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Volume XXXIII

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CM 250530 to CM 252107

(1944)

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CONTENTS OF VOLUME XXXIII

<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
250530	Gacioch	2 Mar 1944	1
250532	Lauderdale	10 Mar 1944	5
250573	Carney, Doherty, Stabb, Sislowski	5 May 1944	11
250662	McCarthy	14 Mar 1944	21
250668	Kistler, Hibner	5 May 1944	31
250772	Greenamyre	18 Apr 1944	37
250787	Eyen	26 Apr 1944	47
250805	Theobald	14 Mar 1944	55
250834	Peterson	10 Mar 1944	63
250863	Arnold	23 Mar 1944	69
250868	Anderson (Thomas)	22 Apr 1944	83
250912	Wells	15 May 1944	91
250939	McCaffree	17 Apr 1944	95
250963	Harju	24 Mar 1944	105
251007	Brossman	14 Mar 1944	111
251025	Woolfolk	14 Apr 1944	117
251055	Anderson (Richard)	28 Apr 1944	123
251075	Circle	15 Mar 1944	129
251104	Strader	1 Apr 1944	137
251162	Diehl	24 Mar 1944	143
251168	Reichey	14 Apr 1944	159
251208	Cox	6 May 1944	169
251225	Johnston	17 Apr 1944	177
251240	Green	20 Mar 1944	183
251280	Fiedler	22 Mar 1944	189
251311	Watts	2 May 1944	195
251341	French	10 May 1944	203
251348	Gaston	26 Apr 1944	211
251370	Elanton	4 May 1944	221
251409	Clark	24 Mar 1944	229
251423	Piasecki	21 Apr 1944	237
251451	Monaghan	29 Mar 1944	243
251459	Sprino	25 May 1944	253

<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
251490	Clift	25 May 1944	263
251541	Quilpa	24 Mar 1944	269
251542	Ball	13 Apr 1944	277
251546	Burleson	6 Apr 1944	287
251549	Allmeroth	29 Mar 1944	297
251554	Riley	27 Mar 1944	309
251969	Rogers	31 Mar 1944	317
252075	McPheron	1 May 1944	325
252086	Kissell	13 Apr 1944	331
252087	Fortney	15 May 1944	345
252103	Selevitz	23 May 1944	383
252107	Moen	17 Apr 1944	397

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

(1)

SPJGK
CM 250530

2 MAR 1944

UNITED STATES)

9TH ARMORED DIVISION

v.)

Trial by G.C.M., convened at
APO 259, Camp Polk, Louisiana,
11 February 1944. Dismissal.

First Lieutenant CHARLES
S. GACIOCH (O-1011173),
Infantry.)

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Charles S. Gacioch, 27th Armored Infantry Battalion, did, at Camp Ibis, California, on or about 13 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to 2nd Battalion Field Exchange, 52nd Armored Infantry Regiment, a certain check in words and figures as follows, to wit:

8 - 15 1943

First National Bank
Manhattan, Kansas

Pay to the
order of Cash \$ 10 #

no

Ten and $\frac{no}{100}$ ----- Dollars

Charles S. Gacioch
O-1011173 52nd. A.I.R.

and by means thereof, did fraudulently obtain from the 2nd Battalion Field Exchange the sum of ten and no/100 Dollars (\$10.00), he, the said First Lieutenant Charles S. Gacioch, then well knowing that he did not have and not intending

(2)

that he should have sufficient funds in the said First National Bank, Manhattan, Kansas, for the payment of said check.

NOTE: And 11 additional Specifications, identical in form with Specification 1, except as to dates, payees and amounts, which are, respectively, as follows:

	<u>Date of Check</u>	<u>Payee</u>	<u>Amount</u>
Specification 2:	28 August 1943	Cash	\$50.00
Specification 3:	6 October 1943	Cash	\$25.00
Specification 4:	8 October 1943	Cash	\$25.00
Specification 5:	9 October 1943	Cash	\$55.00
Specification 6:	9 October 1943	Cash	\$100.00
Specification 7:	9 October 1943	Cash	\$50.00
Specification 8:	9 October 1943	Cash	\$30.00
Specification 9:	9 October 1943	El Cortez Hotel	\$65.00
Specification 10:	10 October 1943	El Cortez Hotel	\$25.00
Specification 11:	10 October 1943	El Cortez Hotel	\$35.00
Specification 12:	11 October 1943	Cash	\$30.00

He pleaded guilty to and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

The prosecution introduced in evidence a stipulation between the accused, defense counsel, and the trial judge advocates, which set forth an itemized list of the checks described in the Specifications. The stipulation recited that -

"These checks were drawn by the accused and presented for payment with knowledge that there were no funds in the First National Bank of Manhattan, Manhattan, Kansas, on which checks drawn to cover any one of the checks * * *". (R.15, Ex.A)

Without objection the prosecution introduced in evidence the checks involved, authenticated copies of which are attached to the record of trial and marked "Exhibits B to K inclusive" (R.15).

4. The record discloses that the accused, after being advised of his rights in the premises to make an unsworn statement, to remain silent, or to testify on oath subject to cross-examination, elected to remain silent.

5. The accused by his plea of guilty admits all the allegations

contained in the Specifications. In view of the plea, and the stipulation, no comment is necessary except to say that the offenses here involved and of which accused has been found guilty are clearly violative of Article of War 95.

6. The accused is 29 years of age. War Department records indicate that he was graduated from high school in 1936. He enlisted in the Michigan National Guard 2 February 1939, which became federalized 15 October 1940. Upon the completion of the prescribed course of instruction in the Armored Force Officer Candidate School, Fort Knox, Kentucky, he was commissioned a temporary second lieutenant, Infantry, Army of the United States, and on 19 October 1942 he was promoted to the grade of first lieutenant.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

Lucy A. G. ... Judge Advocate.
Alvin ... Judge Advocate.
Robert R. Andrews Judge Advocate.

(4)

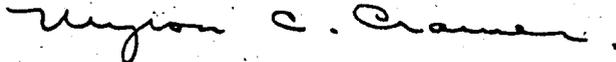
1st Ind.

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 First Lieutenant Charles S. Gacioch (O-1011173), 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 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. 191, 25 May 1944)

(5)

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

SPJGN
CM 250532

10 MAR 1944

UNITED STATES)

10TH ARMORED DIVISION

v.)

Trial by G.C.M., convened at
Camp Gordon, Georgia, 18
February 1944. Dismissal.

Second Lieutenant HARRY H.
LAUDERDALE JR. (0477197),
Field Artillery.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL 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 1: In that Second Lieutenant Harry H. Lauderdale Junior, Field Artillery, Headquarters, Third Detachment, Special Troops, Second Army, Camp Gordon, Georgia, formerly of Company "C", 626th Tank Destroyer Battalion, Camp Gordon, Georgia, did without proper leave, absent himself from his organization and duties at Camp Gordon, Georgia, from about 27 December 1943 to about 30 December 1943.

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

Specification 1: In that Second Lieutenant Harry H. Lauderdale Junior, Field Artillery, Headquarters, Third Detachment, Special Troops, Second Army, Camp Gordon, Georgia, formerly of Company "C", 626th Tank Destroyer Battalion, Camp Gordon, Georgia, did, at or near Augusta, Georgia, on or about 23 December 1943, with intent to deceive Mrs. J. Austin Armistead, a transportation agent of the Delta Air Lines, Daniel Field, Augusta, Georgia, and to obtain Second Lieutenant John B. Everingham's priority for travel on a civilian commercial air line, fraudulently represent himself to the said Mrs. Armistead to be the said Second Lieutenant Everingham which representation was known to the said Second Lieutenant Lauderdale to be untrue in that he was not the said Lieutenant Everingham.

(6)

Specification 2: In that Second Lieutenant Harry H. Lauderdale Junior, Field Artillery, Headquarters, Third Detachment, Special Troops, Second Army, Camp Gordon, Georgia, formerly of Company "C", 626th Tank Destroyer Battalion, Camp Gordon, Georgia, did, at or near Augusta, Georgia, on or about 23 December 1943, with intent to deceive Warrant Officer Junior Grade John W. Lawless, 626th Tank Destroyer Battalion, Camp Gordon, Georgia, officially state to the said Warrant Officer Lawless, that he, the said Lieutenant Lauderdale had authority to obtain a priority for travel on a civilian commercial air line, which statement was known by the said Lieutenant Lauderdale to be untrue in that he did not have such authority.

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

3. The evidence for the prosecution shows that the 626th Tank Destroyer Battalion was inactivated on 20 December 1943. All of its officers, including the accused, were attached unassigned to Headquarters, 3rd Detachment, Special Troops, Second Army, Camp Gordon, Georgia. They did not report immediately to their new station but remained at Battalion Headquarters to "clean up" its records (R. 7,21).

The accused obtained leave "VOCO" from Thursday night, 23 December 1943, to Sunday midnight, 26 December 1943. "Around the middle of the day" on 23 December 1943 he requested an air priority so that he might fly to Chicago. His application was made to Captain Clarence L. Heyde, the Battalion Adjutant. Colonel Krueger, the Battalion Commander, who had the sole authority to issue certificates of this character, was then at home because of illness but he instructed the Captain over the telephone to refuse to grant the priority (R. 7-10, 14-15).

An air priority had been issued on the same day to Lieutenant John B. Everingham who lived in Philadelphia. Three copies of the document were typed. Two were given to him and the third retained for his 201 file. This third copy disappeared (R. 8, 11, 17).

About 1:45 p.m., the accused went to the office of the Delta Air Lines in Augusta, Georgia. He approached Mrs. Marian B. Armistead, the ticket agent, requested Lieutenant Everingham's priority, and said that "he would like to change his reservation to Chicago". He gave as his reason the fact "that he had a family at both places and it didn't make any difference where he went". Mrs. Armistead addressed him as "Lt. Everingham" and told him "that planes were not landing in Philadelphia and that he would have had to fly via Chicago anyway". She accordingly changed the reservation and obtained his phone number so that she "could call him back" (R. 17, 19-20).

Lieutenant Everingham around 5:30 p.m. came to the office of the Delta Air Lines to inquire about his reservation. After identifying himself, he was informed that he was scheduled to fly to Chicago. He "was very much surprised" and left to "get the matter straightened out". Some time thereafter the accused called Mrs. Armistead, stated that he was not Lieutenant Everingham, and apologized for the trouble he had caused (R. 18-19).

At about 7:00 p.m. the accused telephoned Warrant Officer John W. Lawless, the Battalion personnel officer, who was authorized in case of emergency to sign the Adjutant's name to plane priorities. According to Mr. Lawless, the accused requested a priority certificate and

"told me that he had the authority and to just copy down what he gave me and to have it typed up. I asked him if he had approval for it and he said that he did. So I copied it for him. He said something to the effect that he was down town at the Town Tavern and he asked if I was going to town and I told him that I was and that I would be at the Richmond Hotel and that I would see him there."

Although a certificate was forthwith prepared by Mr. Lawless, it was lost by him on the way down town. He had intended to obtain Heyde's signature to it, but the Captain could not be located. Upon learning that Mr. Lawless did not have the certificate with him, the accused urged that "it was important that he get home". Mr. Lawless did not inquire further into the purpose of the trip but, relying upon the representation that the flight was necessary and that approval had been obtained, caused another certificate to be typed to which he signed Captain Heyde's name (R. 20-27).

The accused presented the document at the office of the Delta Air Lines that evening and was placed on a Chicago-bound plane the following day. Although his leave expired on midnight of 26 December 1943, he did not return until 1600 on 29 December 1943. During the period of his absence his proper status was "duty in the Battalion Headquarters with Colonel Krueger" (R. 8-9, 12-13; P. Exs. "A", "B").

4. After his rights as a witness had been fully explained to him, the accused elected to remain silent. The only evidence offered on his behalf consisted of five exhibits. The first was a certificate signed by Mr. Lawless on 31 December 1943, some six weeks before the date of the trial. It read as follows:

"I certify that I have Capt C. L. Heyde's authority to sign his name to official papers.

"On 23 December 1943 Lt Lauderdale presented to me a certificate for priority for civilian airplane travel and asked me to sign it with Capt C. L. Heyde's name.

(8)

"I asked Lt Lauderdale if he had been given authority for the certificate by either his company commander or the battalion commander. To this I am certain that Lt Lauderdale replied that he did have such permission. I then signed the certificate with Capt C. L. Heyde's name" (D. Ex. "1").

The other four exhibits are telegrams. The first, which was sent by the accused from Chicago on 26 December 1943 to the Commanding Officer of the 626th Tank Destroyer Battalion, stated that "ILLNESS WILL DELAY RETURN REQUEST FIVE DAY EXTENSION." Colonel Krueger in a telegram bearing the same date, replied, "HAVE NO AUTHORITY TO GRANT EXTENSION RETURN AT ONCE" (D. Exs. 2-3).

The following day the accused sent the third telegram. It was addressed to the Commanding Officer of "Headquarters Third Detachment Special Troop Second Army" and was in the following words: "LEAVE EXTENSION CANNOT BE GRANTED THROUGH 626 TD BATTALION COULD FIVE DAY EXTENSION BE GRANTED THROUGH YOUR DETACHMENT ILLNESS PREVENTS IMMEDIATE RETURN." The answer which was signed by Colonel Krueger said "REQUEST FOR EXTENSION VIA 3RD DET. REFUSED YOU ARE NOW ABSENT WITHOUT OFFICIAL LEAVE RETURN IMMEDIATELY" (D. Exs. 4-5).

5. The Specification of Charge I alleges that the accused "did without proper leave, absent himself from his organization and duties at Camp Gordon, Georgia, from about 27 December 1943 to about 30 December 1943." This offense is laid under Article of War 61. Specification 1 of Charge II alleges that the accused did on or about 23 December 1943, with intent to deceive a transportation agent of the Delta Air Lines at Augusta, Georgia, and to obtain Second Lieutenant John B. Everingham's air travel priority "fraudulently represent himself to the said [agent] to be the said Second Lieutenant Everingham which representation was known to the said [accused] to be untrue * * *." Specification 2 of Charge II alleges that the accused did on or about 23 December 1943 with intent to deceive Warrant Officer John W. Lawless officially state to the said Warrant Officer that he, the accused, "had authority to obtain a priority for travel on a civilian commercial air line, which statement was known by [him] to be untrue * * *." Both of the acts complained of under Charge II are set forth as violations of Article of War 96.

The text of Article of War 61 "is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there" (underscoring supplied). The proof required where "the accused is charged with absenting himself without proper leave" is that he "absented himself from his command, guard, quarters, 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). All of these elements of the offense are clearly shown by the record. The accused was given leave VOCO for three days. He willfully, without authority, and without extenuating cause absented himself from his station for an additional three days. It is true that in his telegram requesting an extension he represented that "illness"

would delay his return, but there is nothing in the record to show that the illness alleged had created an emergency or was of such a serious nature as to warrant an extension.

In posing as Lieutenant Everingham for the purpose of obtaining his plane priority and subsequently in falsely stating to Warrant Officer Lawless that the issuance of a certificate of priority had been approved, the accused deliberately practiced fraud and deceit upon his brother officers. His natural desire to spend the Christmas holidays with his family is understandable and can readily be sympathized with, but the methods employed by him to that end were unworthy of any one who wears the uniform. They reveal a grasping and unscrupulous character patently inconsistent with the high standards of conduct required of a soldier. His lies to Mrs. Armistead brought discredit upon the military service, and his misrepresentations to Warrant Officer Lawless were prejudicial to good order and military discipline.

6. The accused is about 26 years of age. The records of the War Department show that he was commissioned a Second Lieutenant on 24 June 1942, and that since that 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 legally sufficient to support the findings and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of either Article of War 61 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

William A. Bramwell, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

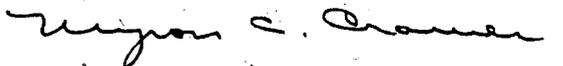
1st Ind.

War Department, J.A.G.O., 25 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 Harry H. Lauderdale Jr. (O-477197), 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,
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. 194, 25 May 1944)

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

(11)

SPJGV
CM 250573

5 MAY 1944

UNITED STATES

v.

Privates JOSEPH F. CARNEY
(31262425), NICHOLAS A.
DOHERTY (37610565), ROBERT
J. STABB (33678135), JOHN
F. SISLOWSKI (33273685),
all of Company H, 264th
Infantry.

66TH INFANTRY DIVISION

Trial by G.C.M., convened at
Camp Joseph T. Robinson,
Arkansas, 31 January 1944.;
Carney, Doherty and Stabb:
Dishonorable discharge (suspended),
and confinement for six (6) months.
All: Post Stockade, Camp Joseph T.
Robinson, Arkansas. Sislowski:
Dishonorable discharge and confine-
ment for ten (10) years. Disciplinary
Barracks.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

1. The record of trial in the case of the above named accused has been examined in the Military Justice Division of the Office of The Judge Advocate General as to Privates Joseph F. Carney, Nicholas A. Doherty and Robert J. Stabb, pursuant to paragraph five of Article of War 50 $\frac{1}{2}$, and there found legally sufficient to support the findings and sentence as to Privates Nicholas A. Doherty and Robert J. Stabb; but legally insufficient to support the findings and sentence as to Private Joseph F. Carney. The record has now been examined by the Board of Review as to Private Joseph F. Carney pursuant to paragraph five of Article of War 50 $\frac{1}{2}$, and as to Private John F. Sislowski pursuant to paragraph 3 of Article of War 50 $\frac{1}{2}$, and the Board submits this, its opinion, to The Judge Advocate General.

2. The record of trial has been held by the Board of Review to be legally sufficient to support the findings and sentence as to Private John F. Sislowski. Therefore, this opinion contains no discussion as to this accused except as it may bear upon the case of Private Joseph F. Carney.

3. Private Carney was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 64th Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

(12)

CHARGE II: Violation of the 89th Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

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

Specification 1: In that Private Joseph F. Carney, Private Nicholas A. Doherty, and Private, then Corporal, Robert J. Stabb, all of Company H, 264th Infantry, did, at Little Rock, Arkansas, on or about 9 January 1944, wrongfully fail to restrain Private John F. Sislowski, Company H, 264th Infantry, from offering violence against Second Lieutenant Robert S. Hall, 266th Engineer Combat Battalion.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Specification 1, Charge I and Charge I; Specification 1, Charge II and Charge II; and Specification 2, Charge III, but guilty of Specification 1, Charge III and Charge III. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four years. The reviewing authority approved the sentence but suspended the dishonorable discharge and so much of the confinement at hard labor and total forfeitures as exceeded six months; ordered the sentence executed and designated the Post Stockade, Camp Joseph T. Robinson, Arkansas, as the place of confinement.

4. The pertinent evidence offered by the prosecution in support of Specification 1 of Charge III is as follows:

On the night of 9 January 1944, around 2200 hours, Second Lieutenant Robert S. Hall, 266th Engineer Combat Battalion, Camp Joseph T. Robinson, Arkansas, and his wife were passengers on a crowded street car in Little Rock, Arkansas. Carney, accompanied by Sislowski, Doherty and Stabb were also passengers on the trolley (R. 7, 8, 38, 95). Carney and his companions were in the forward part of the trolley while the lieutenant and his wife were seated approximately in the middle of the car. The lieutenant's attention was directed to the above enlisted men when two of them, Sislowski and Doherty, began to dance a jig in the front of the trolley (R. 8, 9). They had a bottle from which both took drinks (R. 9, 39, 41). As the motorman of the trolley requested them to quiet down, the lieutenant stepped forward and ordered them to be seated and to put the bottle away. They did so but Sislowski, apparently in a belligerent mood, began to take off his overcoat and blouse. Carney, who had been seated and had caused

no disturbance, persuaded Sislowski to resume his seat and quieted him (R. 9, 22, 26). Sislowski, Doherty and Stabb were intoxicated but Carney was not (R. 29, 30). The group remained quiet while the trolley proceeded approximately a mile and a half to the lieutenant's destination (R. 10). It took about 10 or 15 minutes for the car to travel that distance (R. 56). When the lieutenant descended from the trolley, Sislowski, followed by Carney and the other two enlisted men, also left the car and just as the lieutenant reached the curb, Sislowski accosted him, grasped his arm, planted himself in front of the lieutenant, and addressed him, saying, "Hey Looey what's the idea of embarrassing me in front of those people", and then demanded an apology (R. 44). The lieutenant apologized by explaining that he had only done his duty (R. 12, 13, 14, 44). Sislowski indicated his desire to fight with the lieutenant, "wanted to go up to the woods to fight", but the lieutenant refused and requested Sislowski to leave (R. 14, 16, 45). The lieutenant asked the group several times for their names and organizations but received no reply (R. 28, 48, 96). He asked the question generally, did not ask each man individually and could not say each man knew he was being called on for his name (R. 97). Carney stepped between Sislowski and the lieutenant in an effort to prevent trouble (R. 16, 22, 51). He grasped Sislowski's arm and tried to push him away from his position in front of the lieutenant (R. 16, 22, 51-53). Sislowski then gave Carney a shove, spinning him to the left rear of the lieutenant (R. 16, 53). As the lieutenant glanced to see what had happened to Carney, Sislowski put his foot in back of the lieutenant's legs, placed his hands on his shoulders and pushed him to the pavement. As the lieutenant struck the ground, Sislowski fell crosswise on top of him (R. 16, 17, 25, 26, 31, 45, 46, 50, 54). He did not jump on the lieutenant (R. 31, 32, 54). The latter's head struck the pavement and he received a gash behind his left ear which bled profusely (R. 17, 47, 48). About five or six minutes had elapsed since the lieutenant had left the trolley (R. 52). Carney, with the assistance of Doherty, pulled Sislowski, who did not resist, from the lieutenant and assisted the latter to his feet (R. 18, 53). Carney asked the lieutenant if he was all right. Sislowski then repeated his desire to fight but immediately his attitude changed, he apologized and wanted to shake hands (R. 18, 19, 48). Again the lieutenant asked the men for their names and organizations and the information was given to him (R. 96). It was the lieutenant's opinion that Carney did not do all he could to prevent the attack. The lieutenant opined that he "could have done a little more" and stopped Sislowski by using "physical force" (R. 35).

5. Carney, after an explanation of his rights, elected to take the stand and testify under oath in his own behalf. He testified that he, Sislowski, Doherty and Stabb had been drinking on the evening in question, that he had consumed about eight bottles of beer and some gin and rum, and

that the four of them had boarded the trolley to go to the Terminal Hotel for the night (R. 79, 80). After Lieutenant Hall had interrupted the hilarious conduct of Sislowski and Doherty on the trolley car, and Sislowski had seated himself, Carney "made him be quiet, told him to keep quiet" (R. 80). Sislowski, however, had become angry. Carney left the trolley when the lieutenant did because he saw Sislowski get off, knew he was mad, figured he would get into an altercation, and "didn't want to see him get in trouble with an officer" (R. 81). After Sislowski had accosted the lieutenant and while he was insisting that the lieutenant go to the nearby woods to fight, Carney stepped between the two and grabbed hold of Sislowski with both hands. The pavement had ice upon it and was so slippery that Carney had difficulty holding Sislowski with both hands and keeping his own balance (R. 82, 89). Sislowski gave Carney a shove, spinning him around, and when Carney recovered he saw the lieutenant on the ground with Sislowski on top of him (R. 81, 82). Carney pulled Sislowski from the lieutenant, helped him to his feet, and asked if he were hurt (R. 82). Carney didn't strike Sislowski because, he stated, "I didn't think I could fight him" (R. 89). The assault occurred at a point about 20 to 30 blocks beyond the car stop for the Terminal Hotel where Carney and his companions were attempting to get accommodations. Carney explained his failure to leave the street car at the Terminal Hotel stop by saying, "It slipped my mind sir, just passed it by, that is all. I was drowsy. I didn't quite know where I was. I had an idea where to get off and just passed it by when this incident took place" (R. 87).

6. It is the opinion of the Board of Review that the record of trial is legally insufficient to support the findings that Carney was guilty of wrongfully failing to restrain Sislowski from offering violence against Lieutenant Hall.

The offer of violence was made when Sislowski grasped the lieutenant's arm, invited him to fight and suggested they go to a nearby woods to do so, and thereafter pushed the lieutenant to the pavement. All this occurred within the space of five or six minutes. There is no evidence that Carney abetted Sislowski in this activity. On the contrary, he stepped between Sislowski and the lieutenant, tried to prevent trouble, grasped Sislowski's arm and had been spun aside at the very instant Sislowski set upon the lieutenant. The lieutenant opined that Carney "could have done a little more" and could have stopped Sislowski by "using physical force" (R. 35). Carney stated he didn't strike Sislowski because "I didn't think I could fight him". There is no evidence in the record as to the relative size or strength of Carney and Sislowski.

The offense charged is an offense under that provision of Article of War 96 relating to "neglects to the prejudice of good order and military discipline". The term "neglects" has been defined as

including "the improperly executing an order given, the not taking proper precaution, or doing the best according to the ability and judgment of the party" (Winthrop's Military Law and Precedents, p. 722, n. 74). The construction given to Article of War 67, failure to use one's "utmost endeavor" to suppress a mutiny or sedition, similarly takes into account the abilities of the individual. "The term 'utmost endeavor,' as employed in the Article is to be construed as having a relative bearing, the word 'utmost' thus meaning the utmost that may properly be called for by the circumstances of the situation, and in view of the rank, command and abilities of the individual" (Winthrop's Military Law and Precedents, p. 586).

Thus, the instant question is whether Carney did his best, according to his ability and judgment, to restrain Sislowski from offering violence to the lieutenant. Up to the very moment when Sislowski pushed Carney aside and tripped the lieutenant to the pavement, Sislowski had not threatened imminent violence to the lieutenant. He had been insisting that the lieutenant accompany him to a nearby woods to engage in a fight. Thus, it was not unreasonable for Carney to assume he could avert all violence if he could push or lead Sislowski away from the scene. This he endeavored to do. It cannot be held, on this record, that Carney's judgment as to the course of conduct to be pursued by him to prevent violence was unreasonable.

The fact that the accused Carney and his companions rode many blocks past their trolley stop does not alter the foregoing conclusion. It might be inferred that this action indicated that the four accused had conspired to follow the lieutenant and set upon him. However, the court by its finding of not guilty as to Specification 1 of Charge I expressly determined that they had not so conspired. Further, even if it be concluded that Carney realized Sislowski's intentions in remaining on the trolley after their stop had been reached and tacitly consented thereto, nevertheless, at the time the offer of violence was made Carney's actions indicated that such consent, if it ever existed, had been withdrawn. His guilt or innocence of the offense charged in Specification 1 of Charge III is to be determined by his actions at the time violence was offered toward the lieutenant.

The record of trial is legally insufficient to support the conclusion that Carney failed to do his best, according to his ability and judgment, to restrain Sislowski from offering the alleged violence.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient, in whole or in part, to support the findings and sentence as to accused Carney.

Thomas N. Jaffy, Judge Advocate.

Harold M. Kuder, Judge Advocate.

Robert B. Barwood, Judge Advocate.

SPJGV
CM 250573

1st Ind.

War Department, J.A.G.O., 19 MAY 1944 To the Commanding General,
66th Infantry Division, Camp Rucker, Alabama.

1. In the case of Privates Joseph F. Carney (31262425), Nicholas A. Doherty (37610565), Robert J. Stabb (33678135), and John F. Sislowski (33273685), all of Company H, 264th Infantry, attention is invited to the opinion of The Judge Advocate General's Office that the record of trial is legally sufficient to support the sentences as to Privates Nicholas A. Doherty, Robert J. Stabb and John F. Sislowski, and legally insufficient to support the sentence as to Private Joseph F. Carney. I concur in this opinion.

2. It appears from an examination of the record of trial that your action as reviewing authority has not been promulgated in general court-martial orders as to any of the accused. Therefore, it will not be necessary that the opinion of the Board of Review holding the record of trial legally insufficient as to Private Joseph F. Carney be forwarded to the Secretary of War under the provisions of Article of War 50½ if a new action disapproving the findings and sentence as to accused Carney is substituted by you for the one now appended to the record. A suggested form of action appears in paragraph 5 below.

3. The dishonorable discharge was suspended by you as to all of the accused with the exception of Private John F. Sislowski. Inasmuch as the dishonorable discharge was not suspended as to accused Sislowski, the order directing the execution with respect to this accused was withheld pursuant to Article of War 50½. However, it is believed that if Lieutenant Hall had maintained throughout the firm and proper attitude toward accused that he had shown on the trolley and had not temporized by offering Sislowski a halfhearted apology after leaving the car, the violence may have been prevented. In view of this fact and that this accused was drunk at the time of his assault upon the superior officer, that the assault was not of

22 MAY 1944

a vicious nature, and that the accused has no prior convictions, it is recommended that the confinement be reduced to five years, that the dishonorable discharge be suspended until the soldier's release from confinement, and that a rehabilitation center be designated as the place of confinement. Such a sentence may be executed by you without a formal holding by the Board of Review under the provisions of Article of War 50½.

4. Inasmuch as the accused Doherty and Stabb will have served approximately four months of their sentences by the time this communication reaches you it is believed that you are probably in a position to determine whether their conduct warrants remission rather than suspension of that part of the sentence which provides for confinement in excess of six months. Therefore, the proposed action has been drawn so as to accomplish a remission of that part of the sentence providing for confinement in excess of six months rather than suspension thereof.

5. If you concur in the foregoing, it is recommended that you substitute a new action for that already issued in this case, as follows:

In the foregoing case of Privates Joseph F. Carney (31262425), Nicholas A. Doherty (37610565), Robert J. Stabb (33678135) and John F. Sislowski (33273685), all of Company H, 264th Infantry, the action of the reviewing authority is as follows:

As to Private Joseph F. Carney: The findings and sentence are disapproved.

As to Private Nicholas A. Doherty: The sentence is approved and will be duly executed but the period of confinement is reduced to six months and that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. The Post Stockade, Camp Joseph T. Robinson, is designated as the place of confinement.

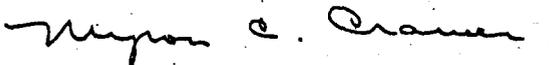
As to Private, then Corporal, Robert J. Stabb: The sentence is approved and will be duly executed but the period of confinement is reduced to six months and that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. The Post Stockade, Camp Joseph T. Robinson, is designated as the place of confinement.

As to Private John F. Sislowski: The sentence is approved and will be duly executed but the period of confinement is reduced to five years and the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. The Rehabilitation Center, Camp Bowie, Texas, is designated as the place of confinement.

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

(CM 250573).

1 Incl.
Record of trial.



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



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

(21)

SPJGQ
CM 250662

14 MAR 1944

UNITED STATES)

12TH ARMORED DIVISION

v.)

Trial by G.C.M., convened at
Camp Berkeley, Texas, 16
February 1944. Dismissal.

Second Lieutenant JOHN J.
MCCARTHY (O-1178243),
493rd Armored Field Artil-
lery Battalion.)

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 96th Article of War.

Specification: In that Second Lieutenant John J. McCarthy, Four Hundred Ninety Third Armored Field Artillery Battalion, Camp Berkeley, Texas, was, at Camp Berkeley, Texas, on or about 29 January 1944, drunk and disorderly in uniform in a public place, to wit, the Artillery Non-commissioned Officer's Club.

He pleaded not guilty to and was found guilty of the Charge and Specification. 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, briefly summarized, is as follows:

The noncommissioned officers of the Artillery units of the 12th Armored Division at Camp Berkeley, Texas, operated what was known as the Noncommissioned Officers Club of the Artillery Command (R. 7, 13). Membership in the club was restricted to the top three grades of noncommissioned officers of the various Artillery battalions (R. 13, 20). While

(22)

neither the constitution nor by laws, rules or regulations specifically forbade admission of commissioned officers to the club premises (R. 20, 57) it did limit such admission to club members and their guests and it was generally understood that commissioned officers were not to be admitted except on special occasions and then only on invitation (R. 11, 16, 20, 22, 32, 40, 57, 59).

On the night of 29-30 January 1944 a dance was given by the non-commissioned officers at their club quarters in which club members, their wives, sweethearts and guests participated (R. 13).

On the same night Second Lieutenant John W. Becker, 493rd Field Artillery Battalion, and the accused, also a second lieutenant in the same battalion, were together, at Camp Berkeley, from about 2 o'clock p.m. until midnight (R. 35). In the evening they had gone to the Field Artillery Officers Club where Lieutenant Becker played bridge while the accused moved about talking to other members who were present (R. 36).

From 2 o'clock p.m. until 9:30 p.m. the two officers had been together constantly and neither had any liquor to drink. After 9:30 o'clock p.m. they each drank two Bourbon-coca cola highballs while together but although Lieutenant Becker drank no more he could not say whether the accused had done any other drinking as he went about the club house (R. 36, 38). The accused had left the club during the evening but returned later (R. 36).

At about a quarter to twelve p.m. the two companions left the officers club together and went to the Noncommissioned Officers Club for the purpose of congratulating Sergeant Foster on his approaching marriage (R. 37). When they arrived at the club house a staff sergeant met them at the door and informed them that officers were not allowed there and notwithstanding the mission on which they had come they were told they could not enter. Lieutenant Becker testified that he knew, because of two years of service in the Army, that officers should not associate with enlisted men socially and he did not go into the club house. Sergeant Foster and his fiancée then came outside and spoke to Lieutenant Becker, and the accused but before Lieutenant Becker had finished chatting with them the accused disappeared (R. 37, 39, 41).

According to the officer of the day and five sergeants the accused was inside of the Noncommissioned Officers Club on the night in question. Staff Sergeant Basel, Headquarters Battery, 494th Armored Field Artillery Battalion, saw him there on two occasions; first, when the accused came in the main door of the club house at 9 o'clock, p.m. at which time he was requested to leave, which he did (R. 7); and at 10 o'clock, when, after a discussion with Sergeants Taylor and Davis in the barroom, he was ushered out of the club house by the battalion duty officer, (officer of the day) who had been summoned for that purpose (R. 8, 10).

First Sergeant John W. Thompson, 493rd Armored Field Artillery Battalion, saw accused come in the door of the club house at 10 o'clock p.m. and leave shortly thereafter. At about midnight, however, he saw him again, this time in the barroom of the club house, engaged in an argument with Lieutenant Chandler (officer of the day) and Sergeant Hand (R. 21, 22).

Master Sergeant Alfred E. Tyler, Headquarters Battery, 494th Armored Field Artillery Battalion saw the accused at about 10:30 or 11 o'clock p.m. as he entered the front door of the club house with other officers who left as soon as Sergeant Davis requested them to do so. The accused, however, remained and walked over to a table and conversed with Sergeant Foster after which he left, going out the front door with Sergeant Jones. At about 1 or 1:30 o'clock a.m. he saw the accused in the club barroom with a group of noncommissioned officers who were asking him to leave. Sergeant Tyler then stepped in and told the accused to leave and to go "through the side door immediately, rather than go through the club room and disturb the guests again". The accused became argumentative and asked Sergeant Tyler who gave him authority to order him out. To this the Sergeant replied that he "wasn't ordering the Lieutenant out" but was just "requesting that he leave". The accused finally told Tyler "Sergeant, you have got me tonight, but I'll get you the first thing Monday morning". Thereafter the duty officer, Lieutenant Chandler, and the accused walked out of the door. (R. 27-30).

Technical Sergeant Robert E. Hand, 494rd Armored Field Artillery Battalion, went into the barroom of the club at about 1 o'clock a.m. and found the accused there. Several noncommissioned officers were asking the accused to leave and Sergeant Hand, as a member of the club house committee, directly requested him to do so. By that time the officer of the day came in and motioned to the accused who then left with the officer of the day (R. 13, 14).

By stipulation it was agreed that Staff Sergeant John Davis, Headquarters Battery, 494th Armored Field Artillery Battalion would, if present in court, testify that he saw the accused twice on the evening of 29-30 January 1944 between 10 p.m. and 1:30 a.m. When the accused first came into the club Sergeant Davis and Sergeant Manson, vice-president of the club requested him to leave and Sergeant Jones then escorted him to the door. About an hour or two later, Sergeant Davis met Lieutenant Becker and the accused coming up the steps to the front door. He spoke to Lieutenant Becker advising him that officers were not allowed in the club house. Lieutenant Becker then asked for Sergeant Foster who left the club and went out to speak with him. Upon returning inside of the club Sergeant Davis heard a commotion outside and leaving by the side door he again went around to the front where he found the accused trying to force open the front door while someone was holding it on the inside. Thereupon Sergeant Davis and Sergeant Basel went to get the officer of the day, who came to the club house and then left with the accused (R. 6; Ex. A).

