accused said "who in the hell is Lieutenant Taylor" (R. 7); and the sergeant replied "he is Assistant Provost Marshal" (R. 7). Accused then said, "to hell with the Provost Marshal and all M.P.s" (R. 7).

Lieutenant Taylor approached accused at this point and told him he would like to check his pass. Accused said, "to hell with that". Upon being asked if he had a pass, accused replied, "I don't believe it is any of your business", or words to that effect. Lieutenant Taylor then told him that he would like to check his AGO card. Accused responded by telling him to "try and get it" and that he was not checking it. Lieutenant Taylor then informed accused that he would have to ask him to go to headquarters. Accused's reply to that was that he was not going anywhere with him or anybody else. Upon being informed that force would be used unless he consented to go peaceably, accused remarked to Lieutenant

Taylor, "all right, I will go with you, you God-damn son of a bitch".

Lieutenant Taylor and accused got into the back seat of the car and, on the way to headquarters, accused said to Lieutenant Taylor, among other things, "the reason you are so God-damn chicken shit is because you are just out of O.C.S. about two months and have the bars". Upon being advised to keep calm until they reached headquarters, accused said, "to hell with you and all M.P.s". Upon their arrival at headquarters, accused told Lieutenant Taylor that if he thought he was going in there he had another thought coming, and, thereupon, struck Lieutenant Taylor on the chin and grabbed him around the waist. Lieutenant Taylor then struck accused in the mouth with his fist hard enough to break accused's grip (R. 7, 8). After a threat to forcibly take his AGO card, accused produced it and also a curfew pass, which authorized him to be on the streets at that time (R. 8).

After reaching headquarters, accused continued to use profane language toward Lieutenant Taylor in the presence of Sergeant Papudis, Private First Class Lawson, and other enlisted men of the military police. When Lieutenant Taylor asked the name of his organization, accused replied: "you are asking the questions, if you are so God-damn smart, you son-of-a-bitch, you find out my organization". And, later during the interview, accused said to Lieutenant Taylor: "you have certainly made a big mistake. You are fooling with a flying officer and you God-damn ground officers have no right to say anything to a flying officer. I would like to see you dead and all the God-damn M.P.s, and I probably will. I don't like M.P.s and I don't want to mess up with you" (R. 8).

Later on, as accused and Lieutenant Taylor were leaving the headquarters for the stockade, another soldier was being brought in by military police. Accused said to him, "Don't worry boy, that chicken shit son-of-a-bitch is going home now" (R. 18).

Accused had a strong odor of whiskey on his breath and occasionally staggered. At times it seemed his tongue was thick and he didn't talk plainly (R. 9). Lieutenant Taylor (R. 9, 13) Sergeant Papudis (R. 18) and Private First Class Robert C. Dixon (R. 29) all expressed the opinion that he was drunk.

Madison and Franklin Streets are public streets in the City of Tampa, Florida. Accused was first accosted and began his abuse of Lieutenant Taylor on the corner of the intersection formed by those streets just in front of the door to Child's Restaurant. It was not dark on the corner (R. 10, 11) and there were some civilians on the streets (R. 9).

officers but may have made the statement "don't worry, the chicken shit son-of-a-bitch is going home now", to a soldier who was being brought in as he was leaving (R. 37). These remarks were not directed to anyone in particular. He used the profanity because he resented being struck by Lieutenant Taylor (R. 38). Accused knew that Lieutenant Taylor was an officer when he approached him and asked for his pass. He had been drinking for two or three hours. He "would not make a definite statement" as to whether he was drunk. He "was drinking" and "would not pass judgment" (R. 39). He remembered "just about every time I swore at him (Taylor) and telling him about hitting a man with his hands in his pocket and the M.P.s holding him" (R. 37).

5. The court found accused not guilty of Charge I and its Specification, whereby he was charged with striking his superior officer in violation of Article of War 64. This leaves for discussion only Charges II and III and their Specifications; and by these, accused is charged with being drunk and disorderly in a public place while in uniform, in violation of Article of War 96, and with behaving with disrespect toward his superior officer, in violation of Article of War 63.

The time when and place where accused is alleged to have been drunk and disorderly in uniform in a public place and to have behaved himself with disrespect toward his superior officer are the same, as set out in the Specification of Charge II and of Charge III. There is no clear cleavage between the evidence relied upon to support the one as distinguished from the other Charge and its Specification, and the same evidence can, and in this instance does, establish the commission of both offenses. That the two offenses are separate and distinct has been held in CM 148099 (1921) (Dig. Op. J.A.G. 1912-40, sec. 421 (3)). This being so, the principle enunciated in paragraph 27, Manual for Courts-Martial 1928, to the effect that one transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges, has, perhaps, been violated in the subject case. However, it is the established rule as to this procedural matter that if conviction on any one of the Specifications supports the sentence in its entirety, it cannot be said that the defective pleading affected the substantial rights of accused (CM 193971 (1931), Dig. Op. J.A.G. 1912-40, sec. 428 (14)). Conviction upon the Specification of either Charge II or Charge III and of the Charge in the subject case is sufficient to support the sentence in its entirety, so, clearly, the mentioned irregularity, if such it was, did not injuriously affect the substantial rights of accused.

The evidence amply supports the action of the court in finding accused guilty of behaving himself with disrespect toward First Lieutenant Guy Taylor, his superior officer, as alleged, and in the manner alleged,

in the Specification of Charge II. Accused admits that he declined, when requested by Lieutenant Taylor, to show either his curfew pass or his AGO card, both of which he had in his possession. His manner was belligerent, and by his statement that he had not "cursed directly at" Lieutenant Taylor until after the latter struck him, he inferentially admits that he had been previously cursing him indirectly. Lieutenant Taylor testified that accused called him "a son-of-a-bitch" while they were at the corner of Madison and Franklin Streets and he is corroborated in this by Sergeant Papudis. The mere fact that accused did not like the manner in which the officer approached him can neither justify nor extenuate the use of such language.

Accused contended that he did not know Lieutenant Taylor was a first lieutenant, or his superior officer. He testified in his own behalf but avoided making any statement that he was too drunk at the time to recognize the rank of Lieutenant Taylor. In fact, he declined to pass judgment upon whether or not he was drunk at all at the time. He also testified that he "really didn't care" whether Lieutenant Taylor was a first or second lieutenant. He did know that he was an officer, and he had been previously informed that the assistant provost marshal wanted to check his pass. The court was amply justified by the accused's own testimony in rejecting this theory of defense and in finding that accused did, in fact, know Lieutenant Taylor was his superior officer.

The findings of guilty of Charge III and its Specification find ample support in the evidence. Accused testified that he had been drinking for two or three hours. Several witnesses testified that he was drunk and his acts and conduct corroborate the witnesses. Accused, having elected to testify as to this charge, was questioned specifically on the point and did not deny that he was drunk. A public street in a town or city is a public place; and accused's belligerent and non-cooperative attitude as well as his use of profanity toward a military police officer then and there in the execution of his office, constituted disorderly conduct. His conduct was clearly to the prejudice of good order and military discipline as well as of such a nature as to bring discredit on the military service because displayed in public.

The Specification of Charge III sufficiently described the place where the offense was alleged to have occurred to put accused on notice thereof. Nothing in the evidence of record indicates that he was in anywise surprised during the trial. The court properly denied his motion to strike the Specification and Charge.

6. War Department records show that accused is 20 years of age and is not married. He is a high school graduate and, before entering the Army, worked in a pottery manufacturing plant. He enlisted 29 October 1942 and became an Air Corps Cadet 29 November 1942. He was commissioned a temporary second lieutenant, Army of the United States, 1 October 1943. On the same date, he was ordered to active duty and reported for active duty with the Air Corps at the AAF Pilot School, Craig Field, Selma, Alabama.

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 to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of either Article of War 63 or Article of War 96.

William A. Pounds, Judge Advocate

Earle Stephens, Judge Advocate

Herbert B. Friedrich, Judge Advocate

1st Ind.

War Department, J.A.G.O., 3 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 Robert A. Jeffrey (0-813167), 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 but that the forfeitures be remitted, and that the sentence as thus modified be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 147, 30 Mar 1944)

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

(345)

SPJGH
CM 247456

28 JAN 1944

UNITED STATES	16TH ARMORED DIVISION
v.	Trial by G. C. M., convened at A.P.O. 412, Camp Chaffee, Arkansas, 23 December 1943. Dismissal and total forfeitures.
Captain THOMAS F. LAWLESS (0-357833), Medical Corps.	

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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain Thomas F. Lawless, Medical Corps, Medical Detachment, 787th Tank Battalion, Camp Chaffee, Arkansas, was, at Camp Chaffee, Arkansas, on or about 7 December 1943, found drunk while on duty as Medical Officer.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one prior conviction of being drunk in uniform in a public place, in violation of the 96th Article of War, was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved only so much of the sentence as provides for dismissal and forfeitures and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution is substantially as follows: Accused, medical officer of the 787th Tank Battalion, came

to the orderly room of Headquarters Company at approximately 1600 on 7 December 1943 to make an inspection of the ventilation and the sanitation in the barracks. Captain Douglas M. Brown, company commander, and Sergeant Harry R. Bly, acting first sergeant, accompanied him on the inspection tour. Captain Brown had seen accused many times previously. Accused "didn't act normal", he was staggering, he "went two feet or more to each side", he "was having a difficult time from the way he was maneuvering as though he were bucking a wind going around the corner of the day room", there was the smell of alcohol on his breath, his speech was incoherent and it was hard to understand him. In the opinion of both Captain Brown and Sergeant Bly accused was drunk (R. 6-14).

Lieutenant Colonel David L. Hollingsworth, the battalion commander, called on accused in the officers' barracks at approximately 1700 on 7 December 1943. He found accused in the bar and requested him to go to his room. Accused walked to his room with a staggering gait, his speech was thick, and his face "had a look of falling apart". Colonel Hollingsworth talked to accused a minute, placed him under arrest for drunkenness, and then left to call his adjutant to take accused to the hospital for a blood test. When the adjutant arrived fifteen minutes later accused was asleep. He was awakened and instructed to put on his coat and hat. He begged Colonel Hollingsworth not to send him to the hospital. In the opinion of Colonel Hollingsworth accused was drunk (R. 15-20).

Second Lieutenant Edward J. Louis, the adjutant, took accused to the hospital for a blood test at approximately 1735. A blood test was made and accused was returned to his barracks. Accused walked with a slight stagger, his face was flushed, and he appeared to be "scared". Lieutenant Louis was with accused for 45 minutes or an hour and in his opinion accused was intoxicated (R. 21-28).

Technician Third Grade George Toya drew the blood from the arm of accused at the hospital and placed it in a sterilized container on which he wrote the name of accused. He placed the container in the ice box so it would not deteriorate and the following morning delivered it to Major Lorin E. Dickelmann, chief of the laboratory at the station hospital at Camp Chaffee, Arkansas, who made a blood alcohol test of the blood of accused and found 375 milligrams per 100 cubic centimeters of blood. A report (Ex. A) was made of the findings. Major Dickelmann interpreted this to mean that there was "sufficient alcohol present in that blood to render an individual

or placing an individual as being under the influence of alcohol." Major Dickelmann testified that it has been established by the American Medical Association that an individual with more than fifteen thousandths (.015) of one percent (1%) of alcohol in the blood would be under the influence of alcohol, and that there are some "State regulation figures *** between 100 and 150 milligrams." Major Dickelmann could not state from the test whether accused drank liquor before 1700. The blood was brought into the laboratory sometime in the afternoon after "closing hours" and the results shown by the test could have been produced by drinking after 1700. The amount of time it would take the alcohol content of the blood stream to run "that high" would be determined by the condition of the stomach at the time of taking the alcohol, whether it was full or empty, and the amount and type of liquor (R. 29-35).

Colonel Hollingsworth further testified that accused was on duty as battalion medical officer between 1600 and 1700 on 7 December 1943. The afternoon duty hours in the battalion on that date were from 1300 to 1700. Accused had one assistant and had authority to decide as to employment of personnel and division of duty in the medical detachment. Colonel Hollingsworth did not mean to imply, by this statement, that accused could place himself on a non-duty status at any time he chose. The officers of the battalion followed the same hours as the troops (R. 15-20).