(24)

First Lieutenant Albert M. Chandler, 494th Armored Field Artillery Battalion was, on 29 January 1944 duty officer of the battalion. As such he went, upon request, to the noncommissioned officers club at 1:30 a.m. 30 January 1944 where he found the accused in the barroom engaged in an argument with a group of noncommissioned officers who were trying to get him to leave. When two of the sergeants asked him to escort the accused from the club room he "reached through the group" and asked the accused to leave with him. When the accused gave no indication of obeying, the officer of the day again asked him to leave. Whereupon he went along with Lieutenant Chandler, but, as he was going through the door he stopped and insisted upon returning to apologize to the sergeants, saying: "I am trying to apologize to these men for what has been going on here. If they think they can shit me, they can't". At this point two sergeants approached and one said: "We aren't allowed in the Officers Club, I don't see why he should be in here", and then after more discussion, Lieutenant Chandler and the accused left and proceeded to the Officers Club.

There is considerable difference of opinion in the testimony regarding the character of the conversations, discussions and arguments between the accused and the noncommissioned officers and as to the accused's sobriety at the time.

Staff Sergeant Basel stated that the discussions were not loud and he had not heard anything the accused had said while in the club rooms. (R. 9, 10). He could not say "if the man was drinking or not" or whether he was intoxicated (R. 8, 9). He smelled no liquor on his breath but did not think his actions were normal (R. 10).

First Sergeant Thompson also failed to hear any of the accused's conversation because he was talking in "a moderate voice" and although he could not detect the odor of liquor on the accused's breath he "would say that he was drinking" but not that he was drunk (R. 22, 24).

Technical Sergeant Hand said "there was quite a bit of confusion" and when he asked the accused to leave he refused to do so (R. 15) and the fact that he had come into the club and remained there together with the statement which the accused made to Sergeant Tyler to the effect that "on Monday morning he would fix him" made him think the accused "had been drinking" (R. 16).

Master Sergeant Tyler testified that the conversation between the accused and the sergeants was "in moderate tones" (R. 28) and that they were not "arguments" but "discussing the situation". The accused, however, "appeared drunk" and insisted upon staying in the club (R. 29) and spoke in an insolent manner (R. 32), at one time threatening Sergeant Tyler without any provocation (R. 31).

Staff Sergeant Davis was of the opinion that the accused had been drinking because "had he been entirely sober", he did not believe "he would have done what he did" (Ex. A).

Lieutenant Chandler, however, said that the conversation between the accused and the sergeants "was being carried on in a loud tone of voice" (R. 44) and at times the accused seemed belligerent in his attitude (R. 44). He did not believe the accused was in full possession of his faculties and in the light of the offensive language the accused had used (R. 48) and his "weaving" to and fro as they left the club house (R. 45) Lieutenant Chandler was of the opinion that he had been drinking (R. 45, 48, 49). He had officially reported to the battalion commander "that Lieutenant McCarthy was acting in a manner unbecoming an officer in the N.C.O. Club and that I was requested to remove him from there, by two noncommissioned officers" (R. 51).

Accused was, at the time of the events in question, in the uniform of an officer (R. 43).

4. The accused, having been informed of his rights, elected to remain silent (R. 60).

Staff Sergeant Dan Foster, Battery A, 493rd Armored Field Artillery Battalion, a witness for the defense, testified that he and the girl to whom he was to be married within a few days were present at the non-commissioned officers club house on the night of 29 January 1944. He, his fiancée and the accused had each resided in McKeesport, Pennsylvania and had been acquainted with one another for many years (R. 54, 56). During the evening the accused came into the club rooms and congratulated him on his approaching marriage (R. 54). In his opinion the accused was sober when he saw him between 11 and 11:30 p.m. but he could not say whether he had been drinking or not (R. 55). The accused disappeared after congratulating Sergeant Foster who then went out of doors to speak with Lieutenant Becker (R. 56).

Staff Sergeant William D. Jones, Medical Detachment, 493rd Armored Field Artillery Battalion, testified that he was a member of the Board of Governors and of the House Committee of the Noncommissioned Officers Club and that there was no rule to the effect that officers would not enter the club house (R. 57). He had, however, only recently been elected to the Board of Governors and was not present when the policy of allowing officers to enter the club house was discussed (R. 58). He knew of only one occasion, excepting the opening night, when an officer had come into the club and that was on a Saturday night at a dance, prior to the one in question. The matter had caused discussion at the meeting of the Board of Governors and he agreed that the noncommissioned officers were justified in excluding officers from the club in the future (R. 59).

Captain William F. Murray, Commanding Officer of the 493rd Armored Field Artillery Battalion and individual counsel for the accused, was sworn as a witness for the defense. He tendered in evidence what purported to be "Lieutenant McCarthy's grades on two subjects". The instrument was admitted as "accused's Exhibit No. 1" (R. 61) but is not attached to the record of trial as an exhibit for the reason, announced by the President, that "on the document presented by the defendant, the court will

take judicial notice, that the accused was Instructor in Grenades, and that a very satisfactory rating was given to the Battery in this. He was further instructor in Thompson Sub-Machine Gun, and the Battery received a grade of 'Excellent' on that" (R. 63, 64). Upon cross-examination Captain Murray stated that he saw the accused at about 10:30 p.m. on 29 January 1944. He was of the opinion that the accused "had had a drink. I don't know how many. He was not intoxicated" (R. 62). Accused then reported to him that he had gone to the Noncommissioned Officers Club to congratulate one of his best friends who was getting married and that he had been insulted. Captain Murray then informed him that "it wouldn't do any good to go back to apologize" and while the advice was not in the nature of an order he did not think the accused would return again to the club (R. 63).

5. The Specification of the Charge upon which the accused was tried alleges that he was drunk and disorderly in uniform, in a public place, to wit, the Artillery Noncommissioned Officers Club at Camp Berkeley, Texas.

The elements of the offense thus charged are that (1) the accused was, on the date alleged, in the place specified; (2) the locale was a public place; (3) he was in uniform at the time; and (4) while there he was drunk and disorderly.

The evidence clearly shows, and it is nowhere contradicted, that the accused was in the Noncommissioned Officers Club of the Artillery Command at Camp Berkeley, Texas on at least two and probably more occasions on the night of 29-30 January 1944 and that he was in uniform during all of the time covered by the testimony in the record of trial.

Whether he was or was not drunk was purely a matter of conjecture on the part of those who were called to witness his lack of sobriety as no one undertook to describe any distinct, physical evidence from which his drunkenness could be inferred. Only one witness said that his appearance indicated a departure from normal. Lieutenant Chandler said that in leaving the club house the accused "made a more weaving course than was normal". Although an effort was made to elicit testimony as to the appearance of the accused's face, eyes and clothing and as to his method of speech, manner of walking and odor of his breath, nothing was shown, except that he talked "kind of fast".

There is direct evidence that the accused had two bourbon and coca-cola highballs in company with Lieutenant Becker after 9:30 p.m. on the night in question. Whether he drank any more during his absence from the officers club is not known since the accused remained silent at the trial and no other witnesses saw him drink; nor was it shown how generously the bourbon was mixed with the coca-cola in the libations which the two officers admittedly drank together and much could depend on those proportions. It is equally uncertain, because of lack of testimony on the matter, whether the accused was customarily able to drink liquor in such fashion without showing its effect. In the absence of any plausible explanation to the contrary, one who does indulge in drinking intoxicating liquor and thereafter conducts himself in an abnormal manner must assume the consequence of having such abnormality attributed to the effects of liquor.

Almost all of the numerous witnesses who saw the accused on the night in question agreed that he appeared to have been drinking. It is the rule that, on an issue of drunkenness admissible testimony is not confined to a description of the conduct and demeanor of the accused and the testimony of a witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion (par. 145, M.C.M., 1928).

It was, therefore, proper for the court to admit, as competent evidence, statements of witnesses which expressed merely their conclusions on the issue of the accused's sobriety and to weigh them in connection with all other testimony in determining the matter.

It is apparent that those who were of the opinion that the accused had been drinking but who were reluctant to directly testify that he was, in fact drunk, founded their judgment upon other conduct and demeanor of his which were possibly more indicative of his condition than the appearance of his eyes, face and clothes or the manner of his speech and walk. Thus, there was a fair consensus that if he had not been drinking he would not have presumed to go, repeatedly and against protests, into a place where he was not welcome and where he had no right to be. This, of itself, furnished to them, a reasonable and fair inference for their conclusion in the light of all other circumstances.

However, other facts and circumstances reasonably support the inference that the accused was drunk on the night in question. How often the accused went into the Noncommissioned Officers Club and the time of his trespasses therein cannot be definitely determined; but regardless of the imperfectly coordinated testimony of the many witnesses it seems to be fairly established by direct testimony and logical deductions that the accused left his companion at the officers club some time between 9:30 p.m. and 11:45 p.m. and went to the Noncommissioned Officers Club where he was told, after entering, that he should leave. After some discussion he left and went to his commanding officer complaining about the incident and was advised not to return to the club. Disregarding the advice he again entered the club house and was again requested to leave which, after some argument he did. Thereafter, in company with Lieutenant Becker he went back to the Noncommissioned Officers Club and, although his companion wisely and discreetly remained outside, the accused forcibly entered the club through the front door which was being held against his entry by someone on the inside. There, his conduct in the barroom of the club while surrounded by a group of noncommissioned officers who were remonstrating with him and urging him to leave, became so belligerent, argumentative and threatening that the officer of the day was summoned and the accused was escorted from the club. This incident sufficiently impressed the officer of the day to cause him to report it to his commanding officer as conduct unbecoming an officer.

This course of conduct was not only disorderly but evidenced abnormal behavior on the part of an officer from which witnesses had both the right and reason to believe that he was under the influence of

intoxicants. Drunkenness has been defined as any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties (par. 145, MCM, 1928). It cannot be said that the court failed to properly weigh the evidence on the issue of drunkenness. The record is sufficient to support the finding that accused was, on the occasion, drunk as alleged.

While the drunkenness of the accused was not, of itself, flagrant or disgusting, it did undoubtedly incite the accused to the commission of disorderly acts in a public place to the prejudice of good order and military discipline.

6. Records of the War Department disclose that the accused was born in McKeesport, Pennsylvania and is now 27 years of age. Nothing is shown of his basic education but the appointment Transmittal Sheet gives his education and grade as "3". He was inducted on 16 February 1942. Upon completion of the prescribed course in the Field Artillery School, Fort Sill, Oklahoma, he was commissioned a second lieutenant, Field Artillery, Army of the United States on 25 February 1943 and was assigned to the 12th Armored Division at Camp Campbell, Kentucky. He is married.

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 a violation of Article of War 96.

William A. Pounds, Judge Advocate.

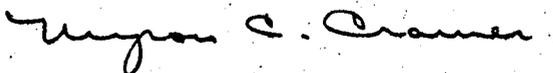
(on leave) _____, Judge Advocate.

Herbert B. Frederica, 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 John J. McCarthy (O-1178243), 493rd Armored Field Artillery Battalion.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that it be 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 designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



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

3 Incls.

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

(Sentence confirmed but commuted to reprimand. G.C.M.O. 253,
30 May 1944)



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

(31)

SPJGV
CM 250668

5 MAY 1944

UNITED STATES	)	SAN FRANCISCO PORT OF EMBARKATION
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Stoneman, California, 4
Privates GENE M. KISTLER	)	February 1944. Each: Dishon-
(39110769), Casual Detach-	)	orable discharge and confine-
ment, Camp Stoneman, Cali-	)	ment for five (5) years.
fornia, and VERNON B.	)	Disciplinary Barracks.
HIBNER (39127346), 205th)	
Hospital Ship Complement,)	
Camp Stoneman, California.)	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

1. The record of trial in the case of the soldiers named above, has been examined in the Office of The Judge Advocate General and there found legally sufficient to sustain the sentence as to accused Private Gene M. Kistler, but legally insufficient to sustain the findings and sentence as to accused Private Vernon B. Hibner. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused were tried upon a single Charge and Specification as follows:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Gene M. Kistler, Casual Detachment, Camp Stoneman, California, did in conjunction with Private Vernon B. Hibner, 205th Hospital Ship Complement, Camp Stoneman, California, at Oakland, California, on or about 12 October 1943, wrongfully take and use without consent of the owner, a certain automobile; to wit, a Ford convertible coupe, Model 1942, property of Gerald G. Gill, Oakland, California, of a value of more than fifty (\$50.00) Dollars.

Each accused pleaded guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be

confined at hard labor for five years. The reviewing authority approved the sentences, ordered their execution and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 9, dated 19 February 1944, Headquarters San Francisco Port of Embarkation, Fort Mason, California.

3. The evidence for the prosecution shows that Second Lieutenant Joseph L. Judson, M.A.C., the investigating officer, interviewed both accused on 25 January 1944. After fully explaining to each accused his right to make or refrain from making a statement with reference to the alleged offense, he took sworn statements from them which were received in evidence without objection as Exhibits A and B. The statements recited that the two accused arrived in San Francisco, California, early in the evening of 11 October 1943, and missed the bus back to Camp Stoneman that night. They tried to hitchhike back to Camp Stoneman, but were unsuccessful. After the lapse of several hours, they went over to Oakland, California, where they were equally unsuccessful. They then decided to return to camp at any cost, and proceeded to look for a car. Locating a car, belonging to Dr. Gerald G. Gill, in an apartment garage at 400 Perkins Street, Oakland, California, accused took it and returned to Camp Stoneman, accused Kistler doing the driving. The keys were in the car at the time they took it and it also contained a doctor's medical bag. They parked the car in Section F on the post, and that evening, 12 October 1943, they drove the same car back to San Francisco, but before reaching the city they secured some license plates from an abandoned car on a wrecking lot in the suburbs of Benecia, California. They installed these old plates on Dr. Gill's car and threw his plates away. Accused drove around San Francisco until early morning of 13 October, when they entered a garage at 2121 Broadway, and were there arrested by San Francisco police at about five o'clock the same morning. It was established by stipulation between accused, their counsel and the trial judge advocate that the car wrongfully taken by accused was a 1942 Ford convertible coupe owned by Dr. Gerald G. Gill, Oakland, California, and of the value of \$1000 at the time of the taking.

4. The defense offered no evidence and each accused, having been fully advised of his rights, elected to remain silent.

5. The evidence coupled with the plea of guilty, fully sustains the findings of guilty and the sentence as to accused Kistler.

6. The only question of law involved in the subject case is whether or not accused Hibner is charged in the Specification with committing any offense. Eliminating from the Specification certain descriptive words, it would read as follows:

*** Private Gene M. Kistler ***, did, in conjunction with Private Vernon B. Hibner *** wrongfully take and use without consent of the owner, a certain automobile; to wit, a Ford convertible coupe, Model 1942, property of Gerald G. Gill, Oakland, California, of a value of more than fifty (\$50.00) Dollars."

The charging part or words of action in the present Specification are "*** did take and use". It is accused Kistler who is specifically connected with this verb phrase, and not Hibner. "Kistler *** did *** take and use". The prepositional phrase "in conjunction with Private Vernon B. Hibner" is descriptive only. It describes with whom Kistler was associated in the commission of the wrongful taking and using. The meaning of the Specification becomes obvious and has but one interpretation, viz:

Kistler, while associated with Hibner, did *** take and use *** a certain automobile, etc.

There is, therefore, no allegation that accused Hibner committed any offense. The Specification violates the fundamental principle of pleading that "an indictment, information or complaint must be positive in respect to the charge that the person accused committed the crime which renders him amenable to the charge and must directly and positively allege every fact necessary to constitute the crime ***". (CM ETO 882, Biondi and White citing 31 C.J., sec. 179, p. 659).

"The allegation of the indictment or information must be direct and certain as to the person charged ***" (31 C.J., sec. 226, p. 689).

Accused Hibner was brought to trial upon a Specification which was fatally defective as to him. Such defect was not waived by his plea of guilty to the general issue, nor by his failure to raise the question during trial. It was an organic defect which nullified the whole prosecution against Hibner. It may be considered by the Board of Review upon appellate review (CM ETO 882, Biondi and White; CM 201710, Reynolds; M.C.M., 1928, par. 126c).

The error in the Specification as against Hibner is not a defective statement of facts constituting an offense, but the Specification itself is devoid of any charging words alleging an offense against accused Hibner. As a consequence, the defect is not within the purview of the curative statute (A.W. 37), and is fatal to these proceedings against Hibner.

7. Accused Kistler was 25 years, 11 months of age at the time of the commission of the offense. He was inducted on 21 October 1942 for

(34)

the duration of the war plus six months. Accused Hibner was 22 years of age at the time the offense was committed. He was inducted on 13 March 1943 for the duration of the war plus six months.

8. The record of trial has been examined in the Military Justice Division of The Judge Advocate General's Office and there found legally sufficient to support the sentence as to accused Private Gene M. Kistler. It is now before the Board of Review for consideration solely as to accused Private Vernon B. Hibner.

9. The court was legally constituted, but as to accused Hibner, was without jurisdiction of either the person or the offense. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to accused Private Vernon B. Hibner.

Thomas N. Tapp Judge Advocate

Herbert M. Kuder Judge Advocate

Robert B. Harwood Judge Advocate

SPJGV
CM 250668

1st Ind.

War Department, J.A.G.O., 13 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Privates Gene M. Kistler (39110769), Casual Detachment, and Vernon B. Hibner (39127346), 205th Hospital Ship Complement, both of Camp Stoneman, California.

2. I concur in the opinion of the Board of Review, and for the reasons therein stated recommend that the findings and sentence as to Private Vernon B. Hibner be vacated and all rights, privileges and property of which said accused Private Vernon B. Hibner has been deprived by virtue of said sentence be restored.

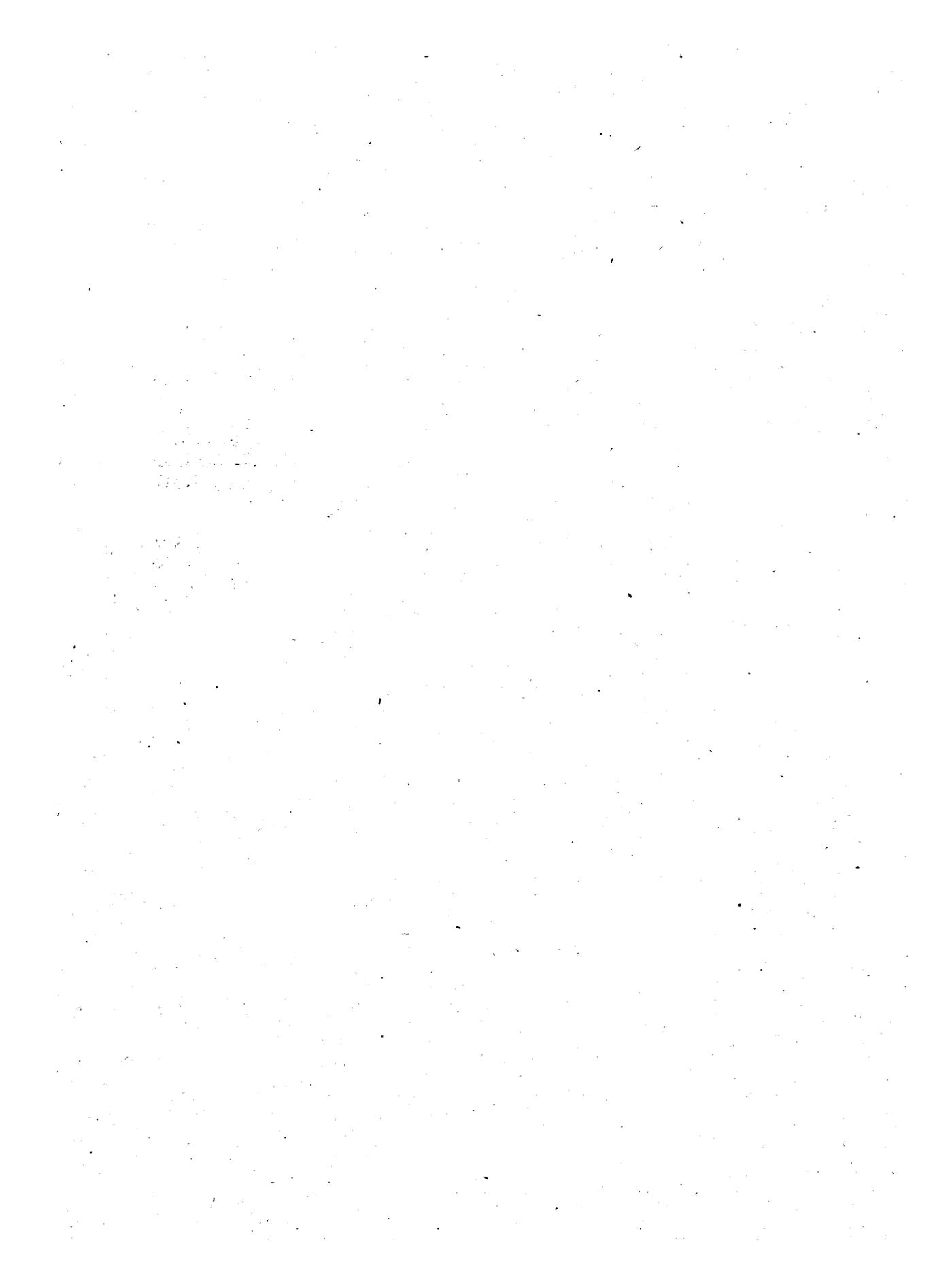
3. Inclosed is a form of action designed to carry into effect the recommendation hereinabove made, should it meet with your approval.

Myron C. Cramer

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

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

(Findings and sentence vacated as to Private Hibner by order of the Under Secretary of War. G.C.M.O. 235, 29 May 1944)



cents (\$48.25) in United States currency, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston at San Antonio, Texas, for the payment of said check.

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

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

Specification 5: Same form as Specification 2, but alleging check dated 21 December 1943, payable to the order of Belleville Hotel, made and uttered to the Belleville Hotel, Belleville, Illinois, and fraudulently obtaining thereby \$20 in cash.

Specification 6: Same form as Specification 2, but alleging check dated 22 December 1943, payable to the order of Belleville Hotel, made and uttered to the Belleville Hotel, Belleville, Illinois, and fraudulently obtaining thereby \$10 in cash.

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

Specification 8: (Finding of guilty disapproved by the reviewing authority).

Specification 9: (Finding of guilty disapproved by the reviewing authority).

Specification 10: Same form as Specification 2, but alleging check dated 20 December 1943, payable to the order of Stewart's, made and uttered to Stewart Apparel, Inc., St. Louis, Missouri, and fraudulently obtaining thereby \$65.45 in merchandise.

Specification 11: Same form as Specification 2, but alleging check dated 10 January 1943, payable to the order of Diehl's, made and uttered to Diehl's Jewelry Store, Belleville, Illinois, and fraudulently obtaining thereby \$25 in cash and merchandise.

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, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority disapproved the findings of guilty of

Specifications 1, 3, 4, 7, 8 and 9 of the Charge, approved only so much of the findings of guilty of Specification 2 of the Charge as involves a finding of guilty of fraudulently obtaining, in the manner alleged, the sum of \$25 and approved only so much of the findings of guilty of Specification 10 of the Charge as involves a finding of guilty of fraudulently obtaining, in the manner alleged, merchandise of some value, not in excess of \$20. 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 in support of Specifications 2, 5, 6 and 10 shows that the accused and his wife, Ruth C. Greenamyer, had a joint bank account in the National Bank of Fort Sam Houston, San Antonio, Texas. The balance in the account was 25 cents on 5 December 1943. On 6 December 1943 a deposit of \$75 was made in the account and on the same day there were two withdrawals from the account of \$50 and \$24 respectively (the record does not disclose whether accused or his wife made such withdrawals), leaving a balance of \$1.25. On 7 December 1943 the balance in the account was 75 cents; on 9 December 1943 the balance was 25 cents; and on 14 December 1943 the account was overdrawn. No further deposits were made and the account remained overdrawn continuously to 5 January 1944 (R. 25; Pros. Ex. 6).

On 6 December 1943, the day when the account in the National Bank of Fort Sam Houston, San Antonio, Texas had a balance of \$1.25 as of the close of business, the accused issued two checks against the account in the amounts of \$15 and \$20 respectively, which, when put through for collection, were returned unpaid by the bank because of insufficient funds in accused's account. On 10 December 1943 accused issued a check for \$50 against the account which, similarly, was not paid (R. 10, 17; Pros. Exs. 1, 2). The cashing of these three checks was laid as offenses in Specifications 1, 9 and 4 respectively of the Charge. Findings of guilty of these Specifications were disapproved by the reviewing authority but the evidence in connection therewith is set forth as it is material to an explanation of the other offenses of which accused was found guilty.

In support of Specification 2, the evidence shows that on 10 December 1943 the accused presented a check (Pros. Ex. B) drawn on the National Bank of Fort Sam Houston for \$48.25 to Mrs. Anne Patterson, an employee of the Officers' Club, Scott Field, Illinois. She applied \$23.25 thereof in payment of the accused's account with the Officers' Club and gave the accused \$25 in cash for the balance of the check. The accused signed the check as maker in the presence of Mrs. Patterson. The check was deposited and returned unpaid by the bank because of insufficient funds in accused's account (R. 12, 15, 16).

In support of Specifications 5 and 6, the evidence shows that on 21 and 22 December 1943 the accused presented two checks, each bearing his name as maker (Pros. Exs. G, H), drawn on the National Bank of Fort Sam Houston for \$20 and \$10 respectively, to A. M. Fowler, manager of the

Belleville Hotel, Belleville, Illinois, who gave the accused cash in exchange in the amounts of \$20 and \$10 respectively from funds of the hotel. The checks were deposited and returned unpaid by the bank because of insufficient funds in accused's account (R. 23, 24; Pros. Exs. 3, 4).

In support of Specification 10, the evidence shows that on 20 December 1943 the accused presented a check bearing his name as maker (Pros. Ex. J) drawn on the National Bank of Fort Sam Houston for \$65.45 to Addison Olian, President of Stewart's Apparel Incorporated, in payment of a ladies' coat which was then delivered to the accused. There was no testimony as to the value of the coat. The check was deposited and returned unpaid by the bank because of insufficient funds in accused's account (R. 24; Pros. Ex. 4).

With respect to Specification 11, the accused and his wife, Ruth C. Greenamyer, also had a joint account in the Bank of Auburn, Auburn, Alabama. However, there were no funds to the credit of accused in this account from 22 November 1943 to 5 February 1944 (R. 25; Pros. Ex. 7). The evidence shows that on 10 January 1944 the accused presented a check bearing his name as maker (Pros. Ex. K) drawn on the Bank of Auburn, Auburn, Alabama for \$25 to A. F. Diehl, owner of Diehl Jewelry Store, Belleville, Illinois and, in exchange therefor the accused was given \$10.98 in cash and merchandise of the value of \$14.02. The check was deposited and returned unpaid by the bank because of insufficient funds in accused's account (R. 25; Pros. Ex. 5).

4. The evidence for the defense consisted of the testimony of Major Walter Briehl, Medical Corps, Chief of Neuropsychiatric Section, Station Hospital, Scott Field, Illinois, and an unsworn statement of the accused. Major Briehl testified he had the accused under observation from 24 January 1944 and that, "Following psychiatric examination of the accused, I arrived at the following diagnosis without psychosis, acute emotional upset" (R. 28). In explanation of this diagnosis the witness testified that "without psychosis" indicates "the individual can distinguish right from wrong and knows the nature and consequences of his acts. Acute emotional upset is a constitutional reaction where for a period of time an individual is under the stress of some problem or difficulty, and he will behave in a manner which is not the ordinary everyday behavior of the individual" (R. 28, 29). The witness further stated that he believed that the accused's domestic problems and his worry about balancing the family budget inasmuch as he had one child and his wife was expecting another weighed upon the mind of accused and influenced his behavior so that he did not use his best judgment and common sense "for the time being" (R. 29). The witness expressed his opinion that the prognosis for the accused was favorable and that he would be able to carry on his duties as an officer (R. 31). The acute emotional upset commenced clinically about 1 October 1943 but had ended by the date of trial of the accused (R. 32, 33).

The accused's unsworn statement is substantially as follows: He was born on a ranch in Texas on 8 June 1922. As a member of the National

Guard he was ordered into Federal service on 25 November 1940. He was married on 17 April 1941. About 1 November 1943 his wife went home (place not designated) because she was pregnant. Shortly thereafter the accused obtained a leave of absence, visited his wife and discovered she wished a divorce. She finally agreed to wait until after the birth of the expected child. Accused's domestic disturbances were caused by the fact that he could not support his wife in the same manner as her two sisters were being supported by their husbands who were not in the service. When the accused returned from leave he commenced to drink heavily. On 27 or 28 December 1943 the accused was given a leave of absence and "intended to go home and give my wife her divorce and straighten out my debts" (R. 27). Their differences were patched up and the accused returned to duty. On 8 January 1944 he talked to a friend in San Antonio who owed accused \$110, and this friend promised to deposit that amount of money in the Bank of Auburn the next day by telegraph money order. The accused later found out the deposit was not made (R. 36, 37).

A copy of the accused's classification card, W.D., A.G.O. Form No. 66-1, was admitted in evidence (Def. Ex. 1). It showed that the accused received a rating of very satisfactory for his work as instructor at Gunter Field and Tuskegee, Alabama.

A stipulation with respect to the testimony of the accused's wife, Ruth C. Greenamyer, was admitted in evidence wherein it was stated that she separated from her husband on 1 November 1943 and informed him she was going to get a divorce; that thereafter, on 2 January 1944, she and the accused effected a reconciliation. Their second child was born 1 February 1944, the first having been born 15 July 1942 (Def. Ex. 3).

5. Specifications 2, 5, 6 and 10 allege that the accused, in violation of the 96th Article of War, did, with intent to defraud, wrongfully and unlawfully make and utter various checks on the National Bank of Fort Sam Houston, San Antonio, Texas, and did thereby fraudulently obtain various sums of money, knowing he did not have and not intending that he should have sufficient funds in that bank for the payment of the checks. Specification 11 of the Charge alleges a check similarly drawn on the Bank of Auburn, Auburn, Alabama. A deposit of \$75 was made on 6 December 1943 in the National Bank of Fort Sam Houston but on the same day there were two withdrawals of \$50 and \$24 from that account, leaving a balance of \$1.25. As aforesaid, the evidence does not disclose whether accused or his wife made these withdrawals. On 7 December 1943 the balance in the account was 75 cents; on 9 December 1943 it had been reduced to 25 cents; and on 14 December 1943 the account was overdrawn and it so remained thereafter.

Competent evidence offered in support of Specification 2 shows that on 10 December 1943 the accused made and presented a check drawn on the

National Bank of Fort Sam Houston in the amount of \$48.25 to the Officers' Club, Scott Field, Illinois, receiving \$25 in cash and leaving the balance of \$23.25 applied on his account with the club. This transaction occurred subsequent to the cashing by the accused of three checks on this account, two on 6 December 1943 and one on 10 December 1943, in the respective amounts of \$15, \$20 and \$50 (see p. 3, supra). On 6 December as stated above, a check for \$50 and one for \$24 issued by either accused or his wife, had cleared the account, reducing it to \$1.25. From an examination of the amounts and the dates, it appears that the three checks for \$15, \$20 and \$50 issued by accused were in addition to the two checks for \$50 and \$24 which had cleared the account and reduced it to \$1.25. It is thus apparent that the check alleged in Specification 2 was uttered at a time when the accused knew, or was chargeable with knowing from his own transactions, that his account had insufficient funds to pay it (CM 202601, Sperti). The proof supports the finding of guilty of this Specification as approved by the reviewing authority that the accused fraudulently obtained in the manner alleged the sum of \$25.

Competent evidence supports the allegations of Specifications 5 and 6. On 21 and 22 December 1943 the accused presented two checks drawn on the National Bank of Fort Sam Houston, in the amounts of \$20 and \$10 respectively, to A. M. Fowler, manager of the Belleville Hotel, receiving therefor \$20 and \$10 in cash. These checks bore the name of the accused as maker and were uttered by him. In addition, the court had before it the check covered in Specification 2 which had been identified as made by the accused and which, accordingly, could properly be used by the court to compare with these two checks to determine if they bore the signature of the accused (Winthrop's Military Law and Precedents, 2d Ed., p. 370). These checks were issued by the accused some fifteen days after his account had been reduced to a balance of \$1.25. The conclusions set forth with respect to Specification 2 are likewise applicable here.

In support of Specification 10, competent evidence shows that on 20 December 1943 the accused presented a check drawn on the National Bank of Fort Sam Houston, in the amount of \$65.45, to Addison Olian, President of Stewart's Apparel Incorporated, in payment of a ladies' coat delivered to the accused at that time. Again, the accused's account had insufficient funds to pay this check, and indeed, for some fourteen days prior to 20 December, had not had in excess of \$1.25 therein. The check bore the name of the accused as maker and was presented by him in payment for the coat. The conclusions set forth with respect to Specification 2 are likewise applicable here. There was no proof offered as to the value of the ladies' coat. However, the proof is sufficient to establish that the property obtained by the accused is of some value not in excess of \$20 (Bull. JAG, January 1943, sec. 451 (42)).

Competent evidence offered in support of Specification 11 shows that although the accused and his wife had a joint account in the Bank of

Auburn, Auburn, Alabama, there were no funds to the credit of accused's account for the period from 22 November 1943 to 5 February 1944. On 10 January 1944, the accused presented a check drawn on this bank, in the amount of \$25 to A. P. Diehl of Diehl Jewelry Store which was returned by the bank unpaid. It is apparent that accused knew he had insufficient funds to cover this check. The intent to defraud may be inferred from such circumstances (CM 202601, Sperti).

During the time accused committed the above offenses he was under an emotional strain and was drinking, but there is no showing that his condition was such as to make him incapable of formulating the necessary intent to defraud. Such factors can only be considered in this case as extenuating circumstances.

6. Eight of the nine members of the court which tried accused joined in a plea for clemency for the accused, recommending that the reviewing authority remit so much of the sentence as exceeded dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of one year. The reviewing authority remitted the entire period of confinement, approving the sentence of dismissal from the service and the total forfeitures (page 3, supra). There is also attached to the record a plea for clemency signed by the defense counsel and assistant defense counsel which requests some punishment other than dismissal, assigning as reasons therefor the accused's age of 21 7/12 years, his good military and civil record, the opinion of the psychiatrist that the offenses were committed during an acute emotional episode of temporary nature, the expenditure of money by the Government in training accused and his qualifications as a flying officer. Testimonials to accused's good character submitted by five residents of San Antonio, Texas, accused's home town, and by his father, are also attached to the record, together with a letter of H. W. Birdsong, Jr., of Athens, Georgia, U.S. Army Civilian Flight Instructor, in which Mr. Birdsong states that accused's judgment, coordination and ability as a pilot were well above the average.

7. The accused is about 22 years of age. He joined the 36th Division, 141st Infantry of the National Guard in 1938 or 1939 and as a member thereof was ordered into Federal service on 25 November 1940. He served as an enlisted man until 29 April 1943, when upon completion of the prescribed training at the Army Air Forces Advanced Training School, Marianna, Florida, he was commissioned second lieutenant, Air Corps, in the Army of the United States.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority

(44)

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

Thomas N. Jaffy, Judge Advocate.

Herbert M. Kidder, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
GM 250772

1st Ind.

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

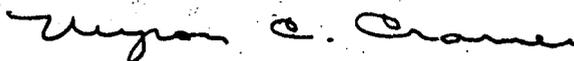
- To the Secretary of War.

6 MAY 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 F. Greenmyer (O-801853), 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 as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures 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,
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 as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 376, 18 Jul 1944)



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

2 6 APR 1944

(47)

SPJGH
CM 250787

UNITED STATES)

v.)

Captain JOSEPH M. EYEN)
(O-329967), Infantry.)

HAWAIIAN DEPARTMENT

Trial by G.C.M., convened at
APO 958, 4 January 1944.
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 95th Article of War.

Specification 1: In that Captain Joseph M. Eyen, Army of the United States, did, at APO 914, on or about June 1943, with intent to defraud, wrongfully and unlawfully make and utter to Post Exchange 914-1, APO 914, a certain check in words and figures as follows, to wit:

Schofield Barracks, T.H., June 1943 No. _____
59-125 Bishop National Bank of Hawaii 59-125
at Honolulu
Schofield Barracks Branch

Pay to the
order of Post Exchange 914-1 \$200.00
Two Hundred & no/100 ----- Dollars
Joseph M. Eyen, Capt. Inf.

and by means thereof, did fraudulently obtain from Post Exchange 914-1, APO 914, \$200.00, he, the said Captain Joseph M. Eyen, then well knowing that he did not have and not intending that he should have, sufficient funds in the Bishop National Bank of Hawaii, Schofield Barracks Branch, or any other branch of said bank, for the payment of said check.

Specification 2: Similar to Specification 1; but alleging check dated 11 June 1943, in the sum of \$400, made and uttered to the same payee, and the fraudulent obtaining of \$400.

Specification 3: Similar to Specification 1; but alleging check dated 23 May 1943, in the sum of \$700, made and uttered to the same payee, and the fraudulent obtaining of \$700.

Specification 4: Similar to Specification 1; but alleging check dated 19 May 1943, in the sum of \$200, made and uttered to the same payee, and the fraudulent obtaining of \$200.

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

3. The evidence for the prosecution as to the Charge and all Specifications thereunder may be summarized as follows: It was stipulated (Ex. E) between the prosecution, defense counsel and accused that the accused made and uttered four checks, drawn on the Bishop National Bank of Hawaii, at Honolulu, Schofield Barracks Branch, payable to the order of Post Exchange 914-1, that the checks were presented to the payee on the dates of issuance, and that the accused received the full face value therefor, as follows: check (Ex. D) dated 19 May 1943, for \$200; check (Ex. C) dated 23 May 1943, for \$700; check (Ex. A) dated June 1943, issued prior to 11 June 1943, for \$200; and check (Ex. B) dated 11 June 1943, for \$400 (R. 7, 10-13).

The check dated 19 May 1943 in the sum of \$200 was cashed for accused by Second Lieutenant Dawson B. Smith, Jr., Post Exchange Officer at APO 914. On Sunday, 23 May 1943, accused requested Lieutenant Smith to meet him at the post exchange and cash a check for him. The post exchange had cashed checks for \$200, but Lieutenant Smith "kind of balked" at accepting a check for \$700, which accused presented to him. The accused told him that he was leaving the island and the money was needed to pay his obligations. After deducting "a few dollars" accused owed on other checks, Lieutenant Smith cashed the check and gave him the balance of the \$700. Lieutenant Smith testified that checks cashed at Post Exchange 914-1 were sent by registered mail to the Fiscal Officer, Army Exchange Service 914-1, New York City (R. 22-26).

The accused maintained a checking account in the Bishop National Bank, Schofield Branch, from 27 September 1940 to 28 September 1943. The statement (Ex. F) of his account with that institution from 31 July 1942 to 28 September 1943 showed his bank balance on the dates the checks were issued as follows: 19 May 1943, \$157.76; 23 May 1943, \$107.76; from 1 June to 11 June 1943, \$7.76; and 11 June 1943, \$7.76. At no time during the period between 19 May and 11 June 1943 did the daily bank balance exceed \$157.76. When the four checks were presented to the drawee bank through channels (National City Bank of New York) payment was refused because of insufficient funds and formal notices of protest (Exs. D-1, C-1, A-1, B-1) were mailed to

accused on the same dates the checks were dishonored. On the respective dates the checks were presented for payment the bank account of accused showed the following balances: Exhibit D, 5 June 1943, \$7.76; Exhibit C, 11 June 1943, \$7.76; Exhibit A, 20 July 1943, \$.66; and Exhibit B, 16 July 1943, \$.66 (R. 9-15).

On his return to Honolulu from APO 914, the accused deposited \$400 on 22 June 1943 at the "head office" of Bishop National Bank. The deposit reached the Schofield Branch on 23 June 1943 and paid checks presented to the Bank between 23 June and 17 July 1943, but did not cover any of the four checks issued to post exchange 914-1 between 19 May and 11 June 1943. Mr. Edward A. Wootton, assistant manager of the Schofield Branch, Bishop National Bank, informed accused on his return from APO 914 that the bank had to "bounce" some of his checks and accused said that he would do his best to take care of the checks. On 9 August 1943 the Schofield Branch received by mail, a cashier's check for \$1000 from accused, drawn on the First National Bank of Lincoln, Nebraska, and dated 2 August 1943. The \$200 check (Ex. D) and the \$700 check (Ex. C) were paid from this deposit. On 28 September 1943, the accused made a deposit of \$528.34, which, with his remaining balance, paid the \$200 check (Ex. A) and the \$400 check (Ex. B). Mr. Wootton testified that accused had been careless in his financial affairs, but he did not believe "for a minute" that accused ever intended to defraud the bank (R. 8, 13, 16-21).

During the course of an investigation made between 25 July and 27 August 1943, by Lieutenant Colonel Harry May, Jr., Inspector General's Department, accused, after being advised of his rights, stated to Colonel May that at the time the checks were drawn he knew he did not have sufficient funds in the bank to meet them, that he wanted to pay off all his obligations and gambling debts before leaving the island, and that he believed his bank account would be sufficient by the time he arrived at "Cahu" (R. 26-30).

4. For the defense:

Captain Max W. Cady, 762nd Military Police Battalion, APO 957, testified that he had known accused for more than three years and served in the same regiment with him for about a year and a half. According to Captain Cady the accused was highly respected among his fellow officers as an officer and a gentleman, and to the best of his knowledge the accused had no previous trouble in connection with checks (R. 30-32).

The accused testified that he was an "R.O.T.C." graduate from the University of Nebraska, was on active duty as a Reserve officer from 1936 to 1937, and entered on extended active duty 22 July 1940. He was assigned to the 35th Infantry at Schofield Barracks 13 September 1940, and in August 1942 was placed in command of an infantry company at APO 914 (R. 33-34).

With reference to the checks issued to Post Exchange 914-1, accused testified that he cashed the first two checks (Exs. D and C) after receiving notice that he was to be transferred from the island, as he needed the money to settle gambling debts. Before he left the island on final orders for his transfer, he cashed the other checks (Exs. A and B) to obtain funds to satisfy other outstanding obligations. He had money in his mother's name in the First National Bank of Lincoln, Nebraska, but it was impossible for him to transfer funds from the mainland in a short period of time. About two months before leaving APO 914, the accused wrote to Lincoln, Nebraska, requesting his brother to withdraw \$800 to \$1,000 from the Lincoln National Bank and to forward the money to the Bishop National Bank, and believed it would arrive in time for him to write checks against the deposit. He also expected about \$200 to be deposited to his account by two officers who were indebted to him. The deposits were not made by his brother or the officers. The accused further stated that he first received orders to leave APO 914 on 23 May 1943, the day the \$700 check was issued. He boarded a ship the same day but was detained because written orders confirming his departure failed to arrive. When he returned to Honolulu about a month later, he learned from the bank that two of his checks had been "rejected". He made a deposit of \$400, and stated to Mr. Wootton that he would obtain funds as soon as possible to cover the two checks and that the \$400 deposit was to meet a \$400 check that was outstanding. The accused then wrote to "Major Dickson" at APO 914, stating that if the checks were returned to the post exchange, he was "positive" sufficient funds would be on deposit to cover the checks by the time they arrived. On 17 July 1943, a check for \$350 that accused had "completely forgotten about" cleared the bank (R. 34-40, 45, 47-49).

The accused testified that he left Honolulu for the United States on 1 July 1943 and arrived in San Francisco about 10 July 1943. He was transferred to Camp Roberts, California, and left there about 22 July on a thirty days leave to visit his home. He arrived at Lincoln, Nebraska about 30 July 1943. The following day he withdrew \$1,000 from the First National Bank in Lincoln and sent it to the Bishop National Bank, Schofield Branch. The accused believed that the \$1,000 deposit together with the money that was owed to him and funds in his possession would be sufficient to pay his outstanding checks. On 6 August 1943 accused received a telegram from Camp Roberts cancelling his leave because of War Department orders transferring him to duty outside the continental limits of the United States. He returned to Honolulu pursuant to the orders (R. 39-46).

The accused further stated that he never had a checking account before entering the Army. He knew that checks cashed at the post exchange at APO 914 were cleared through the National City Bank of New York and then returned to Honolulu to the drawee bank, by regular mail. Accused

considered himself careless and negligent in thinking that the checks would not reach the Bishop National Bank before he was able to deposit funds to pay them, but stated that he did not intend to defraud the Bishop National Bank or Post Exchange 914-1. Though ordinary mail from APO 957 reached APO 914 in a week or ten days, his statements from the Bishop National Bank were about two months late in arriving (R. 35, 37, 48).

According to accused, there was not much to do at APO 914 after the day's work was finished and he would join other officers at the only club on the island to gamble. Money meant very little, and at times the gambling "did get a little out of hand" and a "lot" of money was lost. Accused never gambled before going to APO 914 (R. 38).

5. The evidence shows that between 19 May and 11 June 1943 accused drew and cashed four checks at the post exchange at APO 914, as alleged. All of the checks were drawn on the Bishop National Bank of Hawaii, Schofield Barracks Branch, and were for amounts as follows: \$200 on 19 May (Spec. 4), \$700 on 23 May (Spec. 3), \$200 in June prior to 11 June (Spec. 1) and \$400 on 11 June (Spec. 2). The checks were forwarded to New York by regular mail and then returned to the Schofield Barracks Branch for collection, where they were dishonored because of insufficient funds on dates, respectively, as follows: 5 June, 11 June, 20 July and 16 July. Although accused had a checking account in the Schofield Barracks Branch, it was less than \$200 in amount from 19 May to 11 June, and on the several dates when the checks were presented to the bank for payment. Accused knew when he drew the checks that his account was insufficient to cover them, and also knew the practice of forwarding such checks to New York in course of collection. He testified that he expected to have sufficient money in the account to pay the checks by the time they came through for collection, but the facts show that at most he could have had a mere hope. After the checks had been dishonored, accused made deposits out of which they were subsequently paid, as follows: on 9 August, \$1,000 and on 28 September 1943, \$528.34.

Accused testified that he cashed the checks in order to pay up gambling and other debts he owed at APO 914 before leaving there; that he had written to his brother in Lincoln, Nebraska, several weeks before, requesting that he forward \$800 or \$1,000 to the Bishop National Bank from funds of accused; and that he also had requested two officers who owed him a total of about \$200 to deposit it to his credit in the bank. Accused also testified that he had no intention of defrauding either his bank or the post exchange.

It is uncontradicted that accused drew and cashed the checks at a time when he knew his bank account was not sufficient to cover them. Although he hoped that he would have enough money in the bank to pay the checks by the time they went to New York by regular mail and returned to Hawaii for presentation to his bank, accused had no substantial basis to

believe that the checks would be paid when presented. What he did in each instance was, in effect, to obtain a loan from the post exchange under the false pretense that he was cashing a check drawn upon a sufficient bank account. Regardless of any intention on his part ultimately to make the checks good and the fact that they were afterwards paid, it is clear that they were cashed with intent to defraud. The fraud was accomplished when a check, known to be worthless at the time, was presented as good, so that the post exchange paid the face amount of the check to the accused for the check.

Such conduct - giving a check on a bank where accused knows there are not sufficient funds to meet it, and without intending that there should be - is a violation of the 95th Article of War (MCM, 1928, par. 151).

6. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows: appointed second lieutenant, Infantry Reserve, Army of the United States, and accepted, 10 June 1935; active duty 7 July 1935 to 20 July 1935, 15 July 1936 to 9 October 1937; promoted to first lieutenant, Army of the United States, 6 July 1938; active duty, 12 August 1938 to 25 August 1938, 13 August 1939 to 26 August 1939, and from 22 July 1940; temporarily promoted to captain, Army of the United States, 3 July 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 of the 95th Article of War.

Samuel M. Driver, Judge Advocate

Robert B. Cannon, Judge Advocate

J. J. Lottubas, Judge Advocate

1st Ind.

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

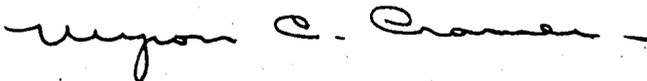
- To the Secretary of War.

6 MAY 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 Captain Joseph M. Eyen (O-329967), 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 with intent to defraud, made and uttered to a post exchange four checks in the total amount of \$1500, all drawn on a bank in which he had insufficient funds. The record of trial indicates that he used the proceeds of the checks to pay gambling debts and other obligations. The checks were issued in May and June 1943 and accused paid them, \$1,000 in August and the balance in September 1943. I recommend that the sentence to dismissal be confirmed and carried into execution.

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



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

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

(Sentence confirmed. G.C.M.O. 363, 17 Jul 1944)



the Reynolds home, living in their house itself. He testified by deposition for the prosecution concerning most of the incidents which constituted accused's offense (R. 22,23; Pros. Ex. C).

Mr. Stephens stated that he was a collector of and owned seven guns, one a Colt Woodsman .22 calibre automatic pistol, having a $4\frac{1}{2}$ inch barrel, adjustable target sights, a blue finish and walnut stocks. Its serial number was 134213. He had purchased it for \$32.50 on 13 October 1939 from Potchernick's, Incorporated, hardware and gun merchants, of San Antonio. Later he had obtained by mail from the S. D. Myres Saddle Company, of El Paso, Texas, a stamped, hand-sewn leather holster, with the name of the maker on the back. This had cost him \$3.50 (R.16,17). He kept all his guns in a small closet, " * * * a little cubby hole place in my room approximately $6\frac{1}{2}$ feet from the floor", directly over the shower bath in his room (R.21).

Stephens testified that he first met accused about 1 or 2 October 1943, that they usually saw each other several times a week, and that they were in the habit of talking about guns, airplanes and cars. They were not close personal friends. Stephens twice had invited accused into his room. One occasion was when accused retrieved his dog, which Stephens had admitted to his room when it whined at his door, and the other occasion was "some time between the first and fourteenth of November". The two men were discussing guns in the back yard of the Reynolds' home and Stephens took accused to his room, got his guns from the closet, and showed them. He did not give accused permission to take any of them at that time or in the future, or to use or sell them (R. 16,22-24,27,28).

The last time witness saw the pistol was "some ten to twelve days, possibly two weeks before the time I missed it". He had taken it out, oiled it, and replaced it, along with its holster and another holster which he had made himself (R. 17). He last saw accused on Sunday, 12 December, at which time accused told him that he had orders transferring him to California. Stephens missed the gun on 28 December 1943. He reasoned that accused had taken it, obtained accused's new station from Randolph Field, and wrote to the Commanding General of the 6th Ferry Command, Long Beach, California (R. 17,20,24,25).

Meanwhile accused had arrived at Long Beach, where he sold the pistol to Second Lieutenant Robert C. Barlow, 28th Ferrying Squadron, Long Beach Army Air Field. The circumstances of the sale were described by Lieutenant Barlow, First Lieutenant Thomas Miller May, and Sergeant (then Corporal) Robert L. Sparks, all of the 28th Squadron. Witnesses, accused, and probably several other officers, were present in the squadron's day room in the forenoon of 21 December 1943. Accused came over to a counter, behind which Sparks and Lieutenant May were sitting, produced a pistol and holster, and offered them for sale. Lieutenant Barlow examined

the gun, as did Lieutenant May and Sergeant Sparks, and Barlow purchased it for \$35, which was the price asked by accused. Payment was made by Barlow's personal check, drawn on the Cherry-Anaheim branch of the Bank of America, dated 21 December 1943 (Pros. Ex. D). Accused cashed the check. Barlow did not ask for a certificate of ownership because after discussing this matter the group concluded that none was necessary, the gun being of a "sporting type". Barlow stated that he "had no reason to doubt that it was not (sic) the accused's gun" (R. 29-32,33-37,38,40,41).

All three witnesses identified the gun and holster sold by accused as those introduced in evidence as Prosecution's Exhibits A and B, with the exception that none had checked the serial number of the gun at the time of the sale (R. 30,35,39).

Mr. Stephens stated that accused telephoned him on the evening of 6 January 1944 (apparently from Long Beach) and -

"* * * started out by telling me right at first that he did take my gun and * * * that he had sold it to one of the men on the field. He then asked me to write a letter out there and state that I had given him permission to have the gun and to sell it if he so desired. He was very positive, and said, 'Jake, you have got to do this - you have got to help me out of this situation'".

Stephens refused to write such a letter. Accused "was very insistent", saying that "his entire future was at stake". He told Stephens that he was going to state at eight o'clock the following morning that he did have permission to have the gun. Stephens still refused to write a letter of the nature requested by accused (R. 26,27).

Testimony concerning the value of the pistol and holster was given by Mr. Harvey D. Wood, a sporting goods dealer and gunsmith of Long Beach, California, and by stipulation between accused, his counsel, and the prosecution, concerning the testimony which would have been offered by Mr. Maurice W. Rex, Secretary-Treasurer of Potchernick's, Incorporated, from whom the weapon had been purchased by Stephens. Mr. Rex would have testified that the purchase price in 1939 was \$32.50. Mr. Wood stated that Prosecution's Exhibit A was "as good as a new gun", that its last catalog list price was \$32.75, that such guns have a lifetime use, that they are in great demand at the present time, since they cannot be purchased from jobbers, and that he had sold "quite a number of them" for \$50.00. The hand-tooled holster, he stated, was worth "at least \$2.50". Mr. Stephens stated concerning his gun that "I like it and I want to keep it", and that "I would not take sixty dollars for it at the present time" (R. 6, 7-13, 19,20).

The pre-trial investigation of this case took place on 6, 7, and 10 January 1944, and was made by First Lieutenant Gilbert John Dunkley, Air Corps, Long Beach Army Air Base. Accused made two separate statements to Lieutenant Dunkley, after being fully advised of his rights by the investigating officer before each statement. The first statement was corrected in minor details by accused after it had been typed, and was then sworn to and signed by him. While the second was not signed, it appears from it that it was also made under oath (R. 44-48; Pros. Exs. E, G, 1, 2, 3).

Prior to making his first statement, accused was shown the evidence against him, and requested a delay "pending receipt of additional evidence which he believed would completely exonerate him", and which was to come from San Antonio. At this time he made the statement contained in Prosecution's Exhibit E. Most of it corresponded in all important details with the testimony heretofore outlined. Accused went on to state that a "friendly atmosphere" had prevailed among the tenants of the Reynolds family. Accused had access to "practically the entire house", visited with Stephens "a number of times", and "would say that we became mutual friends". Accused and Stephens showed each other their guns, including the .22 Colt automatic, "on a number of occasions". He admitted that -

"I had possession of this * * * pistol before I left Randolph Field * * * even before I knew that I was going to be transferred to * * * Long Beach, California. The gun was in my possession in my apartment over the garage."

He stated further that -

"When I arrived at this field I decided that I was going to sell the gun because the trip that I made changing stations was made at a considerable expense and I needed money in order to finance a ferrying trip. * * *"

His description of the circumstances of the sale to Lieutenant Barlow conformed in all respects to the other testimony about it (Pros. Ex. E).

Accused gave as his reason for requesting delay the fact that he had communicated with Stephens who had -

"* * * informed me that he was sending another letter to the Commanding Officer of this Post explaining the situation more thoroughly. I don't know exactly what the contents of that letter will be, but it will clarify his original letter. * * * That letter will show that I have a moral right to sell the gun * * *. * * * that I had a right to dispose of the gun in any way that I wanted to and that I had * * * access to the

gun at all times as I was free to come and go * * * in Mr. Stephens' room or quarters, and take the gun whenever I wanted to."

Accused stated that he would "rather not answer any question" as to how the gun came into his possession, but would wait for the arrival of Stephens' letter (Pros. Ex. E).

The investigation was resumed on 10 January, at which time Stephens' letter and other letters were shown to accused (R. 48-51; Pros. Exs. F,G, H,4,5). He stated that, "these aren't the letters I expected to come, but these are evidently all that Stephens is going to send" (Pros. Ex. G,5). He then described the circumstances of his taking the gun. He had been in the Reynolds' house "four or five days before the 13th" in order to use the telephone, which was next to Stephens' room. He stood there talking for a while to a girl who also roomed there. The door to Stephens' room was open, and he picked up the gun (where it was, he did not say) and took it to his room. He had just got a box of shells, and intended to use them in the gun. He never did so, but "just left it up there". He did not know whether the girl saw him take it, nor did he tell Stephens or anyone else that he had done so. He stated that he didn't know that Stephens would object to his having it. He had expected Stephens to say that "it was all right with him and that he was surprised that I hadn't said anything to him" (Pros. Ex. G, 7-10).

Evidence for the defense.

The law member advised accused of his rights as a witness, and accused elected to testify in his own behalf (R. 51,52). His testimony corroborated in all material respects that of the prosecution's witnesses, and was similar to the statements made by him to the investigating officer. He reiterated his frequent associations with Stephens and his "privilege of the house" (R. 55,56,64,65,70,71). He denied knowing about the cubby hole, stating that the first time he saw the guns they were lying on Stephens' bed (R. 55,72). He took the pistol from either Stephens' bed or dresser, where it was lying "in plain sight", at the time he was in the house making the phone call. His purpose was to use in it the shells he had bought, to shoot when he was taking his dog for walks in the open country around San Antonio (R. 57,58). He did not mention it to Stephens because "it didn't occur to me at all that he would care at all whether I took his gun out and shot it". He did not then anticipate leaving the "Training Command", but shortly thereafter he received his orders, and "five days later I left" (R.59). The gun was still in his room when he packed. He had not seen Stephens about for several days, due to the latter's being under medical treatment at that time. He put the gun in a small kitbag, intending to buy the proper shells at the little town of Kerrville, en route to his new station, and to use it "to pop at some rabbits" at times when he would halt his car and allow his dog to run, -

"using it for sport on the way and later returning it to Mr. Stephens" (R. 59-61,73). He left the Reynold's home about 4:30 in the morning, saw no one about when he departed and did not at any time notify Stephens that he had the gun. He left a note for Mrs. Reynolds with a forwarding address (R. 70,73,74; Defense Ex. 1).

He did not buy any shells at Kerrville because he went through there early in the morning, the stores were just opening, and he was in a hurry. The day after arriving at his field he received orders to go out on a trip. He drew \$109 mileage allowance immediately upon arrival, but used this to send money orders to repay various loans made prior to his change of stations. These loans were made in order to make the trip, because of his many dependents, and because of his "very shaky financial situation" (R. 62,63,66-69). He was "flat broke", and did not want to borrow from his new squadron mates. Since Stephens "had offered the gun for sale indirectly to me before" and "had indirectly said I could use it", he sold the gun to Lieutenant Barlow. He thought of "advising" Stephens that he had done so, and would have so informed him in "several more days" if he had had the chance "to settle down" after arriving at Long Beach (R. 62, 63,65). He denied any intent to sell the gun at the time he took it (R. 63).

4. The evidence is clear and convincing and justifies the findings of guilty beyond any reasonable doubt. The circumstances of the original taking, together with the subsequent conduct of accused, supply all the elements of the offense of larceny.

5. The court admitted in evidence two letters written by Stephens, to the Commanding General, 6th Ferry Command, Long Beach, California, and to the "Commanding Officer, Legal Department, Long Beach Flying Field (Exs. F and H, respectively), which were shown to accused at the time of the second investigation of the Charge. Both letters were hearsay, and come within no exception of the rule excluding such evidence. The competent evidence of accused's guilt is, however, so overwhelming in all respects, that it cannot be said that he was prejudiced in any way by their admission.

6. War Department records, the Charge Sheet, and accused's testimony show that accused is 30 years of age. He served as a Flying Cadet from 21 February 1936 to 20 June 1937, at which time he graduated from Selfridge Field, Mt. Clemens, Michigan, and was commissioned a second lieutenant, Air Corps Reserve. He continued in active service for three years, at Selfridge and Mitchel Fields, was relieved from active duty on 20 June 1940 and placed on a reserve status. He was recalled to active duty as a second lieutenant on 1 July 1943, and entered upon active duty 11 July 1943. In accused's War Department A.G.O. 201 File is a copy of a letter from one H. C. Brandt, Rt. 7, Box 591, San Antonio, Texas, without date, addressed to The Adjutant General, and stating that a check

given to Mr. Brandt by accused in the sum of \$8.20 has not been paid, and asking for information concerning accused.

7. Attached to the record is a statement by accused concerning his flying experience. In addition to the information supplied in the foregoing paragraph, accused stated that while on active duty following receipt of his commission he had qualified as an expert aerial gunner on ground and towed targets, as a "first pilot" on medium bombers, and as an expert aerial bombardier, and that he received the rating of combat observer. He also stated that as a civilian flight instructor in teaching Air Corps aviation cadets he had trained pilots in night flying for the Royal Air Force Eagle Squadron, several of his students having later distinguished themselves in combat, and had been squadron commander, chief flight instructor and assistant field commander at the British Flying Training School at Glendale, California, in which position he had been commended for his group's safety record and training methods. Since returning to active duty a report made by him of experiments and investigation of training methods has been adopted at Randolph Field; he has met the requirements for a "Senior Pilot's" rating, and has a total of 3415:22 hours of civilian and military flying time.

Also attached to the record is a plea for clemency submitted by Captain Sigmund L. Milford, Air Corps, Defense Counsel, based upon the statement of his flying experience by accused.

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 authorized upon conviction of violation of Article of War 93.

Wm. L. Goss, Judge Advocate.
Wm. W. Hambrick, Judge Advocate.
(On Leave), Judge Advocate.

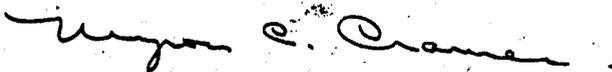
1st Ind.

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 Robert A. Theobald (O-357351), 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. 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. 283, 10 Jun 1944)

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

(63)

SPJGN
CM 250834

10 MAR 1944

UNITED STATES)

75TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Fort Leonard Wood, Missouri,
18 January 1944. Dismissal
and total forfeitures.

Second Lieutenant ROY P.
PETERSON (O-1307070),
291st Infantry.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL 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 Charges and Specifications:

CHARGE I: (Finding Disapproved by Reviewing Authority).

Specification: (Finding Disapproved by Reviewing Authority).

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

Specification: In that Second Lieutenant Roy P. Peterson, 291st Infantry, was near Fort Leonard Wood, Missouri, on or about 18 December 1943, drunk and disorderly in uniform in a public place, to wit: Fairfield Club, near Fort Leonard Wood, Missouri.

After the accused's special plea of former jeopardy had been denied, he pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Charge I and its Specification, approved the sentence but recommended that it be commuted to a forfeiture of \$75 per month for 8 months and forwarded the record of trial for action under Article of War 48.

3. The defense, in support of its special plea of former jeopardy based on the accused having been restricted pending trial by his commanding officer, sought to elicit the testimony thereon of the accused.

The court erroneously refused to admit such testimony, sustaining the prosecution's objection that the commanding officer's testimony would be the best evidence thereof. The court's error, however, was harmless because the defense then adduced the undisputed testimony of the commanding officer who testified that the accused had merely been restricted to the organization's area for investigation purposes and not as punishment (R. 6-8).

While restriction administered under Article of War 104 is a form of punishment for minor offenses, it is not a bar to a trial involving an offense of a serious character. Furthermore, administrative restriction pending trial is legal (CM 204275, (1936) and 159617 (1924) Dig. Ops. JAG, 1912-40, sec. 462 (2) and (3), JAG Bul. Nov. 1943, sec. 427 (1)). The special plea was, therefore, properly overruled.

4. The evidence for the prosecution shows that on the evening of 18 December 1943 the accused, accompanied by two fellow officers, visited the Fairfield Club near Fort Leonard Wood, Missouri. One of them left shortly to eat elsewhere but returned later. In the meantime the accused and the other officer sat at the bar drinking. Upon the other officer's return the club was accommodating many enlisted men and civilians of both sexes with the three officers being the only officers there. The accused then appeared to be obviously intoxicated and began a course of obnoxious conduct by going from table to table. Two sergeants, their wives and two unescorted women were sitting at a table approached by the accused but one of the sergeants requested his departure. He returned later, embarrassed one of the women by placing his hands on her and his face close to hers, and was again requested to leave which resulted in his engaging in an argument with one of the sergeants whom he offered to fight outside. Here the accused assumed a belligerent stance but staggered, stumbled and fell after which he was escorted back into the club by the other two officers who incurred some difficulty in seating him. A captain of military police, who had entered the club about this time, then ordered the three officers into a staff car which took them to the military police station. Although the two officers who accompanied him did not attribute either drunkenness or disorderly conduct to the accused, the military police captain, an enlisted "MP", the sergeant, the sergeant's wife and one of the other women at his table all testified that the accused was drunk, talking loud and attracting attention (R. 10-14, 14-15, 18-21, 23-25, 25-27, 27-29, 29-31, 32-34).

The proprietor of the club who had observed the accused's actions testified that the accused was intoxicated; that he had circulated from table to table "bothering" the customers; that the accused had gone to one table where an elderly woman was sitting with her son and had, in the presence of about 10 people, kissed her and asked her "if he could sleep with her"; that this conduct would have precipitated a fight except for the accused's apologies and the intervention of other people; that at another table he "bothered" "another fellow and his girl"; and

that he had danced with one woman who left him on the floor without completing the dance. The proprietor also corroborated the testimony of the sergeant and the others at his table who testified (R. 15-18).

At the military police station where the three officers waited for the arrival of the military police captain, the accused, according to the captain, was drunk "beyond intoxication" although the captain would not venture the opinion that the accused was "grossly drunk". However, the accused was sent to the station hospital, still accompanied by the other two officers, for an alcoholic blood content test which revealed a content of "1.75 milligrams per c.c." of blood, which in the opinion of the medical officer, who made the test, was "definite evidence" of a person being under the influence of liquor, but further limited his opinion by saying that the alcoholic test only indicated that the accused "had been drinking" (R. 18-21, 21-22).

5. The evidence for the defense consisted of the testimony of the accused, who, after his rights as a witness had been explained to him, elected to testify, and one of his officer companions on the evening in question. The latter testified that the accused's conduct was not "conspicuously disorderly", that the accused made no improper advances to women while at the club, that he was unassisted into the club after going outside with the sergeant, that he had accompanied the accused to the club to advise its proprietor that another club had been selected for the company's approaching Christmas party which news the club's proprietor "didn't like", and that he had never accompanied the accused before or since the evening in question, having known him only since 19 October 1943 (R. 34-36).

The accused testified that he had gone to the club with the other two officers for the purpose of informing the proprietor about the Christmas party at which information the proprietor exhibited extreme displeasure. He denied being intoxicated or disorderly but admitted drinking five or six "mixed cokes" and two beers. He stated that he had danced some and had on two occasions approached the sergeant's table but was intercepted each time by the sergeant who was intoxicated himself. On the second occasion in order to avoid a disturbance he had suggested that they go outside where they conversed for a few minutes and returned, unassisted, when he perceived that one of his officer companions had stepped out of the door. After he had seated himself, the military police captain requested him and his two companions to get into the command car which they promptly did. At no time had he spoken to an elderly woman or her son and he had not argued with any civilians. At the military police station he had gone to sleep while awaiting the captain's return and thereafter had been given a blood test at the hospital from which he returned to his barracks (R. 36-40).

6. The Specification, Charge II, alleges that on or about 18 December 1943 near Fort Leonard Wood, Missouri, the accused was "drunk and disorderly in uniform in a public place, to wit: Fairfield Club, near Fort Leonard Wood, Missouri". "Drunkenness" and disorderly con-

duct while in uniform in a public place are violative of Article of War 96 (M.C.M., 1928, par. 152a, CM 230222 (1943) Bul. JAG March 1943, Sec. 395 (44) at p. 96). The disapproval by the reviewing authority of the findings of guilty of Charge I and its Specification obviates the necessity for any discussion concerning the sufficiency of the evidence to support a conviction of a violation of Article of War 95.

The evidence for the prosecution conclusively shows that on the night in question the accused while in uniform in a public tavern in the presence of enlisted men and numerous civilians of both sexes drank intoxicants to excess and engaged in disorderly conduct by approaching tables to which he was uninvited, talking loudly, staggering around, engaging in altercations and quarrels with enlisted personnel and being obnoxious and annoying generally. The testimony of the numerous witnesses concerning his intoxication, fortified by the blood test and medical testimony, shows beyond a reasonable doubt that he was intoxicated to a degree that the rational and full exercise of his mental and physical faculties was sensibly impaired (M.C.M., 1928, par. 145). His own testimony that he had imbibed 5 or 6 "mixed cokes" and two beers implicitly admits such intoxication and his mere denial of disorderly conduct is wholly unconvincing when contrasted with the forceful testimony to the contrary of the numerous eyewitnesses who observed his actions while at the club. The evidence, therefore, establishes beyond a reasonable doubt his guilt of the offense alleged and abundantly supports the findings of guilty of Charge II and its Specification.

7. The accused is about 29 years old. The War Department records show that he has had enlisted service from 17 February 1941 until 6 January 1943 when he was commissioned a second lieutenant upon completion of Officer Candidate School and that he has had active duty as an officer since the latter date.

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 II and its Specification and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate

William H. Lambrell, Judge Advocate

Gabriel H. Goldin, Judge Advocate

SPJGN
CM 250834

1st Ind.

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

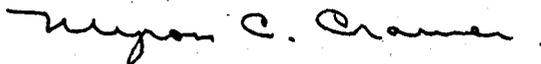
- To the Secretary of War.

25 MAR 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 Roy P. Peterson (O-1307070), 291st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a forfeiture of \$75 of his pay per month for eight months, and that the sentence as thus modified be ordered executed.

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

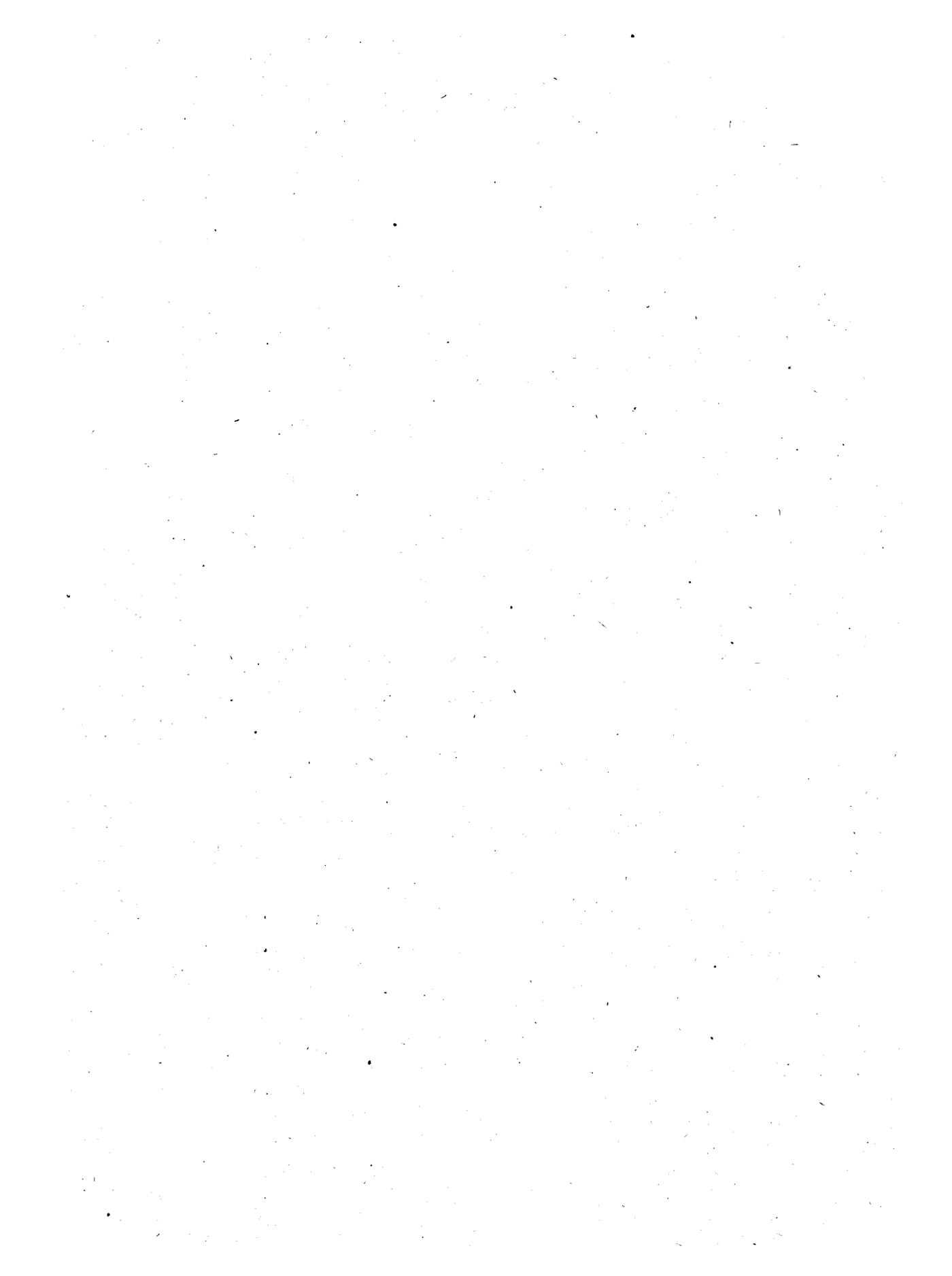


Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.