4. For the defense: Accused testified that on 7 December 1943 he was on duty from 0800, and spent the morning inspecting barracks and mess halls. His assistant, "Lieutenant Rothchild", was left in charge of the dispensary while he was away. In the afternoon accused left the dispensary at 1400 and conducted some business in the office of the division surgeon. He returned to the dispensary and went to his quarters in the officers' barracks about 1550. He found two officer friends there who had received their "orders" and had been to his room the night before for a farewell party. They had some whiskey and accused had "about five drinks" of "straight whiskey". He told them he had some work to do and would be back by 1700. He then went to the Headquarters Company barracks, made measurements of the distances between the beds, made other forms of inspection, and finding that remedies which he had suggested in the morning had not been carried out complained to Captain Brown. He left Captain Brown at about 1655, returned to his barracks, rejoined his friends and they had "about 3, 4, or 5 drinks apiece". Accused then went to the bar in the officers' club room. Colonel Hollingsworth came in

about 1715, asked accused if he had been drinking and ordered him to his room under arrest. Accused stretched out on his bed until Colonel Hollingsworth called him. Accused asked that he not be sent to the hospital because he "didn't think it was necessary". Colonel Hollingsworth insisted so accused accompanied the adjutant to the hospital where the blood alcohol test was made. He returned to his barracks and was reading in bed when the officer of the day came into his room between 2300 and 0100. He spoke to the officer of the day. The following morning accused saw the adjutant, who said, "the Colonel must have scared the hell out of me because I was perfectly sober when I went over to the hospital with him" (R. 38-40).

On cross-examination accused testified that he was on duty until 1700, but that he considered himself, on "the authority of Colonel Hollingsworth", off duty after that hour. Between 1700 and 0800 the following day the medical needs of the 787th Tank Battalion and the 717th were taken care of by a medical officer of the day. Accused was not the medical officer of the day on 7 December 1943. There was a roster "on the board" which was also submitted to the division, and if the officer designated was unable to go on duty at 1700 he notified the division or the dispensary and someone else was appointed prior to that time (R. 41-42).

The defense requested that the court note that accused "has a red complexion and a ruddy face" (R. 40).

5. The evidence discloses that on 7 December 1943 accused was on duty as medical officer of the 787th Tank Battalion. His afternoon duty hours were from 1300 to 1700. After the latter hour a medical officer of the day was on duty, and accused was not medical officer of the day. According to his own testimony, accused inspected health conditions in the barracks that morning, spent the early afternoon at the office of the division surgeon, left the dispensary about 1550, went to his quarters in the officers' barracks where he met some friends and, after taking five drinks of "straight" whiskey, went to the headquarters company to complete the inspection he had commenced in the morning. Captain Douglas M. Brown, company commander, and Sergeant Harry R. Bly, acting first sergeant, accompanied accused on his inspection.

The accused did not "act normal", he staggered, smelled of alcohol, was hard to understand and spoke incoherently. In the opinion of Captain Brown and Sergeant Bly accused was drunk. Accused also testified that he left the headquarters company barracks about 1655 and rejoined his friends, and that he had "3, 4, or 5" drinks at this time. Lieutenant Colonel David L. Hollingsworth, the battalion commander, called on accused at the officers' barracks at approximately 1715. Accused walked with a staggering gait, his speech was thick, and his face "had a look of falling apart". In the opinion of Colonel Hollingsworth accused was drunk. Accused was taken to the station hospital at approximately 1735 where a blood alcohol test revealed the presence of 375 milligrams of alcohol per 100 cubic centimeters of blood. The medical officer in charge of the laboratory interpreted this to mean that there was sufficient alcohol in the blood to render the individual under the influence of alcohol. The battalion adjutant who accompanied accused to the hospital, basing his opinion upon the flushed face of accused and his staggering walk, testified that accused was intoxicated. Accused testified that he was on duty until 1700 but that he considered himself off duty after that hour inasmuch as another officer was appointed to act as medical officer of the day after 1700.

Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the 85th Article of War (MCM, 1928, par. 145). It is the opinion of the Board of Review that the evidence establishes beyond any reasonable doubt that accused was drunk on duty at the time and place alleged in the Specification. Inasmuch as the evidence shows that accused was drunk between 1600 and 1700 on the date alleged, a time when he was admittedly on duty as battalion medical officer and engaged in the performance of his official duties, it is unnecessary to decide whether accused was on duty after 1700. The evidence for the prosecution is essentially uncontradicted. Accused, while testifying in detail concerning his activities on the day in question, did not challenge the testimony of the witnesses for the prosecution that he was intoxicated. His testimony concerning the amount of liquor he consumed strongly supports the opinions given as to his intoxicated condition.

6. The accused is 40 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed first lieutenant, Medical Corps Reserve, Army of the United States, 10 June 1937; accepted 28 June 1937; active duty 15 July 1939 to 28 July 1939, 1 November 1939 to 11 March 1940, and from 28 July 1941; temporarily promoted to captain, Army of the United States, 8 October 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 mandatory upon conviction of a violation in time of war of the 85th Article of War.

Samuel M. Silver, Judge Advocate.

Robert W. Cannon, Judge Advocate.

T. J. Lotterhos, 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 Captain Thomas F. Lawless (O-357833), Medical Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was found drunk while on duty as a medical officer. He has one prior conviction by general court-martial of being drunk in uniform in a public place on 13 January 1943. It appears from the records of the Office of The Adjutant General that about February 1943 he was absent without leave for two days, for which a fine was imposed, that on 21 May 1943 he was sent to a hospital where a psychiatrist diagnosed his case as chronic alcoholism with a mild degree of mental retardation, but that on 29 June 1943 a disposition board found that he was physically fit for full active duty. I recommend that the sentence to dismissal and total forfeitures 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 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 forfeitures remitted. G.C.M.O. 110, 10 Mar 1944)

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

SPJGV
CM 247490

7 FEB 1944

UNITED STATES v. Second Lieutenant EZRA H. HENDERSON (0-1285935), 368th Infantry.	93RD INFANTRY DIVISION Trial by G.C.M., convened at Camp Clipper, Essex, California, 17 December 1943. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and RIVES, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lt. Ezra H. Henderson, 368th Infantry, did, at Camp Clipper, California, on or about July 16, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the 368th Infantry Post Exchange a certain check, in words and figures as follows, to wit.

FORT HUACHUCA, ARIZ. 16 July 1943 NO. 14.
91-167 ARMY BRANCH 91-167

MINERS AND MERCHANTS BANK
(HEAD OFFICE, BISBEE, ARIZ.)

PAY TO THE
ORDER OF 368TH POST EXCHANGE $25.00

-------TWENTY FIVE DOLLARS

LIEUT EZRA H. HENDERSON
COMPANY L, 368TH INFANTRY

and by means thereof did fraudulently obtain from said

Post Exchange $25.00 cash, he the said 2nd Lt. Ezra H. Henderson, then well knowing that he did not have and not intending that he should have any account with the Army Branch, Miners and Merchants Bank for the payment of said check.

Specification 2: In that 2nd Lt. Ezra H. Henderson, 368th Infantry, did, at Camp Clipper, California, on or about July 16, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the 368th Infantry Post Exchange a certain check, in words and figures as follows, to wit.

FORT HUACHUCA, ARIZ. 16 July 1943 - No. 15.
91-167 ARMY BRANCH 91-167

MINERS AND MERCHANTS BANK
(HEAD OFFICE, BISBEE, ARIZ.)

PAY TO THE
ORDER OF 368TH POST EXCHANGE $25.00

-------TWENTY FIVE DOLLARS

LIEUT EZRA H. HENDERSON
COMPANY L, 368TH INFANTRY

and by means thereof did fraudulently obtain from said Post Exchange $25.00 cash, he the said 2nd Lt. Ezra H. Henderson, then well knowing that he did not have and not intending that he should have any account with the Army Branch, Miners and Merchants Bank for the payment of said check.

Specification 3: In that 2nd Lt. Ezra H. Henderson, 368th Infantry, did, at Camp Clipper, California, on or about August 15, 1943, with intent to deceive his Commanding Officer, Colonel James R. Urquhart, officially state to said Commanding Officer, that he did not owe the American Red Cross of the 93rd Infantry Division any money, or any other Red Cross in the United States any money, which statement was known by the said Lt. Henderson to be untrue in that said Lt. Henderson had at this time an outstanding debt of $50.00 with the American Red Cross, 93rd Infantry Division.

Specification 4: In that 2nd Lt. Ezra H. Henderson, 368th Infantry, having on or about October 20, 1942, become

indebted to the American Red Cross in the sum of $100.00 for a loan, having failed without cause to liquidate $50.00 of said indebtedness, and having on or about September 11, 1943, promised in writing to his Commanding Officer, Colonel James R. Urquhart, that he would on or about September 15, 1943, settle such indebtedness in full, did, without due cause at Camp Clipper, California on or about October 8, 1943 dishonorably fail to keep said promise.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Second Lieutenant William H. Perry, Post Exchange Officer for 368th Infantry, cashed two checks for accused on or about 16 July 1943, each for $25. He identified prosecution's exhibits 1 and 2 by his signature which appeared on the back of each, as the same checks he had cashed. He saw accused sign his name as maker to each check at the time they were written and accused told him he had sufficient funds in the bank to cover them. The checks had not been redeemed at the time of trial (R. 9-11).

The deposition of R. T. Edwards, Manager, Army Branch, Miners and Merchants Bank, Fort Huachuca, Arizona, which was received in evidence without objection, shows that he had known accused since 31 July 1942, when accused opened a checking account with Army Branch, of Miners and Merchants Bank. The accused made his last deposit in this account 2 March 1943, to pay an overdraft, and the account was closed on that date. He identified prosecution's exhibits 1 and 2 as two checks which had been presented to the bank for payment 26 July 1943, and dishonored, because accused's account had been closed. He compared the signature appearing on each check (Pros. Exs. 1, 2) with that on accused's signature card, which was signed at the time he opened the account, and testified that the signatures appearing on the checks agreed with the signature of accused on the signature card (R. 6-8).

On or about 15 August 1943, the regimental adjutant of 368th Infantry delivered to Colonel James R. Urquhart, the regimental commander, two checks, each in the amount of $25, bearing date 16 July 1943, and purporting to bear the signature of accused as maker. These checks had been received by the adjutant from a Fort Huachuca bank, marked "no account". Colonel Urquhart sent for accused and upon reporting was asked if he had written the two checks in question. Accused admitted that he had and stated

that the account had been closed, but later reopened by his wife. Colonel Urquhart identified prosecution's exhibits 1 and 2 as the same checks which had been delivered to him by the adjutant and which he had discussed with accused. During this same interview Colonel Urquhart asked accused if he owed any money to the American Red Cross, and he replied in the negative. He then asked accused if he owed any money to the Division Red Cross, and accused replied that he didn't owe the Division Red Cross, or any other Red Cross in the United States, any money. Shortly after this conversation took place Colonel Urquhart received an official letter from the Red Cross, 93rd Infantry Division, stating that accused had borrowed $100 in October 1942 and had promised to repay it in November and December of the same year. The letter also stated that accused had repaid $50 of the loan, but had not repaid the balance. The witness could not remember the date, but believed it was 11 September 1943 when he had another talk with accused. Accused then admitted that he owed the American Red Cross and promised to pay the debt (R. 11-13). Colonel Urquhart identified prosecution's exhibit C as a letter he had received from Mr. Edward S. Powell, assistant field director of American Red Cross, 93rd Infantry Division, dated 27 September 1943, which indicated the circumstances under which the loan was originally made. The witness testified that accused had not at the time of trial furnished him with a receipt evidencing payment of the debt as he had promised in his reply indorsement (R. 17-18).

Lieutenant Colonel Howard N. Smalley, 368th Infantry, was present when Colonel Urquhart talked with accused on 15 August 1943 about the two checks and heard him ask accused if he owed the 93rd Infantry Division Red Cross any money. When accused stated he did not, Colonel Urquhart then asked him if he owed any Red Cross agency in the United States any money, and accused stated that he did not (R. 14).

Captain W. B. Langworthy, adjutant of 368th Infantry, identified prosecution's exhibit B as a first wrapper indorsement pertaining to accused, which was sent to accused by order of Colonel Urquhart on 11 September 1943 for reply by indorsement. Attached to the wrapper indorsement was a letter Colonel Urquhart had received from the field director of 93rd Infantry Division Red Cross (Pros. Ex. D) relative to accused's indebtedness to the Red Cross (R. 14-17).

4. For the defense:

At his own request, accused was sworn and testified that during the month of July he went to Lieutenant Perry, Post Exchange Officer, and asked him to cash a personal check (amount not stated). Lieutenant Perry declined, and accused then asked the lieutenant if he would take the check to a bank in town and get it cashed for him. Lieutenant Perry agreed to do this and accused gave him the check. The next day he saw Lieutenant Perry and was told that he had not been to town because his car was being repaired,

but would go that afternoon. Lieutenant Perry suggested that accused write two separate checks of $25 each and during the conversation asked accused if he had sufficient funds in the bank to cover the checks. Accused said that he did. Lieutenant Perry then remarked that it was a funny thing how checks bounce back and accused said to him, "This is no place to write a bad check". About a month later, Colonel Urquhart called accused to his office, handed him two checks, and asked accused if they were his checks. He looked at them and told Colonel Urquhart they were. Colonel Urquhart then asked accused what he proposed to do about them and he told the colonel that he would back the checks up. This conversation took place about the 15th of August (R. 18-19).

He went back later to pick up the checks, and Colonel Urquhart asked him if he owed the 93rd Infantry Division Red Cross any money. Accused immediately answered no, because at the time he borrowed the money he did not borrow it from the 93rd Infantry Division Red Cross, but from the Red Cross at Fort Huachuca. This conversation took place in the presence of Colonel Hoke and Colonel Smalley. The following month accused asked Colonel Hoke to cash his monthly pay check of $40.07. Colonel Hoke asked him if he was getting his bills paid, and said, "Do you know it might cause you some trouble"? Accused said, "Yes, Sir". About the 23rd of September accused went to Colonel Urquhart to get some data about the checks and the colonel said, "You know you have not paid your bill", and accused said, "Yes, Sir". Colonel Urquhart then asked what he was going to do about the checks, and accused said he would take care of them. The next month just as he received his pay check he went to the hospital and before he returned to duty the investigating officer came to the hospital and presented him with the charges (R. 19-20).

On cross-examination and examination by the court accused stated that he did not know at the time he wrote the checks in July that they were not good, but found out about it the middle of the following month. He had not redeemed these checks, because he did not have sufficient money left out of his monthly pay after his allotment and living expenses were deducted. He made a monthly allotment to his wife of $150 and normally had about $70 left, after paying his living expenses. He admitted making a deposit of about $3 to his account on 2 March 1943 and was informed by Mr. Edwards that it was for the purpose of covering an overdraft. That was the last deposit he had made. He was under the impression that his wife had deposited her allotment money in the bank at Fort Huachuca, as she had remained in Tucson, Arizona for a while after he left his station for maneuvers. However, he had never received any information from her to this effect. He wrote his wife about two months prior to the date of trial and asked her about the allotment money and she informed him that she was depositing the money in a bank in Columbus, Georgia, where she was then residing with her parents. He admitted receiving the wrapper indorsement directed to him on 11 September 1943 by Colonel Urquhart, and admitted that he indorsed it back to his commanding officer with a promise to pay the debt on 15 September. He did not get his pay on the 15th of September but did get it the last of the month.

He got in a gambling game and lost his money and was thus unable to pay it as he had promised (R. 20-25).

5. The evidence thus shows that during the early part of 1942 accused was stationed at Fort Huachuca, Arizona, and on 31 July 1942 opened a checking account with the Army Branch, Miners and Merchants Bank, and signed the customary signature card. He departed from this station the latter part of March 1943, when his organization left for maneuvers in Louisiana. He left his wife in Tucson, Arizona, and she remained there during the entire period of the Louisiana maneuvers. She then went to Columbus, Georgia, to live with her parents. On 16 July 1943 accused made and uttered two checks of $25 each, drawn on the Army Branch, Miners and Merchants Bank, and received the equivalent in cash from Lieutenant William H. Perry, the Post Exchange officer of 368th Infantry, then stationed at Camp Clipper, California. Both checks were dishonored by the bank on which they were drawn, because accused's account had been closed. The checks were unredeemed at the time of trial. Accused contended that he was under the impression that his wife was depositing in his bank the money from a monthly allotment of $150 which he had made to her, but his contention is untenable as the account was not a joint account, and on 2 March the accused had made a last deposit of $3 to cover an overdraft, at which time the account was closed.

The evidence also shows that on 20 October 1942 while accused was stationed at Fort Huachuca, he borrowed $100 from the American Red Cross, with the understanding that $50 of the loan was to be repaid 1 November 1942 and the balance of $50 to be repaid on 1 December 1942. Accused repaid $50 of the loan on 9 February 1943, leaving a balance of $50 unpaid. The American Red Cross brought the matter to the attention of Colonel Urquhart, accused's commanding officer, and Colonel Urquhart sent for accused and asked him if he owed the money to the 93rd Infantry Division American Red Cross. Accused denied owing it, and stated that he did not owe either the American Red Cross of the 93rd Infantry Division or any other Red Cross in the United States. This conversation took place about the middle of August 1943. On 11 September 1943 Colonel Urquhart sent a wrapper indorsement to accused, to which was attached a letter from the field director, 93rd Infantry Division American Red Cross, and a statement of accused's account, directing accused to reply by indorsement. Accused replied by indorsement that he would pay the $50 balance on 15 September 1943 and furnish Colonel Urquhart with a receipt. This he failed to do and the debt was unpaid at the time of trial.

6. The evidence establishes beyond a reasonable doubt that accused was guilty of the Charge and all Specifications. Such conduct on the part of accused seriously compromises his character and standing as a gentleman and is clearly in violation of the 95th Article of War.

7. War Department records show that accused is 24 years of age. He

graduated from Washington High School, Covington, Georgia, and for three years attended Boggs Academy, Keyesville, Georgia. He served as an enlisted man from 11 October 1939 to 25 June 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 the Officer Candidate School, his commanding officer stated that accused was of excellent character, had demonstrated outstanding qualities of leadership and possessed educational qualifications or practical experience which would enable him to complete satisfactorily the course of instruction.

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

Thomas N. Tappy, Judge Advocate.

Herbert M. Kiduer, Judge Advocate.

(On Leave), Judge Advocate.

SPJGV
CM 247490

1st Ind.

War Department, J.A.G.O., 16 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 Ezra H. Henderson (0-1285935), 368th 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, to support the sentence, and to warrant confirmation of the sentence. The accused made and uttered, with intent to defraud, two worthless checks of $25 each, drawn on a bank in which he had no checking account. With intent to deceive, he made a false official statement to his commanding officer concerning his indebtedness to the American Red Cross, and dishonorably failed to keep his promise to pay this indebtedness, all in violation of the 95th Article of War. 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 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 action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 145, 30 Mar 1944)

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

SPJGV
CM 247496

16 MAY 1944

UNITED STATES v. First Lieutenant LEO L. EGALNICK (O-577449), Air Corps.	OKLAHOMA CITY AIR SERVICE COMMAND Trial by G.C.M., convened at Headquarters 813th Army Air Forces Specialized Depot, Kansas City, Missouri, 6, 20 and 21 December 1943. Dismissal, total forfeitures, fine of $500 and confinement until fine paid but not more than three (3) months.

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OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant Leo L. Egalnick, Headquarters Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance & Distribution, Traffic Division, District Number Seven, Kansas City, Missouri, did, at Kansas City, Missouri, on or about 23 September 1943, make a claim against the United States by presenting to Lieutenant Colonel J.V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, a voucher in the amount of $29.75 for per diem expenses covering an alleged official trip to Dodge City, Kansas, and adjacent air bases, which claim was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent.

Specification 2: In that First Lieutenant Leo L. Egalnick, Headquarters Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance & Distribution, Traffic Division, District Number Seven, Kansas City, Missouri, did, at Kansas City, Missouri,

on or about 23 September 1943, present for payment a claim against the United States by presenting to Lieutenant Colonel J.V. Johnson, Finance Officer, at Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, a voucher in the amount of $29.75 for per diem expenses covering an alleged official trip to Dodge City, Kansas, and adjacent air bases, which claim was then known by the said First Lieutenant Leo L. Egalnick to be false and fraudulent.

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

Specification 1: In that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, on or about 1 July, 1943, make a claim against the United States by presenting to Lieutenant Colonel J.V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of $105.39 for mileage expenses covering an alleged official trip to Omaha, Nebraska, to Sioux Falls, South Dakota, from Sioux Falls, South Dakota, to Rapid City, South Dakota, from Rapid City, South Dakota, to Omaha, Nebraska, from Omaha, Nebraska, to Kansas City Missouri, which claim was false and fraudulent in that no such trip was made, and was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent; said First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, on or about 7 July 1943, make a claim against the United States by presenting to Lieutenant Colonel J. V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of $27.00 for per diem expenses covering an alleged official trip from Kansas City, Missouri, to St. Louis, Missouri, and return, which claim was false and fraudulent in that no such trip was made and was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent; that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, on or about 14 July 1943, make a claim against the United States by presenting to Lieutenant Colonel J. V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims in the amount of $36.00 for per diem expenses covering an alleged official trip to Topeka, Kansas, which claim was false and fraudulent in that temporary duty at Topeka, Kansas, was completed in approximately one 24-hour period, and that it was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent in that claim was made for approximately $30.00 to cover

a tour of duty that was not performed; further, that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, on or about 28 July, 1943, make a claim against the United States by presenting to Lieutenant Colonel J. V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of $55.40 for per diem expenses covering an alleged official trip from Kansas City, Missouri, to Chicago, Illinois, and return, which claim was false and fraudulent in the amount of approximately $24.00 in that said First Lieutenant Leo L. Egalnick did not commence this trip until 23 July 1943, at approximately 5:10 P.M., and that said First Lieutenant Leo L. Egalnick was actually in Kansas City, Missouri, between the dates of 19 July, 1943, and 23 July, 1943, up to 5:10 P.M., and it was then known by said First Lieutenant Leo L. Egalnick, to be false and fraudulent, further that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, on or about 7 August 1943, make a claim against the United States by presenting to Lieutenant Colonel J. V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of $52.00 covering an alleged official trip to Denver, Colorado, Casper, Wyoming, Cheyenne, Wyoming, and return, which claim was false and fraudulent in that for the period of time shown in said claim as originating at approximately 6:30 P.M., 30 July, 1943, to 1 August, 1943, inclusive, said First Lieutenant Leo L. Egalnick was on duty in Kansas City, Missouri, and it was then known by said First Lieutenant Leo L. Egalnick that this portion of his claim was false and fraudulent in the amount of approximately $18.00; further, that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, on or about 14 August, 1943, make a claim against the United States by presenting to Lieutenant Colonel J. V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of $37.50 for per diem expenses covering an alleged official trip to Topeka, Kansas, and return, which claim was false and fraudulent in that no such trip was made and was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent; further, that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, on or about 28 August, 1943, make a claim against the United States by presenting to Lieutenant Colonel J. V. Johnson, Finance Officer,

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Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of $54.65 for per diem expenses covering an alleged official trip to Omaha, Nebraska, Scottsbluff, Nebraska, Casper, Wyoming, Denver, Colorado, and return, which claim was false and fraudulent in that the tour of duty for which per diem expenses were claimed, did not commence until approximately 6:00 P.M., 22 August, 1943, and was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent that this portion of his claim was false and fraudulent in the amount of approximately $6.00; further, that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City Missouri, did at Kansas City, Missouri, on or about 4 September, 1943, make a claim against the United States by presenting to Lieutenant Colonel J. V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of $46.90 for per diem expenses covering an alleged official trip to Salina, Kansas, Lincoln, Nebraska, Oklahoma City, Oklahoma, and return to home station, Kansas City, Missouri, which claim was false and fraudulent for that portion of the amount claimed, excluding the trip to Oklahoma City, Oklahoma, and return between 2 September and 3 September, and that said claim was false and fraudulent in the amount of approximately $40.90 and covers an alleged trip from Kansas City, Missouri, to Salina, Kansas, and Lincoln, Nebraska, when no such trip was made; further, that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City Missouri, on or about 11 September, 1943, make a claim against the United States by presenting to Lieutenant Colonel J. V. Johnson, Finance Officer, Kansas City, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of $49.00 for per diem expenses covering an alleged official trip from Kansas City, Missouri, to Chicago, Illinois, Topeka, Kansas, Salina, Kansas, and return to Kansas City, Missouri, which claim was false and fraudulent in the amount of approximately $43.00 in that for the period of time as shown in said claim, excluding the period of time from 8 September, 1943, and return to Kansas City, Missouri, same day, said claim was false and fraudulent in that no such official trip was made and was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent; further that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, on or about 4 September, 1943, issue a transportation request for air passage to Chicago, Illinois, and return for

personal travel not on official business, which transportation request was used to purchase a ticket from Braniff Airlines and represents a value of approximately $41.70, which act was false and fraudulent and was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent.

Specification II: Alleging false and fraudulent presentation for payment, at the same place and on the same dates, of the same claims described in Specification I.

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

Specification 1: In that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did at Kansas City, Missouri, at various times between the dates of 27 June, 1943, and 24 November, 1943, with intent to defraud the United States, unlawfully make and present claims against the United States in the amount of approximately $331.79 for mileage and per diem expenses covering alleged official trips to various points in the territory assigned to Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, well knowing that said claims were false and fraudulent and that no such trips were made, and by means thereof, did fraudulently obtain from the United States the sum of approximately $331.79.

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

Specification 1: In that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, with intent to defraud the Government of the United States, did, at Kansas City, Missouri, on or about 4 September, 1943, unlawfully pretend to Braniff Airlines that he was traveling on official business by presentation of transportation request WQ 5,172,741 and requesting transportation from Kansas City, Missouri, to Chicago, Illinois, and return, well knowing that said pretenses were false and fraudulent, and by means thereof did fraudulently obtain from the said Braniff Airlines transportation in the value of approximately $41.90.