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

(Sentence confirmed but commuted to forfeiture of \$50 pay per month for six months. G.C.M.O. 169, 11 Apr 1944)



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

(69)

SPJGQ
CM 250863

23 MAR 1944

UNITED STATES)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Lieutenant Colonel GEORGE
K. ARNOLD (O-333125), Medical
Corps.)

Trial by G.C.M., convened at
Camp Blanding, Florida, 18
and 19 January 1944. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

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

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

Specification 3: In that Lieutenant Colonel George K. Arnold, Medical Corps, Station Complement, Camp Murphy, Florida, did, at Camp Murphy, Florida, on or about 8 May 1943, wrongfully enter the sleeping quarters of Second Lieutenant Isabel C. Scanlon, Army Nurse's Corps, pull the covers off of her and tell her in substance to "Get up and go on a fishing party", under such circumstances as to bring discredit upon the military service.

Specification 4: In that Lieutenant Colonel George K. Arnold, Medical Corps, Station Complement, Camp Murphy, Florida, did, at Camp Murphy, Florida, on or about 5 June 1943, wrongfully make the following remark to a Civil Air Patrol Captain, name unknown, about Second Lieutenant Isabel C. Scanlon, Army Nurse Corps, in the presence of several officers

and ladies and in a voice loud enough to attract their attention, "I have been trying to make this woman for over a year" and (pointing to Second Lieutenant W. T. Collins, Signal Corps) said, "See that big bastard over there, well, that big son-of-a-bitch has beaten my time and if he thinks I am out he's crazy" or words to that effect.

Specification 5: (Motion to strike granted.)

Specification 6: (Finding of not guilty.)

Specification 7: In that Lieutenant Colonel George K. Arnold, Medical Corps, Station Complement, Camp Murphy, Florida, having received a lawful order from Lieutenant General H. A. Drum, United States Army, in the form of a standing order as promulgated in paragraph 9, sub-paragraph h, Public Proclamation No. 2, Headquarters, Eastern Defense Command and First Army, Governors Island, New York, dated 7 September 1942, and paragraph headed "Zone B-67" page 9, Public Proclamation No. 3, Headquarters, Eastern Defense Command and First Army, Governors Island, New York, dated 21 December 1942, to refrain from going within one hundred (100) yards of the line of mean high tide during the period of sunset and sunrise, the said Lieutenant General H. A. Drum, being in the execution of his office, did, at Jupiter Island Beach, Florida, on or about 1 August 1943, wrongfully fail to obey the same.

Specification 8: In that Lieutenant Colonel George K. Arnold, Medical Corps, Station Complement, Camp Murphy, Florida, having received a lawful order from Lieutenant General H. A. Drum, United States Army, in the form of a standing order as promulgated in paragraph 9, sub-paragraph h, Public Proclamation No. 2, Headquarters, Eastern Defense Command and First Army, Governors Island, New York, dated 7 September 1942, and paragraph headed "Zone B-67", page 9, Public Proclamation No. 3, Headquarters, Eastern Defense Command and First Army, Governors Island, New York, dated 21 December 1942, to refrain from going within one hundred (100) yards of the line of mean high tide during the period of sunset and sunrise, the said Lieutenant General H. A. Drum, being in the execution of his office, did, at Jupiter Island Beach, Florida, on or about 2 August 1943, wrongfully fail to obey the same.

He pleaded not guilty to all Specifications and the Charge. Specification 5 was, on motion, stricken. He was found not guilty of Specification 6 and guilty of all others and the Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. With regard to those Specifications as to which findings of guilty have not been disapproved, the testimony for the prosecution may be briefly summarized as follows:

As to Specification 3.

Second Lieutenant Isabel C. Scanlon, Army Nurse Corps, was stationed at Camp Murphy, Florida, from 31 August 1942 to November 1943 (R. 35). The accused was at the same time and place Commanding Officer of the station hospital. Lieutenant Scanlon lived in the nurses' quarters from which all male personnel who were not on official business were excluded (R. 32, 39). Signs were posted to the effect that the building was private quarters of the nurses (R. 31, 39).

At a time fixed by Lieutenant Scanlon as "a Sunday morning" "in the latter part" of the summer (year not given) she went on a fishing party with the accused and several others of the personnel of the Station Hospital of which the accused was Commanding Officer. The trip had been planned on the previous day and each member of the party was expected to pay his or her share of the expenses. On the Sunday morning in question all who were going on the trip, except Lieutenant Scanlon, had gathered in the vicinity of the nurses' quarters when her absence was noted by the accused, and he sent word to her to get up and join the party. She was not inclined to and did not do so. Thereupon the accused went to her room, entered it, told her to get up and, according to Lieutenant Scanlon, when she refused to do so pulled the covers of her bed from her. She was, at the time, in her nightgown and other nurses were present (R. 31, 33).

Second Lieutenant Genevieve Manzo, Army Nurse Corps, was also a member of the group comprising the fishing party on this occasion (R. 38). She and Lieutenant Scanlon had rooms on the same floor in the nurses' quarters (R. 39) and she was present, standing in the doorway, after the accused had entered Lieutenant Scanlon's room (R. 40). She said that the accused "came in to see if she (Lieutenant Scanlon) was ready and told her to get ready and come on and go fishing with us" (R. 39). She did not see anything and did not know whether the accused touched the bed covers or not because "it has been so long ago" and she "wasn't paying particular attention", (R. 40) "but he could have" (R. 41).

The trial judge advocate then attempted to lay the predicate for impeachment of Lieutenant Manzo and the following colloquy took place:

- Q. Do you recall having testified under oath before Colonel Montgomery sometime last November?
- A. Yes, sir.
- Q. And do you recall that on that occasion questions were put to you which you answered to Colonel Montgomery?
- A. Yes, sir.
- Q. Is it not a fact that on that date you were asked if you knew anything about an incident relating to certain specifications which had been preferred in the case of Colonel Arnold?
- A. Yes, sir.
- Q. Now, in response to the question, 'Do you know anything about that?', did you not state, 'I was there, he did enter the room and pull the covers off, but his intentions were right, it was just to get her up to go fishing.'? Did you not make that statement?
- A. Did I say he pulled the covers off?
- Q. I will read it again, 'I was there, he did enter the room and pull the covers off, but his intentions were right, it was just to get her up to go fishing.'
- A. I don't think he pulled the covers off.
- Q. Did you or did you not make that statement at the time in the investigation before Colonel Montgomery?
- A. If I did, I certainly didn't mean it that way.
- Q. Did you or did you not make the statement?
- A. I don't know whether I did or not.
- Q. Will you deny that you made the statement at that time?
- A. Yes, sir.
- Q. You do deny that you made that statement?
- A. I will change that statement from the way it is there" (R. 42).

As the result of the accused's visit to the room, Lieutenant Scanlon arose, dressed and joined the fishing party (R. 33). She did so because, although both she and the accused were off duty at the time (R. 32), she felt that she was obliged to comply with her Commanding Officer's request (R. 36).

As to Specification 4.

In the first part of June 1943 Lieutenant Scanlon had occasion to attend a dance given at the Officers Club, Camp Murphy, Florida (R. 32).

Second Lieutenant William F. Collins, Signal Corps, to whom she later became engaged (R. 46) was her escort on this occasion (R. 44, 45).

During the course of the evening, while they were in a game room near a bar in the rear of the club, the accused approached them in company with a captain (not named) who was a pilot with the Civil Air Patrol. The room was crowded with other people, both men and women. The accused then introduced the captain to Lieutenant Scanlon who made some flattering remarks regarding her appearance, whereupon, according to Lieutenant Scanlon, the accused, in a voice loud enough to be overheard, and which did attract the attention of others, said: "Yes, I have been trying to make that girl ever since she has been in Camp Murphy, but this big bastard has beaten my time" (R. 32). Lieutenant Collins testified that "Colonel Arnold made a rather derogatory remark that he had been trying to make Miss Scanlon for a long time and pointed to me and said, 'See that big bastard over there, well, that big son-of-a-bitch has been beating my time and if he thinks I am out he is crazy.'" (R. 45)

Lieutenant Collins was "naturally quite peeved over it" and took Lieutenant Scanlon by the arm and left (R. 37-45).

As to Specification 7.

On 7 September 1942 Public Proclamation No. 2 was promulgated by Headquarters, Eastern Defense Command and First Army, Governor's Island, New York. Paragraph 9_h thereof is as follows:

"Within any of the Restricted Zones B-1 and B-4 to B-69, inclusive, no person not in the armed forces of the United States engaged in the performance of official duties shall enter upon or be found in the area seaward of a line 100 yards inland from the line of mean high tide during the period between sunset and sunrise. Whenever such area is paralleled by a public road, railroad or boardwalk and such public road, railroad or boardwalk is less than 100 yards inland from the line of mean high tide, the prohibitions in this restriction shall extend only to the area seaward of such public road, railroad or boardwalk."

On 21 December 1942 Public Proclamation No. 3 was promulgated by the same authority. Zone B-67, on page 9 thereof, is bounded and described as follows:

"Florida No. 4. Location: The area consists of all islands, keys, beaches, coastal strips, banks and reefs on the eastern coast of Florida bounded as follows: On the north by Ponce de Leon Inlet; on the west by the Inland

Waterway (Intracoastal Waterway) following its course through Mosquito Lagoon, Haulover Canal, and the Indian River to St. Lucie Inlet; on the south by St. Lucie Inlet; and on the east by the Atlantic Ocean and sounds, coves, gulfs, bays, inlets, and indentations thereof. The Restricted Zone shall further consist of an extension of the above area along the Atlantic Coast from St. Lucie Inlet south to Cape Florida on the southern end of Key Biscayne, Florida; said additional area to be bounded on the east by the Atlantic Ocean and on the west by a line paralleling the line of the coast at a distance of one hundred (100) yards inland from the line of mean high tide, such western boundary extending to the south from St. Lucie Inlet to a north-south line through the most southerly point of Cape Florida; with respect to Virginia Key the above extended area shall run from the most northerly point of the Key along its Atlantic Coast to its most southwesterly point; with respect to Key Biscayne said area shall run from North-west Point along the Atlantic Coast to the above north-south line through Cape Florida. The corporate limits of Coronado Beach, Cocoa Beach, Melbourne Beach, Winter Beach, Vero Beach, and Jensen Beach shall be excluded from the restricted area except the areas thereof seaward of a line parallel to and one hundred (100) yards west of the line of mean high tide of the Atlantic Ocean, which area shall be restricted."

The court took judicial notice of the two proclamations and that Jupiter Island Beach, Florida, lies within the zone thus restricted (R. 9, 10).

For the purpose of enforcing the regulations and restrictions contained in the proclamations, members of the Coast Guard were detailed to make nightly patrols along the beach of the Atlantic Ocean on Jupiter Island, Florida (R. 10, 11, 15). Among other things the guards were ordered to allow no one on the beach from sunset to sunrise and if any one was found on the beach within the prohibited period, to check identification and, if not found satisfactory, to arrest the person (R. 12, 13, 16).

Seaman First Class Cherry A. Womack and George R. Gomers were on such guard patrol along the beach of the Atlantic Ocean on Jupiter Island around midnight of 1-2 August 1943 (R. 10, 16). At some time between 10 o'clock p.m. and 12:30 o'clock a.m. they saw what appeared to be someone running along the beach. Both Womack and Gomers were mounted and they first believed it was another guard who had lost his horse (R. 10) but they were unable to see because the night was dark and cloudy. (R. 12, 13, 21, 25). Womack, who was in front of Gomers, shouted "Halt" and some one answered: "Don't shoot, don't shoot, Colonel Arnold." (R. 10, 16, 17). Both guards then rode up to the accused and Gomers asked him what he was doing on the beach at that

hour, to which the accused answered that he was having a swim. When told about the prohibition against any unauthorized person being on the beach at that hour the accused said: "I know, but we work late hours and I am going to have my fun." The guards noticed, during flashes of lightning, that the accused was nude, and they detected liquor on his breath. When they went with him to a house nearby for the purpose of checking the accused's identification, they saw a woman, also nude, jump from the steps and throw her arms around the accused. The guards then entered the house and checked the accused's identification card. After warning the accused not to go on the beach again under such circumstances under penalty of arrest the guards left (R. 10, 11, 14, 16, 17, 19, 26).

As to Specification 8.

On the night of 2-3 August 1943 Seaman First Class Roy L. Sigemore was serving as a coast guard patrol on Jupiter Island, Florida, in the vicinity of the beach where the incident described by the evidence relative to Specification 7 above set forth had occurred (R. 27). The night was real dark but the clouds were scattered (R. 29). As he proceeded south his horse noticed something in the water in front of the house where the accused lived. Because of the darkness the guard could not see the object so he dismounted, and approached the water. Seeing what looked like two heads, he called out to ask who was there, whereupon the accused came out of the water, completely nude, and said: "Don't shoot, it is the same thing as last night". This guard also asked the accused whether he did not know that he was not permitted to be on the beach at night, to which the accused answered that "he didn't get off until 10 or 10:30 at the hospital and it was the only chance he had to be on the beach." At this point the guard observed a woman, ankle deep in the water, also entirely nude. He then told them they would have to get off the beach, whereupon they left (R. 27, 28).

4. The accused, having been informed of his rights, elected to remain silent (R. 113, 114).

Colonel L.A.A. Berry, General Staff Corps, Headquarters, Fourth Service Command, testified for the defense that from 20 October 1942 to 21 July 1943, the accused was Post Surgeon while Colonel Berry was Commanding Officer at Camp Murphy, Florida. During this period the hospital was rated as "superior" and the accused's services were entirely satisfactory. Colonel Berry stated that he would be very glad to have the accused serve under him in the capacity of a surgeon or commanding officer of a hospital at any time (R. 101, 102).

It was stipulated and agreed that, if the officers herein-after named were present in court, they would testify, respectively, as follows:

Lieutenant Colonel William C. Menninger, Medical Corps, Office of the Surgeon General, had several contacts with the accused on which occasions he saw him for short periods of time while inspecting the effectiveness of hospital organization. In his opinion the accused discharged his responsibility as administrator of the Station Hospital, Camp Murphy, Florida, in a capable way. He had never known of any misdemeanor or misconduct on the part of the accused and he never had any reason to assume that he was other than a capable, efficient and respected medical officer (R. 104; Def. Ex. 5).

Lieutenant Colonel Rettig A. Griswold, Medical Corps, member of the staff of Walter Reed General Hospital, Washington, became acquainted with the accused during his (Colonel Griswold's) tour of duty as consultant in surgery to the Fourth Service Command from September 1942 to July 1943 during which period he saw the accused on several occasions. While the accused was commanding officer at Camp Murphy, Florida, inspection showed that it was run efficiently and well and that the accused had the respect of his officers, personnel and patients and was rendering service of a superior grade. On all occasions when he came in contact with accused his demeanor and conduct were exemplary and he could find nothing to criticize professionally or personally in his conduct as an officer and a gentleman (R. 104, 105; Def. Ex. 6).

Colonel A. W. French, Medical Corps, Surgeon, Headquarters, Fourth Service Command, outlined the duties performed by the accused since his call to active duty and commented favorably upon his ability and efficiency as the commanding officer of the Station Hospital, Camp Murphy, Florida. He considers the accused an officer of exceptional administrative ability capable of efficiently organizing and commanding a medical field with up to 1000 bed capacity (R. 105; Def. Ex. 7).

By depositions, Mr. Bruno Julian Jaeckel, Mr. James Owen Brown and Mrs. J. O. Brown, his wife, all civilians, testified that they each knew the accused and that his reputation for morality, integrity and general conduct is good (R. 103, 104; Def. Ex. 2, 3, 4).

In rebuttal, the prosecution called Captain Joseph D. Everingham, Medical Administrative Corps, Station Hospital, and Major Harold J. Crumley, Signal Corps, both stationed at Camp Murphy, Florida, who testified that in their opinion the accused's reputation for morality is bad (R. 105-108; R. 109-111).

5. At the conclusion of the prosecution's case counsel for the defense moved that "by reason of complete insufficiency of evidence, testimony adduced here or evidence submitted to this court to support the Specifications and Charge, that the court at this time direct a dismissal of his cause with acquittal for the accused." Thereupon the law member ruled: "Unless there is some objection by some member of the court the motion is denied." Apparently there was no objection.

Defense counsel then moved that the court "direct the striking of Specification 5 from the Charge". The trial judge advocate consented and the law member granted the motion.

A motion of defense counsel that the court strike Specification 6 "from the Charges" was denied.

Finally, a motion to strike Specifications 1, 2, 7 and 8 on the grounds that Specifications 1 and 2 are patently incompatible with Specifications 7 and 8 was denied.

6. In viewing the conduct of the accused toward Miss Scanlon, as alleged in Specification 3, it is necessary to bear in mind that he was, at the time, the commanding officer of the Station Hospital in which she was then serving as a commissioned officer of the Army Nurse Corps. Consequently, irrespective of whether they were on duty or off duty, there was a relationship between them, arising from their respective official capacities, which required an even higher degree of amenities and polite conduct than would ordinarily be expected.

While it is true that, as such commanding officer, he had the power and authority to enter into the private quarters of the nurses when engaged on official business, no stretch of imagination could clothe him with the right to do so arbitrarily and for his own private purposes, and certainly only the gravest necessity could justify his entering their bedrooms without invitation or permission.

On the instance in question there was neither justification nor excuse for what occurred. Lieutenant Scanlon, though she was invited by the accused to join a fishing party and having agreed to go, was expected to pay her share of the expenses, was not compelled to go and was at liberty to change her mind, as she did. The action of the accused in going to her bedroom uninvited and while she was still in bed, clad only in her night gown, in order to demand that she get up, dress and join the party, was indecent and, in the light of their official relationship, prejudicial to the discipline of the hospital. Whether he did, in fact, pull the covers back, thus disclosing Lieutenant Scanlon's dishabille, is in dispute. Lieutenant Scanlon said he did but another nurse, Lieutenant Manzo, gave conflicting testimony. When testifying before the investigating officer Lieutenant Manzo, Army Nurse Corps, said the accused "did pull the covers off" adding, by way of saving amendment, "but his intentions were right". At the trial she repudiated her statement regarding the bed covers and said she "didn't see anything" and that she "did not know if he touched the covers or not". Under the circumstances the unimpeached testimony of Lieutenant Scanlon bears the greater weight.

There is little doubt that the accused presumed upon his official position to do what he would certainly not consider justifiable if done by any subordinate officers of his staff. Both the

unwarranted entry into the nurse's bedroom and his attempt, because of his office, to coerce her into doing what she had a lawful right not to do, if she so chose, were clearly violations of Article of War 96.

On a later occasion, the record of trial discloses a still greater abuse by the accused, of his rank and official station. It was shown that, at a dance being held in the Officers Club, the accused introduced a Captain of the Civil Air Patrol to Lieutenant Scanlon in the presence of Lieutenant Collins, who was her escort. Other ladies and gentlemen were in the immediate vicinity. Without justification or excuse, and referring both to Lieutenant Scanlon and Lieutenant Collins, he addressed the following remarks to the Captain: "I have been trying to make this woman for over a year" and, pointing to her escort, Lieutenant Collins, he continued, "See that big bastard over there, well, that big son-of-a-bitch has beaten my time and if he thinks I am out he's crazy."

The import of the words is plain. If others heard the remarks (and the testimony indicates that some did) it merely aggravated the effect of the language which the Civil Air Patrol Captain, and Lieutenants Scanlon and her escort, Lieutenant Collins, were obliged to hear. What was said evidently connoted that the accused had been trying to court the affections of Lieutenant Scanlon for a long time and had been, thus far, thwarted by Lieutenant Collins' successful addresses to her. Even though the information had been couched in more delicate language such a bold announcement would have justified the inference that Lieutenant Scanlon could improperly advance her own interests if she acceded to the importunities of her commanding officer. Even so, it would have been an indecorous as well as an indiscreet statement on the part of the accused. But, when modified by vulgar and obscene epithets directed against his supposed rival, the accused's language constituted conduct not only prejudicial to good order and military discipline, but unbecoming an officer and a gentleman as well.

The defense made an effort to discredit the testimony of Lieutenant Scanlon by attempting to show that, for various, vague reasons, she had become disgruntled and embittered against the accused who had been her erstwhile friend. The showing is too shallow to accomplish any purpose. The fact that Lieutenant Scanlon and Lieutenant Collins were, at the time of the trial, engaged to be married, was also shown as indicative of their bias and prejudice. Such a close relationship might tend to color testimony but it would be monstrous to say that it presupposed a willingness, on that account, to give perjured evidence. No one offered any testimony in denial or rebuttal of their story and, since it is unchallenged, it is legally sufficient to support the finding.

In determining the guilt or innocence of the accused as to Specifications 7 and 8 it must be borne in mind that the offenses alleged were violations of orders which had been promulgated by public proclamation. They emanated from the Commanding Officer of the Eastern Defense Command of the United States Army. What all the world knows the court must be presumed to know and we may take judicial notice of the fact that enemy submarines had been torpedoing merchant vessels just off the Coast of Florida in the vicinity of the place where these offenses are alleged to have occurred. In order to lessen the probabilities of further enemy depredations of like character and to reduce the hazards of coastal shipping, most of the Atlantic coast line from Maine to Florida had been placed under "blackout" orders and the public was forbidden, between sunset and sunrise, to be within designated restricted areas. These are the orders which the accused is charged with violating. Since public proclamations receive the most widespread publicity in newspapers and by posting, even civilians would find it difficult to assert that they were unaware of their content. Certainly no high ranking officer of the Army could rely upon his ignorance of the law to defend against a charge of violating orders of such grave importance, nor would he be permitted to question their applicability to him because of any fancied unusual circumstances because of which he felt he was exempted from their provisions.

Notwithstanding, the accused did, on the night of 1-2 August 1943 enter into the restricted area and, at about midnight, was discovered by a patrol of the Coast Guard, bathing in a nude condition, on the beach of Jupiter Island, Florida. He was accompanied by a nude female. It is evident that the accused was residing temporarily in a house somewhere on the beach in the vicinity of where he was bathing. Although he had violated the orders and must have known of the nightly coast guard patrol inasmuch as he cried out "don't shoot" immediately when he was hailed, the guard merely checked his identification papers and warned him not to go upon the beach in the future between specified hours.

These facts and circumstances constituted a violation of the orders set forth in Specification 7 and while it might be condoned as a first offense without particularly aggravating circumstances the events of the next evening present a different picture. On the night of 2-3 August 1943 the accused, again nude and in the company of a nude female, was found disporting himself in the surf at the same place and again, at about midnight. That he knew he was violating orders on this occasion is conclusively shown by his first remark to the guard when he was hailed: "Don't shoot, it is the same thing as last night."

Thus, there is portrayed in this evidence, a willful and flagrant disobedience of orders which the accused knew were binding upon him and which he had, within twenty-four hours been warned to obey. It was all the more aggravated because, being an officer of the United States Army, his manner and his words toward a member of the coast guard patrol who was endeavoring to enforce obedience to the orders indicated; that he felt he was above the necessity of obeying

them. Irrespective of the nudity of the accused and his female companion at a place where he had been found in the same condition on the previous night by members of the guard patrol, which conduct was certainly of a nature to bring discredit upon the military service, the actions of the accused in again violating the orders contained in the public proclamations and in refusing to heed the well-intentioned warning of a coast guard patrolman, was clearly conduct to the prejudice of good order and military discipline.

7. The motion to "direct a dismissal of this cause with acquittal for the accused" made at the conclusion of the prosecution's case was properly denied. What was evidently intended was a motion for findings of not guilty. Such a motion will not be granted if there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every essential element of an offense charged or included in any specification to which the motion is directed (par. 71d, M.C.M. 1928).

Since the accused was found not guilty of Specification 6, he has not been harmed by the failure of the court to grant the motion to strike the Specification.

While there was some merit to the contention that Specifications 1 and 2 were incompatible with Specifications 7 and 8, the motion to strike all of them was too broad. The action of the reviewing authority in disapproving the findings as to Specifications 1 and 2 accomplished all that the court could properly have done in disposing of the motion.

8. Records of the War Department disclose that the accused was born in Dallas, Texas and is now 34 years and 7 months of age. He was graduated from high school in 1927. He attended Southern Methodist University for two years and was graduated from Baylor University (Medical Department) in 1933 after which he was an interne at St. Paul's Hospital, Dallas, Texas, for 18 months. He was commissioned a First Lieutenant, Medical Corps Reserve, on 7 June 1935. On 4 October 1939 he was promoted to Captain, Medical Corps Reserve. On 26 October 1940 he was called to extended active duty and assigned to Fort Crockett, Texas. He later served at Fort Huachuca, Arizona and Camp Blanding, Florida. In 1941 he pursued a refresher course at the Carlisle Barracks, Carlisle, Pennsylvania. On 29 July 1942 he was promoted to Major, Medical Corps, Army of the United States, and on 8 May 1943 to Lieutenant Colonel, Medical Corps, Army of the United States. At the time of the offenses charged he was Commanding Officer of the Station Hospital at Camp Murphy, Florida.

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

trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

William A. Gouss, Judge Advocate.

Charles Stephum, Judge Advocate.

Wesley H. Frederic, 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 Lieutenant Colonel George K. Arnold (O-333125), 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

3 Incls.

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

(Sentence confirmed but execution suspended. G.C.M.O. 198, 26 May 1944)

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

(83)

SPJGV
CM 250868

22 APR 1944

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

v.

Second Lieutenant THOMAS
C. ANDERSON (O-803533),
Air Corps.

ARMY AIR FORCES
EASTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Fort Myers, Florida, 2 February
1944. Dismissal.

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

CHARGE: Violation of the 96th Article of War.

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

Specification 2: In that Second Lieutenant THOMAS C. ANDERSON, Air Corps, 715th Flexible Gunnery Training Squadron, Buckingham Army Air Field, Fort Myers, Florida, was at or near Fort Myers, Florida, on or about 1 December 1943, disorderly in uniform in a public place, to wit, the Town Hall, Lee County, Florida.

Specification 3: In that Second Lieutenant THOMAS C. ANDERSON, * * *, did, on or about 4 December 1943, at Fort Myers, Florida, wrongfully violate the written provisions of paragraph 1 of Post Memorandum, Headquarters, Army Air Forces Flexible Gunnery School, Fort Myers, Florida, dated 19 August 1942, to which he was subject and which provided as follows:

CURFEW: Effective this date the following instructions apply to all Officers of this Command including those who are temporarily authorized to live off the Post.

1. All Officers will proceed to their homes or quarters so as to be present by 2400.
2. In the event it becomes necessary for an Officer to be off the Post after 2400, he will secure from his Squadron Commander a written pass for such permission.

as amended by paragraph VII, Daily Bulletin Number 122, Headquarters, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, dated 6 May 1943, which provided as follows:

VII. NOTICE TO ALL MILITARY PERSONNEL.

1. Effective at once, curfew regulations for this Post are changed to allow military personnel to be absent from the Post until 0200 on Sunday morning ONLY. Curfew will remain at 2400 for every other night of the week.

in that he wrongfully failed to proceed to his home or quarters so as to be present by 2400, 3 December 1943.

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

Specification 1: In that Second Lieutenant THOMAS C. ANDERSON, * * *, did, on or about 2 December 1943, at Fort Myers, Florida, wrongfully violate the written provisions of paragraph 1 of Post Memorandum, Headquarters, Army Air Forces Flexible Gunnery School, Fort Myers, Florida, dated 19 August 1942, to which he was subject and which provided as follows:

CURFEW: Effective this date the following instructions apply to all Officers of this Command including those who are temporarily authorized to live off the Post.

1. All Officers will proceed to their homes or quarters so as to be present by 2400.
2. In the event it becomes necessary for an Officer to be off the Post after 2400, he will secure from his Squadron Commander a written pass for such permission.

as amended by paragraph VII, Daily Bulletin Number 122, Headquarters, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, dated 6 May 1943, which provided as follows:

VII. NOTICE TO ALL MILITARY PERSONNEL.

1. Effective at once, curfew regulations for this Post are changed to allow military personnel to be absent from the Post until 0200 on Sunday morning ONLY. Curfew will remain at 2400 for every other night of the week.

in that he wrongfully failed to proceed to his home or quarters so as to be present by 2400, 1 December 1943.

Specification 2: In that Second Lieutenant THOMAS C. ANDERSON, * * *, was at or near Fort Myers, Florida, on or about 4 December 1943, disorderly in uniform.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to "be dismissed the service, and to be confined at hard labor for a period of eighteen (18) months." Evidence was introduced of one previous conviction by general court-martial for violating flying altitude regulations, for being disorderly in uniform in a public place, and for being out after hours contrary to a standing curfew order, all in violation of the 96th Article of War. The reviewing authority disapproved the finding of guilty of Specification 1 of the Charge, approved the sentence but remitted the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution shows that on the night of 1 December 1943 the accused was present in uniform in a night club known as the Town Hall, located in the vicinity of Fort Myers, Florida (R. 15, 16, 22). Mrs. Gloria Fleischer, the wife of an officer, was also there with her sister (R. 15). Mrs. Fleischer stopped Corporal McKenzie, an M.P. on duty there, to ask him about medical attention for a toothache. The accused then accosted the two, asked Corporal McKenzie what right he had to put his arm around Mrs. Fleischer, and demanded the corporal's name and organization. The latter wrote out the requested information for the accused (R. 15, 22, 24). It was about midnight and Corporal McKenzie proceeded with his duty of "getting everybody out" of the establishment (R. 22). The accused then engaged the bartender of the place in conversation, asking him to agree that all M.P.s were "sons-of-bitches" (R. 24). The bartender refused and disagreed with the accused (R. 22, 24). Accused thereupon called the bartender a "God-damned 4-F son-of-a-bitch" (R. 15, 22, 24). Corporal McKenzie and other M.P.s stepped between the two and ushered the accused out to the street (R. 22). The bartender followed the accused into the street and the accused thereupon stated to him, "You God-damned son-of-a-bitch, I can whip you" (R. 15). The bartender drew back to strike the accused but the M.P.s intervened (R. 15, 22) and the accused was put into a taxi (R. 22, 23, 24). As the taxi drove off the accused called out the window, "You're a God-damned four-F son-of-a-bitch" (R. 22, 24). While accused in a loud voice was cursing the bartender several M.P.s, Mrs. Fleischer, her sister and ten or fifteen other people were present (R. 22).

It was after 2400 on 1 December 1943 when the accused was put into the taxi by Corporal McKenzie (R. 22). The bartender shortly thereafter called the accused at the Franklin Arms Hotel and the accused said he was sorry about what had happened. A little later he came back and personally apologized to the bartender. The Town Hall closed at twelve thirty at night and it "wasn't long afterward" when the accused returned to apologize (R. 24). A standing order of the commanding officer of the accused's organization, issued 19 August 1942, required all officers to be in their homes or in quarters by 2400, and was amended 6 May 1943 to allow them to be absent until 0200 on Sunday morning only. To remain absent after such hours it was requisite for an officer to secure a written pass for such permission from his squadron commander (R. 12, 13; Pros. Exs. A, B). The accused had no such permission to be absent after 2400 on 1 December 1943, and, as a matter of fact, had never at any time been given a curfew pass by his squadron commander (R. 14).

Around 2430 on 4 December 1943, the accused in uniform was again in the Town Hall night club accompanied by Mary Ann Kunze, the sister of Mrs. Fleischer. Sergeant Sanders of the 912th Guard Squadron, a military police organization, who was then off duty, was also in the club and was called over to the accused's table by Mrs. Kunze. She introduced the accused and the sergeant and the latter offered to shake hands with the accused. The accused in a loud voice said something about the sergeant being a "Son-of-a-bitch of an M.P." and the sergeant started to walk away (R. 26, 27). The accused called the sergeant to attention and berated him in a loud voice (R. 27). The sergeant "started to wander away" but the accused followed him and called him to attention again, stating that he had wanted to get an M.P. in trouble for a long time, that he was going to have the sergeant busted and that he was going to call the officer of the day (R. 27). He called the guard squadron to see if the sergeant was on duty and then called the officer of the day. The accused and the sergeant argued for awhile and then the sergeant was asked to accompany the accused (R. 27) while he took Mrs. Kunze to the home of her sister, Mrs. Gloria Fleischer (R. 17, 18, 27). The accused and Mrs. Kunze entered the house (R. 27). Mrs. Kunze told Mrs. Fleischer, who had retired, that the sergeant was under arrest and the latter told Mrs. Kunze to bring the sergeant into the house (R. 18).

Sergeant Sanders entered the house and engaged in conversation with Mrs. Fleischer in her bedroom. The accused entered the bedroom and said, "Come on MP, we're going." Mrs. Fleischer objected to the accused taking the sergeant with him. The accused said to the sergeant, "God-damned your soul, come on." He also told the sergeant he was going to get his "God-damned ass busted", and used the expression "God-damn it" several times while in Mrs. Fleischer's presence. Mrs. Fleischer asked

the accused to leave and he refused. She finally picked up a shotgun, pointed it at the accused and he left the house (R. 18, 27, 28). Mrs. Fleischer had injected herself into the situation and objected to the arrest of the sergeant because she "didn't think no drunken officer could take no enlisted man or no one else with him" (R. 20).

These events occurred between 2400 on 3 December 1943 and 0100 on 4 December 1943 (R. 21). Standing orders of the accused's organization required that he be in his home or quarters by 2400 each night except on weekends when the curfew hour extended to 0200 on Sunday morning (R. 12, 13; Pros. Exs. A, B). To remain absent after such hours it was requisite for an officer to secure a written pass for such permission from his squadron commander. The accused did not have the permission of his squadron commander to be absent after 2400 on 3 December 1943 (R. 14).

No summary of the evidence offered by the prosecution in support of Specification 1 of the Charge is made herein as the findings of guilty of this Specification were disapproved by the reviewing authority.

4. The accused, after his rights had been fully explained to him, elected to take the stand and testify under oath with respect to Specification 1 of the Charge, which was disapproved by the reviewing authority, and to remain silent as to all others.

Second Lieutenant Fred C. Ford, Air Corps, a witness for the defense, testified that he was in the Town Hall club with the accused on the night of 1 December 1943. He saw an M.P. at the bar with his arm around a girl and asked the accused if M.P.s behaved in that manner. They went to the bar and the accused took the M.P.'s name and turned it over to an M.P. sergeant. The bartender objected to the accused's conduct, jumped over the bar and followed Lieutenant Ford and the accused outside. The accused and the bartender were talking. There were about six M.P.s around at the time. The bartender drew back to strike the accused, the M.P.s intervened and Lieutenant Ford "shoved" the accused into a taxi cab. The bartender had stated to the accused that "no God-damned shavetail is going to act like that in my place" and the accused had replied, "I don't give a God-damned whether you like it or not." The accused shouted out of the window of the cab as it drew away, "you four F son-of-a-bitch" (R. 37).

Second Lieutenant Mark S. Dalen, Air Corps, a witness for the defense, testified that he was with the accused on the night of 3 December 1943. About eleven o'clock they left their quarters, picked up Mary Ann Kunze and went to the Town Hall club. An M.P. came over to the table. He had no M.P. brassard on his arm. The accused made some remark about not liking M.P.s and wanted the M.P. to leave. The M.P. indicated he was going

to turn in the accused and Lieutenant Dalen for being out after curfew "which we were" (R. 41). He stated he was on twenty-four hour duty and had the right to turn anybody in at any time regardless of the fact that he didn't have an arm band on. He also made some remarks about second lieutenants being cowards and hiding behind trees while the privates fought the war. A loud argument ensued between the accused and the M.P. The accused made some telephone calls and then arrested the M.P. for being drunk and disorderly and for falsely stating that he was on duty. All four of them then left in a cab, proceeding to the house of the girl's sister. It was then around twelve o'clock or a little after (R. 41, 42, 43). Lieutenant Dalen did not enter Mrs. Fleischer's house but remained outside. He saw the accused subsequently being pushed out of the house with a gun pointed at his stomach (R. 43).

5. Specification 2 of the Charge alleges that the accused was disorderly in uniform in a public place on or about 1 December 1943. The evidence sustains the finding of guilty of this Specification. On the night of 1 December 1943 and the early morning of 2 December 1943, the accused used language that was loud and clearly profane, insulting and provocative toward a bartender both inside and in front of a public night club in the presence of military personnel, women and others. He was about to be engaged in a public brawl with the bartender when a brother officer removed him from the scene.

A specification alleging disorderly conduct should allege the specific conduct relied upon as constituting the offense (Dig. Op. JAG, 1912-40, sec. 454 (34), p. 353). This Specification fails to do so. However, a finding made under a defective Specification is not to be disapproved unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby (MCM, 1928, par. 87b, p. 74). It is apparent from the record that the accused understood fully the particular offense with which he was charged under this Specification. He was not misled nor were any of his rights injuriously affected thereby.