Specification 2: In that First Lieutenant Leo L. Egalnick, Headquarters, Army Air Forces, Assistant Chief Air Staff, Materiel, Maintenance, and Distribution, Traffic Division, District Number 7, 306 Pickwick Building, Kansas City, Missouri, did, at Kansas City, Missouri, on or about 2 October, 1943, with intent to deceive Captain Edward G. Stubbs, officially and wrongfully state to the said Captain Edward G. Stubbs that the false and fraudulent

claim for $29.75 as presented to the Finance Officer on Voucher 31659, 23 September, 1943, was the only instance where he had made a false and fraudulent claim, or words to that effect, which statement was known by the said First Lieutenant Leo L. Egalnick to be untrue in that he had made other false and fraudulent claims prior to his statement, all to the prejudice of good order and military discipline.

The accused pleaded guilty to Specifications 1 and 2 of the original Charge, to the original Charge, to Specifications 1 and 2 of Additional Charge I and to Additional Charge I, and not guilty to Additional Charges II and III and their Specifications. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to be fined $500 and to be confined at hard labor at such place as the reviewing authority might direct until such fine be paid, but not more than three months. The reviewing authority approved the sentence but his action incorrectly stated, "pursuant to Article of War 50½ the order directing the execution is withheld". The record was forwarded to the Board of Review where it has been acted upon pursuant to the provisions of Article of War 48.

3. The evidence offered by the prosecution, in support of Specifications 1 and 2 of the original Charge, shows that on 23 September 1943, Voucher No. 31659 (Pros. Ex. 2) for $29.75 was presented for payment at the office of Colonel Johnson, Finance Officer, and the accused was paid that amount as per diem for official travel from his station at Kansas City, Missouri, to Dodge City, Kansas, for the period from 19 September 1943 to 23 September 1943 (R. 17, 17a, 21b). The voucher was prepared for the accused at his request by one Annetta Stout, a stenographer-clerk in his office (R. 14, 14a). The accused had not so traveled but, on the mentioned dates, was on duty at his station in Kansas City, Missouri (R. 18b,c; Pros. Ex. 11). The accused subsequently repaid the amount of this voucher to the finance officer (R. 21c; Ex. "US #A").

Specification 1 of Additional Charge I alleges that a series of false claims was made by the accused against the United States, and Specification 2 of this Charge alleges the presenting of such claims to one Colonel Johnson, Finance Officer, an officer of the United States duly authorized to pay such claims. Considering each of the alleged false claims in the order they appear in the Specifications, the evidence shows that:

a. On 1 July 1943 Voucher No. 524 (Pros. Ex. "US #6a") in the amount of $105.39, covering mileage for official travel by the accused from Kansas City, Missouri, to Omaha, Nebraska, Sioux Falls and Rapid City, South Dakota, and return, for the period from 27 June to 30 June 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount thereon (R. 17, 17a, 21a; Pros. Ex. "US 6a"). The accused had not so traveled but, on the mentioned dates, was on duty at his station in Kansas City, Missouri (R. 18b, c; Pros. Ex. "US 7a").

b. On 7 July 1943 Voucher No. 3128 (Pros. Ex. "US 6b") in the amount of $27, covering per diem for official travel by the accused from Kansas City, Missouri, to St. Louis, Missouri, and return, for the period from 3 July to 7 July 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount thereon (R. 17, 17a, 21a; Pros. Ex. "US 6b"). The accused had not so traveled but, on the mentioned dates, was on duty at his station in Kansas City, Missouri (R. 18b, c; Pros. Ex. "US 7b").

c. On 14 July 1943 Voucher No. 5094 (Pros. Ex. "US 6c") in the amount of $36, covering per diem for official travel by the accused from Kansas City, Missouri, to Topeka, Kansas, and return, for the period from 8 July to 14 July 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount thereon (R. 17, 17a, 21a; Pros. Ex. "US 6c"). The accused had traveled to, and returned from, Topeka, Kansas, on 12 July 1943 and, on all the other days was on duty at his station in Kansas City, Missouri (R. 18b, c; Pros. Ex. "US 7c"). Thus he was entitled to per diem for one day only in the amount of $6, and not the sum of $36 based on 6 days travel at $6 per diem (see Pros. Ex. "US 6c").

d. On 28 July 1943 Voucher No. 9692 (Pros. Ex. "US 6c"), in the amount of $55.40, covering per diem for official travel by the accused from Kansas City, Missouri, to Chicago, Illinois, and return, for the period from 19 July to 28 July 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount thereon (R. 17, 17a, 21a; Pros. Ex. "US 6d"). From 19 July to 23 July 1943 the accused was continuously on duty at his station in Kansas City, Missouri (R. 18b, c; Pros. Ex. "US 7d"), and thus he was not entitled to at least four days travel allowance at the rate of $6 per diem, totaling $24 as alleged (see Pros. Ex. "US 6d").

e. On 7 August 1943 Voucher No. 15101 (Pros. Ex. "US 6e"), in the amount of $52, covering per diem for official travel by the accused from Kansas City, Missouri, to Denver, Colorado, Casper and Cheyenne, Wyoming, and return, for the period from 30 July to 7 August 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount thereon (R. 17, 17a, 21a; Pros. Ex. "US 6e"). On 30 and 31 July and 7 August 1943 the accused was on duty at his station in Kansas City, Missouri (R. 18b, c; Pros. Ex. "US 7e") and thus he was not entitled to three days travel allowance at the rate of $6 per diem, totaling $18 as alleged (see Pros. Ex. "US 6e").

f. On 14 August 1943, Voucher No. 17688 (Pros. Ex. "US 6f") in the amount of $37.50, covering travel allowance for official travel by the accused from Kansas City, Missouri, to Topeka, Kansas, and return, for the period from 8 August to 14 August 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount thereon (R. 17, 17a, 21b; Pros. Ex. "US 6f"). The accused had not so traveled but, on the mentioned dates, was on duty at his station in Kansas City, Missouri (R. 18b, c; Pros. Ex. "US 7f").

g. On 23 August 1943 Voucher No. 21688 (Pros. Ex. "US 6g") in the amount of $54.65, covering travel allowance for official travel by the accused from Kansas City, Missouri, to Omaha and Scottsbluff, Nebraska, Casper, Wyoming and Denver, Colorado, and return, for the period from 21 August to 28 August 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount (R. 17, 17a, 21b; Pros. Ex. "US 6g"). On 21 August 1943 the accused was on duty at his station in Kansas City, Missouri (R. 18b, c; Pros. Ex. "US 7g") and did not leave on this trip until Sunday, 22 August 1943 (Pros. Ex. "US 7g"). Accordingly, he was not entitled to one day's travel allowance at the rate of $6 per diem as alleged (the voucher indicates it was allowed at the rate of $7 per diem.)

h. On 4 September 1943, Voucher No. 25403 (Pros. Ex. "US 6h") in the amount of $46.90, covering travel allowance for official travel by the accused from Kansas City, Missouri, to Salina, Kansas, Lincoln, Nebraska, Oklahoma City, Oklahoma, and return, for the period from 28 August to 3 September 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount (R. 17, 17a, 21b; Pros. Ex. "US 6h"). On 2 September 1943 the accused left on a trip to Oklahoma City, Oklahoma, and returned sometime on 3 September 1943 (R. 18b, c; Pros. Ex. "US 7h"). On all the other days during this period he was on duty at his station in Kansas City, Missouri (Pros. Ex. "US 7h"). He was not entitled to the claimed travel allowance for 6½ days (Pros. Ex. "US 6h"), but at the most for two days only. Thus, computed at the rate of $7 per diem as set forth in the voucher, the evidence shows the accused was not entitled to $31.50 of the $45.50 paid him as per diem, although the Specification charges he was not entitled to $40.90 thereof.

i. On 11 September 1943, Voucher No. 28066 (Pros. Ex. "US 6i") in the amount of $49, covering travel allowance for official travel by the accused from Kansas City, Missouri, to Chicago, Illinois, Topeka and Salina, Kansas, and return, for the period from 4 September to 11 September 1943, was presented for payment at the office of the Finance Officer, Colonel Johnson, and the accused was paid that amount (R. 17, 17a, 21b; Pros. Ex. "US 6i"). On 8 September 1943 the accused was on a one-day trip to Topeka, Kansas (Pros. Ex. "US 7i") and on all the other days during this period he was on duty at his station in Kansas City, Missouri (Pros. Ex. "US 7i"). He was entitled to per diem for one day only at the rate of $7 as appears in the voucher but was not entitled to the balance of the claimed amount. Thus, he was not entitled to $42 of the $49 paid him, although the Specification charges he was not entitled to $43 thereof.

j. In support of the tenth offense alleged in Specifications 1 and 2 respectively, of Additional Charge I (also in support of Specification 1, Additional Charge III) that the accused issued and presented a false transportation request for air passage to Chicago, Illinois, in the amount of $41.70, the evidence shows that on 4 September 1943 the accused was a passenger on Route Trip No. 9-4, Braniff Airways, Inc. (Pros. Ex. "US #8").

Transportation Request WQ5172741 was issued to cover air travel on 4 September 1943 from Kansas City, Missouri, to Chicago, Illinois (R. 18f). Voucher No. 28066 was issued to pay the transportation furnished under Transportation Request WQ5172741 (R. 21b; Pros. Ex. "US 14"). The accused was not traveling on any official business on 4 September 1943 (Pros. Ex. "US 7i"). The amount paid on this voucher is also the basis of two separate offenses previously alleged in Specifications 1 and 2 of Additional Charge I (see paragraph i, next above).

In addition to the accused's plea of guilty to Specifications 1 and 2 of the Charge, and the Charge, Specifications 1 and 2 of Additional Charge I, and Additional Charge I, he took the stand, after he had been fully advised of his rights, and made a sworn statement admitting his commission of the offenses and that he "submitted vouchers, and received payment on them" (R. 31a). He further stated:

> "I can offer no actual motivating reason for doing this, other than the fact that I was hard pressed for funds at this time and it seemed like an opportunity, and I just grabbed at it, and I did it and did it again and it got to the point that I wanted to stop, but I was pretty far in by that time" (R. 31b).

The evidence offered to prove Specification 1 of Additional Charge II and Charge II was the same evidence set forth above.

The evidence offered to prove Specification 1 of Additional Charge III was the same evidence set forth under paragraph j, supra. In addition the accused, in his sworn statement on the stand, stated that, "I admit very openly the charges presented. I did do every one of them" (R. 31a). He further admitted he used a Government transportation request for an air trip when not on official business (R. 31b).

The evidence offered to prove Specification 2 of Additional Charge III shows that, although the accused had made the ten earlier vouchers alleged in Specifications 1 and 2 of Additional Charge I, when questioned by Captain Edward G. Stubbs, his commanding officer, he stated that the only false claim he had made was the one for $29.75 evidenced by Voucher No. 31659 (R. 25b, 25c). In his sworn statement given on the stand the accused admitted that, when confronted with this voucher by Captain Stubbs, he stated it was the only fraudulent voucher he had submitted (R. 31b). It seemed to the accused "the logical thing to do at the time to put a conclusion to all that" (R. 31b). He also admitted "it was no easy thing to lie to Captain Stubbs because I have never known a finer man than him" (R. 31b).

4. The only evidence for the defense was the accused's testimony given under oath after his rights had been fully explained to him.

He enlisted in the Air Corps in August 1941, before he was 21 years of age, was trained as a radio operator and mechanic and assigned to the 24th Air Depot at Mobile, Alabama. In May 1942 his outfit was sent to Trinidad, British West Indies. Thereafter he was transferred to Natal, Brazil, and also saw service in Africa. He was one of seven men chosen to return to the United States to attend officers' candidate school. He entered the school in January 1943 and completed the course in April 1943, receiving his commission as a second lieutenant. He was then sent to Washington, D. C., for a short briefing course and was then, at the age of 22, assigned to Headquarters Staff of the Army Air Forces. He was thereafter assigned to the District Office in Kansas City as Air Traffic Officer.

He had never lived on his own before and he was fascinated by the manner of life of other officers, older than he, and attempted to live up to the Jones'. He freely admitted his derelictions.

5. The accused pleaded guilty to Specifications 1 and 2 of the original Charge and to the Charge. These Specifications were drawn to allege, respectively, the making of a false claim and the presentation of a false claim, in violation of the 94th Article of War. Although they allege the accused knew the claims were false and fraudulent, the Specifications fail to allege an essential allegation that in fact such claims were false and fraudulent in certain particulars (MCM, 1928, par. 150a,b). However, such can be reasonably implied from the facts alleged. The accused was not in fact misled by the defect nor were his substantial rights injuriously affected thereby. Accordingly, the defect is not fatal (MCM, 1928, par. 87b). The accused's sworn testimony and the evidence introduced by the prosecution establish all of the elements of the offenses and the findings of guilty of these two Specifications are sustained.

6. Specification 1 of Additional Charge I lists a series of separate offenses of making false claims against the United States, in violation of the 94th Article of War. Each offense should have been alleged in a separate specification under the charge (MCM, 1928, par. 29b). However, this defect in form is not fatal since the essential elements of each offense were fully alleged, the accused was not misled thereby and the error in pleading did not affect any of the accused's substantial rights (CM 202601, Sperti). The accused's sworn testimony and the evidence introduced by the prosecution establish the commission of the first seven offenses as alleged and sustain the findings of guilty thereof.

As to the eighth offense, the evidence establishes the making of a false claim in the amount of $31.50, rather than $40.90 as alleged, and the finding of guilty of the offense in that amount is sustained.

As to the ninth offense, the evidence establishes the making of a false claim in the amount of $42, rather than $43, as alleged, and the finding of guilty of the offense in that amount is sustained.

The allegations of the tenth offense are, in essence, that the accused issued a transportation request, on or about 4 September 1943 for air passage from Kansas City, Missouri, to Chicago, Illinois, and return, which was false and fraudulent in that the request was used to obtain air passage "for personal travel not on official business" (R. 10b). This language of the Specification does not allege the making of a false claim against the United States, or the making of a false writing for the purpose of obtaining the allowance of a claim against the United States (AW 94, MCM 1928, App. 4, par. 101, 104), or any other offense under Article of War 94 (Dig. Op. JAG 1912-1940, sec. 452 (6)). At most, it alleges only the making of a false statement by the accused for the purpose of fraudulently obtaining air passage at a reduced rate, in violation of Article of War 96. This offense is in effect charged in Specification 1 of Additional Charge III and will be there considered.

7. Specification 2 of Additional Charge I alleges a series of separate offenses of presenting false claims against an officer of the United States. These offenses follow seriatim the offenses alleged in Specification 1 of this Charge, being alleged in similar order. The formal defect of failing to allege each offense in a separate specification is not fatal (see Par. 6, supra). The accused's plea of guilty, his confession on the stand and the evidence introduced by the prosecution fully prove the commission of the first seven offenses. As to the eighth offense, the evidence sustains a finding of guilty of presenting a false claim in the amount of $31.50 rather than in the amount of $40.90 as alleged, and as to the ninth offense, the evidence sustains a finding of guilty of the offense in the amount of $42 rather than $43 as alleged.

The Specification as to the tenth offense alleges that the accused "presented a transportation request for air passage to Chicago, Illinois, and return for personal travel not on official business to Braniff Airlines, which represents a value of approximately $41.70, and which act was false and fraudulent and was then known by said First Lieutenant Leo L. Egalnick to be false and fraudulent". This allegation was intended to allege the presenting of a false claim under Article of War 94. It is fatally defective as such, however, in failing to allege that the accused presented for approval a certain claim against the United States "to a certain person in the civil or military service of the United States having authority to approve or pay it." (MCM, 1928, par. 150b; Dig. Op. JAG, 1912-40, sec. 452 (6)). In addition, the evidence introduced by the prosecution does not demonstrate that in fact this transportation request was presented as a claim against the United States. It was used only to procure air passage from Braniff Airlines at Government rate. At most there is alleged only, the making of a false statement by accused for the purpose of fraudulently obtaining air passage at a reduced rate, in violation of the 96th Article of War. This offense is in effect charged in Specification 1 of Additional Charge III and will be there considered.

8. The Specification of Additional Charge II alleges, in essence, the unlawful making and presenting, in violation of the 95th Article of War, of the various claims alleged as offenses under Specifications 1 and 2 of Additional Charge I, in violation of the 94th Article of War. The

accused pleaded not guilty to the Specification and the Charge. The evidence introduced by the prosecution and accused's confession, commented upon above (pars. 6 and 7 supra), fully sustain the conviction of this Specification and the Charge. Although it was a formal defect to join in one Specification the various separate offenses it is not a fatal defect (CM 202601, Sperti). Joining the two offenses of making and presenting, although duplicitous, is not fatal since it did not injuriously affect the substantial rights of the accused (CM 145339, Lee). There is no unreasonable multiplication of offenses (MCM, 1928, par. 27) in charging, on the same facts, both an offense under Article of War 94 and under Article of War 95 (see CM 218924, Foster). The charge under Article of War 95 requires proof of the additional element that the acts charged constitute conduct unbecoming an officer and a gentleman.

9. Specification 1 of Additional Charge III alleges that the accused knowingly and falsely pretended to Braniff Airlines that he was traveling on official business by presenting transportation request WQ 5172741 for air passage from Kansas City, Missouri, to Chicago, Illinois, and return, and did thereby fraudulently obtain such transportation. The Specification alleges conduct of a nature to bring discredit upon the military service and was fully proven (see par. 3j, supra). The finding of guilty of this Specification is sustained by the evidence.

10. The finding of guilty of Specification 2 of Additional Charge III is fully sustained by the accused's confession on the stand and by the evidence introduced by the prosecution, and no further comment thereon is necessary.

11. The accused is 22 years of age. He enlisted in the Air Corps in August 1941. He was stationed for awhile in Trinidad, British West Indies, Brazil and Africa and was one of seven enlisted men selected to return to the United States to attend officers' candidate school, from which he graduated in April 1943, receiving his commission as a second lieutenant. Thereafter, at the age of 22 he was assigned to the District Office in Kansas City as Air Traffic Officer.

12. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Specifications of the original Charge and the Charge; legally sufficient to support the findings of guilty of the first seven offenses alleged in Specifications 1 and 2 of Additional Charge I, and of so much of the eighth offense therein alleged as involves the making and presenting of false claims in the sum of $31.50 at the time and place and in the manner alleged, rather than $40.90, and of so much of the ninth offense therein alleged as involves the making and presenting of false claims in the sum of $42 at the time and place and in the manner alleged, rather than $43, and of Additional Charge I, legally sufficient to support only so much of the findings of guilty of the tenth offense alleged in Specifications 1 and 2 respectively, of Additional Charge I as involves findings of guilty of the Specifications in violation

of Article of War 96; legally sufficient to support the findings of guilty of the Specification of Additional Charge II and Additional Charge II, and of Specifications 1 and 2 of Additional Charge III and Additional Charge III. The variance between the findings as made by the court and as held legally sufficient by the Board of Review is immaterial and of no legal consequence. The record of trial is legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 or 96 and mandatory upon conviction of a violation of Article of War 95.

Thomas H. Tappy, Judge Advocate.

Herbert M. Kidner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 247496

1st Ind.

War Department, J.A.G.O., 29 MAY 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 First Lieutenant Leo L. Egalnick (0-577449), 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, to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that so much thereof as involves forfeiture of all pay and allowances due or to become due and confinement be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the 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. S/W.
Incl.3-Form of action.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 409, 27 Jul 1944)

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

SPJGV
CM 247527

23 MAR 1944

UNITED STATES	)	11TH AIRBORNE DIVISION
v.	)	Trial by G.C.M., convened at Camp Mackall, North Carolina, 29-30 December 1943. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant JOHN A. ROSASCO (0-1316332), Infantry.	)	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

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

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

Specification: In that Second Lieutenant John A. Rosasco, Company F, 188th Glider Infantry, did, without proper leave, absent himself from his organization at Camp Mackall, North Carolina, from about 20 September 1943 to about 1 December 1943.

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

Specification 1: In that Second Lieutenant John A. Rosasco, Company F, 188th Glider Infantry, did, at Camp Mackall, North Carolina, on or about 20 September 1943, feloniously embezzle by fraudulently converting to his own use funds, of the value of Three Hundred Three Dollars and fourteen cents ($303.14), the property of the 188th Glider Infantry Officers' Mess, entrusted to him as Mess Officer by the said Officers' Mess.

Specification 2: In that Second Lieutenant John A. Rosasco, Company F, 188th Glider Infantry, did, at Camp Mackall, North Carolina, on or about 20 September 1943, feloniously embezzle by fraudulently converting to his own use funds, of the value of Three Hundred Fifty-one dollars and eight cents ($351.08), the property of the 187th-188th Glider Infantry Officers' Mess, entrusted to him as Mess Officer by the said Officers' Mess.

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

Specification 1: In that Second Lieutenant John A. Rosasco, Company F, 188th Glider Infantry, did, at New York City, New York, on or about 5 October 1943, with intent to defraud wrongfully and unlawfully make and utter to 27th Division Exchange, New York, New York, a certain check, in words and figures as follows, to wit: Oct. 5 1943 Bank of Southern Pines, NC Pay to Cash or order $10 Ten - - - Dollars Lt. John A. Rosasco, 01316332, he the said Second Lieutenant John A. Rosasco, then well knowing that he did not have and not intending that he should have any account with the Bank of Southern Pines, North Carolina for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 5 October 1943, payable to cash or order in the sum of $20, made and uttered to Hotel Tudor, New York, New York.

Specification 3: Same form as Specification 1, but alleging check dated 7 October 1943, payable to cash or order in the sum of $20, made and uttered to Shirley Steurthal, New York, New York.

Specification 4: Same form as Specification 1, but alleging check dated 8 October 1943, payable to cash or order in the sum of $20, made and uttered to James McCreery and Company, New York, New York.

Specification 5: Same form as Specification 1, but alleging check dated 19 October 1943, payable to the order of cash in the sum of $20, made and uttered to Peoples Industrial Bank, New York, New York.

Specification 6: Same form as Specification 1, but alleging check dated 29 October 1943, payable to the order of cash in the sum of $10, made and uttered to Biltmore Realty Hotels Incorporated, New York, New York.

Specification 7: Same form as Specification 1, but alleging check dated 30 October 1943, payable to the order of cash in the sum of $15, made and uttered to the Roosevelt Hotel Incorporated, New York, New York.

Specification 8: Same form as Specification 1, but alleging check dated 31 October 1943, payable to the order of cash in the sum of $20, made and uttered to the Roosevelt Hotel Incorporated, New York, New York.

Specification 9: In that Second Lieutenant John A. Rosasco, Company F, 188th Glider Infantry, being indebted to The Citizens Bank and Trust Company of Southern Pines, Southern Pines, North Carolina in the sum of Three Hundred Dollars ($300.00) for a note, which amount became due and payable on September 29, 1943, did from September 29, 1943 to the present date, dishonorably fail and neglect to pay said debt.

He pleaded guilty to Charge I and its Specification, not guilty to Charge II and its Specifications, guilty to Specifications 1-8 of Charge III, not guilty to Specification 9 of Charge III and guilty to Charge III. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 24 years. The reviewing authority approved only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of Charge I and its Specification shows that on 17 September 1943 the accused departed his station at Camp Mackall, North Carolina on a three-day leave of absence. When accused failed to return on 21 September 1943, an entry was made in his organization's morning report extending the leave for an additional three days. On 24 September 1943, the organization morning report carried a correction showing accused "AWOL as of 20 Sept 43" (R. 12; Ex. 1). Accused was returned to military control at Fort Jay, New York on 1 December 1943 (R. 12; Exs. 1, 2). On 29 December 1943, after his return to Camp Mackall, North Carolina, accused told Captain Robert M. Mitchell, his company commander, that he had gone home to "straighten up some financial difficulties * * * at camp" (R. 14).

The evidence in support of Charge II and its Specifications shows that accused on 1 July 1943 was appointed custodian of the 188th Glider Infantry Officers' Mess fund and a short time later, custodian of the 187th-188th Glider Infantry Officers' Mess fund, two separate and distinct funds (R. 16, 17). The Council Books of both funds were offered in evidence, the offer being limited to the identity of the books and not constituting an admission of their contents (R. 18; Exs. 3, 4).

As to Specification 1, Charge II, the evidence shows that on 17 September 1943, the date of accused's departure, Colonel Robert H. Soule, commanding officer of the 188th Glider Infantry, directed the adjutant to check the mess accounts of several assistant mess officers of the 188th Glider Infantry Officers' Mess who were proceeding overseas, and to appoint Lieutenant William J. Skytta temporarily as mess officer until accused's return. Lieutenant Skytta acted as mess officer for five days and then on 23 September 1943, Lieutenant Leslie F. Kornowske was appointed mess officer. Lieutenant Kornowske was also a member of the Board appointed to audit the funds of the 188th Glider Infantry Officers' Mess (R. 20-22).