6. Specification 3 of the Charge alleges that the accused violated a standing order of his organization by failing to be in his home or quarters by 2400 on 3 December 1943. Judicial notice can be taken of the fact that 4 December 1943 was not a Sunday in which event the curfew hour would have been 0200 on that day. The evidence of the prosecution, and that offered by the accused, conclusively sustains the findings of guilty of this offense.

7. Specification 1 of the Additional Charge alleges the accused also violated the standing curfew order by failing to be in his home or quarters by 2400 on 1 December 1943. Judicial notice can be taken of the fact that 2 December 1943 was not a Sunday. The evidence sustains

the findings of guilty of this offense.

8. Specification 2 of the Additional Charge alleges that the accused was disorderly in uniform at or near Fort Myers, Florida, on or about 4 December 1943. The evidence sustains the findings of guilty of this offense. The accused's officious conduct and insulting language resulted in a verbal altercation with an enlisted member of the military police in a public place at said time and place. A short time thereafter in the home and in the presence of Mrs. Fleischer and her sister, accused used vile, obscene and profane language and refused to leave until ejected at the point of a gun. Irrespective of his refusal to leave her home when ordered, his profane language in her presence and that of her sister clearly sustains the findings. Although this Specification fails to allege the specific conduct relied upon as constituting the offense, the defect is not fatal. The observations made in paragraph 5 supra, with respect to such a defect are applicable here.

9. The accused is 25 years of age, married and the father of one child. War Department records show he was commissioned second lieutenant on 28 May 1943 and is a rated pilot. He had eight years prior service as an enlisted man.

10. Attached to the record of trial is a recommendation of two of the eight members of the court that the confinement be remitted and that the accused be permitted to resign from the service.

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

Thomas N. Jappy, Judge Advocate.

Herbert M. Kidner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

(90)

SPJGV
CM 250868

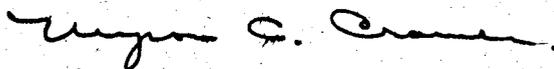
1st Ind.

War Department, J.A.G.O., 27 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 Thomas C. Anderson (O-803533), 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 as approved by the reviewing authority, and to warrant confirmation of the sentence. On the night of 1-2 December 1943, accused, while in uniform, used language that was loud and clearly profane, insulting and provocative toward a bartender both inside and in front of a public night club, Fort Myers, Florida, in the presence of military personnel and civilians, some of whom were ladies. Again on the night of 3-4 December 1943, while in uniform at the same night club, accused by his officious conduct and insulting language became involved in an altercation with an enlisted member of the military police and shortly thereafter visited the home of Mrs. Gloria Fleischer, where he indulged in the use of vile, obscene and profane language, refusing to leave until he was ejected at the point of a gun in the hands of Mrs. Fleischer. On each of the above occasions accused violated the standing curfew order, in failing to be in his home or quarters by 2400 hours. Accused has one previous conviction by general court-martial for violating flying regulations, being disorderly in uniform in a public place and being out after hours contrary to a standing curfew order, all in violation of the 96th Article of War. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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



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

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

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 318, 22 Jun 1944)

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

(91)

15 MAY 1944

SPJGH
CM 250912

UNITED STATES)

v.)

First Lieutenant RICHARD C.)
WELLS (O-924470), Corps of)
Engineers.)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Camp Gordon Johnston, Florida,
15 February 1944. Forfeiture
of \$50 of pay per month for
six months.

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 in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Richard C. Wells, Corps of Engineers, Company B, 534th Engineer Boat and Shore Regiment, Camp Gordon Johnston, Florida, did, at the Municipal Airport, New Orleans, Louisiana, on or about 16 November 1943, wrongfully strike Miss Bernice Schiwetz on the jaw with his fist.

He pleaded in bar of trial that former punishment for the offense charged had been administered by his regimental commander under the 104th Article of War. The court overruled the plea "for the time being". Accused then pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the word "fist", substituting therefor the word "hand", and of the Charge. He was sentenced to forfeit \$50 of his pay per month for six months.

The reviewing authority approved the sentence and ordered it executed. The proceedings were published in General Court-Martial Orders No. 181, Fourth Service Command, Army Service Forces, 25 February 1944.

3. The evidence shows that at about 1:45 a.m. on 16 November 1943 accused, who had arrived at New Orleans Airport about an hour and a half earlier by commercial plane from Chicago, approached the ticket counter of National Air Lines at the airport to arrange for continuing his journey to Tallahassee, Florida, by the next plane. Miss Bernice Schiwetz, operations agent for the air line, was on duty. In the course of an altercation between them, accused slapped Miss Schiwetz one time. Miss Schiwetz testified that accused stated he had been a well known radio announcer, had earned large sums of money and enlisted in the Army, and that he made critical remarks to a civilian employee nearby for not being in uniform. As a result she made a gesture with her right hand from her lower lip to her left shoulder, which she stated indicated that she thought he was bragging. Accused stated that he ought to slap her; she leaned on the counter, tilted her head and said "You want to hit me"; and he struck her on the face. She then "tossed" a small adding machine at him. Her face was bruised by the blow. Accused testified that when Miss Schiwetz made a remark derogatory to those in uniform he stated that she ought to be slapped. She made a gesture which he "took to be thumbing her nose" and then pushed the adding machine toward him. It struck his elbow and fell at his feet. He leaned over the counter and slapped her, merely touched her with his open hand. He then picked up the adding machine (R. 11-30, 34-46).

Three officers testified as to the good reputation of accused, and as to his ability as an officer (R. 31-34).

4. The evidence for the defense in support of the plea in bar of trial based on former punishment shows that about 27 November 1943 accused delivered to Colonel Robert H. Naylor, commanding the 534th Engineer Boat and Shore Regiment, to which accused belonged, a letter from the Commanding Officer of New Orleans Air Base to "Captain Burns", directing him to make an investigation of the incident. It bore successive indorsements, including Captain Burns' report, but had not gone through official channels. Colonel Naylor administered punishment to accused under the 104th Article of War, by reprimanding him officially, for the offense, which was the identical offense alleged in the Specification. Colonel Naylor considered it a minor offense and, based on the facts at hand at the time, that the punishment administered was sufficient. He found nothing in the pre-trial investigation, made subsequent to punishment of accused under the 104th Article of War, other than the testimony presented by Captain Burns, and there was nothing in the investigation which would make "the case" more serious than at the time when Colonel Naylor acted (R. 6-9).

5. The 104th Article of War authorizes the commanding officer of a detachment, company, or higher command to impose disciplinary punishment upon persons of his command for minor offenses. Whether or not an offense may be considered as "minor" depends upon its nature, the time and place

of its commission, and the person committing it. Generally speaking, the term includes derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial. An offense for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement is not a minor offense (MCM, 1928, par. 105).

When an officer administering punishment under the 104th Article of War determines that the offense is a minor one, his determination is, unless there is an abuse of discretion, final and conclusive (CM 204275, Lichtenfels; Dig. Op. JAG, 1912-40, sec. 462(2)).

In the opinion of the Board of Review there was no abuse of discretion on the part of Colonel Naylor in determining that the offense committed by accused was a minor offense and in administering punishment therefor under the 104th Article of War. Accordingly, the reprimand administered was legal punishment for the offense, accused was not thereafter subject to punishment a second time, and the plea in bar should have been sustained.

6. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Samuel M. Driver, Judge Advocate

Robert C. Cannon, Judge Advocate

J. L. Lichtenfels, Judge Advocate

(94)

1st Ind.

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

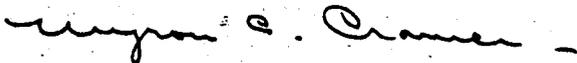
17 MAY 1944

- To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$ as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of First Lieutenant Richard C. Wells (O-924470), Corps of Engineers.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action carrying into effect the recommendation above made.



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

2 Incls.

Incl.1-Record of trial.

Incl.2-Form of action.

(Findings and sentence vacated by order of the Under Secretary of War.
G.C.M.O. 217, 26 May 1944)

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

(95)

17 APR 1944

SPJGH
CM 250939

UNITED STATES)

v.)

Second Lieutenant WALTER O.
MCCAFFREE (0750639), Air
Corps.)

ARMY AIR FORCES TACTICAL CENTER

Trial by G.C.M., convened at
Orlando Air Base, Florida,
28 January 1944. 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 Charges and Specifications:

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

Specification: In that Second Lieutenant Walter O. McCaffree, Air Corps, 415th Bombardment Group, did, at Orlando, Florida, on or about 6 January 1944, with intent to do him bodily harm, commit an assault upon Captain Pasquale J. Christiano, 317th Bombardment Squadron, 88th Bombardment Group, by cutting him on the wrist with a dangerous instrument, to wit: a straight razor.

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

Specification: In that Second Lieutenant Walter O. McCaffree, Air Corps, 415th Bombardment Group, at Orlando, Florida, between the dates of about 29 June 1943 and about 6 January 1944, did live in an open and notorious relationship as man and wife with a woman not his wife, to wit: one Alberta Lynds alias Mrs. Walter O. McCaffree, and did, at or near said place and between said dates, introduce said woman as his wife to divers officers and civilians.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for

one year. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge II as involves a finding that the accused was guilty of the conduct alleged, at the place alleged, between the dates of about 18 November 1943 and about 6 January 1944; approved the sentence but remitted the forfeitures and confinement; and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: Around 5 December 1943 accused rented a room in a rooming house in Orlando, Florida, for himself and a woman he referred to as his wife. The couple thereafter occupied the room. They went frequently to a cocktail lounge in the San Juan Hotel where accused introduced her to other officers as his wife. On 24 January 1944 accused and the woman made application for a marriage license and were married. She was identified in the application (Ex. 4) and the marriage certificate (Ex. 3) as "Alberta Lynds" (R. 65-67, 71-72, 101-107, 107-110).

Accused and Alberta Lynds were in the cocktail lounge of the San Juan Hotel on the evening of 5 January 1944, and left around 11 o'clock. Accused came back later and finally left with "Lieutenant McBeth" about 12:05 after inquiring if the proprietor knew "where Alberta was". Around 12:15 or 12:30 on the morning of 6 January, Miss Lynds was in the lobby of the San Juan Hotel when Captain Pasquale J. Christiano, 88th Bombardment Group, Avon Park, Florida, entered and inquired about a room. Captain Christiano, a navigator, was a veteran of thirty-five combat missions in the South Pacific and had returned to this country to serve as an instructor. His pilot, with whom he had served overseas, was again leaving for overseas duty and Captain Christiano had spent the evening with the pilot and his wife, in the course of which he had consumed "eight Scotches and one beer". Miss Lynds began a conversation with Captain Christiano which resulted in his offer to take her home and she accepted. In response to his questions she told Captain Christiano her name was "Bert" and that she did not live with anyone. They entered Captain Christiano's car, drove around a while with Miss Lynds giving directions, and finally stopped and parked. They engaged in "petting", Captain Christiano kissed her and "played around with her", his hands were under her dress without any protest on her part. After five or ten minutes, she suddenly said "I have to go". He objected verbally but she said "Don't worry, I will be back" and got out of the car (R. 13-26, 31-35, 67-70).

After Miss Lynds left the car Captain Christiano sat there "between 5 and 10 minutes" when "the Lieutenant" approached the car, opened the door and said, "What the hell are you doing with my wife?" at the same time slashing at Captain Christiano with a razor. The razor cut Captain Christiano across the right wrist below the base of the thumb. He felt no pain at first and got out of the car saying, "Let's talk this thing over sensibly before you lose your head and do something more". Accused had the razor in his right hand and said something further but Captain Christiano could not remember it because he was talking at the same time and was excited. His hand became numb, he noticed the blood so he ran for help, flagging down a pick-up truck. Captain Christiano could not identify accused as the man who attacked him but stated that accused later came to the hospital where he, Captain Christiano was confined, and in the

course of conversation admitted he was Captain Christiano's assailant' (R. 27-30, 35-44, 51-54).

The street on which Captain Christiano parked had been barred to traffic because of construction work. Claude H. Morgan, city policeman of Orlando, and John H. Suggs, civilian employee of the construction company, were in the vicinity to enforce the ban and were seated in a "pick-up" truck when they noticed Captain Christiano park. It was around 1 o'clock and "just a very few seconds" after the car parked a girl got out, crossed the street and then a house door slammed. A "few seconds" later a soldier ran across the street, some loud cursing ensued and a man shouted, "I will kill you, you son-of-a-bitch". Morgan and Suggs drove the "pick-up" to the other car and threw their headlights on it. They saw accused at the side of the car "punching" at Captain Christiano, who jumped out of the car and hailed them. Accused walked away rapidly and after Morgan had called to him three times and told him to "Stop or I will shoot" accused came back and was placed under arrest. Accused said, "Don't let me at him again, I will kill him". Captain Christiano and accused were taken back to the office of the construction company where accused was placed in the "tool-house" while tourniquets were applied to Captain Christiano's arm. An ambulance and a patrol car with "Officer Hooten" and a military policeman arrived in response to a call to the police station. While Captain Christiano was being placed in the ambulance, accused threw something out of the window and then climbed out. Officer Hooten pursued accused while Officer Morgan went around under the window where he found a straight-edge razor (R. 54-65, 92, 93-98; Ex. 2).

Officer Hooten shouted to accused to stop and when he failed to do so fired a shot at him but accused continued to run and disappeared into a house. Several officers then entered the house and after making inquiry were directed to a room occupied by accused and Miss Lynds. Their knock was answered by Miss Lynds and then accused came to the door, clad in shorts. In response to a question he said he had been home a "couple of hours". After some discussion accused admitted the officers and allowed them to look around. Miss Lynds was in bed. In an overnight case they found a pair of "pinks" saturated with blood. Accused was asked to put on his clothes and come to the station whereupon Miss Lynds became very excited, jumped out of bed "scantily clad in some flimsy sort of stuff", talked loudly and demanded to see their warrant. Accused then refused to accompany them and it was necessary to use considerable force to remove him, Miss Lynds following them excitedly out into the street. At the police station accused remarked, "You would have done the same thing yourself" (R. 73-83, 83-89, 89-93, 98-101).

Captain Christiano was taken to the station hospital at Orlando where he was examined about 1:30 a.m. by Captain John P. Tomilson, Medical Corps. His clothes were saturated with blood. He was found to be suffering from a mild state of shock due to loss of blood and was given blood plasma. His wound extended obliquely across the right wrist, the skin was seriously divided, and the tendons, radial artery and the median nerve were severed. The severed artery was of such size that it would have permitted him to bleed to death unless the flow was stopped. The severed structures were

repaired, the wound closed and the wrist placed in a cast. Captain Tomilson thought it likely Captain Christiano would have incomplete use of his fingers as a result of the wound although stating it was impossible to make this determination with certainty at the date he testified. Captain Christiano answered questions sensibly when brought to the hospital although Captain Tomilson smelled alcohol on his breath (R. 44-51).

4. Evidence for the defense: Mrs. Walter O. McCaffree, nee Alberta Lynds, wife of accused, testified she met accused in May, 1943, in Macy, Arizona. She was a divorcee and accused told her he had a wife and child but intended to get a divorce. When accused left Macy in July, 1943, for a station in Colorado she accompanied him as his wife, wore a ring which served as both engagement and wedding ring, and was introduced to officers and their wives as the wife of accused. They came to Orlando, 18 November 1943. On the evening of 5 January 1944, Lieutenant McBeth and another girl, she and accused, were in the cocktail lounge of the San Juan Hotel. She had "about 7 or 8" drinks that evening and left around 12 o'clock following a quarrel with accused. She went into the lobby of the hotel, saw Captain Christiano there and he spoke to her. She thought he was an officer to whom she had been introduced earlier in the evening, "men in uniform look the same to me", so she talked to him and accepted his offer to take her home. He drove her to her house and parked a little distance beyond. After he stopped the car she prepared to leave when he took hold of her and started to kiss her. She told him she wanted to leave, that her husband would be there in a few minutes and there would be trouble but he continued to hold her. She pulled away from him, mussing her hair and tearing a button off her blouse, she got out of the car, walked across the street to their house, where she found accused standing behind a tree. Accused slapped her twice, told her to go into the house, and walked over to the car where she saw him strike at Captain Christiano. She went in the house and then accused came in running. His clothes were covered with blood so she hid them (R. 122-152).

Accused testified that he entered the military service 14 January 1942. He met Alberta Lynds in May 1943 while training as an air cadet, had several engagements with her, and disclosed to her that he was a married man but his wife was getting a divorce. He was commissioned a second lieutenant, pilot in the Air Corps, in July 1943 and was transferred to La Junta, Colorado. Miss Lynds and he were contemplating marriage as soon as he was free to marry so she accompanied him as his "wife", and was introduced as such to other officers, officers' wives, and civilians at various posts where he was stationed. His wife commenced divorce proceedings in October 1943 and he received word from his mother about 24 January 1944 that the divorce had been granted following which he married Miss Lynds (R. 154-156, 163-170, 176-177).

On the night of 5 January 1944 accused, Miss Lynds and friends were in the cocktail lounge of the San Juan Hotel. He quarreled with Miss Lynds and she left the party around 11 or 11:15. Accused left the lounge about midnight and commenced searching for his "wife". As he approached his house he saw a car drive up and the lights turned out. He came up to the rear of the car and heard his wife say, "You had better let me alone and

let me out of here; my husband will be here soon and you will be in trouble". Accused walked on across the street and stood behind a tree. In "half a minute" his "wife" got out and came across the street. She was dishevelled, hair mussed, lipstick smeared, a button off her blouse. He was enraged, slapped her, told her to go in the house and started to the car. As he walked across the street he plunged his hand in his left hand trouser pocket and felt a razor there. He had placed the razor in his pocket around noon on 5 January for the purpose of taking it to a barber to have it honed according to arrangements he had made with the barber on 4 January. He took the razor out of his pocket, struck at the man in the car and he did not remember what followed. He remembered the man saying "I didn't know she was your wife", and another car driving up, and then he found himself in the toolhouse. He took the razor, which was still in his possession, dropped it out the window and then walked out the door. He did not know he was under arrest. As he ran toward his house he heard a shot fired but he continued on and went to his room. He took his bloodstained clothes off, his "wife" attempted to hide the trousers and then the police came. They asked him when he had arrived home and he told them two hours ago. They told him to come along with them and he refused to go without a warrant. He resisted and they finally subdued him. On cross-examination accused denied that he had gone to his room and got his razor when he saw his "wife" and Captain Christiano in the car. He did not intend to inflict bodily harm upon Captain Christiano, "I was so infuriated I didn't know what I was doing". He remembered striking at the captain. He identified Exhibit 2 as his razor (R. 156-163, 170-176).

It was stipulated that if J. C. Keith were present he would testify that on 4 January 1944 accused asked him in his (Keith's) barber shop to hone and sharpen a straight razor for him and said he would bring it down (R. 110-111).

Second Lieutenant Ira B. Baker testified he had known accused as a pilot, officer and cadet since June 1943, and had "never heard anyone say anything bad" about him. Under examination by the court Lieutenant Baker testified that accused had introduced Alberta Lynds to him and others as his wife. He did not know they were not married until 10 January 1944. (R. 111-121).

5. a. Specification, Charge II: The evidence for the prosecution shows that about 5 December 1943, accused rented a room at an Orlando, Florida, rooming house for himself and Alberta Lynds, whom he referred to as his wife. They occupied the room thereafter and he introduced her to other officers and officers' wives as his wife. On 24 January 1944, he made application for a license and married Miss Lynds.

Accused and his wife, formerly Miss Lynds, a witness in his behalf, testified that they met in May 1943, while he was an air cadet at Macy, Arizona, and that he told her he was then married and had a child but that his wife was contemplating divorce. They intended to marry as soon as the divorce was granted and when he received his commission and was transferred to another station in July 1943, she accompanied him as his "wife" being introduced as such thereafter to officers, officers' wives and civilians.

They came to Orlando, Florida, together on 18 November 1943. His first wife commenced divorce proceedings in October 1943 and when he received word that it had been granted on 24 January 1944, he married Miss Lynds.

The evidence accordingly establishes that accused lived in an open and notorious relationship with Alberta Lynds, a woman not his wife, and introduced her to officers and civilians as his wife, at the time and place alleged in the Specification, as approved by the reviewing authority. Such conduct offends against good morals, violates public decency and propriety and is cognizable under the 95th Article of War (CM 234787, Klotz). His misconduct is not expunged by the fact that he subsequently married the woman.

b. Specification, Charge I: The evidence for the prosecution shows that accused, Miss Lynds and some friends spent the evening of 5 January 1944 in the cocktail lounge of the San Juan Hotel in Orlando. Miss Lynds left the lounge around 11 p.m. but accused remained there until about midnight. About 12:30 on the morning of 6 January Miss Lynds was in the lobby of the hotel when Captain Pasquale J. Christiano entered. Miss Lynds and Captain Christiano engaged in conversation and he offered to take her home. She accepted and they drove in his car to the street in front of her house where they parked. Captain Christiano testified they engaged in some "petting" and after five or ten minutes she said she had to go but would return. After she left Captain Christiano sat there another five or ten minutes when accused approached the car, opened the door, and said, "What the hell are you doing with my wife?" Accused had a straight-edge razor in his right hand and slashed at Captain Christiano cutting him across the right wrist in such manner that the tendons, radial artery and the median nerve were severed. A policeman and a civilian guard who had watched Captain Christiano park, Miss Lynds leave and accused approach the car, then drove up. They saw accused punch at Captain Christiano and shout, "I will kill you, you son-of-a-bitch". Captain Christiano jumped from the car and accused ran away pursued by the policeman who threatened to shoot unless accused stopped. Accused returned, was placed under arrest and lodged temporarily in a construction company's toolhouse nearby. He told the officers, "Don't let me at him again, I will kill him". While the others were engaged in applying tourniquets to Captain Christiano's wound which was bleeding badly, accused jumped from the window of the toolhouse and ran away pursued by a policeman who fired a shot in a vain attempt to bring him to a halt. Accused was found in his room with Miss Lynds a few minutes later and in response to questioning by the police he asserted he had been home for two hours. His bloody clothes, partly hidden, were found in the room and he was asked to accompany the officers to the police station. He refused and was removed bodily.

Mrs. McCaffree, formerly Miss Lynds, a defense witness, testified that when she saw Captain Christiano in the lobby she thought she recognized him as an officer she had met earlier in the evening and therefore accepted his offer to drive her home. When he stopped near her house he took hold of her and kissed her over her protests but she finally pulled away from him, mussing her hair and pulling a button off her blouse, and left the car. When she got near her house accused stepped out from behind a tree, slapped

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NAVY DEPARTMENT

(101)

her and told her to get into the house. She saw accused approach the car and strike at Captain Christiano.

Accused testified that he left the cocktail lounge around midnight and commenced searching for his "wife". He finally went on home and as he approached he saw a car drive up and the lights turned out. He went to the rear of the car and heard his "wife" say, "You had better let me alone and let me out of here; my husband will be here soon and you will be in trouble". He walked on across the street, hid behind a tree and in "half a minute" his "wife" got out and came across the street. She was dishevelled, hair mussed, lipsticker smeared, a button off her blouse. He became enraged, slapped her and ordered her into the house, and then started for the car. While walking across the street he felt a razor in his trouser pocket. He had placed the razor in his pocket at noon on 5 January to take it to a barber for honing. (It was stipulated that J. C. Keith, the barber, would testify that on 4 January 1944, he agreed to the request of accused to hone and sharpen a razor and that accused told Mr. Keith he would bring it in). He took out the razor and struck at Captain Christiano. He testified, "I was so infuriated I didn't know what I was doing". He denied any intent to inflict bodily harm upon Captain Christiano.

It is established by the evidence for the prosecution and admitted by the accused that at the time and place alleged accused assaulted Captain Christiano with a straight-edge razor, and slashed him across the wrist severing tendons, nerve and artery and causing an injury of such gravity that, according to a medical witness, loss of the complete use of the fingers might result. The circumstances surrounding the assault, the nature of the weapon used and the character of the wound inflicted show an intention to do bodily harm (Dig. Ops. JAG 1912-40, sec. 451 (10)). There was little provocation for the assault. Whether Miss Lynds voluntarily engaged in a "petting" affair with Captain Christiano as the latter testified, or whether he detained her momentarily against her will and kissed her, as she testified, in either event a savage assault of this character was unjustified. The earlier quarrel which accused had with Miss Lynds, her disappearance thereafter, his search for and finding her in a car with another man may account for his jealous rage but do not excuse his actions. The offense is clearly proven.

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 14 January 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 28 July 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 approved sentence, and to warrant confirmation of the approved sentence. Dismissal

is authorized upon conviction of a violation of the 93rd Article of War
and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Dixon, Judge Advocate.

Robert O. Cannon, Judge Advocate.

J. J. Lott, Judge Advocate.

1st Ind.

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

3 MAY 1944

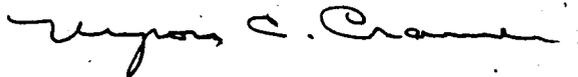
- To the Secretary of War.

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 Walter O. McCaffree (O-750639), 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 from 18 November 1943 to 6 January 1944 lived in open and notorious marital relationship with, and introduced to various officers and civilians as his wife, a woman who was not his wife (Spec., Chg. II) and on 6 January 1944 committed an assault with intent to do bodily harm with a dangerous instrument upon Captain Pasquale J. Christiano by slashing his wrist with a straight razor (Spec., Chg. I). Accused committed the assault late one night in a fit of jealous rage upon discovering that Captain Christiano, who did not know of the woman's illicit relations with accused, had taken her home from a cocktail lounge in his car. On 24 January 1944, after his wife had obtained a divorce and 4 days after the Charges had been referred for trial the accused married the woman. I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Consideration has been given to a letter directed to the President, dated 1 February 1944, from Mrs. Esther B. Lynds of Mesa, Arizona, the mother-in-law of accused, requesting clemency in his behalf.

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



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-Ltr. fr. Mrs. Lynds,
1 Feb. 1944.

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 367, 17 Jul 1944)



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

(105)

SPJGK
CM 250963

24 MAR 1944

UNITED STATES)

THIRD AIR FORCE

v.)

Trial by G.C.M., convened at
Drew Field, Tampa, Florida,
11 February 1944. Dismissal
and confinement for six (6)
months.

First Lieutenant WESLEY G.
W. HARJU (O-661752), Air
Corps.)

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that 1st Lieutenant Wesley G. W. Harju, 499th Fighter Bomber Squadron, 85th Fighter Bomber Group, Army Air Field, Waycross, Georgia, did, on or about 1600 7 January 1944, at or near Beach, Georgia, wrongfully and unlawfully perform acrobatics in a military P-39 type aircraft at an altitude of less than five thousand (5000) feet in violation of paragraph 3, III Fighter Command Memorandum 55-5 dated 25 September 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for six months. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

The prosecution introduced in evidence "a true extract copy" of that part of Memorandum Number 55-5, Headquarters III Fighter Command, Drew Field, Tampa, Florida, dated 25 September 1943, relating to acrobatics, which

provides:

"3. Acrobatics. a. All acrobatics and maximum maneuvers will be conducted above an altitude of 5,000 feet. In addition, all acrobatic maneuvers will be started at such an altitude that recovery to normal flight will be effected at a minimum altitude of 5,000 feet above the surface of the earth. An example of a violation of this regulation would be to start an Immelman Turn at 3500 feet in the hope of recovery at 5,000 feet.

"b. No acrobatics will be conducted in formation during the first sixty (60) hours of fighter training. Necessary supervision of acrobatics during the first sixty hours will be accomplished by the supervisor flying off to one side, and not by leading the student through the maneuver in string formation.

"c. Rat racing and violent string formation during the first sixty hours will be considered as a violation of this directive." (R. 4; Ex. B.)

On 7 January 1944 the accused was the leader and instructor of a flight of four P-39 aircraft which took off from the Waycross Base at 1500 on a bombing and gun camera training mission (R.4; Ex. A). The other planes were piloted by student pilots Second Lieutenant Jack B. Elliott, Second Lieutenant John F. Evans, and "Lieutenant Erickson". The student pilots had had 18 to 20 hours flying time. The first element of the flight was led by accused. Lieutenant Erickson was his wing man. Lieutenant Elliott led the second element, with Lieutenant Evans as his wing man. The bombing phase was completed but on account of a 2000 foot cloud ceiling it was impossible to accomplish the gun camera phase of the mission. On the return to their base they flew over the airport at Alma, Georgia, and executed a Lufberry Circle, after which they resumed formation and "headed back" toward Waycross. In the course of this flight the accused "peeled off", followed in succession by the student pilots Lieutenants Erickson, Elliott and Evans. At this time they were in a string formation with Lieutenant Evans the No. 4 plane "pretty far back in the formation trying to catch up". When near Beach, Georgia, the accused again "peeled off" 1500 or 2000 feet to the left, and turned to the right and pulled up in a "slow roll". Lieutenant Erickson who was following accused attempted to execute the maneuver, went over on his back into a split-S and crashed, losing his life. Immediately prior to the accused's slow roll Lieutenants Elliott and Evans heard some radio conversation but static conditions were such that the conversation was not intelligible. According to the testimony of Lieutenants Elliott and Evans the accused executed the maneuver at an altitude of between 1500 and 2,000 feet (R. 4-8). Mr. W. L. Taylor, Jr., a farmer who resided in that vicinity, testified through a deposition that he witnessed the occurrence. He stated that the planes were flying a "little lower than most planes I usually see", and estimated that they were about 200 to 250 feet above the ground.

"There were four planes in a line. The first plane did a roll, the second started to roll and when in a position with nose down, it continued that way until it crashed into the ground."

On cross-examination Mr. Taylor stated that he did not consider himself qualified to estimate altitudes of aircraft in the air (R. 8; Ex. C). Captain Dave H. Hoyer of Headquarters 85th Fighter Bomber Group, identified a written statement obtained by him from the accused on 11 January 1944. Witness testified that the statement was made, subscribed and sworn to by the accused after he had been fully advised that he was not required to submit a statement and that any statement which he made would be used against him. Without objection this statement was introduced in evidence (R. 9; Ex. D), and is as follows:

"I, Wesley G.W. Harju, at approximately 1500 on the 7 January 1944, took off on a scheduled bombing and gun camera mission. After releasing our bombs, we joined formation and climbed above the overcast. Seeing that it was impossible to run the camera mission I called Lt. Anton in the target ship and told him that I would fly formation below the overcast for the remainder of the period.

"After forming a Lufberry Circle over the Alma Airport I got my flight back into formation. The last man in my flight was flying out of position so I was going to show him what position in which to fly. I tried to call my wing man to lead the formation but could not contact him. I motioned him ahead by hand and seeing that he was moving ahead I left the formation. I did a slow roll and when I looked around again I saw flames of the ship on the ground. I circled the spot and got my formation together and returned to the field and reported to Operations."

The defense offered no evidence. Accused declined to testify or to make an unsworn statement.

4. The uncontradicted evidence clearly shows that the maneuver of the accused, executed under the circumstances and conditions described by the witnesses, constituted a violation of the letter and spirit of paragraph 3, III Fighter Command Memorandum 55-5 as alleged in the Charge and Specification. The wisdom of the regulation is tragically attested by the unfortunate and fatal accident to the student pilot who was trying to follow his leader and instructor.

There was no proof that accused's organization (499th Fighter Bomber Squadron) was a part of the III Fighter Command. It may be assumed however that the court took judicial notice of General Orders No. 28, Headquarters III Fighter Command, Drew Field, Florida, dated 6 August 1943, designating as a part of that command the 499th Fighter Bomber Squadron, 85th Fighter Bomber Group, Waycross Army Air Forces and Waycross Army Air Base.

5. The accused is 24 years of age. The records in the Office of The Adjutant General show that accused was graduated from Eveleth Junior College (Minn.) in 1939. For the convenience of the Government, he was discharged as an aviation cadet on 3 July 1942 and commissioned a second lieutenant, Army Air Forces Reserve. He was promoted to the grade of first lieutenant, Air Corps, Army of the United States, 24 July 1943. In recommending him for promotion his commanding officer stated that the accused had performed in an excellent manner the duties of a pilot and Assistant Flight Leader.

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 and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Wm. C. Lyon, Judge Advocate.
Wm. F. Summitt, Judge Advocate.
Fletcher B. Andrews Judge Advocate.

1st Ind.

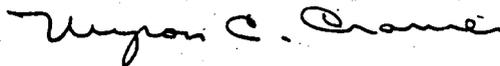
War Department, J.A.G.O., 11 APR 1944 - To the Secretary of War.

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 First Lieutenant Wesley G. W. Harju (O-661752), 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.

3. Consideration has been given to the attached memorandum from the Commanding General, Army Air Forces, to The Judge Advocate General dated 14 March 1944, stating that he is familiar with the facts in this case and strongly recommending that the entire sentence be confirmed and ordered executed. I concur in the recommendation that the sentence be confirmed and ordered executed and further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



Myron C. Cramer,
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. fr. CG, Army
Air Forces to JAG.

(Sentence confirmed. G.C.M.O. 247, 30 May 1944)



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

(111)

SPJGQ
CM 251007

14 MAR 1944

UNITED STATES

v.

Second Lieutenant DONALD
P. BROSSMAN (O-1055542),
CAC, AAAORP, Fort Eustis,
Virginia.

ANTI-AIRCRAFT ARTILLERY
REPLACEMENT TRAINING CENTER

Trial by G.C.M., convened at
Fort Eustis, Virginia, 25
February 1944. Dismissal.

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

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

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

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

Specification: In that 2d Lieutenant Donald P. Brossman, CAC, AAAORP, Fort Eustis, Virginia, with intent to defraud the United States, did at Fort Eustis, Virginia, on or about 31 January 1944 unlawfully pretend to Lt. Col. Ellis R. King, F.D., Finance Officer, Fort Eustis, Virginia, that Virginia L. Brossman, Pittsburgh, Pennsylvania, was his lawful wife, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the United States the sum of \$81.70 as a monthly subsistence and rental allowance for dependents.

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

Specification: In that 2d Lieutenant Donald P. Brossman, CAC, AAAORP, Fort Eustis, Virginia, with intent to defraud the United States, did at Camp Stewart, Georgia, on or about 30 June 1943 unlawfully pretend to Captain W. A. Henderson, F.D., Finance Officer, Camp Stewart, Georgia, that Virginia L. Brossman, 140 Meriden Street, Pittsburgh, Pennsylvania, was his lawful wife, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said United States the sum of \$81.00 as a monthly subsistence and rental allowance for dependents.

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

3. After calling a witness to identify the accused and place him in the military service, there was offered in evidence a written stipulation signed by the accused, defense counsel and prosecution, which was received as Prosecution Exhibit "1" (R. 5), which stipulation sets forth the testimony of Helen G. Brossman, the legal wife of the accused; of Virginia Cronin; of Captain W. A. Henderson, F.D.; and of Lt. Col. E. R. King, F.D., who, if they were present before the court and sworn as witnesses, would testify as shown herein below; and, in addition, attached thereto by reference and made a part thereof, the monthly pay and allowance vouchers filed by the accused for the months of June 1943 and January 1944.

This evidence is to the effect that Helen G. Brossman, residing at Reading, Pennsylvania, is the legal wife of the accused and was such prior to 30 June 1943, and that such marriage is valid and continuing to this time, and has not been annulled nor the parties divorced. That to said marriage a daughter, Patricia, was born, who is now approximately 10 years of age. That Virginia Cronin, residing at 140 Meriden St., Pittsburgh, Pa., is not the wife of the accused nor have she and the accused attempted any marriage ceremony, but have, however, lived together at various places and represented themselves as husband and wife. That she and Helen G. Brossman are not the one and same person.

The testimony of W. A. Henderson is to the effect that on 30 June 1943, and subsequent thereto, he was the finance officer at Camp Stewart, Georgia, and that on said date the accused, as an officer in the military service and while stationed at Camp Stewart, Georgia, filed a pay and allowance account voucher with him for the month of June 1943, wherein it was represented that Virginia L. Brossman was the legal wife of the accused, and that, acting on said representation and as the finance officer, on behalf of the United States Government, did pay to the accused the sum of \$81.00, as the monthly subsistence and rental allowance for June 1943, which money was received and retained by the accused.

The testimony of Lt. Col. E. R. King is to the effect that he is the Finance Officer at Fort Eustis, Virginia. On or about 31 January 1944, the accused, as an officer in the military service, filed with him a monthly pay and allowance voucher covering the month of January 1944, wherein he represented that Virginia L. Brossman was his wife. Relying on his representation as to dependents and acting on behalf of the United States Government as the finance

officer, he paid to the accused the sum of \$81.70, representing the monthly subsistence and rental allowance of January 1944 for dependents. True copies of each of these pay vouchers are attached to the stipulation and were received in evidence.