It was stipulated that as of 31 August 1943 accused was responsible to the 188th Glider Infantry Officers' Mess Fund for the sum of $677.39 (R. 37). On 17 September 1943 Lieutenant Skytta, on orders of Captain John F. Beck, regimental adjutant of the 188th Glider Infantry, removed $320.40 in checks and $26.23 in cash or a total of $346.63 from accused's foot locker, which amount was credited to the 188th Glider Infantry Officers' Mess fund (R. 33). Lieutenants Skytta and Kornowske collected $105.52 from officers in payment of August 1943 mess bills (R. 33, 34). Lieutenant Kornowske stated that in accordance with the arrangements for collecting the accounts, the bills were made out on the first of the month for the preceding month's accounts and then the officers paid their bills to the mess officer before the tenth of the month, payment being shown by the officer's initials after the total amount paid (R. 34). Vouchers relating to the fund from 1 September 1943 through 19 September 1943 were accepted into evidence over defense counsel's objection that no proof had been presented connecting the entries therein to the accused (R. 35, 36; Ex. 7 (withdrawn from record at the close of trial)). A voucher dated 20 September 1943 was then read into the record which stated that collections for August 1943 bills amounting to $851.31 "have been recorded as paid on this date by the following officers, amounts being listed after name, signed by the Mess Officer" (R. 36). A calculation made by the trial judge advocate allegedly on entries in the Council Book for September 1943 showed a shortage of $303.14. Briefly stated, this shortage represented the difference between total receipts of $1528.70 (consisting of $677.39 due the fund on 31 August 1943 and $851.31 shown as collections by the voucher of 20 September 1943) and authorized deductions of $1225.56 (consisting of disbursements of $266.60, a bank balance of $494.99, and cash on hand of $463.97) (R. 37, 38). Lieutenant Kornowske, who took over the custodianship of the fund on 23 September 1943, stated that all of the entries made on 20 September 1943 totaling $851.31 did not represent collections on that date but were recorded that way by him under the direction of Lieutenant Colonel Paul H. Mahoney, President of the 188th Glider Infantry Officers' Mess council, to avoid the necessity of getting a "re-signature" (R. 40). The collections of $105.52 made by Lieutenants Skytta and Kornowske were included in the $851.31 (R. 37). Other figures used in making the calculation depended upon vouchers which are not a part of the record and are simply computations by the trial judge advocate unsupported by any original records or connected to the accused (R. 38). Lieutenant Kornowske testified that "there was nothing recorded on the vouchers file or in the Council Book by Lieutenant Rosasco for the month of September and they had to be done after I took over the custodianship of the Mess" (R. 39).

The testimony respecting the 187th-188th Glider Infantry Officers' Mess fund (Spec. 2, Charge II) shows that Major Sidney A. Heaton of the Inspector General's Department, was detailed to investigate the funds of this mess (R. 41, 42). Over objection by the defense that the entries were not properly identified, Major Heaton testified that entries in the Council Book showed that accused as custodian was responsible for $1171.94 at the end

of August 1943. Also, over objection by the defense that a proper basis had not been laid for admission of the evidence, a September 1943 voucher was offered as "the official record for the month of September of the 187th-188th Officers' Mess, to be known as Exhibit 9" (R. 45). The law member ruled that inasmuch as Colonel Robert H. Soule, commanding officer of the 188th Glider Infantry, had testified that "accused was custodian of those records and they could have been made by a clerk in the battery or anybody else" the vouchers were admissible even though certain vouchers were prepared by Colonel Mahoney, who was not present at the trial (R. 21, 45). This witness (Major Heaton) testified to a shortage in the fund's account amounting to $351.08 as of 30 September 1943 (R. 45). The calculation showing this shortage included September 1943 figures, although there were no checks or vouchers for this month in the "name" of the accused (R. 45).

Captain Patrick W. Cotter, investigating officer, testified that during the investigation of the charges prior to trial, after being warned of his rights, the accused stated that he was guilty of "all the offenses". However, accused qualified this statement by stating that "he didn't realize the amounts which it specified that he was responsible for * * * he didn't realize that the amounts were as large as the specifications said that they were in regard to the Mess Fund and the Club Fund". Accused, in his statement to the investigating officer, went on to state that he realized that he was responsible for these funds but that collections were made many times in the field, which probably resulted in a mixture of such funds with his own funds, making it difficult to keep an account of the mess funds (R. 47, 48).

The evidence offered in support of Charge III, Specifications 1-8 thereof, consisted principally of a stipulation that the accused drew the checks described in the Specifications, at the times and in the amounts stated, on the Bank of Southern Pines, North Carolina; that accused made and uttered said checks knowing he had no funds in said Bank of Southern Pines and that, in fact, there was no such bank. Photostatic copies of the checks were offered in evidence by the prosecution without objection, as Exhibits 10-18 (R. 11, 46, 47). The accused pleaded guilty to Charge III and Specifications 1-8 thereof (R. 9).

In support of Specification 9, Charge III, the prosecution introduced Mr. N. L. Hodgkins of the Citizens' Bank and Trust Company of Southern Pines, North Carolina, who testified that the said bank loaned accused $300 on 14 September 1943; the loan was secured by a 15-day note due 29 September 1943; that he was present when the note was made; and it was signed by the accused (R. 10, 11). The witness testified that the accused, when he received the money, stated "he would be able to pay the note within that time and that he had a source from which he was to receive sufficient funds to repay the note at the end of the fifteen days" (R. 10). The note was not paid on the due date, in spite of notices sent to the accused respecting its payment, and accused made no attempt to contact the bank and request an extension for payment of the note (R. 10, 11). Accused was in a status of absent without

leave from his organization on 29 September, the due date of the note (R. 12).

4. The defense, at the close of the prosecution's case, moved for findings of not guilty of Charge II and its Specifications, contending that there was no adequate proof that accused received the monies he was alleged to have embezzled (R. 49, 50). Defense also moved for findings of not guilty of Specification 9 of Charge III, contending that the prosecution had proved merely the failure of accused to pay an obligation and not a dishonorable failure in violation of Article of War 95. The motions were denied (R. 50, 51).

Private Ford E. Seals, a witness for the defense, stated that he worked in the "187th Officers' Club" as custodian during the time accused was mess officer and that he made collections which in many cases were held for a few days before being turned over to the accused (R. 52).

Captain Robert M. Mitchell, a witness for the defense, testified that he was commanding officer of "Pfc. Gilbert", steward at the "187th-188th Officers' Club"; that Gilbert failed to return 26 November 1943 from a fifteen-day furlough; that he (Gilbert) has not since returned (R. 53).

A stipulation was offered by the defense relative to collections of the "188th Officers' Mess" which stated, inter alia,

> "That Lt. Skytta was appointed Mess Officer of the 188th, Gl. Inf. mess on 17th. Sept., 1943 and made some collections of officers accounts until relieved by Lt. Kornowske who was appointed mess officer on the 23rd. of Sept., 1943 and collected some of the accounts after that date.
>
> "That some of the officers of the 188th. and 187th. Glider Infantry, during the period Lt. Rosasco [accused] acted as custodian of the 187th and 188th. Club Mess fund, paid their accounts due said club to Enlisted men Pfc. Gilbert and Pvt. Seals who acted as stewards at said club." (R. 53, 54; Ex. A).

Accused, after an explanation of his rights, made an unsworn statement. He stated with respect to the 188th Glider Infantry Officers' Mess that Lieutenant Person made the majority of collections of the 188th Glider Infantry funds from the first of September through the fifteenth of September 1943; that accused was busy with other duties at this time; that Lieutenant Person had departed the post on one day's notice; that he (Person) had given accused a bag containing certain monies which accused placed in his foot locker without counting (R. 54, 55).

He stated with respect to the 187th-188th Glider Infantry Officers' Mess that no audit was made of its funds when taken over by the accused; no proper accounting could be made due to the fact that a number of people had

handled the fund; that a Lieutenant Schwartz had made certain collections subsequent to 30 August 1943; that he (Schwartz) had departed the post on one day's notice; and that on 16 September 1943 a Lieutenant Carneyhand took over the fund, resulting in a "mixup" (R. 54, 55).

5. Accused pleaded guilty to absence without leave from 20 September 1943 to 1 December 1943 as set forth in Charge I and its Specification. Evidence introduced by the prosecution in support of this Charge showed that accused departed his organization on 17 September on a three-day leave of absence and failed to return until 1 December. His leave was extended for an additional three days on 21 September which extension was subsequently revoked upon his continued failure to return. This revocation did not injuriously affect accused's rights as it was merely an administrative expedient to prevent accused being marked absent without leave unjustly.

Accused pleaded not guilty to the embezzlement alleged in Charge II and its Specifications. Specification 1 of Charge II alleges an embezzlement of $303.14 from the 188th Glider Infantry Mess fund. There is no evidence proving that shortage or from which any shortage can be mathematically computed. The trial judge advocate made a lengthy statement, demonstrating a shortage of $303.14. However, such a statement is not evidence nor were the calculations made by the trial judge advocate based in essential particulars upon competent evidence contained in the record. One of the essential items in the calculations was a voucher dated 20 September 1943 amounting to $851.31 representing collections for August 1943 mess bills. Entries representing these collections were made by Lieutenant Kornowske, after accused's departure, at the direction of Lieutenant Colonel Mahoney, President of the 188th Glider Infantry Officers' Mess Council. Colonel Mahoney did not testify and there is no competent evidence showing accused's responsibility for these entries. Defense properly objected to the introduction of the voucher of $851.31 because of the lack of evidence connecting accused to the entries of said voucher. In fact, the entries representing collections in the $851.31 voucher were not made by accused or anyone acting under his authority, and the collections were not made on 20 September 1943 as set forth in the voucher - some were made before, some after that date. The collections were recorded that way by Lieutenant Kornowske at the direction of Colonel Mahoney - who did not testify - to avoid the necessity of getting a "re-signature" (R. 40). Therefore, as there is no showing that the entries were in the handwriting of the accused, or recorded under his direction and control, they cannot be admitted as admissions against him (Dig. Op. JAG, 1912-40, sec. 395 (15)). Also, it is not proper to seek to prove the actual transactions which may have established accused's liability by admitting these records as books of account where the entries are, to a great extent, a record of the acts of others, not within the personal knowledge of the bookkeeper but made up from the statements of others (Wharton's Criminal Evidence, 11th Ed., Vol. 2, sec. 809; Post v. Kenerson 72 Vt. 341; 52 LRA p. 552 at p. 563, 589, 595). Thus, the evidence with respect to the offense charged in Specification 1 of Charge II fails to prove any shortage. No corpus delicti has been established.

In support of Specification 2, Charge II, alleging embezzlement of $351.08 from the 187th-188th Glider Infantry Officers' Mess funds, the testimony of Major Heaton of the Inspector General's Department proves a shortage of that amount in the fund, although it does not trace such shortage to the accused. His testimony is sufficient to establish the corpus delicti of the offense charged. "This evidence of the corpus delicti need not be sufficient of itself to convince beyond a reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense" (MCM, 1928, par. 114). In addition, the accused admitted his guilt. After the investigating officer informed the accused of his rights, the accused stated that he was guilty of "all the offenses", stating, in addition that he did not realize the amounts he was responsible for, that he didn't realize the shortages were as large as alleged, and, further, that collections were made many times in the field which probably resulted in a mixture of such funds with his own funds, making it difficult to keep an account of the mess funds. The confession of the accused was admissible and it was for the trier of the facts of the case to determine what weight should be given to the exculpatory part of the confession (Wharton's Criminal Evidence, 11th Ed., Vol. 2, p. 961). It cannot be said that, as a matter of law, the trier of fact was unjustified in treating the confession as a full confession.

The corpus delicti of the offense charged in Specification 2 of Charge II having been established by the testimony of Major Heaton, the confession of the accused is competent evidence to establish his guilt of the offense alleged in this Specification.

The accused pleaded guilty to Charge III and Specifications 1-8 thereof. In support of these Specifications photostatic copies of the checks described in the Specifications were introduced in evidence by the prosecution without objection, and a stipulation was offered to the effect that accused drew the checks so described at the times and in the amounts stated, on the bank of Southern Pines, North Carolina; that he made and uttered said checks knowing he had no funds in said bank of Southern Pines and that, in fact, there was no such bank. In view of the plea of guilty, there is no need to discuss the sufficiency of the evidence presented with respect to said Specifications.

Accused pleaded not guilty to Specification 9 of Charge III alleging that he dishonorably failed and neglected to pay a note due the Citizens' Bank and Trust Company of Southern Pines, Southern Pines, North Carolina, in the sum of $300. On 14 September 1943 when accused secured the loan, he represented that he would be able to pay it back within 15 days and that he had a source from which he would receive sufficient funds for repayment. On 29 September 1943, the due date of the note, accused was absent without leave and made no attempt to pay the note or to contact the bank and request an extension for payment thereof. From these facts it may be inferred that accused's failure to keep the promise to pay

the note within 15 days was dishonorable (CM 230736, Delbrook).

The record, therefore, is legally insufficient to support the finding of guilty of Specification 1 of Charge II, but legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 2 thereof, and Charge III and Specifications 1-9 thereof.

6. Accused is about 31 years of age and married. He left high school without graduating and attended business college for one and a half years. He was inducted into the armed services on 6 March 1941 and served as an enlisted man until 31 March 1943 when upon gradudation from the Infantry School, Fort Benning, Georgia, he was commissioned second lieutenant, Infantry, Army of the United States. He has been serving as an officer since the latter date.

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 insufficient to support the finding of guilty of Specification 1 of Charge II, but legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 2 thereof, and Charge III and Specifications 1-9 thereof; legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 61st or 93rd Article of War and mandatory upon conviction of a violation of the 95th Article of War.

Thomas H. Taylor, Judge Advocate.

Arthur W. Redmer, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 247527

1st Ind.

War Department, J.A.G.O., 12 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 Second Lieutenant John A. Rosasco (0-1316332), 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 of Charge II, but legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 2 thereof, and Charge III and Specifications 1-9 thereof; legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority of dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year be confirmed and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas be designated as the place of confinement.

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

(Finding of guilty of Specification 1, Charge II, disapproved. Sentence as approved by reviewing authority confirmed. G.C.M.O. 225, 29 May 1944)

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

SPJGV
CM 247651

7 APR 1944

UNITED STATES	81ST INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp San Luis Obispo, California, 30 December 1943. Dismissal and $150 fine.
Second Lieutenant WILLIAM C. SAWYER (0-1302204), Infantry.	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant William C. Sawyer, 0-1302204, Company M, 321st Infantry, did, at Camp Horn, Arizona, on or about 18 September 1943, with intent to deceive, falsely make in its entirety a War Department QMC Form #237, Driver's Trip Ticket, and sign the name Sergeant Dittman, Motor Sergeant, Headquarters Company, Third Battalion, 321st Infantry, said instrument was a writing of a public nature, which might tend to operate to the prejudice of another.

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

Specification: In that Second Lieutenant William C. Sawyer, 0-1302204, Company M, 321st Infantry, did, at Camp Horn, Arizona, on or about 18 September 1943, knowingly and willfully apply to his own use and benefit without proper authority one quarter ton vehicle, U. S. A. No. 20199897, of the value of about $900.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Second Lieutenant William C. Sawyer, 0-1302204, Company M, 321st Infantry, in violation of standing orders, to wit, to sign the officers departure book at Regimental Headquarters prior to departure from Camp Horn, Arizona, did, at Camp Horn, Arizona, on or about 18 September 1943, fail to obey same.

CHARGE IV: Violation of the 61st Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded guilty to Charge III and its Specification and not guilty to all other Charges and Specifications. He was found not guilty of Charge IV and its two Specifications and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be fined $150. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Accused made a sworn statement (Ex. B) to Major William L. Porte, the investigating officer, in which he stated that on Saturday evening, 18 September 1943, he left Camp Horn, Arizona, intending to go out on the desert in the vicinity of Paul's Well to shoot some coyotes and jack rabbits. He obtained a caliber .45 revolver and some caliber .45 ammunition from one of the men of Company M, 321st Infantry. He contacted Private First Class Lynn G. Ramsey, a driver of Company M, and ordered him to drive him. He did not obtain a pass for Private Ramsey as he did not at that time intend to be gone very long and also wanted Private Ramsey to think that he was driving for him on a duty status. Accused did not obtain permission to leave Camp Horn nor did he sign out in the Officers' Departure Book, as he did not intend to leave the area of the camp. He went down to the maintenance tent of the Third Battalion Motor Park, obtained a dispatch form and filled it out, signing Sergeant H. E. Dittman's name to it. He identified Prosecution's Exhibit A as the form he had made out and used to obtain motor vehicle M-19 from the Motor Park. Thereafter Private Ramsey reported to accused at the Motor Park and together they left the post. They drove across country over the desert, coming out on U.S. Highway No. 80 at Welton, Arizona. He and Private Ramsey slept on the ground that night not far from a hotel in Welton and the next morning ate breakfast at a cafe in Welton and spent most of the day there. They left Welton together about 2330 Sunday evening, 19 September 1943 and proceeded east on U.S. Highway No. 80. Private Ramsey was driving the Government vehicle. He was not a careless or fast driver and usually drove between 35 and 40 miles per hour. There was very little traffic on the road and accused did not recall

seeing any other motor vehicle coming from the opposite direction at or about the time of the accident. He remembered nothing about the accident except a terrible screeching of rubber tires on the pavement. After that everything went black and he remembered nothing until about Tuesday, 21 September 1943. Neither he nor Private Ramsey had had any intoxicants during the entire trip.

On 20 September 1943, Major William L. Porte, Commanding Officer os the Second Battalion, 321st Infantry, investigated an accident that occurred near Mohawk, Arizona, and saw accused in an Evacuation Hospital near Datland, Arizona. Accused's statement (Ex. B) was made to Major Porte several days later as he, Major Porte, was advised by the attending surgeon not to take the statement on the morning of the 20th due to accused's physical condition. Major Porte went to the scene of the accident on the morning of 20 September 1943 and observed a one-quarter ton motor vehicle off the road near Mohawk, Arizona, in an upright position and at an angle of about 30° from the road. He examined the motor vehicle and found a pair of coveralls bearing the laundry mark of accused's initials and the last three figures of his serial number on the collar. The witness identified Prosecution's Exhibit B as the voluntary statement made to him by accused several days after the accident occurred. He testified that accused was fully informed of his rights as a witness; that the statement was made voluntarily and that accused's physical condition had improved to such an extent that he could talk coherently and in an understandable manner. The witness identified Prosecution's Exhibit A as a Dispatch Slip which was turned over to him several days after the accident by a soldier who had visited the scene of the accident shortly after it occurred and had removed this exhibit from the glove compartment of the motor vehicle involved in the accident. He could not recall this soldier's name but testified that the exhibit had been in his custody and possession continuously since it was delivered to him. The number shown on the Dispatch Slip, Exhibit A, corresponded with the number on the vehicle involved in the accident.

Private (formerly Sergeant) H. E. Dittman, Headquarters Company, Third Battalion, 321st Infantry, testified that on 18 September 1943 he was Transportation Sergeant in charge of the motor vehicles of the battalions; that he had no authority as Transportation Sergeant to dispatch any motor vehicles on that date; that the Regimental Dispatcher had this authority; that the signature appearing on the Dispatch Slip (Ex. A) was not his signature and that he did not make any of the writing on the exhibit; that the bumper number of motor vehicle M-19 corresponded with the number of the Dispatch Slip (Ex. A).

Captain Lauren L. Shaw, Jr., 321st Infantry, testified that he was Regimental Adjutant and was the official custodian of the Officers' Sign In and Sign Out Book (Officers' Register). He identified the Officers' Register (Ex. C) and testified that accused did not sign in or out on either the 18th, 19th or 20th of September 1943. He testified that in order to

obtain a vehicle from the Motor Pool it was necessary that the officer or enlisted man desiring the vehicle submit a request to headquarters for approval by the Executive Officer and himself as Adjutant. He identified accused's statement (Ex. B) as a true copy of the original statement which had been sent to the Ninth Service Command and was not available at the time of trial. On 18 September 1943 the witness was the Approving Transportation Officer.

Captain Joseph E. Blanford, 781st Ordnance Company, testified that he was acquainted with the value of various Government vehicles and that the value of a one-quarter ton U.S. truck was $768.75.

4. No evidence was introduced for the defense and the accused, after being fully informed of his rights as a witness, elected to remain silent.

5. The evidence shows that accused on the evening of 18 September 1943 obtained a Dispatch Form from the Motor Pool of the 321st Infantry Battalion, filled it out and signed Sergeant Dittman's name to it as Dispatcher; that he used this Dispatch Form to obtain a Government motor vehicle number M-19 from the Motor Pool; that he ordered Private First Class Ramsey to drive him from Camp Horn across country to a place called Welton where he and Private Ramsey spent the night; that the following night he and Private Ramsey left Welton at about 2330 and were proceeding in the direction of Camp Horn along U.S. Highway No. 80 when an accident occurred resulting in serious injuries to the accused and damage to the Government vehicle in which he and Private Ramsey were traveling. The report of investigation accompanying the record of trial discloses that the accident resulted in the death of Private Ramsey. The vehicle was Government owned and of the value of approximately $768.75. The evidence also shows that accused failed to sign out in the Officers' Register on leaving the post as required.

6. Accused is 24 years of age. He attended high school for three years. He enlisted in the Army 3 October 1940 and served as an enlisted man until 2 December 1942 when upon graduation from the Infantry Officer Candidate School, Fort Benning, Georgia, he was appointed second lieutenant, Army of the United States, and ordered to active duty.

7. Accused's efficiency report rendered 30 November 1943 rates him as unsatisfactory, and various letters of his superior officers, appearing in accused's 201 file, describe him as an irresponsible, childish, gullible officer, unfit to hold a commission. It also appears that on 6 August 1943 accused's commanding officer, Lieutenant Colonel Mark F. Brennan, administratively reprimanded accused for an unauthorized absence from duty.

8. 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, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 93, 94 and 96.

Thomas H. Tabby, Judge Advocate.

Herbert M. Kediver, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 247651

1st Ind.

War Department, J.A.G.O., 21 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 Second Lieutenant William C. Sawyer (0-1302204), 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, to support the sentence and to warrant confirmation of the sentence. Accused's efficiency report rendered 30 November 1943 rates him as unsatisfactory, and various letters of his superior officers, appearing in accused's 201 file, describe him as an irresponsible, childish, gullible officer, unfit to hold a commission. It also appears that on 6 August 1943 accused's commanding officer, Lieutenant Colonel Mark F. Brennan, administratively reprimanded accused for an unauthorized absence from duty. In view of all the circumstances I recommend that the sentence be confirmed but that the fine imposed be remitted, and that the sentence as thus modified be carried into execution.

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

(Sentence confirmed but fine remitted. G.C.M.O. 321, 22 Jun 1944)

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

SPJGQ
CM 247671

2 FEB 1944

UNITED STATES	NEW ENGLAND SECTOR
v.	Trial by G.C.M., convened at Fort Adams, Rhode Island, 3 January 1944. Dismissal.
Captain HAROLD E. MILLER (0-1683862), Medical 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. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 85th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification 1: In that Captain Harold E. Miller, Medical Corps, Two Hundred and Forty-Third Coast Artillery (HD), did, at Boston, Massachusetts, on or about 16 August 1943, wrongfully and unlawfully make and utter to Rogers Peet Company, Boston, Massachusetts, a certain check in words and figures as follows; to wit: "Citizens and Southern National Bank, Savannah, Georgia, 16 August 1943, Pay to the order of Rogers Peet Company, Thirty and 00/100 dollars, ($30.00), H. E. Miller", and by means thereof, did fraudulently obtain from Rogers Peet Company, $30.00, he the said Captain Miller, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens and Southern National Bank, Savannah, Georgia, for the payment of said check.

Specification 2: In that Captain Harold E. Miller, Medical Corps, Two Hundred and Forty-Third Coast Artillery (HD), did, at Boston, Massachusetts, on or about 28 August 1943, wrongfully and unlawfully make and utter to A. Beckwith Company, Boston, Massachusetts, a certain check in words and figures as follows, to wit: "Citizens and Southern National Bank, Savannah, Georgia, 28 August 1943, Pay to the order of A. Beckwith Company, Thirty & 00/100 dollars, ($30.00), H. E. Miller", and by means thereof, did fraudulently obtain from A. Beckwith Company $30.00, he the said Captain Miller, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens and Southern National Bank, Savannah, Georgia, for the payment of said check.

Specification 3: In that Captain Harold E. Miller, Medical Corps, Two Hundred and Forty-Third Coast Artillery (HD), did, at Hartford, Connecticut, on or about 30 October 1943, wrongfully and unlawfully make and utter to G. Fox and Company, Hartford, Connecticut, a certain check in words and figures as follows, to wit: "Citizens and Southern National Bank, Savannah, Georgia, 30 October 1943, Pay to the order of G. Fox and Company, Eighty & 00/100 dollars, ($80.00), H. E. Miller", and by means thereof, did fraudulently obtain from G. Fox and Company $80.00, he the said Captain Miller, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens and Southern National Bank, Savannah, Georgia, for the payment of said check.

Specification 4: In that Captain Harold E. Miller, Medical Corps, Two Hundred and Forty-Third Coast Artillery (HD), did, at Manchester, Connecticut, on or about 2 November 1943, with intent to deceive Brigadier General William Hesketh, Commanding General, 46th Anti-aircraft Artillery Brigade, Boston, Massachusetts, officially report to the said Brigadier General Hesketh, that "as directed by the General, the above matter has been tended to", which report was known by the said Captain Miller to be untrue in that the matter in question was not attended to.