4. The accused, after being advised of his rights, elected to be sworn as a witness in his own behalf (R. 6). The relevant and material portion of his testimony recites that he is a second lieutenant, CAC, of the Army of the United States stationed at Fort Eustis, Virginia (R. 6), and is legally married to Helen G. Brossman. About eight years after his marriage, and while living apart from his wife, he met Virginia Cronin (R. 7). He and Miss Cronin and her mother, shortly after their meeting, shared the same apartment (R. 8). About the same time he was inducted into the Army (R. 8). He was sent to Newfoundland and Miss Cronin moved to Philadelphia (R. 8). He returned to the United States, visited Miss Cronin, went on to Camp Davis and finally to Camp Edwards, Massachusetts, where he rented a cottage, had Miss Cronin move in, and represented her as his wife (R. 9). When he later returned to Camp Davis, North Carolina, to attend Officer Candidate School a second time, he took Miss Cronin with him. She lived in Wilmington, North Carolina, while he was going to school at Camp Davis (R. 9). After graduation he was assigned to Camp Stewart, Georgia, where he represented Virginia Cronin as Virginia Brossman and his wife (R. 9). On search in the Lancaster County Court in Pennsylvania he found no evidence of a divorce decree from his lawful wife. He then went to Newark, New Jersey, reported this situation to the Office of Dependency Benefits and stated that he wanted to make restitution of the money he had drawn. "The official told me that if I had a divorce decree and a marriage certificate it would satisfy the record" (R. 10). Accused identified the two pay vouchers in question, admitted that Virginia L. Brossman is not, nor never has been, his wife (R. 10), and that she and Virginia Cronin are one and the same person. He has never received any notice of divorce proceedings having been completed, or even begun, by his wife (R. 11), nor has he ever instituted divorce proceedings himself (R. 12).

Upon cross-examination, the accused admits filing each of the two pay and allowance account vouchers (R. 10) which are attached to Prosecution Exhibit "1"; that Virginia L. Brossman, alias Virginia Cronin, is not his wife; that no one had ever told him Helen G. Brossman had instituted divorce proceedings against him or had ever divorced him (R. 11); that at the time he filed the pay and allowance vouchers he knew that the dependent named therein, namely Virginia L. Brossman, really Virginia Cronin, was not his wife (R. 12) and that he received the full amount of money called for in each of the said vouchers and retained the same (R. 12). That the purpose of such representation was that the accused needed the money (R. 13).

In addition to the plea of guilty, there appears to be ample evidence to support a finding of guilty, and in addition thereto, the accused, in cross-examination, admits each of the elements of the offenses, namely, that he did falsely represent Virginia L. Brossman as his wife upon monthly pay and allowance vouchers as alleged and as a result thereof did obtain from the Government of the United States monthly subsistence and rental allowances because of dependents as alleged.

5. War Department records disclose that accused is now thirty years of age, completed elementary and high schools, attended Wyoming Polytechnic Institute for one year, was inducted 24 November 1941 and served in the grades of private, corporal and sergeant from 24 November 1941 to October 1942. He failed once at Officer Candidate School at Camp Davis, North Carolina, but on a second attempt was commissioned second lieutenant, CAC, Army of the United States, and ordered to active duty on 6 May 1943.

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

William A. Rounds, Judge Advocate.

(on leave), Judge Advocate.

Herbert B. Audiman, Judge Advocate.

1st Ind.

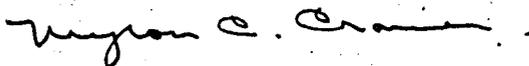
War Department, J.A.G.O., 6 - APR 1944 To the Secretary of War.

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 Donald P. Brossman (O-1055542), CAG, AAAORP, Fort Eustis, Virginia.

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 addressed to the President, dated 15 March 1944, from Mrs. Elva M. Brossman, mother of the accused. Subsequent to the trial, there has been received in this office the attached letter from the Staff Judge Advocate of the Antiaircraft Replacement Training Center at Fort Eustis, Virginia, dated 29 March 1944, to The Judge Advocate General, forwarding photostatic copies of documents establishing that the accused, while an enlisted man, represented to the Office of Dependency Benefits, Army Service Forces, Newark, New Jersey, that Virginia Loretta Brossman was his lawful wife, that they had been married and that there had been a divorce granted from Helen G. Brossman.

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



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

5 Incls.

- 1 - Record of trial.
- 2 - Dft. ltr. for sig. S/W
- 3 - Form of Executive action
- 4 - Ltr. 15 Mar. 44.
- 5 - Ltr. 29 Mar. 44 with
10 incls.

(Sentence confirmed. G.C.M.O. 275, 8 Jun 1944)



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

(117)

SPJGV
CM 251025

14 APR 1944

UNITED STATES	)	SECOND AIR FORCE
)	
v.	)	Trial by G.C.M., convened at
	)	Pyote, Texas, 2 February 1944.
Second Lieutenant ALBERT S.	)	Dismissal.
WOOLFOLK (O-729537), Air)	
Corps.)	

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 96th Article of War.

Specification 1: In that Second Lieutenant Albert S. Woolfolk, Combat Crew Detachment, did, at Army Air Field, Pyote, Texas, on or about 11 January 1944, with intent to deceive Captain Robert C. Long, officially state to the said Captain Robert C. Long, that he had flown with his crew on 9 January 1944, which statement was known by the said Second Lieutenant Albert S. Woolfolk to be untrue in that Second Lieutenant Albert S. Woolfolk had not flown with his crew since 3 January 1944.

Specification 2: In that Second Lieutenant Albert S. Woolfolk, Combat Crew Detachment, having been restricted to the limits of his station, did, at Army Air Field, Pyote, Texas, on or about 19 January 1944, break said restriction by going to Monahans, Texas.

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

Specification 1: In that Second Lieutenant Albert S. Woolfolk, Combat Crew Detachment, did, without proper leave, absent himself from his organization at Pyote, Texas from about 0600, 9 January 1944 to about 0800, 11 January 1944.

Specification 2: In that Second Lieutenant Albert S. Woolfolk, Combat Crew Detachment, did, at Army Air Field, Pyote, Texas, on or about 1430, 6 January 1944 fail to repair at the fixed time to the properly appointed place of assembly for film analysis formation.

Specification 3: In that Second Lieutenant Albert S. Woolfolk, Combat Crew Detachment, did, at Army Air Field, Pyote, Texas, on or about 1900, 6 January 1944 fail to repair at the fixed time to the properly appointed place of assembly for flight line formation.

Specification 4: In that Second Lieutenant Albert S. Woolfolk, Combat Crew Detachment, did, at Army Air Field, Pyote, Texas, on or about 1245, 7 January 1944 fail to repair at the fixed time to the properly appointed place of assembly for ground school formation.

Specification 5: In that Second Lieutenant Albert S. Woolfolk, Combat Crew Detachment, did, at Army Air Field, Pyote, Texas, on or about 1900, 11 January 1944 fail to repair at the fixed time to the properly appointed place of assembly for flight line formation.

Specification 6: In that Second Lieutenant Albert S. Woolfolk, Combat Crew Detachment, did, at Army Air Field, Pyote, Texas, on or about 0745, 13 January 1944 fail to repair at the fixed time to the properly appointed place of assembly for ground school formation.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. 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.

3. The evidence for the prosecution in support of Charge I and its two Specifications is substantially as follows:

Specification 1

Accused, a flying officer, was treated at the Dispensary, Pyote Army Air Field, Texas, for diarrhea on 3 January 1944, and as the malady persisted he again reported to the Dispensary on 11 January 1944 when he was examined by Captain Robert C. Long, Medical Corps, flight surgeon then on duty at the Dispensary. He was given medicine for diarrhea and marked for duty not involving flying. During the course of his examination and in response to a question by Captain Long as to the

last time he had flown, accused replied that he had flown 9 January 1944 (R. 9). There was nothing in the Dispensary records that would relieve accused from full duty status between 3 January and 11 January 1944 (R. 10).

First Lieutenant James B. Pinson, Jr., testified that he was first pilot of Crew 1582, Combat Crew Detachment, 19th Combat Crew Training School, Pyote, Texas, and that accused was a member of his crew. He also testified that accused did not fly with him on 9 January 1944 (R. 15; Ex. 2).

Specification 2

Pending an investigation of his unauthorized absence, (Charge II, Specification 1, post) accused on 11 January 1944 was restricted to the base by Major Cecil A. Pitts, senior tactical officer, Combat Crew Detachment, 19th Combat Crew Training School, Pyote, Texas (R. 24, 26). Accused's restriction to the base by Major Pitts was confirmed the following day by Major William A. Cocks, commanding officer, Crew Detachment, 19th Combat Crew Training School, Pyote, Texas (R. 32). On 18 January 1944 accused breached his restriction by going to Pyote, Texas in a car driven by Lieutenant Edward W. Lane (R. 33), and was picked up by military police in a hotel in Monahans, Texas the next day (R. 34).

In support of Charge II and its six Specifications the evidence for the prosecution is substantially as follows:

Specification 1

Properly authenticated extract copies of the morning reports of accused's organization showing him absent without leave from 9 January 1944 to 11 January 1944 were received in evidence without objection (R. 31; Exs. 5, 6).

Specifications 2 and 3

On 6 January 1944 two formations were scheduled, one for film analysis and one for flight line, which required accused's presence. He was absent from both formations (R. 16, 21; Ex. 3).

Specification 4

On 7 January an assembly for ground school formation was held which required accused's presence and he was absent from this formation.

Specification 5

On 11 January 1944 a flight line formation was scheduled requiring accused's presence but accused failed to repair for this flight formation (R. 17; Ex. 4).

Specification 6

On 13 January 1944 a ground school formation was held requiring accused's presence but accused was absent from this formation (R. 21).

4. For the defense:

The accused, after having his rights as a witness explained to him, elected to make an unsworn statement. He admitted his attendance at various formations between 3 January 1944 and 11 January 1944 had been irregular, due to his physical condition. He stated that he never missed a flight during this period without being told by a medical officer to stay on the ground, but neglected to sign the sick book or to get a regular grounding slip on these occasions. His understanding was that Major Pitts had restricted him on 11 January 1944 until he could see him the next day, the major's exact words being "You are to stay on the Base until you see me tomorrow." He saw Major Pitts the next day and nothing further was said about the restriction. He did not recall that Major Cocke had restricted him at all. When he was in Monahans, Texas, it was during what he believed to be his free time (R. 38, 39).

5. The evidence shows that accused, during the course of a medical examination, told Captain Long, Medical Corps, that he had flown on 9 January 1944, whereas in truth and fact accused knew that he did not fly on that date; that after having been restricted to his base on 11 January 1944 accused breached his restriction on 18 January 1944 by going to Pyote, Texas and Monahans, Texas; that accused was absent without leave from his organization from 9 January 1944 to 11 January 1944; that accused failed to repair at the fixed time to the properly appointed place of assembly for film analysis formation on 6 January 1944, for flight line formation on 6 January 1944, for ground school formation on 7 January 1944, and for flight line formation on 11 January and 13 January 1944.

6. War Department records show that accused is 24 years of age. He graduated from Columbus High School, Columbus, Georgia and completed two years work in Civil Engineering at Georgia Tech, Atlanta, Georgia. He completed the Bombardier course at Victorville Army Flying School, California, and was appointed second lieutenant, Air Corps-Reserve, Army of the United States on 5 September 1942, and has continued as such since that 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 sufficient to support the findings of guilty, to support the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st and 96th Articles of War.

Thomas M. Jaffy, Judge Advocate.

Arthur W. Tidner, Judge Advocate.

Whit B. Harwood, Judge Advocate.

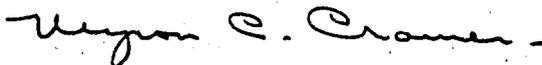
SPJGV
CM 251025

1st Ind.
3 May 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 Albert S. Woolfolk (O-729537), 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 as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but that the execution thereof be suspended during accused's good behavior.
3. Consideration has been given to the attached letter addressed to the President by Mr. and Mrs. Albert S. Woolfolk, parents of the accused, in which they request clemency.
4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.



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

- 4 Incls.
Incl.1-Record of trial.
Incl.2-Ltr. 20 Apr 44
fr. acc. parents.
Incl.3-Dft. ltr. for
sig. S/W.
Incl.4-Form of action.

(Sentence as approved by reviewing authority confirmed.
Execution suspended. G.C.M.O. 324, 27 Jun 1944)

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

(123)

28 APR 1944

SPJGH
CM 251055

UNITED STATES)

FIRST AIR FORCE)

v.)

Trial by G.C.M., convened at
Dover Army Air Field, Dover,
Delaware, 15 February 1944.
Dismissal.)

Second Lieutenant RICHARD
L. ANDERSON (O-810752),
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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Richard L. Anderson, Air Corps, 534th Fighter Squadron, 83rd Fighter Group, Dover Army Air Field, Dover, Delaware, while piloting a P-47 airplane, did, at Chestertown, Maryland, on or about 28 December 1943, wrongfully and unlawfully dive at and fly over a building area, including powder magazines of the Kent Defense Corporation, at an altitude of less than 1,000 feet in violation of paragraph 16 a (1) (a), Army Air Force Regulation No. 60-16, 9 September 1942.

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

3. The evidence for the prosecution shows that on 28 December 1943 accused was a pilot in the 534th Fighter Squadron, 83rd Fighter Group, Dover Army Air Field, Delaware. Operations Orders No. 35, 534th Fighter Squadron, 28 December 1943 (Ex. 2), directed accused to participate in two flights on that date, one of which was described as mission "1" from 1:10 p.m. to 3:10 p.m. in ship "P-47D-2". A flight report (Ex. 1) of the same date showed that accused made the flight described in a plane with the serial number "42-8179". Mission "1" means "transition". Accused was not authorized to do

any low altitude flying nor any low level strafing or simulated dive bombing on that flight. The planes of the squadron had large white block numbers on the sides, and the number on "P-47D", serial number "42-8179", was "J-68". No other plane carried that number. This plane weighed about 14,000 pounds and was of a value of about \$140,000 (R. 13-19, 21-22).

Kent Defense Corporation operated a plant for manufacturing detonators for the Army and Navy at Chestertown, Maryland, about 33 miles west of Dover. It consisted of a large number of frame buildings, 25 to 30 feet high, located in an area of about 26 acres. There were about 300 employees. Between 1:00 and 2:00 p.m. on 28 December three men employed at the Kent plant saw a "dark plane, one wing, single wing plane, one motor plane" diving down on the plant. It came down within 100 feet of the ground over one of the buildings, went back up, turned, and came over the building again at a height of between 200 and 300 feet above the ground. One of the witnesses observed and wrote down the number on the side of the plane, which was "J-68" (R. 24-26, 31, 42-49, 52-54).

4. For the defense: The accused testified that he was born in Minneapolis, Minnesota, on 15 February 1924, was graduated from high school about 26 May 1942, and entered the Air Corps on 2 July 1942. After receiving pilot and gunnery training at a number of stations, he was assigned to the 534th Fighter Squadron. He has had "approximately" 110 to 115 hours of flying time in P-47 airplanes. On the afternoon of 28 December 1943 he "took off" in plane number "J-68" from Dover Army Air Field on a transition flight. After "just flying around" he saw "this town down below and saw these buildings on the edge of the town and I just peeled off on it, dove down on it and then pulled up again. I did a 180° turn and came back over it again". He testified that he had never been charged with violation of low flying regulations before, but had felt the urge to engage in "buzzing" many times. He felt the greatest urge to engage in "buzzing" locomotives (R. 61-65).

On cross-examination and examination by the court, accused stated that he did not know that he was flying over the buildings of the Kent Defense Corporation and had "no particular reason" for being there. Although he carried a sectional map in his plane folder for navigational purposes, he had never had it out, and did not know whether the Kent plant was shown on it. He had not been instructed that a defense organization was in Chestertown. He testified that he was familiar with Army Air Forces Regulation No. 60-16 and that it was "impressed" upon him. On the afternoon of 28 December he was not briefed to do a low altitude mission. On other occasions he had been briefed on, and had flown, such missions. He has "never found anything to suppress" his "urge" to engage in "buzzing", but had never violated the low flying regulation before this time (R. 65, 67-69).

First Lieutenant Ralph O. Gassman, who had known accused for almost three years, went through various phases of training with him, and regarded

him as one of his best friends, testified that the reputation of accused for telling the truth is good, that he is of very good character, and that he is a good soldier and flyer. Lieutenant Gassman would like to have him "flying on the wing". First Lieutenant Martin E. Ryan, a prosecution witness, was permitted to testify for the defense while under cross-examination. He stated that the reputation of accused for truth and veracity was "very good" and his character "superior" (R. 19-21, 76-77).

Major Jacob W. Dixon, commanding the 534th Fighter Squadron, who had known the accused since 27 November 1943, testified that his reputation for truthfulness was very good, that he was of "excellent" character, and that, excluding the present charge, he had a "very fine record" as a soldier. He considered the accused to be one of "our best trainee pilots". Accused was sent to Natagorda, Texas because he was the "best man at the time with the possibility of becoming a gunnery instructor". He was of the opinion that accused could still be made a good officer. On cross-examination he stated that the pilots of the squadron had been instructed that they were "bound" by Army Air Forces Regulation No. 60-16, and that low level flying and "buzzing", unless scheduled, were forbidden (R. 78-82).

Objection having been sustained, the defense offered to prove that upon completion of 30 hours of "high altitude work" and aerial gunnery and 40 to 50 hours of "ground school" accused would be ready for combat duty; and that on 14 January 1944 the vice-president of Kent Defense Corporation, who had previously reported the low flying on 28 December, wrote a letter (Def. Ex. C) to Headquarters, First Fighter Command, stating that "if there is any way I can withdraw my complaint, I would like to do same as I do not feel the punishment for this one act should be so severe" (R. 72, 76).

5. The evidence shows and the pleas of guilty admit that on 28 December 1943, the accused, while piloting a P-47 military airplane in the course of a local transition mission, engaged in practicing low flying procedure over the buildings of Kent Defense Corporation, Chestertown, Maryland. He dived at the buildings once at a height of about 100 feet above ground, and another time at an altitude of between 200 and 300 feet. He was not authorized to engage in low level flying at the time. He was familiar with Army Air Forces Regulation No. 60-16, which provides, in paragraph 16a (1)(a), that the minimum altitude of flight above any building, house or other obstructions to flight shall be 1,000 feet.

The conduct of accused in operating the plane at an altitude of less than 1,000 feet under the circumstances shown, contrary to regulations, was a violation of the 96th Article of War.

6. The accused is 20 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from

6 January 1943; appointed temporary second lieutenant, Army of the United States, and active duty, 1 October 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. Lives, Judge Advocate

W. H. ..., Judge Advocate

F. J. ..., Judge Advocate

1st Ind.

War Department, J.A.G.O., 9 May 1944 - To the Secretary of War.

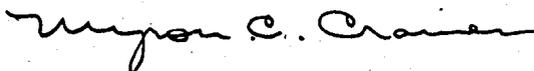
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Richard L. Anderson (O-810752), Air Corps.

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 while piloting a P-47 military airplane on a local transition flight dived to within 100 feet above the ground over a building of a plant engaged in the manufacture of detonators for the Army and Navy in violation of an Army Air Forces Regulation which provides that the minimum altitude of flight above any building shall be 1,000 feet.

In a memorandum to me dated 19 March 1944 the Commanding General, Army Air Forces states that he has personally considered the evidence in the present case, that the accused not only endangered his own life and plane but jeopardized a highly important defense plant, that his testimony, to the effect that he had an insuppressible urge to buzz ground objects, bears out reports that those who violate flying regulations are often repeaters, and that the best interests of the service require the elimination of this officer. I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Consideration has been given to requests for clemency by the accused and the law member of the court, attached to the record of trial.

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



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

- 4 Incls.
Incl.1-Rec. of trial.
Incl.2-Draft of ltr. for
sig. S/W.
Incl.3-Form of Action.
Incl.4-Memo. fr. CG, Army
Air Forces, 19 Mar. 1944.

(Sentence confirmed. G.C.M.O. 248, 30 May 1944)



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

(129)

SPJGK
CM 251075

15 MAR 1944

UNITED STATES)

v.)

First Lieutenant ELBERT)
V. CIRCLE (O-387071),)
Infantry.)

FIELD ARTILLERY
REPLACEMENT TRAINING CENTER
CAMP ROBERTS, CALIFORNIA

Trial, by G.C.M., convened at Camp
Roberts, California, 16 February
1944. Dismissal, total forfeitures
and confinement for one (1) year.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that 1st Lt. Elbert V. Circle, Company C, 89th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 14 January 1944, in his testimony before a General Court-Martial at the trial of 1st Lt. Elbert V. Circle make under oath a statement in substance as follows: That at approximately 0600 on 24 December 1943 he personally signed the Morning Report of Company C, 89th Infantry Training Battalion for the day of 23 December 1943 and that the signature on the bottom of that Morning Report was his signature, which statement he did not then believe to be true.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions by general court-martial, each for violation of Article of War 96, but without indication of the offense for which convicted, 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.

Accused was charged with having made a statement under oath at a previous trial by court-martial, which statement he did not then believe to be true. Evidence of the statement was offered through the testimony of Captain Harold E. Manning, Headquarters, 55th Battalion, of Private Stanton E. Johnson, Headquarters and Headquarters Battery, Field Artillery Replacement Training Center, the trial judge advocate and official court reporter, respectively, at the previous court-martial trial, and by a transcript of portions of accused's testimony at that trial. Captain Manning stated that accused was sworn by him as a witness and testified under oath in answer to questions put to him by Captain Manning (R. 6,7, 27). Private Stanton testified that he had transcribed accused's testimony at his previous trial on 14 January 1944, and that prosecution's Exhibit 1 was a duplicate, carbon copy of the record of testimony made from witness' shorthand notes at that trial. Witness also stated that the notes had been correctly transcribed (R. 7-9).

The complete record of accused's previous trial was admitted in evidence as prosecution's Exhibit 1, but the law member subsequently directed that all of it except the testimony of accused found at pages 41, 42 and 45 thereof be withdrawn. This was concurred in by prosecution and defense counsel (R. 30; Pros. Ex. 1).

Accused was specifically charged with having stated that at approximately 0600 on 24 December 1943, he personally signed the morning report of Company C, 89th Infantry Training Battalion for the day of 23 December 1943, and that the signature on the bottom of that morning report was his signature. Pertinent excerpts of his testimony to that effect are as follows (R. 30-32; Pros. Ex. 1,41,42,45):

"Q. What did you do at that time?

"A. At that time I left the place where I was and started out to get a cab. I was picked up by a civilian driving a Chevrolet and who let me out at Gate No. 1. I arrived at Gate 1 at 0530 or maybe 0545, approximately that time. I went to my quarters, removed my blouse and shirt, picked up my toilet kit, went down to the latrine, shaved, freshened up a bit, and went over to the company orderly room. It was now a few minutes after 0600. I went over there because it was my specific duty that morning to check and sign the company morning report. The morning report was laying (sic) on my desk. I checked and signed it and laid it on the desk of the company clerk.

* * * * *

"Q. I show you this morning report, Lt. Circle, and ask you to tell the court what date is that morning report of Company C of the 85th (sic) Infantry Training Battalion?

"A. That is the morning report of December 23rd.

"Q. Whose signature?"

An objection by the prosecution to this testimony was overruled, but the last question was not answered by accused, due to the fact that defense counsel then asked the following question:

"Q. Is that your signature that appears on the bottom of that morning report, Lt. Circle?"

"A. It is."

Here the defense counsel introduced in evidence in the previous trial, as Defense Exhibit A, a copy of the morning report in question (R. 32; Pros. Ex. 1, page 42).

"Q. Lt. Circle, when did you sign the morning report of the 23rd of December?"

"A. At approximately 0600 on the morning of the 24th of December.

* * * * *

"Q. Will you tell the court what happened on the 24th of December after you signed the morning report?"

"A. After I signed the morning report I again went over past the orderly room" (R. 32; Pros. Ex. 1, p. 42.)

Under cross-examination by the prosecution, the following testimony was elicited:

"Q. I want you to look carefully at this signature and identify it to the court as your own if it is.

"A. It is.

"Q. Is that your signature?"

"A. That's right." (R. 32; Pros. Ex. 1, p. 45.)

Testimony concerning the falsity of accused's statements at the previous trial was given by First Sergeant Walter H. Hoyt, Company C, 89th Infantry Training Battalion, and Technician 5th Grade Charles Munie, company clerk of the same organization. Corporal Munie stated that he had arrived at the orderly room at about 0550 on the morning of 24 December, while Sergeant Hoyt testified that he came on duty at about 0620. Both were present in the orderly room except for brief intervals during that morning (R. 10,11,14,15,16,18,19,21). Sergeant Hoyt stated that he did not see accused on 24 December until the afternoon (R. 12). Together, Hoyt and Munie determined upon the remarks for the morning report of 23 December, and Munie typed it and placed it on the clerk's desk at 0730 or 0745 (R. 10,11,17,18; Pros. Ex. 3). Munie then signed it with accused's name, attempting to imitate accused's signature, with

which he was familiar from long observation of it. He had done this upon previous occasions, with accused's knowledge, and did so at this time because accused was not there (R. 11,12,13,16,18,19,21-23,26). Although the company morning report was the company commander's responsibility, the practice of the battalion was to allow it to be signed by the executive officer, which position accused occupied at that time (R. 13,19). Both witnesses stated that they clearly remembered the events of that particular morning, because it was the day before Christmas, and also because of the excitement provided by the fact that five members of the company were missing after an all-night bivouac, and were the object of a wide search (R. 15,20).

The copy of the morning report signed by Munie with accused's name, introduced as Prosecution's Exhibit 3, was identified by Captain Manning as the same one introduced at accused's previous trial as Defense Exhibit 1, which, Captain Manning also testified, was stated by accused to have been signed by him (R. 27-30). Prosecution's Exhibit 5a, containing signatures stipulated to be accused's, was introduced for comparison with that on Prosecution's Exhibit 3 (R. 25).

Evidence for the defense.

The defense introduced as its Exhibit A a telegram from Captain Russell E. Cook, Infantry Headquarters, 56th Training Battalion, Camp Wolters, Texas, accused's former commanding officer. In it Captain Cook stated that accused had served with him as a platoon leader for about one year, on maneuvers and in combat in foreign service, that he had found accused to be an industrious, conscientious and thoroughly competent officer and a leader, that he had officially inspected positions for which accused was responsible, in a defensive sector on Guadalcanal and in the Solomon Islands, and found them the best he had seen. He further stated that he "would desire Lt. Circle as an officer in my command in combat" (R. 35; Def. Ex. A).

Accused's service record was also introduced by stipulation. He joined the "(Ohio) National Guard" on 25 May 1929, serving continuously until 25 January, 1940, at which time he was commissioned a second lieutenant. He was inducted into Federal service on 15 August, 1940, and was promoted to first lieutenant on 1 February, 1941, was sent to the Fiji Islands in May, 1942, arrived on Guadalcanal on 7 February, 1943, and remained there until May, 1943. He had been at Camp Roberts, California, from 25 June, 1943, until the time of his trial (R. 35).

Accused's rights as a witness were correctly explained to him by the law member, and he elected to remain silent (R. 34,35).

4. In the previous trial, accused had been tried for absence

without leave from 0800 to 1300 on 24 December, in violation of Article of War 61 (Charge I and Specification), for failing to render a report upon the observation by personnel of military courtesies, as required by a regimental memorandum, in violation of Article of War 96 (Charge II and Specification), and for making a false official report of the reason for his absence on 24 December, in violation of Article of War 95 (Additional Charge and Specification). He was found guilty of Charge II and its Specification, and not guilty of Charge I and the Additional Charge and their Specifications. In that trial the prosecution offered as witnesses in rebuttal Sergeant Hoyt and Corporal Munie. Sergeant Hoyt testified that the morning report had been signed by Corporal Munie on 24 December. Corporal Munie, after an explanation to him of his rights under the 24th Article of War, declined to answer a question whether he recognized the signature at the bottom of the morning report.

The findings of the court in the previous trial do not preclude the presently considered finding that accused was guilty of making under oath a statement which he did not believe to be true, and which, as the proof shows conclusively, was not true. An exhaustive search of authorities reveals that the acquittal of one charged with crime is no bar to a prosecution for perjury for testimony given by him at the former trial. (15 Am. Jr. 45 (sec. 368, Criminal Law); 39 L.R.A. (N.S.) 385, cases cited; Allen v. U.S., 194 Fed. 664; 44 L.R.A. (N.S.) 514, 516; 15 A.L.R. 634; 37 A.L.R. 1291; People v. Miles, 300 Illinois, 458, 133 N.E. 252.) Even in the very few cases which have held to the contrary, and which have been practically overruled by subsequent decisions, it is held that -

"* * * the former verdict is conclusive only as to facts directly and distinctly put in issue, and the finding of which is necessary to uphold the judgment * * * The conclusiveness of a former judgment is restricted to facts directly in issue, and does not extend to facts which rest in evidence, and are merely collateral." (People v. Albers, 137 Mich. 678, 100 N.W. 908; cf.: U.S. v. Butler, 38 Fed. 498.)

An examination of the record of the first trial of accused shows conclusively that the issue of whether he had signed the company morning report at the time that he said he did so was collateral to the issues of his absence without leave, his failure to render the military courtesy report, and his false official statement. Although his testimony in this respect undoubtedly contributed to the court's findings of not guilty of Charge I and the Additional Charge, it is impossible to say that on the record the court was not otherwise justified in so finding. While accused was in the second trial not charged with the specific offense of perjury, the Specification does allege an offense closely analogous thereto, and, a fortiori, the same legal principles are applicable.

5. One minor error in the record requires comment. The Specification of the Charge alleges that accused made a statement under oath which he did not then believe to be true. It does not go on to allege that it was not in fact true. The proof, however, shows beyond any reasonable doubt that the statement was not true, and that accused so knew when he testified. There is clear implication that it was intended to be charged that the statement was false, and the Specification having been sufficient to apprise accused of the offense intended to be charged, the accused having made no objection thereto, and it not appearing that he was misled in any degree, it follows that the defect did not constitute error injuriously affecting the substantial rights of the accused within the meaning of Article of War 37 (pars. 73, 87b, M.C.M., 1928; CM 189223, Johansen).

6. War Department records show that accused is 33-4/12 years of age. His record of military service as set forth in the stipulation between prosecution and defense counsel conforms to that found in his A.G.O. 201 file. He attended Springfield, Ohio, High School, for 3-1/2 years, but did not graduate. War Department records also contain a letter from Mrs. Florence Aldrich, accused's divorced first wife, dated 10 November, 1941, addressed to Mr. (Stephen?) Early, Washington, D.C., and complaining of accused's continued failure to comply with a court order to pay \$8 a week for the support of their three minor children, aged 7, 8 and 10 years. On 8 December, 1941, in response to official inquiry through military channels, accused stated that his failure to comply with the court's decree was due directly to "financial difficulties", and promised to liquidate all prior indebtedness and to comply with the decree in the future. On 9 February, 1942, accused was tried by a general court-martial at Camp Shelby, Mississippi, for dishonorably neglecting and failing to comply with the order of the juvenile court, and upon eight specifications of wrongfully and unlawfully making and uttering checks, knowing that he did not have and not intending that he should have sufficient funds in the bank for payment of them, all in violation of Article of War 95. He was found not guilty of the specification concerning non-support of his children, and guilty of the eight specifications concerning the checks, in violation of Article of War 96, and was sentenced to be restricted to the Regimental Area for six months, of which sentence the reviewing authority approved three months' restriction only.

War Department records also contain correspondence concerning an indebtedness on accused's part in the amount of \$10, left unpaid by him upon his departure from the Station Hospital, Indiantown Gap, Pennsylvania, in March or April, 1942, which indebtedness was apparently paid by accused on 4 May, 1942.

Information found in War Department records concerning accused's other trial by court-martial, on 14 January, 1944, has already been set forth in discussing its relation to the present case.

7. Accompanying the record is a letter from the Reverend Mr. C. A. Sundberg, D.D., of Springfield, Ohio, dated 4 March, 1944, and addressed to The Adjutant General, in which the writer, accused's pastor in civil life, states that accused was a regular attendant at his church and Sunday school services for a period of fifteen years, and in which letter he requests that accused be given consideration for this reason.

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

Wm. C. Gann, Judge Advocate.
Alvin Tammhill, Judge Advocate.
(On Leave), Judge Advocate.

1st Ind.

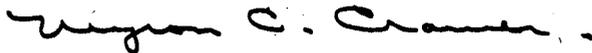
War Department, J.A.G.O., 30 MAR 1944 - To the Secretary of War.

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 First Lieutenant Elbert V. Circle (O-387071), 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. Under all the circumstances, I believe that dismissal will be adequate punishment and I therefore recommend that the sentence be confirmed, but that the forfeitures and confinement be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter from the Reverend Mr. C. A. Sundberg, D.D., of Springfield, Ohio, accused's pastor in civil life, requesting clemency for 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 recommendation hereinabove made, should such action meet with approval.



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 Rev. C.C.
Sundberg, D.D.

(Sentence confirmed but forfeitures and confinement remitted.
G.C.M.O. 281, 10 Jun 1944)

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

(137)

SPJGV -
CM 251104

1 APR 1944

UNITED STATES)

TANK DESTROYER CENTER

v.)

Trial by G.C.M., convened at
Camp Hood, Texas, 4 February
1944. Dismissal.

Second Lieutenant HAROLD
A. STRADER (O-1824934),
Army of the United States.)

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 96th Article of War.

Specification: In that Harold A. Strader, Second Lieutenant, A.U.S., First Training Group, Unit Training Center, Camp Hood, Texas, being a married man, did, at Belton, Texas, from on or about 4 August 1943 to on or about 15 October 1943, wrongfully and unlawfully live and cohabit with a woman whose name is unknown but who was then and there not his wife.

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

Specification: In that Harold A. Strader, Second Lieutenant, AUS, First Training Group, Unit Training Center, Camp Hood, Texas, being a married man, did, at Belton, Texas, from on or about 4 August 1943 to on or about 15 October 1943, wrongfully, dishonorably and unlawfully live and cohabit with a woman whose name is unknown but who was then and there not his wife.

He pleaded not guilty to and was found guilty of each Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved

the sentence but recommended that the execution thereof be suspended, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution in support of each Charge and its Specification is the same and is substantially as follows: It was shown by stipulation that accused and Carolyn or Caroline Bechtel Strader were lawfully married 15 November 1940 in Campbell County, Kentucky, and that the marriage relation between them existed at the time of trial.

Caroline Strader was present during the trial. She testified that she was the wife of accused and resided with him at 620 North A Street, Temple, Texas; that she had resided there since March 1943; had never lived in Belton, Texas, and had never been known as Maxine, or by any name other than Caroline Strader.

Mr. Clarence R. Owens testified that he resided at 519 North Wall Street, Belton, Texas. Accused came to his house 4 August 1943 and rented a room, saying he would not occupy the room until the following Sunday when his wife, not stating her name, was expected to arrive. The following Sunday night about 10 o'clock accused arrived at his house with a woman. Mrs. Caroline Strader, who was then brought into the courtroom, was not the woman who accompanied accused to his house; that accused maintained this room until about 15 October 1943, and occupied it with a woman named Maxine. They occupied the room for about five weeks, and after an absence of about one week, they returned and again occupied the room for four or five weeks more. Accused came to the house at 519 North Wall Street, Belton, Texas, practically every night during this period and Maxine remained there every day and night. Accused and the woman, Maxine, occupied the room together during the entire time. Accused never introduced Maxine to the witness as his wife. The witness identified Prosecution's Exhibit B as a picture of the same woman named Maxine who had occupied the room in his house with accused.

Mrs. Clarence R. Owens identified Prosecution's Exhibit B as a picture of the same woman named Maxine who had occupied a room in her home for a period of about nine and a half weeks with accused. She testified that Mrs. Caroline Strader was not the same person as the woman named Maxine who had occupied the room with accused. The accused came to this room practically every night. She saw him leave in the morning on two occasions only. On one occasion during the month of September 1943, the witness carried a blanket into accused's room and saw accused and the woman Maxine Strader in bed together. She did not observe the dress of accused as he was under the cover, but Maxine was dressed for bed. Upon arrival at her house Maxine Strader signed the register.

Technician Fourth Grade Clarence E. Barnes and his wife, Jean Barnes, each testified that they lived at 519 North Wall Street, Belton,

Texas, from about the first of September to about the 20th of December 1943. During the time they resided at this address accused also stayed there for about six weeks and occupied a room across the hall with a woman called Maxine. Each witness identified Prosecution's Exhibit B as a picture of the woman called Maxine who occupied this room with accused. T/4 Barnes was confronted with Mrs. Caroline Strader, present in the courtroom, and testified that she was not the woman who had lived at this address with accused. He frequently awakened accused in the morning by knocking on his door, and at other times he had set his alarm clock and placed it inside accused's room for the purpose of awakening him. Once or twice when he knocked on the door in the morning, Maxine answered. Both witnesses stated that accused came to the room almost every night.

Samuel B. McElroy, Chief of Police, Belton, Texas, testified that Mrs. Caroline Strader spoke to him during the month of August 1943 and asked what could be done about her husband living with another woman; she had information that her husband was living with another woman in a house in Belton, Texas, within a block of McElroy's home. She described the color of the house, and told him that accused came home but once or twice each week as he was very busy in camp.

First Lieutenant James W. Hunter, Provost Marshal at Temple, Texas, testified that Mrs. Caroline Strader came to him some time in July 1943 and spoke about her husband. She complained that her husband was keeping company with another woman, and wanted the witness to do something to stop it; she said when her husband came home he did not remain very long, and would give an excuse to go back to camp or to some other place.

Reverend J. D. Thorne, Minister of the Baptist Church in Belton, Texas, testified that he met accused 26 September 1943, in the rear of his church auditorium, at the close of the evening service. He introduced himself and accused said that he was Lieutenant Strader. The witness then said to accused, "you are the husband of the woman I just baptized", and accused replied, "yes". During the church service the witness had observed accused, and the woman he later baptized, sitting together in church. The woman he baptized gave her name as, and was baptized as, Mrs. Maxine Strader. The witness identified Prosecution's Exhibit B as a picture of the woman who was with accused that night and the one he baptized.

4. For the defense:

Mrs. Caroline Strader, as a witness for the defense, testified that between 4 August and 15 October 1943, accused came home two or three nights a week some weeks, and during other weeks, three or four times a week. She denied telling the Chief of Police in Belton, Texas, as well

as the Provost Marshal in Temple, Texas, that her husband, accused, was spending the evenings with Maxine in Belton, Texas. She complained to them only because the woman was using her name. She had been married to accused for three years and had never had occasion to complain about his morals. She had succeeded in breaking up this affair between accused and Maxine, and had not requested military authorities to prefer charges against accused. She and accused have one child about a month old, and she had become fully reconciled with her husband at the time of trial.

Lieutenant Colonel Robert H. Wilson, Major A. V. Elston, and Major Gilbert A. Elmon each testified in substance that accused's manner of performance of duty was excellent or superior; he was dependable, conscientious, a good instructor and possessed leadership.

Having been fully acquainted with his rights as a witness, accused made an unsworn statement through counsel, in which he denied that he had ever introduced Maxine as his wife; he had never intended anyone to assume that she was his wife; he did not consent to her use of his name; during the time Maxine resided in Belton, Texas, he visited her infrequently. Shortly after he met Maxine he advised her to return to her home, and furnished her sufficient money to make the trip, although he did not feel responsible to do this; about a week later she returned claiming she had lost the money he gave her. He admitted he had made a mistake, which would never occur again.

5. The evidence conclusively shows that during the period of time alleged in the Specifications (as amended at the trial) of each Charge, to wit: from on or about 4 August 1943 to on or about 15 October 1943, accused occupied a room with Maxine, a woman not his wife. This room was in the home of Mr. and Mrs. Clarence R. Owens who resided at 519 North Wall Street, Belton, Texas, and was rented by accused a few days prior to occupancy. Caroline Strader, accused's lawful wife, and to whom he had been married for over three years, lived in Temple, Texas. She had never lived in Belton, Texas, and was not the woman with whom accused occupied this room. The accused and the woman, Maxine, were seen in the room together on numerous occasions, both in the day and night time, and by both civilian and military personnel.

Accused was a married man and the circumstances are strongly indicative of adulterous relations between him and the woman Maxine. Accused's act in renting the room and thereafter illicitly occupying it over a long period of time with a woman not his wife was indecorous and disgraceful, amounting to conduct unbecoming an officer and a gentleman within the meaning of Article of War 95 and was wrongful and unlawful in violation of Article of War 96.

Accused is about 28 years of age and has a wife and one child. He is a high school graduate, and in civil life was manager of an A & P

grocery store, receiving a weekly salary of \$55. He was inducted 3 July 1942 and served as an enlisted man until 15 April 1943, when upon graduation from Officer Candidate Tank Destroyer School, Camp Hood, Texas, he was appointed second lieutenant, Army of the United States, and ordered to active duty.

7. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffy, Judge Advocate.

Herbert M. Kuebler, Judge Advocate.

Robert B. Harwood, Judge Advocate.

(142)

SPJGV
CM 251104

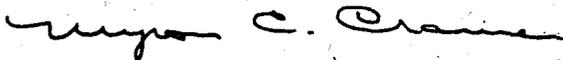
1st Ind.

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 Harold A. Strader (O-1824934), Army of the United States.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. On 4 August 1943 accused, while lawfully married, rented a room in the home of Mr. and Mrs. Clarence R. Owens, Belton, Texas, and thereafter occupied it with a woman not his wife until about 15 October 1943. It appears that at the time of trial accused had terminated his relations with the other woman, and had become fully reconciled with his wife. The reviewing authority recommended that the execution of the sentence be suspended. In view of these circumstances, and accused's previous good record, I recommend that the sentence be confirmed, but that the execution thereof be suspended during good behavior.

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

(Sentence confirmed but execution suspended. G.C.M.O. 219, 29 May 1944)

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

(143)

SPJGQ
CM 251162

24 MAR 1944

UNITED STATES	)	MOBILE AIR SERVICE COMMAND
)	
v.	)	Trail by G.C.M., convened at
	)	Brookley Field, Mobile, Ala-
Captain ELMER J. DIEHL	)	bama, 11 February 1944. Dis-
(O-907333) Air Corps.	)	honorable discharge, total
	)	forfeitures and confinement
	)	for two (2) years.

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 I: Violation of the 61st Article of War.

Specification: In that Captain Elmer J Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, did, without proper leave, absent himself from his station at Army Air Base, Brookley Field, Alabama from about 30 December 1943 to about 4 January 1944.

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

Specification 1: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, being indebted to Clement H. Chanfrau in the sum of One Hundred Dollars for One Hundred Dollars lawful money of the United States loaned the said Captain Diehl by the said Clement H. Chanfrau, which amount became due and payable in monthly installments of Twenty Dollars beginning 1 August 1943 did, at or near New Orleans Army Air Base, New Orleans, Louisiana, from about the latter part of July 1943 to about 13 January 1943, dishonorably fail and neglect to pay said debt.

(144)

Specification 2: (Finding of not guilty).

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

Specification 1: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, did, at or near New Orleans Army Air Base, New Orleans, Louisiana, on or about the latter part of July 1943, wrongfully borrow One Hundred Dollars, lawful money of the United States, from Clement H. Chanfrau, then a civilian employee of the United States of America under the direct control and supervision of the said Captain Diehl.

Specification 2: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, being indebted to Clement H. Chanfrau in the sum of One Hundred Dollars for One Hundred Dollars lawful money of the United States loaned the said Captain Diehl by the said Clement H. Chanfrau, which amount became due and payable in monthly installments of Twenty Dollars beginning 1 August 1943 did, at or near New Orleans Army Air Base, New Orleans, Louisiana, from about the latter part of July 1943 to about 13 January 1943, dishonorably fail and neglect to pay said debt.

Specification 3: (Finding of not guilty).

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

Specification 1: In that Captain Elmer J Diehl Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, did, at or near Army Air Base, Brookley Field, Alabama, on or about 22 December 1943, in testimony before Major William McCraw, Air Corps, Acting Assistant Inspector General, Mobile Air Service Command, make under oath a statement in substance as follows:

Clement H. Chanfrau was repaid in full his loan to me of One Hundred Dollars.

which statement he did not then believe to be true.

Specification 2: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, being indebted to The First National Bank in Gadsden, Alabama, in the sum

of Three Hundred Dollars for Three Hundred Dollars lawful money of the United States loaned the said Captain Diehl by said bank, which amount became due and payable on or about 2 December 1943, did, at or near Army Air Base, Brookley Field, Alabama, from about 2 December 1943 to about 17 January 1944, wrongfully and dishonorably fail and neglect to pay said debt in its entirety.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

Specification 6: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, being indebted to Charles E. Kroelinger, Jr. in the sum of Twenty Five Dollars for Twenty Five Dollars lawful money of the United States loaned the said Captain Diehl by the said Charles E. Kroelinger, Jr., which amount became due and payable on or about 31 October 1943, did, at or near Army Air Base, Brookley Field, Alabama, from about 31 October 1943 to about 17 January 1944, wrongfully and dishonorably fail and neglect to pay said debt.

Specification 7: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, being indebted to Harry F. Martin in the sum of Nineteen Dollars and Fifteen Cents for Nineteen Dollars and Fifteen Cents lawful money of the United States loaned the said Captain Diehl by the said Harry F. Martin, which amount became due and payable on or about 21 November 1943, did, at or near Army Air Base, Brookley Field, Alabama, from about 21 November 1943 to about 17 January 1944, wrongfully and dishonorably fail and neglect to pay said debt.

Specification 8: (Finding of not guilty).

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

Specification 1: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, did, at or near Army Air Base, Brookley Field, Alabama, on or about 22 December 1943, in testimony before Major William McCraw, Air Corps, Acting Assistant Inspector General, Mobile

Air Service Command, make under oath a statement in substance as follows:

Clement H. Chanfrau was repaid in full his loan to me of One Hundred Dollars.

which statement he did not then believe to be true.

Specification 2: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, being indebted to The First National Bank in Gadsden, Alabama, in the sum of Three Hundred Dollars for Three Hundred Dollars lawful money of the United States loaned the said Captain Diehl by said bank, which amount became due and payable on or about 2 December 1943, did, at or near Army Air Base, Brookley Field, Alabama, from about 2 December 1943 to about 17 January 1944, wrongfully and dishonorably fail and neglect to pay said debt in its entirety.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

Specification 6: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, being indebted to Charles E. Kroelinger, Jr. in the sum of Twenty Five Dollars for Twenty Five Dollars lawful money of the United States loaned the said Captain Diehl by the said Charles E. Kroelinger, Jr., which amount became due and payable on or about 31 October 1943, did, at or near Army Air Base, Brookley Field, Alabama, from about 31 October 1943 to about 17 January 1944, wrongfully and dishonorably fail and neglect to pay said debt.

Specification 7: In that Captain Elmer J. Diehl, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Alabama, being indebted to Harry F. Martin in the sum of Nineteen Dollars and Fifteen Cents for Nineteen Dollars and Fifteen Cents lawful money of the United States loaned the said Captain Diehl by the said Harry F. Martin, which amount became due and payable on or about 21 November 1943, did, at or near Army Air Base, Brookley Field, Alabama, from about 21 November 1943 to about 17 January 1944, wrongfully and dishonorably fail and neglect to pay said debt.

Specification 8: (Finding of not guilty).

Counsel for Defense made one motion to strike Specification 1, Charge III, upon the theory that it charged no offense, and another to strike all Specifications charged as violation of Article of War 96 which were also charged as violation of Article of War 95, contending that such duplication of charges was improper and unauthorized. Both motions were denied. Accused, thereupon, pleaded not guilty to all Charges and Specifications, as well as to all of the Additional Charges and Specifications. He was found guilty of Charge I and its Specification; of Specification 1, Charge II, and of Charge II; of Specifications 1 and 2, Charge III, and of Charge III; of Specifications 1, 2, 6, and 7, Additional Charge I, and of Additional Charge I; and of Specifications 1, 2, 6, and 7, Additional Charge II, and of Additional Charge II. He was found not guilty of the following Specifications: Specification 2, Charge II, Specification 3, Charge III, and Specifications 3, 4, 5, and 8 of Additional Charge I and of Additional Charge II, respectively. No evidence of previous convictions was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of two years. The reviewing authority approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of record for the prosecution, limited to that which supports the Specifications and Charges of which accused was found guilty, may be summarized as follows:

Charge I and its Specification: As shown by properly authenticated extract copy of the morning report of the 480th Base Headquarters and Air Base Squadron, accused, without proper leave, absented himself from his station at Brookley Field, Alabama, on 30 December 1943 (R. 14; Ex. 1). It was stipulated by the prosecution and defense that if First Lieutenant James B. Folsom, Staff Sergeant Anthony Barone, and Sergeant Nathan Dell Angelica, of Chicago's Military Police Detachment were present in court, they would testify that on 4 January 1944, they arrested and returned accused to military control at Chicago, Illinois (R. 14; Ex. 2).

Specification 1, Charge II, and Specifications 1 and 2, Charge III:

Accused, being then the officer "in charge of the mess hall", at "the Air Base", New Orleans, Louisiana, and, as such, the "boss" or "supervisor" (R. 16) of Clement Henry Chanfrau, a civilian, who was employed at the mess hall as an instructor of cooks, borrowed \$100 from Chanfrau. The loan was made during August 1943, according to Chanfrau's recollection, while accused was in the hospital (R. 16). Accused agreed at the time to repay the loan in monthly installments of \$20 each, together with interest, the first installment to be due the following month (R. 18). Chanfrau told him that he did not care about interest, or the length of time taken to repay the loan, just so long as his money was repaid (R. 18). No security or evidence of indebtedness was required or given for the loan (R. 17). The loan was made by Chanfrau as a personal favor to accused, and their business relations had nothing to do with it and were not affected by it (R. 19). Accused left the New

Orleans Air Base shortly after the loan was made, and Chanfrau did not see him again until they met, by chance, in New Orleans on or about 14 September 1943. At that time, accused stated that he was soon to be back in charge of the mess hall at the New Orleans Air Base, and told Chanfrau, who was no longer employed there, that he would want him to return to work. He also told Chanfrau that he would like to have him "sign a little paper" (R. 17), a receipt (R. 20), and that he would settle with him (R. 17). Chanfrau expressed his willingness, and on the following day, when a woman, who represented herself to be the wife of accused, presented a prepared receipt, purporting to evidence receipt from accused of \$110, "loan and interest", he signed it (R. 17; Ex. 3). Chanfrau received no money at the time he signed the receipt. In fact, money was not mentioned, and no time was fixed for payment (R. 18). The only reason given by accused for wanting the receipt was that it would keep him out of trouble (R. 19). Chanfrau signed it to favor a friend (R. 20). Accused had never denied his indebtedness to Chanfrau, and the latter did not expect that accused would undertake to use the receipt against him (R. 19). Chanfrau had never written accused, or made demand for repayment of the loan (R. 20). Chanfrau did not report the matter to military authorities, and did not know how they learned of the loan; but he did tell them the facts when he was questioned (R. 20).

On 8 October 1943, accused, who was then stationed at the 829th AAF Specialized Depot, Gadsden, Alabama, delivered the receipt, which had been obtained from Chanfrau, to Major W. T. Finley, Executive officer, together with a letter, in which he stated that he neither admitted nor denied that the loan had been made, but felt that the receipt for the amount in question was sufficient (Exs. 4 and 5).

Specification 1, Additional Charge I, and Specification 1, Additional Charge II: In view of the disposition hereinafter made of these Specifications, it becomes unnecessary to detail the evidence offered in support of them.

Specification 2, Additional Charge I, and Specification 2, Additional Charge II: On 2 September 1943, accused borrowed \$300 from the First National Bank in Gadsden, Alabama. He executed and delivered to the bank a note for \$300, bearing date 2 September 1943, due 2 December 1943, and bearing interest from maturity (Exs. 7 and 8). The loan was secured by a mortgage given by accused on a Dodge Sedan automobile (Exs. 7 and 8). The mortgage was not recorded (Ex. 7, p. 2). Accused repaid \$50 on this loan on 4 October 1943, but has paid no part of the balance of \$250 (Ex. 7, p. 2). The bank has not released its mortgage and has not at any time consented for accused to sell the mortgaged automobile (Ex. 7, p. 2-3). On 5 November 1943, the bank wrote accused at Brookley Field, Alabama, suggesting that the loan had been made primarily because he was stationed locally, and requesting that, since he had changed stations, he endeavor to refinance the loan at his new station (Ex. 10). On 11 December 1943, the bank sent a telegram to accused at Coral Gables, Florida, and mailed a letter to him at Brookley

Field, Alabama, calling attention to his past due note (Exs. 11 and 12). On 21 December 1943, the bank sent another telegram to accused at Coral Gables, requesting him to advise disposition to be made of his past due note (Ex. 13). On 22 December 1943, accused wired the bank the following: "Half payment Jan third with interest balance Feb third - Thanks." (Ex. 9). The bank wired him at Mobile on 23 December 1943 that the proposed terms were unsatisfactory and expressed its desire for immediate liquidation of his indebtedness (Ex. 14).

On 29 December 1943, Alexander Motors, Mobile, Alabama, without notice to them of any encumbrance thereon, purchased from accused the automobile upon which the Gadsden bank then held a lien. The agreed purchase price was \$580, and payment thereof was made by three separate checks, each payable to the order of accused, for the respective amounts of \$250, \$200 and \$130 (R. 24-26; Exs. 15, 16, 17).

Specification 6, Additional Charge I, and Specification 6, Additional Charge II: On 29 August 1943 at Gadsden, Alabama, Charles E. Kroelinger, Jr., loaned accused \$100. The following day accused signed a check to Kroelinger for that amount, and marked it "loan sixty (60) days" (Ex. 18, p. 3). Twenty-five dollars of this loan was repaid about 1 September 1943, and another \$25 was repaid about 1 October 1943 (Ex. 18, p. 3-4). The balance of this loan (\$50) became due 21 October 1943, and no part of it has been repaid (Ex. 18, p. 4). About the middle of October 1943, Kroelinger loaned accused an additional \$25, which amount was to be repaid, together with the \$50 due on the previous loan, from accused's next pay check, about 1 November 1943; but no part of it has been repaid (Ex. 18, p. 4). Kroelinger subsequently extended the time for payment of the amounts due him until 1 December 1943 (Ex. 18, p. 4). He has never made any direct demand on accused for payment of the indebtedness (Ex. 18, p. 4, 5).

Specification 7, Additional Charge I, and Specification 7, Additional Charge II: At different times, Harry F. Martin, of Gadsden, Alabama, loaned accused money, varying in amounts from \$10 to \$40. Accused is still indebted to him in the amount of \$39.15. Twenty dollars of this total was received by accused on the day he was leaving Gadsden (21 October 1943). He gave Martin a check for that amount, but post-dated the check 5 November 1943, representing that it would be good as soon as he deposited his October pay voucher. Martin knew the amount of accused's bank balance at the time to be only \$4.87. The remaining \$19.15 was evidenced by a promissory note, dated 21 October 1943, and due thirty days after date. Martin never presented the check to the bank for payment and never made demand on accused for any amount (Ex. 19, 20, 21). There was nothing dishonorable or disrespectful about the manner in which accused acquired the money (Ex. 19, p. 3).

4. After having his rights explained to him, accused elected to make an unsworn statement. His statement together with other evidence introduced by the defense, may be digested in pertinent part as follows:

Accused was commissioned a first lieutenant (R. 59) on 2 June 1942, and entered on active duty at the New Orleans Air Base, as Base Mess Officer, on 22 June 1942 (R. 34). He attended Officers Training School at Miami, Florida, from 1 May 1943 until 12 June 1943, after which he returned to New Orleans (R.34). About 1 August 1943, he was transferred from New Orleans to Brookley Field, Mobile, Alabama, and arrived there on 4 August 1943 (R. 34, 35). He had only been at Brookley Field four days when he was transferred to the Air Base at Gadsden, Alabama. He remained at Gadsden from 8 August 1943 until 21 October 1943, and was then transferred back to Brookley Field (R. 36). Within about ten days after returning to Brookley Field, he was sent to Army Air Forces Regional Hospital, Coral Gables, Florida, for treatment and remained there until the 21st or 22nd of December 1943, at which time he again returned to Brookley Field (R. 37).

Accused owned no permanent home (R. 35, 38), and after September 1942, his wife and daughter lived with him, except for the period of time he was in Officers Training School. He first began to have financial troubles after returning from school to New Orleans in June 1943, because, due to their inability to secure other and cheaper quarters, he and his wife and daughter were compelled to live at a hotel (R. 35). They continued to live in the hotel until they left New Orleans (R. 35), and thereafter lived in hotels at each new station, except for about three weeks of the time they were in Gadsden. He and his wife and their friends were constantly on the lookout for cheaper quarters at each station, but none were available. During his first three weeks in Gadsden his hotel expense, alone, was \$7 per day. When the opportunity presented itself, he accepted three rooms in an old night club some ten or fifteen miles from Gadsden, without even going to look at it. He was required to pay rent at the rate of \$75 per month for these accommodations. The building was not equipped for heating and numerous windows were out (R. 48), so he was compelled to return to the hotel within about three weeks because of the cold. His expenses regularly exceeded his income by \$2 or \$3 per day, but he was transferred so often that he was unable to remedy the situation.

Accused was in the hospital when he borrowed \$100 from Chanfrau. He received the money on the 29th or 30th of July 1943. He had no knowledge then that he was to be transferred from New Orleans, and borrowed the money for the primary purpose of making an advance payment of rent for an apartment which his wife had located. He made a deposit of \$40 for the apartment, and only received \$10 of it back when he left New Orleans on the 2nd or 3rd of August 1943. (R. 37). He was not able to repay Chanfrau before leaving New Orleans, and has not since been able to repay him. He had at no time entertained the idea of using the receipt signed by Chanfrau to avoid repaying him (R. 38).

When accused was ready to move from the Reich Hotel in Gadsden, Alabama, to the house in the country, he did not have sufficient funds with which to pay his hotel bill. Kroelinger voluntarily loaned him \$100 with which to pay the hotel and make the required advance

payment of rent on the house. On the day following, accused gave Kroelinger a check for \$100, marked so as to show that it was intended as a note for 60 days. Accused thereafter repaid \$50 on that loan, in two \$25 installments. When accused was preparing to leave Gadsden on the night of 21 October 1943, he lacked approximately \$20 having enough money with which to pay his hotel bill, and intimated to Kroelinger that he intended to ask the hotel management for an extension of time in which to make payment. Kroelinger, knowing at the time that accused was in the act of leaving Gadsden, said that such action was not necessary, voluntarily advanced him \$25, and told him to go pay the hotel bill (R. 42). Accused and Kroelinger had been friends, and their families had visited in a social manner. They parted on friendly terms, and Kroelinger told him to take his time about paying him, and to not worry (R. 50, 64).

During the time he was in Gadsden, accused had borrowed approximately \$40 from Mr. Martin. He had repaid all of that loan except \$19.15, and on 21 October 1943, when he was preparing to leave Gadsden, being unable to pay the balance, he voluntarily made Martin a note for that amount and gave it to him (R. 43).

Accused recognized all of these loans as valid debts, and disclaimed any intention of defrauding anyone. He had thought he would finally get located permanently, and could cut down his expense and pay his debts.

Accused's health became impaired while he was still in New Orleans. He suffered an attack of flu in January 1943 and seemed unable to regain his strength. He also suffered from asthma, and was afflicted with severe pains in his head. He had suffered a double skull fracture in an automobile accident in 1930 and fell and struck his head another severe blow while on duty in New Orleans. His condition grew worse after he was transferred to Gadsden, and he was sent to the hospital at Coral Gables shortly after his return to Brookley Field. While at Coral Gables he continued to suffer greatly from the persistent pains in his head, and upon two occasions suffered mental lapses, during which he seemingly did not know what he was doing, or what was going on around him (R. 47, 65). He made the return trip from Coral Gables to Mobile by automobile, and had to take tablets and powders all the way because of the pain he was suffering. Immediately upon his arrival at Brookley Field he was called before Major William McCraw for questioning about his indebtedness. He was again questioned on 24 December 1943 and still again on 29 December 1943. Upon this latter date, he was first questioned in the morning and was then granted until 2:30 p.m. to confer with his wife and ascertain if she wanted to appear as a witness. He and his wife concluded to dispose of what property they could in an effort to obtain enough money to pay off his debts. He sold the car and obtained three checks, one of which, in the amount of \$250, he intended to deliver to the bank in Gadsden, Alabama; but he discovered that the bank was closed and thereupon concluded to let his wife take the money and clear the debts. His wife phoned Major

McCraw in an effort to stay further proceedings until the following day, to enable her to satisfy his creditors, but Major McCraw did not indicate his willingness to grant the additional time. Accused's wife then tried to phone the commanding officer of Brookley Field, but was unable to get him.

Accused then told his wife to give him what money they had, with the exception of about \$40, and told her he was going back to the field to see Major McCraw, and probably would not be back that night. He then took two capsules of medicine that had been supplied him at Coral Gables, and drank a scotch highball; and was unable to recall his further actions until 7:00 p.m. 31 December 1943, when a lady in the lounge car of an Illinois Central train touched him on the shoulder and asked if he was ill, suggesting that his eyes looked glassy. Accused thereupon discovered that he was on the train, with no baggage, and that he had a stub of a bus ticket, unused, indicating passage from Springfield to Chicago (R. 38-39).

The wife of accused testified that when accused left her on 29 December to return to the field, he left approximately \$300 with her (R. 55), part of the proceeds of the sale of the automobile (R. 56). She "just kept it", because she did not know what was going to happen. She did not still have all of it because accused's check for the previous month had been held up (R. 60). She admitted that she possibly told Major McCraw that accused left her without money when he departed on 29 December (R. 56).

5. The prosecution introduced evidence in rebuttal substantially as follows:

Major Thomas V. Woods, M.C., testified that he examined accused in January 1944, and, based on subjective symptoms (R. 67), concluded that, in addition to bronchitis, accused was afflicted with a post traumatic neurosis, mild. He explained this as being "a syndrome that follows injuries of the head, manifested largely by complaints referable to the site of the injury, as pain and nervousness in the severer forms". "The personality changes and behavior changes". No condition was found to exist which might have caused or explain an attack of amnesia (R. 67). True amnesia is rare, and when occasioned by a head injury, usually follows the injury rather closely (R. 68). In his opinion, accused knew right from wrong and was able to adhere to the right (R. 67).

On 13 January 1944 accused requested Private Willie Johnson, who was on duty at the hospital, to dispatch the following message, and, if need be, to sign his own name to it, and to say nothing to anyone about it (R. 69), to wit:

"Butch Hyde
3107 Wilson Ave.
Chicago, Ill.

Remember this if interviewed you know Nora I don't know

how I got there had amnesia. I was AWOL know your family twenty years, sold car to me February all paid you left Orleans July. Did not see Clem sit tight no matter what is said to you letter love
Butch^m.

Accused, in a statement to Major N. W. Overstreet, Jr., on 14 January 1944, represented that his purpose in undertaking to send this message to Mrs. Hyde was to make sure that she did not forget facts already known to her, and that she would tell the truth in the event she should be questioned by agents of the Federal Bureau of Investigation (Ex. 23).

6. Defense counsel made a motion to strike Specification 1 of Charge III, citing as his reason that the allegation thereof failed to state an offense in violation of Article of War 96. The trial judge advocate, in supporting his argument against this motion, cited paragraphs e (2), e (2) (a) and 3 (2) (a) 1 of AR 600-10, which do nothing more than state broadly a War Department policy regarding prohibitive conduct between an Army officer when acting as a government agent and the persons or firms with whom that officer is obliged to carry on negotiations for, and on behalf of, the government. It is evident from the context that, irrespective of wide implications, the scope of these regulations does not include the comparatively insignificant business relationship of a purely personal nature existing between an officer temporarily supervising a government project and ordinary laborers serving under such supervision. It is unreasonable to hold that the mere act of borrowing money from a civilian employee, in a transaction purely of a private nature, and in which the Government has no interest or concern, should be deemed within the purview of the cited regulations or that, unless some extraordinary circumstances are shown, such a transaction could constitute an offense to the prejudice of good order and military discipline or one of such a nature as to bring discredit upon the military service, or come within the scope of a crime or an offense not capital of which a person subject to military law may be guilty, in violation of Article of War 96. In denying the motion the court was apparently influenced by a false analogy in that it assumed that because it is an offense for an officer to borrow money from an enlisted man therefore it follows that it is likewise a penal offense for him to borrow from a civilian employee. Since the relationship between the parties in the former case rests on a wholly different basis from that existing between an officer and a civilian employee, such reasoning starts from a false premise and leads to an illogical conclusion. In the opinion of the Board, the court erred in failing to grant the motion. Since it failed to do so, the findings as to Specification 1 of Charge III must be disapproved.

Defense counsel's motion, made before pleading to the general issue, to strike those Specifications which allege as violations of Article of War 96 the same acts and conduct already charged, in identical Specifications, as violations of Article of War 95, was properly overruled.

The Manual for Courts-Martial provides that Article of War 95 "includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman" (par. 151, M.C.M., 1928); and by illustration, makes it clear that an accused may properly be convicted of a violation of both Article of War 95 and any other applicable Article of War, under a proper factual situation (CM 244212 - McFarlane). It follows, therefore, that it is not improper to allege the same acts as violations of both Article of War 95 and some other appropriate Article of War; and it is apparent that, in a majority of instances, a determination of whether the acts properly constitute a violation of both Articles of War can only be made after the evidence has been introduced. The question can then be controlled and disposed of by the findings on the Charges.

The evidence shows beyond doubt that accused was absent without leave from his station, as alleged in the Specification of Charge I, from 29 December 1943 until 4 January 1944. Accused admitted this, but apparently sought to excuse his conduct by claiming that he was suffering at the time from an attack of amnesia. This defense was injected into the record by accused's unsworn statements, made to the investigating officer and at the trial. It is not convincing when viewed in the light of the other evidence of record. The only evidence tending, even remotely, to corroborate his contention was the testimony of his wife and daughter that accused apparently suffered two short mental lapses while at Coral Gables. On the other hand, medical testimony was offered by the prosecution, showing that an examination of accused after his return had failed to disclose any indication of amnesia or anything calculated to render it probable that accused had been afflicted with it. Accused while attempting to explain his effort to send the night letter to Mrs. Hyde, contended that she knew he had amnesia at the time in question, but the record of trial fails to show that he made any effort to procure her testimony. The court was justified in rejecting the amnesia theory, but, even if one were disposed to give credence to it, accused's own statement reflects that he regained possession of his faculties as early as 7:00 o'clock p.m. on 31 December 1943. He did not then return to military control. He did not voluntarily return to military control at anytime, but was apprehended by military police on 4 January 1944. The evidence is sufficient to support the findings.

Specification 1, Additional Charge I, and Specification 1, Additional Charge II, are each legally insufficient to charge an offense, either under Article of War 95 or Article of War 96. It is fairly well apparent from the Specifications and record that it was the intention of the accuser to charge accused with the offense of knowingly giving false testimony under oath, but the Specifications, as drawn, fall short of charging this offense; and allegations of fact essential to the validity or sufficiency of a Specification cannot be supplied by mere deduction or speculation.

The rule governing the sufficiency of a Specification to charge an offense is thus succinctly stated in Dig. Op. JAG, 1912-1940, Sec. 451 (44): "That a specification must exclude every reasonable hypothesis

of innocence - must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted as true or duly proven to be true, the accused cannot be innocent - may be regarded as the settled law of this office as it is the settled law of the land" CM 187548 (1929).

The Specifications under discussion wholly fail to allege that the statement attributed to accused was false. Neither do they allege that the statement was wrongfully or unlawfully made. The only allegation contained therein which tends to discredit the statement which accused is alleged to have made or to brand as illegal or wrongful his conduct in making it, is the allegation that it was a statement which accused "did not then believe to be true".

An unwholesome state of mind, secretly harbored and not manifested by acts or omissions which are themselves wrongful or unlawful, cannot be said to be conduct unbecoming an officer and a gentlemen, within the purview of Article of War 95, nor a disorder or neglect to the prejudice of good order and military discipline, nor conduct of a nature to bring discredit upon the military service, within the purview of Article of War 96. It follows that the mere fact that accused may have lacked belief in the truth of his testimony, unattended by other circumstances, would not constitute an offense cognizable under the Articles of War, if the testimony so given was, in fact, true; and it becomes manifest that as a result of their failure to allege that the statement was false, the specifications fail to meet the test of the rule above set out. Since they fail to state an offense, the specifications are legally insufficient to sustain the findings made upon them.

Specification 1, of both Charge II and Charge III, and Specifications 2, 6 and 7 of both Additional Charge I and Additional Charge II, deal with the failure of accused to pay his debts. They will be discussed as a group.

Those to whom the debts which are specified in these Specifications are owing, and the amount owing to each upon the debt alleged, are as follows: Chanfrau - \$100; The First National Bank in Gadsden, Alabama, - \$250; Kroelinger - \$25 (loan made on 21 October 1943); and, Martin - \$19.15 (amount evidenced by note, Ex. 20). Such other debts as the evidence shows to be owing by accused are material only to the extent that they shed light upon accused's general attitude toward incurring debts, and upon his disposition and ability to pay his debts.

That accused is justly indebted to the above named persons in the amounts shown, and that the debts are past due, was clearly established by the evidence, and was freely admitted by accused in his unsworn statement to the court. Therefore, it is only necessary to determine whether his failure to pay the debts in issue has been attended by circumstances of a nature to make such failure an offense in violation of Articles of War 95 and 96. The neglect or failure by military personnel to pay their

debts becomes an offense cognizable under the Articles of War only when accompanied by such circumstances as indifference, evasion, fraud, deceit or dishonorable conduct. CM 121207 (1918) and CM 123090 (1918), Dig. Op. JAG 1912-1940, sec. 453 (14) and (15); CM 240754 (1943), Bull. JAG, January 1944, p. 7. In the instant case the element of dishonorable conduct was supplied in the necessary degree, as regards each Specification, under both Article of War 95 and Article of War 96, by accused's failure to apply the proceeds of the sale of the automobile (which was itself encumbered by a mortgage lien to secure the bank's debt) toward the liquidation and extinguishment of his various debts. The money so derived was sufficient to have enabled him to pay all of his debts which are shown by the evidence of record and had he so applied it, it is doubtful that he would have been prosecuted upon these Specifications, or if so, that a conviction for failure to pay any of the debts could have been sustained; but his failure to so apply it, under the circumstances that existed, is inexcusable. His financial dealings were then under investigation, and the bank had been pressing him for full payment of its past due note. The situation was one that demanded that accused make use of all means at his command to secure the necessary money to liquidate his indebtedness. Instead, he disposed of the bank's security, went absent without leave and deliberately avoided any attempt to pay his creditors. His conduct evidenced a dishonest purpose and intent not to pay any of the debts in question.

Accused's contention that he was suffering from amnesia, in the absence of clear and convincing proof, is not credible. The evidence is sufficient to support the findings on each of these Specifications, and as violations of both Article of War 95 and Article of War 96.

The court sentenced accused "to be dishonorably discharged the service". The sentence should have been that he "be dismissed the service", but, since this form of sentence also imports that the severance of service connections is under dishonorable conditions, the substantial rights of accused were not prejudiced by the form used, and it will be construed as though the proper phraseology had been employed.

7. War Department records disclose that this officer is 43 years of age, married, and has one child. He attended high school for two years, but did not graduate. He reads and speaks Polish and German. He served in the United States Naval Reserve Forces from 25 July 1918 until 19 March 1919. He was a caterer before being temporarily commissioned as a first lieutenant in the Army of the United States on 18 May 1942. He reported for active duty on 2 June 1942 at the New Orleans Army Air Base, New Orleans, Louisiana, and was promoted to the rank of captain on 18 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 not legally sufficient to support the findings of guilty of Specification 1, Charge III, Specification 1, Additional Charge I, and Specification 1, Additional Charge II, but is legally sufficient to support all other findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of violation of Article of War 95, and is authorized upon conviction of violation of Article of War 61 and Article of War 96.

William A. Doss, Judge Advocate.

Charles E. Plunk, Judge Advocate.

Herbert B. Friedman, Judge Advocate.

1st Ind.

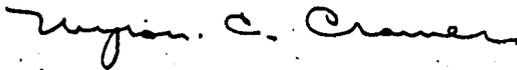
War Department, J.A.G.O., **27 APR 1944** - To the Secretary of War.

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 Captain Elmer J. Diehl (O-907333), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specification 1, Charge III (borrowing money from a civilian employee of the Government), Specification 1, Additional Charge I, and Specification 1, Additional Charge II (same Specifications under Article of War 95 and Article of War 96 - false swearing), but is legally sufficient to support all other findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed, but in view of the fact that the record of trial is held insufficient by the Board to support the findings of guilty of three of the Specifications, and that this officer is 43 years of age, is in poor health, and that he has a wife and daughter to support, I recommend that all forfeitures and confinement be remitted, and that, as thus modified, the sentence be carried into execution.