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

Specification: In that Captain Harold E. Miller, Medical Corps, Two Hundred and Forty-Third Coast Artillery (HD), did, at Boston, Massachusetts, on or about 15 November

1943, wrongfully and unlawfully make and utter to the Athens-Olympia Cafe, a certain check, in words and figures as follows, to wit: "Citizens and Southern National Bank, Liberty Street Branch, Savannah, Georgia, 15 November 1943, Pay to the order of Athens-Olympia Cafe Thirty and 00/100 dollars ($30.00), H. E. Miller", and by means thereof, did fraudulently obtain from the Athens-Olympia Cafe $30.00, he the said Captain Miller, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens and Southern National Bank, Savannah, Georgia, for the payment of said check.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specification of Charge I and of Charge I but guilty of all other Specifications and Charges. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Charge II (Article of War 95) and of the Additional Charge (Article of War 95) as involves findings of guilty of each as a violation of Article of War 96, approved the sentence, but because of the accused's value to the service recommended clemency, and forwarded the record of trial for action under Article of War 48.

3. The accused was found not guilty of Charge I and its Specification, so they require no comment. The evidence for the prosecution, bearing upon the remaining Charges and their Specifications, may be summarized as follows:

Specification 1 of Charge II:

On 16 August 1943 accused presented, and the Rogers Peet Company of Boston, Massachusetts, cashed, his personal check in the amount of thirty dollars. The check was returned unpaid by the Citizens and Southern Bank of Savannah, Georgia, the bank upon which it was drawn, marked "insufficient funds". The Rogers Peet Company wrote accused personally "several times" about this check and, receiving no reply, addressed a complaint to The Adjutant General of the First Service Command, Boston, Massachusetts.

Accused sent the Rogers Peet Company a thirty dollar money order, which it received 25 October 1943, in payment of this check (Ex. A).

Specification 2 of Charge II:

On 28 August 1943 accused presented, and the A. Beckwith Company, of Boston, Massachusetts, cashed, his personal check in the

amount of thirty dollars. The check does not appear to have been introduced in evidence and the evidence of record does not disclose what bank the check was drawn on. However, L. J. Bernstein, treasurer of A. Beckwith Company, testified by deposition that the check was returned on 7 September by "his (accused's) bank" with the notation "insufficient funds". He further testified that the check was "deposited" and "put through the bank" three more times on later dates and each time was returned unpaid. The company wrote accused three letters in reference to the check and then referred the case to The Adjutant General's Department of the Army.

On 5 November 1943 A. Beckwith Company received from accused a thirty dollar money order in payment of the check (Ex. B). The receipt for this money order also bore date 5 November 1943 (Ex. G).

Specification 3 of Charge II:

On 30 October 1943 accused received twenty-two dollars worth of merchandise and fifty-eight dollars in cash from G. Fox and Company, Hartford, Connecticut, in exchange for his personal check for eighty dollars, drawn on the Citizens and Southern National Bank of Savannah, Georgia. The check was deposited to the company's account in its bank for collection and was returned unpaid 9 November 1943 by the Citizens and Southern National Bank of Savannah, Georgia, marked "insufficient funds", and with a protest fee of $1.50 attached. The company wrote accused a personal letter dated 9 November 1943 and its credit manager talked to him by telephone on 13 November 1943 about this check. Accused stated in reply to the telephone inquiry that the bank had apparently made a mistake and agreed to send a money order in payment not later than 16 November 1943. Payment not having been received on 17 November, the credit manager of the G. Fox and Company spoke to a Major Mazzano about the matter.

On 2 December 1943 G. Fox and Company received a money order from accused in the amount of $82.50, to cover the check, the protest fee, and the incidental telephone calls (Ex. C).

Pertinent to each of the foregoing Specifications, J. Walter Caraker, assistant cashier of the Citizens and Southern National Bank, Savannah, Georgia, testified by deposition that accused maintained an account with the bank from 2 January 1943 until 5 November 1943, upon which latter date it was closed. It was an individual account of Harold E. Miller, who alone had authority to check against it. The amount that accused had on deposit in the account on 16 and 28 August 1943, as well as on 30 October 1943, was two cents (Ex. D).

Specification 4 of Charge II:

Under date of 27 October 1943 Brigadier General William Hesketh, Commanding General of the 46th Anti-aircraft Artillery Brigade, wrote accused a letter directing him to investigate and make prompt payment, not later than 1 November 1943, of all checks given by him while on active duty that had not been honored by his bank. Accused was also directed to reply to the letter by indorsement thereon not later than 2 November 1943.

Accused made the following indorsement on the above-mentioned letter: "As directed by the General, the above matter has been tended to". The indorsement was signed but was not dated. It bears stamp of the 46th Anti-aircraft Artillery Brigade Headquarters showing that it was received there on 3 November 1943 (R. 21; Ex. F).

The A. Beckwith Company did not receive payment until 5 November 1943, and G. Fox and Company was not paid until 2 December 1943 for the check presented to and cashed by that company for accused on 30 October 1943.

Specification of Additional Charge:

On 15 November 1943 accused presented and the Athens-Olympia Cafe, of Boston, Massachusetts, cashed his personal check, drawn on the Citizens and Southern National Bank, Savannah, Georgia, in the amount of thirty dollars. The check was deposited by payee in the First National Bank, Boston, and was subsequently returned, marked "account closed". The check had not been paid at the time the deposition of John D. Cocaris was taken on 27 December 1943.

4. Major Dean J. Natali, Post Commander at Fort Varnum, Rhode Island, testified that he considered accused to be a man excellent in character and professional ability (R. 25-26). Major Bernard J. Mangione, Medical Corps, testified that accused was on duty under his immediate supervision and control for two months and that the accused's professional ability and performance of his duties had been very satisfactory (R. 26-27). The affidavit of Lieutenant Colonel Robert W. Ball, Medical Corps, Sector Surgeon, was admitted in evidence, in which he states that accused is of good character and skilled in his profession, but very poor in business and administrative matters. He also expressed the opinion that accused would not intentionally do anything dishonest (Ex. J).

A money order receipt, number 426094, in the amount of $30, was introduced by the defense for the purpose of showing payment of the check given the Athens-Olympia Cafe (Add. Chg.) (R. 28-29). Date of actual payment thereof is not shown by the record.

The accused, having been advised of his rights, elected to be sworn and to testify in his own behalf. His testimony was substantially as follows:

He graduated from college with a B.S. degree, attended medical school for four years, had three years of training in hospitals, and practiced his profession for seven years before entering on active duty in the Army on 6 July 1942. He was first assigned to Camp Stewart, Georgia, and did his banking business with the Citizens and Southern National Bank, Savannah, Georgia (R. 30-31).

His mother had authority to check on his account and made use of the privilege once or twice (R. 31). He did not know when she had last checked on the account.

He had made no deposits in the above-mentioned bank during the past four months because "this condition came up". He had given no one authority to close his account and had paid all checks that he had given (R. 32). He had no intention to defraud anyone.

After receiving the letter from Brigadier General Hesketh, he straightened up his financial affairs to the best of his ability and made his reply, "saying to him that to the best of my knowledge it has been straightened out" (R. 34). He delivered the letter and indorsement to General Hesketh's Headquarters after office hours on the last day designated for compliance (2 November 1943).

When he gave his check to the Athens-Olympia Cafe he thought he had sufficient money on deposit to take care of it. He had wired a friend, M. E. Sear, who owed him approximately $178, to deposit the money to his credit in the bank upon which the check was drawn and had relied upon Sear's making the deposit. Accused had received no bank statement during the month (R. 34, 35, 36). His friend, from whom he had made other unsuccessful efforts previously to collect, had been out of town and had failed to make the deposit (R. 36).

5. The evidence clearly established that accused did make and utter four personal checks and received value for them, as alleged in Specifications 1 to 3, inclusive, of Charge II and in the Specification of the Additional Charge. It also just as conclusively shows that he did not have sufficient money on deposit with the bank upon which the checks were drawn, either at the time he gave the checks or at the time they were presented to the bank for payment, to pay any of them.

By suggesting that his mother had authority to check on his account and had drawn checks against it, accused would apparently have it believed that she had materially reduced his account without

his knowledge. There is no evidence to support any such defensive theory. But even if the record of trial warranted the assumption that accused delivered his check to the Rogers Peet Company on 16 August 1943, or even his check to A. Beckwith Company on 28 August 1943, in ignorance of the state of his bank account, the same charitable view could not be entertained with reference to his conduct in negotiating either his check to the G. Fox and Company on 30 October 1943 or the one to the Athens-Olympia Cafe on 15 November 1943. Both the Rogers Peet Company and the A. Beckwith Company had repeatedly written letters to accused before 30 October 1943, advising him that payment had been refused on the checks given them because of insufficient funds. Brigadier General Hesketh had written him under date of 27 October 1943, directing that he pay all checks by 1 November 1943 which had not been honored by his bank; and before 15 November 1943 (date of check to the Athens-Olympia Cafe), the credit manager of G. Fox and Company had not only written a letter to accused but had talked to him by telephone on 13 November 1943, advising him that payment had been refused on the check given that company because of insufficient funds.

The accused neither denied receiving the letters nor having the telephone conversation above mentioned, nor did he deny that in each instance of refusal by the bank to honor one of his checks he had notice of such fact shortly thereafter. He nevertheless failed to deposit any additional sums of money in the bank, and did not proceed with reasonable dispatch to make direct payment to the injured parties. In fact, he was so dilatory that his Commanding Officer saw fit to order him to make restitution; and even after receiving that written command, accused issued at least one, and probably two, more worthless checks, drawn on the same account. These facts are sufficient to warrant the belief that accused intended to defraud each of the persons or firms to whom the checks in question were issued.

Accused contended that before issuing his personal check to Athens-Olympia Cafe he had wired a friend, M. E. Sear, who owed him approximately $178, to deposit the money to his credit in the Citizens and Southern National Bank, Savannah, Georgia, and that the check to the cafe was issued in reliance on Sear's having made the deposit. However, accused had not received any notice that Sear had complied with his request, and he had made no inquiry to ascertain that the money had been deposited. He had previously endeavored, without success, to collect the money claimed to be owing him by Sear; and this fact alone was sufficient warning that collection of the debt was uncertain.

However, if it were to be conceded that accused entertained no corrupt motive at the times he negotiated the various checks, he was nevertheless guilty of culpable negligence and indifference in

failing to ascertain and know, as was his duty, that he actually had funds in the bank with which they would be paid. Accused's conduct in negotiating the admittedly worthless checks was, under the circumstances, clearly of a nature to bring discredit upon the military service, and a violation of Article of War 96. C. M. 245507, Payne; C.M. 236069, Herdfelder.

The reply which accused made by indorsement to Brigadier General Hesketh's letter of 27 October 1943 was made by command of his superior officer and was an official statement. The evidence of record shows clearly that the statement was false, and leaves no doubt that accused knew it to be false when he made it.

Accused endeavored, while testifying in his own behalf, to construe his indorsement as a qualified representation that he had complied with the command contained in the letter. He testified that he had told General Hesketh that, "to the best of my knowledge, it has been straightened out". However, the indorsement, as written, does not say this. It was unequivocal and was susceptible of only one construction, which was that accused had, in fact, attended to the matters alluded to in the letter and had made the required payments.

Accused had been ordered to pay, not later than 1 November 1943, all checks given by him while on active duty which had not been honored by his bank. He did not procure the money order in favor of A. Beckwith Company until 5 November 1943, which was four days after the deadline fixed for payment by General Hesketh's letter. Furthermore, the check negotiated by accused to the Athens-Olympia Cafe on 30 October 1943 was also included within the spirit of the letter and indorsement; and it would be unreasonable to assume that it was not considered by accused when he wrote the indorsement. The evidence of record does not disclose that he had any reasonable grounds for believing that this check would be paid upon presentation to the bank; certainly none of which the bank had any knowledge.

The Board of Review is of the opinion that accused, in his indorsement to General Hesketh, knowingly made a false official statement, which constitutes a violation of Article of War 96.

6. War Department records show that accused is 40 years of age. He graduated from high school in 1918, attended Clemson University for one year, and then attended Mercer University for three years. He received his B.S. degree from the latter school in 1922. He attended the School of Medicine of the University of Georgia for four years and received an M.D. degree from that school in 1926. He has been licensed to practice medicine in both Georgia and Florida. He was engaged in the private practice of medicine at New Smyrna Beach, Florida, prior to being temporarily commissioned a captain in the

Medical Corps, Army of the United States, on 5 June 1942. He was ordered to active duty and entered upon active duty at Camp Stewart, Georgia, on 6 July 1942. He graduated from the 15th Officers' course at Medical Field Service School, Carlisle Barracks, Pennsylvania, on 29 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 and 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 A. Pounds, Judge Advocate.

Charles Lohm, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 - 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 Captain Harold E. Miller (0-1683862), 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. The reviewing authority in his action on the findings and sentence recommends clemency because he feels that this officer has salvage value to the service. Because of this recommendation I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 83, 25 Feb 1944)

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TITLE

DATE	BORROWER'S NAME	EXT.