3. Consideration has been given to the attached letter addressed to the President from Mrs. Elmer J. Diehl, wife of the accused, and its inclosures.

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.

- 4 Incls.
- 1 - Record of trial
 - 2 - Dft. ltr. for sig. S/W
 - 3 - Form of Executive action
 - 4 - Ltr. from Mrs. Elmer J. Diehl
to the President with incls.

(Findings of guilty of Specification 1, Charge III, and Specification 1 of both Additional Charge I and Additional Charge II, disapproved. Sentence confirmed but total forfeitures and confinement remitted. G.C.M.O. 339, 1 Jul 1944)

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

(159)

SPJGV
CM 251168

14 APR 1944

UNITED STATES

v.

Second Lieutenant DANIEL P.
REICHEY (O-1047748), Coast
Artillery Corps.

ANTIAIRCRAFT ARTILLERY
TRAINING CENTER

Trial by G.C.M., convened at
Camp Stewart, Georgia, 15
February 1944. Dismissal,
total forfeitures and confine-
ment for two (2) years.

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

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

Specification: In that Second Lieutenant Daniel P. Reichey, Battery C, 845th Antiaircraft Artillery Automatic Weapons Battalion, did, without proper leave, absent himself from his organization at Camp Stewart, Georgia, from about 7 October 1943 to about 26 November 1943.

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

Specification 1: In that Second Lieutenant Daniel P. Reichey, * * *, did, at New York City, on or about 26 November 1943 wrongfully and without authority appear in public wearing insignia of a Captain in the United States Army.

Specification 2: In that Second Lieutenant Daniel P. Reichey, * * *, did, at New York City, on or about 26 November 1943 wrongfully and with intent to deceive Lieutenant Colonel John A. McNulty, Provost Marshall of New York City, officially state to the said Lieutenant Colonel McNulty that he was a Captain in the United States Army, which statement the said Second Lieutenant Reichey well knew to be false.

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

Specification 1: In that Second Lieutenant Daniel P. Reichey, * * *, did, at New York City, on or about 13 November 1943, with intent to defraud, wrongfully and unlawfully make and utter to John W. Ryan English Shops, Inc., a corporation, a certain check in words and figures as follows, to-wit:

"West Chester, Pa. Nov. 13, 1943 No. _____
National Bank of Chester County and Trust Company
Pay to the
order of John W. Ryan, Inc. \$55.55
Fifty-five and 55/100..... Dollars

Capt. d. P. Reichey"
O-1047748

and by means thereof did fraudulently obtain from John W. Ryan English Shops, Inc. one trench coat and one pair of gloves, total value \$55.55, he the said Second Lieutenant Reichey then well knowing that he did not have and not intending that he should have any account with the National Bank of Chester County and Trust Company for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank, dated 12 November 1943, payable to order of cash, made and uttered to Edgar Wolke, at New York City, New York, and fraudulently obtaining thereby \$25.

Specification 3: Same form as Specification 1, but alleging check drawn on Manufacturers Trust Company, New York, dated 11 October 1943, payable to order of and made and uttered to Atlantic Coast Line Railroad Co., at Savannah, Georgia, and fraudulently obtaining thereby furlough ticket for passage from Savannah to New York City and return in amount of \$21.05.

Specification 4: (Finding of not guilty).

Specification 5: Same form as Specification 1, but alleging check drawn on same bank as in Specification 1, dated 6 November 1943, payable to order of and made and uttered to Modern Army & Navy Sales Co., at Harrisburg, Pennsylvania, and fraudulently obtaining thereby \$40.

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

Specification 1: In that Second Lieutenant Daniel P. Reichey, * * *, did at Savannah, Georgia on or about 11 October 1943,

with intent to defraud, wrongfully and unlawfully make and utter to Moile Trunk Co. a certain check in words and figures as follows, to wit:

"Manufacturers Trust Company 47
44 Union Square East

Pay New York Oct 11, 1943
to
the
order
of Moile Trunk Co. \$15 20/xx
Fifteen and 20/100 Dollars

No. _____ /s/ Lt. D. P. Reichey 01047748
845th AAA AW Bn Cp Stewart, Ga."

and by means thereof did fraudulently obtain from the Moyle Trunk and Bag Company, Savannah, Georgia, merchandise to the value of \$15.20, he, the said 2nd Lieutenant Reichey, then well knowing that he did not have and not intending that he should have any account with the Manufacturers Trust Company, for the payment of said check.

Specification 2: In that Second Lieutenant Daniel P. Reichey, * * *, did at Savannah, Georgia on or about 8 October 1943, with intent to defraud, wrongfully and unlawfully make and utter to Kroskins, a certain check in words and figures as follows, to wit:

"Hinesville, Ga. Oct. 8, 1943 No. ---
~~The-Citizens-and-Southern-National-Bank~~
Broughten-Street-Office
The Hinesville Bank

Pay
to the
Order of Kroskins \$8 75/xx
Eight and 75/100 -----Dollars

/s/ Lt. D. P. Reichey 01047748
Camp Stewart, Ga.

and by means thereof did fraudulently obtain from the said Kroskins, merchandise to the value of \$8.75, he, the said Second Lieutenant Reichey, then well knowing that he did not have and not intending that he should have sufficient funds in The Hinesville Bank, for the payment of said check.

(162)

Specification 3: Same form as Specification 2, but alleging check drawn on The Hinesville Bank, Georgia, dated 6 October 1943, payable to order of cash, and made and uttered to Al Remler, Club Royale, at Savannah, Georgia, and fraudulently obtaining thereby \$20.

Specification 4: Same form as Specification 2, but alleging check drawn on The Hinesville Bank, Georgia, dated 7 October 1943, payable to order of cash, and made and uttered to Al Remler, Club Royale, at Savannah, Georgia, and fraudulently obtaining thereby \$20.

Specification 5: Same form as Specification 2, but alleging check drawn on The Hinesville Bank, Georgia, dated 8 October 1943, payable to order of cash, and made and uttered to Al Remler, Club Royale, at Savannah, Georgia, and fraudulently obtaining thereby \$20.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications except Specification 4 of Charge III, of which he was found not guilty. There was no evidence of previous convictions introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

a. Specification, Charge I.

Without objection properly authenticated extract copies of morning reports of accused's organization and of the guardhouse, Fort Jay, New York, showing accused's unauthorized absence from his organization at Camp Stewart, Georgia, from 7 October 1943 until he was confined at Fort Jay, New York, on 26 November 1943, were received in evidence (R. 6; Exs. P-1, P-2).

b. Specifications 1 and 2, Charge II.

By deposition Walter C. Sidler, Assistant Manager, Paramount Hotel, New York City, testified that on 26 November 1943 accused came to the Paramount Hotel as a guest. At this time accused was wearing captain's bars and "pretended to be a captain". A picture of accused stapled to the deposition was identified by this witness as being "Capt. D. P. Reichey" (R. 8; P. Ex. 4).

Lieutenant Colonel John A. McNulty, Corps of Military Police, Provost Marshal, City of New York, District No. 1, after identifying a

photograph attached to the deposition as resembling the officer presenting himself to him as Captain Daniel P. Reichey, testified that he saw accused at the 18th Detective Bureau, New York City, on 26 November 1943 as a result of a call from the Detective Bureau. The accused identified himself as a captain and was wearing captain's bars. Accused's A.G.O. card was made out for a second lieutenant and he stated he had since been promoted. Colonel McNulty asked accused several times if he was a captain and accused replied "yes" and admitted he was a second lieutenant only when a list of officers on which accused was listed as a second lieutenant was found among his effects (R. 7; Ex. P-3).

c. Specifications 1, 2, 3 and 5, Charge III, and Specifications 1, 2, 3, 4 and 5, Additional Charge.

Without objection the deposition of Edward E. May, salesman, John W. Ryan, Inc., was received in evidence. He testified that accused on 13 November 1943 purchased merchandise to the amount of \$55.55 and gave a check in that amount drawn on the National Bank of Chester County and Trust Company, West Chester, Pennsylvania, in payment therefor. Accused was wearing captain's bars at this time and displayed his A.G.O. card bearing his photograph. The check was returned due to the fact that accused had no account in the bank on which the check was drawn. This witness identified the check stapled to the deposition as being the check he accepted as above mentioned, and also identified a photograph attached to the deposition as being a photograph of "Captain Reichey". Stapled to the check attached to the deposition is a slip showing that the check was returned by the bank for the reason that the drawer had no account in the bank (R. 8; Ex. P-5).

Without objection the deposition of Edgar Kurt Wolke, Ed's Glam Bar, New York City, was received in evidence. He testified that on 12 November 1943 he cashed a check for accused in the amount of \$25, drawn on the National Bank of Chester County and Trust Company, West Chester, Pennsylvania. He gave this check to his plumber in payment of a bill and next saw it when it was returned to him with a slip indicating no such account in the bank on which the check was drawn. The check attached to the interrogatory was the same check he cashed for accused. A photograph stapled to the interrogatory was identified by witness as being that of Second Lieutenant Daniel P. Reichey (R. 8; Ex. P-6).

The accused gave the Atlantic Coast Line a check dated 11 October 1943, drawn on the Manufacturers Trust Company, New York, in the amount of \$21.05 in payment of a railroad ticket. On the 15th or 16th of October 1943 this check was returned by said bank with a slip showing that the signature on the check was unknown at the bank. The check and slip were introduced in evidence without objection (R. 10; Ex. P-7).

Albert Rashinsky, owner of the Modern Army & Navy Store, Harrisburg, Pennsylvania, testified by deposition, introduced without

objection, that on 6 November 1943 he cashed a check in the amount of \$40 for the accused. The check was drawn on the National Bank of Chester County and Trust Company, West Chester, Pennsylvania, and is the same check as the one attached to the deposition. The check was returned by the bank with a slip showing no such account. At the time the check was cashed accused was "dressed as a captain in the Army" (R. 11; Ex.P-8).

Accused gave to Moyle Trunk & Baggage Company a check drawn on Manufacturers Trust Company, New York, in the amount of \$15.20, dated 11 October 1943 for luggage purchased from said company. The check was dishonored by the bank for the reason that the signature thereon was unknown at the bank. The check and slip showing its dishonor were received in evidence without objection (R. 14; Ex. P-11).

W. E. Powell, Assistant Cashier, National Bank of Chester County and Trust Company, West Chester, Pennsylvania, and Raymond Green, Assistant Cashier of Manufacturers Trust Company, New York, testified by deposition respectively that neither respective bank had had an account during the period from 1 October to 30 November 1943, inclusive, in the name of "Lt. D. P. Reichy", "D. P. Reichy", "Capt. D. P. Reichy" or "Daniel P. Reichy" (R. 11; Ex. P-9) (R. 12; P-10).

On 8 October 1943 accused gave Kroskin's (Military Uniform Store), Savannah, Georgia, a check in the amount of \$8.75, drawn on The Hinesville Bank, Hinesville, Georgia, in payment for merchandise. Payment was refused because of insufficient funds (R. 15; Ex. P-12).

Accused cashed at Remler's Club Royale, Savannah, Georgia, three checks in amounts of \$20 each, dated respectively, 6 October, 7 October and 8 October 1943, all drawn on The Hinesville Bank, Hinesville, Georgia. These checks were returned by the bank (R. 17, 18; Exs. P-13, P-14, P-15).

Wallace F. Martin, Jr., Assistant Cashier, The Hinesville Bank, Hinesville, Georgia, testified that these checks drawn on the Hinesville Bank, were not paid by the bank because accused did not have sufficient funds in the bank for their payment (R. 20).

4. For the defense:

Major Robert A. Dunnigan, 563rd Antiaircraft Artillery Automatic Weapons Battalion, testified that accused had been a member of his organization from December 1942 to sometime in October 1943. When he first joined the organization he was excellent as an instructor, and a "pretty good officer", though his efficiency slipped in later months due to some difficulties accused was in (R. 25). Accused was frequently "called on the carpet" due to absences in the Cadre Pool, and at one time reclassification papers on accused were prepared. Accused submitted a resignation, though

witness did not know its result (R. 27).

It was stipulated that if Captain Benjamin W. Smith were present he would testify that accused while a member of his battery from December 1942 to March 1943 performed his duties in an excellent to a superior manner (R. 32; Ex. D-1).

Efficiency reports on accused signed by Captain John P. Drohan, showing a general rating of "excellent", and signed by Captain Leonard P. Henderson, showing a general rating of "Very Satisfactory", were by agreement received in evidence (R. 32; Exs. D-2, D-3).

By agreement an efficiency report on accused signed by Lieutenant Colonel William H. Mackrell, showing a rating of "Satisfactory" for five months and "Unsatisfactory" for one and a half months, was received in evidence (R. 33; Ex. D-4).

Second Lieutenant William F. Maule testified that he had been in accused's organization since 17 March 1943. Accused was one of the best instructors on the post, a very neat officer, and of value to the service. His efficiency dropped after accused spoke several times of the fact that Colonel Mackrell was riding him (R. 37).

After having his rights as a witness explained to him, accused elected to be sworn as a witness. Accused made a long, rambling statement, the general tenor of which was that he had consistently and continuously been subjected to persecution by Colonel Mackrell, the executive officer of his regiment, because of personal differences between accused and Colonel Mackrell. He repeatedly asked to be transferred but could never effectuate a transfer. Finally when Colonel Mackrell, who was obviously prejudiced against him, signed his efficiency report it was too much and he lost all sense of responsibility (R. 40-48).

On cross-examination and examination by the court accused said he had been laboring under a terrific mental strain from March to October. From the time he left Camp Stewart he was drinking constantly and does not remember buying a railroad ticket, or luggage, nor does he know where he got the captain's bars he wore. The persecution to which he had been subjected made him do things he had never done before (R. 49-51).

5. The evidence shows that accused was absent without leave from his organization at Camp Stewart, Georgia, from 7 October 1943 until he was confined at Fort Jay, New York, on 26 November 1943.

On 26 November 1943 accused was at a hotel in New York as a guest, at which time he was wearing captain's bars and "pretended to

(166)

be" a captain. On that same day, at the 18th Detective Bureau in New York, he officially stated several times to Lieutenant Colonel John A. McNulty, Corps of Military Police, Provost Marshal, City of New York, District No. 1, that he was a captain.

On 6, 12 and 13 November 1943 accused issued checks drawn on the National Bank of Chester County and Trust Company, West Chester, Pennsylvania, to various parties for \$40, \$25 and \$55.55, respectively, and on 11 October and 11 November 1943 issued checks drawn on Manufacturers Trust Company, New York, to two different parties in amounts of \$21.05 and \$15.20, respectively, for which he received cash or merchandise. These checks were dishonored by the respective banks for the reason that accused had no account in either bank.

On 8 October accused gave Kroskin's store in Savannah, Georgia, a check drawn on The Hinesville Bank, Hinesville, Georgia, in the amount of \$8.75, in payment for merchandise, and on 6, 7 and 8 October 1943 cashed checks drawn on The Hinesville Bank in the amount of \$20 each at Remler's Club Royale, Savannah, Georgia. Payment of these checks was refused by the Hinesville Bank because accused did not have sufficient funds on deposit for their payment. The evidence establishes beyond all reasonable doubt that the accused was guilty of all Charges and Specifications except Specification 4, Charge III, concerning which no evidence was presented due to absence of witnesses.

6. War Department records show that accused is 30 years of age. He was voluntarily inducted into the military service 2 July 1942; attended Antiaircraft Artillery Officer Candidate School, Camp Davis, North Carolina, and was commissioned second lieutenant, Coast Artillery, Army of the United States, 3 December 1942, at the time of his graduation.

7. The court was legally constituted and had jurisdiction of the person and 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, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 61 or 96 and is mandatory upon conviction of violation of Article of War 95.

Thomas N. Jaffy, Judge Advocate.

Herbert W. Tucker, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 251168

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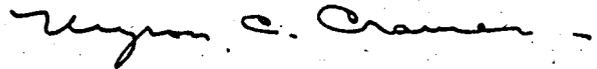
War Department, J.A.G.O., 27 APR 1944 - To the Secretary of War.

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 Daniel P. Reichy (O-1047748), 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, to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Consideration has been given to the letter of accused dated 31 March 1944, requesting the suspension of that portion of his sentence providing for confinement in order that he may render further service as an enlisted man.

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



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

- 4 Incls.
Incl.1-Record of trial.
Incl.2-Ltr. from accused
dated 31 Mar 44.
Incl.3-Dft. ltr. for
sig. Sec. of War.
Incl.4-Form of action.

(Sentence confirmed but one year of confinement remitted.
G.C.M.O. 302, 17 Jun 1944)



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

6 MAY 1944

(169)

SPJGH
CM 251208

UNITED STATES

v.

Major LAWRENCE P. COX
(O-903826), Ordnance Department.

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Mississippi Ordnance Plant,
Flora, Mississippi, 21 February
1944. 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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Major Lawrence P. Cox, Ordnance Department, Ordnance Officer's Replacement Pool, Ordnance Unit Training Center, Mississippi Ordnance Plant, Flora, Mississippi, did, without proper leave, absent himself from his organization and station, at Ordnance Unit Training Center, Mississippi Ordnance Plant, Flora, Mississippi, from about 18 October 1943 to about 15 November 1943.

He pleaded not guilty to and was found guilty of the Specification and Charge and was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

The accused was tried by general court-martial on 14, 15 and 16 December 1943 upon the same Specification and Charge set forth above, there designated Specification, Charge II, and Charge II, and also upon another Specification for being drunk and disorderly in a public place in violation of the 96th Article of War (Spec., Chg. I). He was found not guilty of Charge I and of the Specification thereunder and guilty of Charge II and of the Specification thereunder and was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become

due. The reviewing authority disapproved the findings and sentence, withdrew the Specification of Charge I and Charge I and ordered a rehearing as to the Specification of Charge II and as to Charge II.

3. Evidence for the prosecution:

Extract copies (Exs. B and C) of the morning reports of the Ordnance Officers' Replacement Pool, Ordnance Unit Training Center, Mississippi Ordnance Plant, Flora, Mississippi, the organization of accused, showed him from duty to absent without leave 18 October 1943, and from absent without leave to duty on 15 November 1943 (R. 3).

4. Evidence for the defense:

A document in the form of a letter (Ex. D) dated 10 November 1943 and directed "To Whom it may concern" by Captain John G. Novak, Medical Corps, Ward Surgeon at Walter Reed General Hospital, Washington, D.C., was introduced into evidence by the defense. The letter states that accused reported to the out-patient department of the hospital for treatment on 28 October 1943; that he was examined by Captain Novak, who understood that he was on annual leave; that Captain Novak was of the opinion that accused was apparently a very conscientious officer who had been working long hours over a period of many weeks and was suffering from an "exhaustion state" and accordingly prescribed daily hydrotherapy and vitamin therapy; and that accused responded well, was considered capable of returning to his duties, and should be cautioned to avoid working long hours and neglecting activities of a relaxing nature (R. 3).

The defense also introduced into evidence a letter (Ex. E) dated 17 November 1943 from Major J. W. Mollaun, Medical Administrative Corps, Adjutant at Walter Reed General Hospital, to the Commanding Officer, Mississippi Ordnance Plant, in response to a radiographic request of the latter of 16 November 1943. This letter gave the following report on the treatment received by the accused:

The Out-Patient Service clinical records show that accused reported at such service on 28 October 1943, stating that he was on leave and that he had been working very hard for the past 18 months with about 4 or 5 hours sleep out of each 24 hours. It was evident to the examining physician that he was under nervous tension and unable to relax, and he was given sedatives and instructed to return in a day or so for further study. On 30 October the nervous tension appeared to be more severe and an emergency neuropsychiatric consultation was requested. Captain Novak examined accused and made a report to substantially the same effect as his letter "To Whom it may concern", mentioned above. On 1 November accused was started on a treatment of 1 to 1½ hours of continuous tub therapy and given

sedatives. After three days of the treatment he showed remarkable improvement, the tension disappeared, he indicated that he was no longer restless, his appetite was improved and he was able to sleep 7 to 8 hours without difficulty. The treatment was concluded on 10 November. The excellent response of the accused indicated that the symptoms were not very severe. The diagnosis was that the accused was in a state of physical exhaustion with some mild anxiety concerning his own physical condition and it was recommended that he return to duty and "strike a balance of work, sleep, and relaxing activities" (R. 3-4).

The accused testified that he had been recommended for appointment to the Command and General Staff School three times and had received four "marks" of superior and five of excellent. He admitted that he was absent without leave but stated that he had pleaded not guilty because he did not think that he was absent for the time alleged. After "Pearl Harbor" he went to work in the Automotive School at Fort McPherson, worked very hard and was given a commission as a captain in the Army. After receiving his commission he was put in charge of the building of eight schools, worked all day and drove all night from station to station, and as a result of his "great efforts" in this work was recommended for promotion to major. Following this promotion accused was appointed commanding officer of the 128th Ordnance Battalion, took command on 10 February 1942 and found himself working harder than ever preparing the organization for overseas movement. For the work of organizing the battalion he received five or six letters of commendation and an appointment to "General Staff School" which he "happened to miss by a few days". In the "subsequent re-organization" he lost his best men and officers, his nerves began to "give way", he went to the hospital and was told by "the doctor" to slow down on his work but had reached a point where that was no longer possible (R. 4-5).

Accused also testified that after meeting "Colonel Stanton" he began to work as hard as ever, worked "all day and night", noticed a change in his own "personality", and was advised to go to the hospital but did not do so as he was getting ready to go overseas. He was again recommended for Command and General Staff School but the recommendation "was returned" because it was considered that accused would make a better commanding officer than "anything else". A week later he was relieved of his command and sent "here to Mississippi". His character and his work had been excellent as shown by his letters of commendation. It was the first time he had not acted the part of a soldier. He benefited greatly from the treatment which he received at Walter Reed General Hospital, he had also been sent to Foster General Hospital in Jackson, Mississippi, was once again in good health, and hoped that he would be given an opportunity to "build" another battalion. He had been advised by the "doctor at the hospital" as to how to control his work and relaxation and "now" knew how to do so. He knew that he was a good soldier and wanted a chance to prove it (R. 5-6).

On cross-examination and examination by the court accused testified that he went to the hospital as a "regular patient" and was directed to the out-patient department by "the sergeant". He was asked if he wanted quarters but replied that he did not want them. He received treatment at the hospital every day from 1:00 p.m. to 5:00 p.m. Although he admitted that he had been absent without leave, he stated that he had not pleaded guilty because he "had been advised" that the time spent in the hospital was not "marked as days without leave". He was never on his post during the period from 18 October to 15 November. In an effort to inform his commanding officer of his whereabouts accused tried three times to "contact Colonel Greaves" at the Pentagon Building but he was "out of town". Accused made no other attempt (R. 6).

On redirect examination accused stated that he had gone to the hospital "freely", that although it was very overcrowded "they" wanted to put him to bed immediately but he refused. As soon as his treatments had been concluded and he had been released, he returned to his station. When asked whether he had been put on the sick report he answered "They put me on some report. They took my full history".

The defense introduced in evidence copies of two Army Regulations pertaining to daily sick reports and medical attendance (R. 4; Exs. G and H).

The testimony of Major George W. Carle, Jr., Ordnance Department, in the former trial, which was introduced into evidence (Ex. F) was substantially as follows:

Major Carle had known accused since the first of August 1943, and during the time the former was Director of the Training Branch at Camp Perry, Ohio, accused was in command of the 254th Ordnance Battalion. Major Carle "would say" that accused was above the average as a battalion commander. The high state of training "at Perry" was primarily due to his efforts. Accused worked night and day getting his battalion ready for overseas duty. Major Carle had commended him many times. Accused had prepared a schedule for troop movement and embarkation, which was still in use, and had made a Table of Equipment which was submitted to and approved by the Chief of Ordnance. He had been recommended for "General Staff School". On 28 September accused was transferred to the Mississippi Ordnance Plant and was very much perturbed. On 30 September 1943 Major Carle had given accused a rating of excellent but later it was changed to unsatisfactory. The change was due to an unsatisfactory item, "handling troops" which the Chief of Ordnance thought would alter the rating of excellent. Major Carle thought that the condition of accused was responsible for his trouble in handling troops. When asked whether accused drank moderately or heavily Major Carle replied that he had never seen accused take a drink (R. 4).

The defense also introduced into evidence numerous letters, photographs, pamphlets and other documents, for the purpose of showing the nature and scope of the work performed by accused as well as his industry, devotion to duty, good character and efficiency (R. 7; Exs. A1 to Z1 and AA to AR).

5. In rebuttal Lieutenant Colonel Allen De Camp, Medical Corps, commanding officer of the Medical Detachment at the Mississippi Ordnance Plant, testified that when an officer is treated at an Army hospital as an out-patient he does not thereby become subject to the control of the commanding officer of such hospital. The officer would come under the control of the commanding officer if he were put in quarters (R. 8-9).

6. It is shown by the evidence that accused was absent without leave from his organization and station from about 18 October 1943 to about 15 November 1943. In his testimony he admitted that he was absent without authority but maintained that such absence terminated when he presented himself for medical treatment at Walter Reed General Hospital on 28 October 1943. It appears from documentary evidence introduced by the defense that the accused was treated as an out-patient, that he was never quartered in the hospital, and that he represented himself to be on leave and was carried on that basis on the hospital records. Under the circumstances the absence without leave of accused continued until his return to duty with his organization on 15 November 1943.

7. The accused stated, both before and after his rights were explained to him, that he desired to testify under oath. Although he testified on direct examination, cross-examination and examination by the court, the record does not show that he was sworn. Since his testimony did not deny the fact of his absence without leave, as shown by morning reports, except as a matter of law during the period he was undergoing medical treatment, the Board of Review does not consider this irregularity as prejudicial to the substantial rights of accused.

8. Accused is 42 years of age. The records of the Office of The Adjutant General show his service as follows: appointed temporary captain, Army of the United States, 28 April 1942, accepted 4 May 1942, and active duty, 9 May 1942; temporarily promoted to major, Army of the United States, 19 December 1942.

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

(174)

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

Samuel M. Driver, Judge Advocate

Richard J. Cannon, Judge Advocate

J. J. Lottcher, Judge Advocate

1st Ind.

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

15 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 Major Lawrence P. Cox (O-903826), 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 was absent without leave from his organization and station at Flora, Mississippi, from 18 October 1943 until 15 November 1943. He was a conscientious, industrious officer whose record of service was excellent until a short time prior to his present difficulty when apparently he suffered a breakdown from overwork. On 28 October 1943 he applied for treatment at the out-patient service of Walter Reed Hospital on the representation that he was on leave status, was found to be suffering from nervous tension and "exhaustion state" and was treated continuously until 10 November 1943 when it was recommended that he return to duty. I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures adjudged be remitted and, in view of all of the circumstances, that the execution of the sentence as thus modified be suspended during good behavior.

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



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

3 Incls.

Incl.1-Rec. of trial.

Incl.2-Drft. ltr. for sig.

S/W.

Incl.3-Form of Action.

(Sentence confirmed but forfeitures remitted. Execution suspended.
G.C.M.O. 337, 27 Jun 1944)



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

(177)

SPJGK
CM 251225

17 APR 1944

UNITED STATES)

v.)

Second Lieutenant ROBERT
C. JOHNSTON (O-1309563),
Infantry.)

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at Fort
Sam Houston, Texas, 20, 24 January
and 10 February 1944. Dismissal,
total forfeitures and confinement
for three years.

OPINION of the BOARD OF REVIEW

LYON, HILL and ANDREWS, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Robert C. Johnston, Company B, Army Specialized Training Unit No. 3875, University of Arkansas, Fayetteville, Arkansas, did, at Fort McIntosh, Texas, from on or about 22 February 1943 to on or about 16 June 1943, being then and there custodian of Army Emergency Relief funds and acting in such capacity, feloniously embezzle by fraudulently converting to his own use Four Hundred Seventy-Two and No/100 Dollars, lawful money of the United States, of the value of \$472.00, which said money came into his possession while acting in the capacity aforesaid, the property of Army Emergency Relief, a corporation, and entrusted to him by the said Army Emergency Relief.

He pleaded not guilty to the Charge and its Specification. The court found him guilty of the Charge and by exceptions and substitutions found him guilty of the Specification excepting the amount of \$472, and substituting therefor the amount of \$407. 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 five years. The reviewing authority approved only so much of the findings of guilty as involved the embezzlement of \$237.50; approved the sentence but reduced the period of confinement to three years, and forwarded the record of trial for action

under Article of War 48.

3. Summary of evidence.

Accused is a second lieutenant, Infantry, Company B, "ASTU", 3875, University of Arkansas, Fayetteville, Arkansas. At all times mentioned in the Charge and Specification, accused was in the military service (of the United States) and was stationed at Fort McIntosh, Texas. On 26 February 1943, he was duly appointed Chief of the Army Emergency Relief Section at Fort McIntosh, and on 16 June 1943 he was officially relieved of his duties as chief of this section (R. 8, Ex. 1).

First Lieutenant Harry W. Ninde, Jr., 1860th Service Unit, Fort McIntosh, who was accused's predecessor "as AER officer" (R. 70,89), was witness in chief for the prosecution (R. 8). Lieutenant Ninde's new duties, post adjutant and administrative officer, had vested in him "general supervision of the operations of the Army Emergency Relief fund for the commanding officer. He was familiar with the records (of this fund) kept between 28 February and 16 June 1943 (R. 9, 24). When accused assumed his duties as "AER officer", Lieutenant Ninde instructed him "concerning the records and the operation of his position * * * that the fund would be kept as any of the unit or similar funds are kept in the Army * * *. The routine to be followed in receiving funds and accounting for them * * *" (R. 89,90). Lieutenant Ninde explained the book-keeping procedure (R. 13-19). The check book of the Laredo National Bank, where the funds were on deposit, and the council book or cash book were the books of account of this fund (R. 9-12, 70-71; Exs. 2,3, and 4). All receipts by the fund, whether funds from the Eighth Service Command as "contributions to the fund" (working capital, so to speak) or repayments on loans, were to be deposited in the bank with identifying entries on deposit slips and similar entries in the council or cash book, showing specifically "the source from which the money was received", as well as the date of receipt. "When money is paid out the same routine is followed. Disbursements are made only by check, payable to the borrower * * * or to the Service Command" (R. 12-14). The cash balance of the fund in the bank as of the last of February was \$93.40 (R. 13, 27; Exs. 3,4). The balance of the account as shown in the cash book for February corresponded with the bank statement (R. 27; Ex. 2). Accused took charge of the fund and its bookkeeping as of 1 March 1943 (R. 12; Ex. 2). Lieutenant Ninde testified that thereafter, to and through 16 June 1943, the balance as shown by the bank statements corresponded exactly, at all times, with the balance shown in the cash book as established and determined by the latter's credit and debit entries (R. 25,27,80; Exs. 2,3,4). First Lieutenant James P. Cahalan, Finance Department, Eighth Service Command, whose duties were those of "Auditor of fiscal accounts", audited the accounts of accused for this period from 27 February to and through June. He too checked the balances as shown in the cash book and on the bank statements and, in addition, the canceled checks and deposits. He found that "the section

cash book here, the balances shown and all entries, check with the entries as shown on the bank statement" (R. 87,88).

Accused stipulated that 24 borrowers made 28 repayments on account of their respective loans. The amount of each of such repayments was included in the stipulation. It was also stipulated that accused received each of these repayments and that he did not enter any one of these items of repayment in the council or cash book (R. 18-21,28,69,79-80; Exs. 7-20,22-53, 57,58). The total of these 28 repayments is \$407. Accused, as a witness for himself, testified he had received all these repayments (R. 122).

Technical Sergeants Oris L. Akins and Lawrence H. Verheyen, both of the 56th Cavalry Brigade, Fort McIntosh, Texas, testified with respect to one of these repayments, \$10, which Akins repaid on a loan he had made, and which repayment accused admitted receiving without recording in the cash book and which admission is incorporated in Exhibits 44 and 45 (above). Akins testified that he gave this money to Verheyen to pay for him. Verheyen said he repaid the money to accused and obtained Exhibit 44, the receipt, for the payment (R. 81-83). Private John F. Marion and Private First Class Joaquin Romero, both of the 56th Cavalry Brigade, testified that they made repayments on loans which they had taken out from the Army Emergency Relief. Marion repaid \$50 by check. Marion's loan, the fact that he repaid this \$50 by check, that this check was received and was cashed by accused are shown by Exhibits 13 and 14. Romero's loan, his repayment of \$17.50, and its receipt by accused are also evidenced by Exhibits 30 and 31 (R. 84-86).

Lieutenant Ninde testified that none of the repayments made by the 24 borrowers, mentioned above, could have been deposited in the bank without throwing the accounts out of balance, such amounts not having been entered in the cash book (R. 97). Lieutenant Johnston, the auditor, testified that the total of the amounts which accused stipulated he had received and had not entered in the cash book (the amount being stated erroneously at that point to have been \$470) could not "have been deposited in the bank without throwing the cash book and the bank statements out of joint" (R. 88). Lieutenant Ninde also testified specifically based on his examination of the actual deposits and the cash book entries, that the following repayments which accused stipulated he had received were not deposited in the bank account: \$50, received by accused on 21 April (R. 32-34; Ex. 13,14); \$20, on 1 June (R. 35; Exs. 15,16); \$5, on 22 May (R. 40; Exs.19,20).

An analysis of the repayments which accused received and the dates on which they were received, as evidenced by the stipulation, mentioned above, shows that although the total amount of the 28 items so received by accused was \$407, the actual total stipulated to have been received by him during his term of office as "AER Officer" was only \$237.50, or at the most \$257.50, 14 or 15 items. (The reviewing authority approved only so much of the findings of guilty as involved the embezzlement of \$237.50).

Defense counsel stated that the rights of the accused had been explained to him and he elected to testify as a witness in his own behalf (R. 102). The accused stated that he was inducted 15 July 1942 at Jefferson Barracks, Missouri. He served as an enlisted man until 28 January 1943, at which time he graduated from the Officer Candidate Infantry School at Fort Benning, Georgia, and was commissioned a second lieutenant. At no time during his entire career as a soldier has the accused received any type of punishment. He is married and has a son by a former marriage. The accused studied law for five years but is not a licensed attorney. His civilian experience was that of a clerk, salesman and claims-adjuster (R. 102-118).

The accused further testified that while stationed at Fort McIntosh, Texas, he had numerous other duties in addition to those as Army Emergency Relief Officer; that he received no instruction concerning how the books and records were to be kept; that he had no Manual at first, and when he did receive it, he just glanced through it (R. 105-107). When repayments were made by borrowers, he attached the money to the receipt and placed it in the drawer of his desk, which was not always locked. He had no box or container in the drawer in which he put the money (R. 108). He usually kept between \$50 and \$75 on hand for emergency loans, although this was not authorized (R. 129). The cash realized by accused from Marion's \$50 check was put by accused in the drawer of his desk (R. 123, 124). He said it was undoubtedly stolen (R. 125). The bookkeeping was not difficult. However, on occasions entries were not made in the cash book, and vouchers were not executed until after he had returned from making a deposit in the bank (R. 119,126). Before he became Army Emergency Relief Officer, he obtained a loan from his predecessor, First Lieutenant H. W. Ninde, in the amount of \$75 (R. 131,132). While he was serving as Army Emergency Relief Officer, he made two loans to himself, one in the amount of \$75 and the other \$200. He also borrowed \$100 from the bank (R. 132-134). The accused acknowledged that he had received all of the money that the prosecution contended was paid to him, and he admitted his shortage (R. 122,139,140). His only explanation was that the money and the vouchers (receipts) were stolen from his desk (R. 139-140). He said he did not know the money was missing until the following September (R. 113,142). The accused also stated that in his opinion his lack of interest and the carelessness which he exhibited in his work were due in part to his dislike of his assignment and his desire for duty with troops (R. 117). At no time during his tenure as Army Emergency Relief Officer did the accused know of the shortage. He first learned of it in September, 1943 (R. 113,140).

4. It is believed that each of the elements of embezzlement was established by the evidence. "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 money which accused received was paid to him as Army Emergency Relief Officer. He was trustee of such moneys by operation of law. As such trustee he was required to deposit these moneys in the bank and to account for them to the Eighth Service Command, the commanding officer. The evidence clearly showed that

while actually acting in this capacity accused received 14 repayments which totaled \$237.50. The reviewing authority approved only so much of the findings of guilty as involved the embezzlement of \$237.50. The evidence shows that accused not only failed to deposit any of these 14 repayments but that he failed to enter the fact or the amount of any one of them in the cash book, with the sinister result that the cash book and the bank statements were at all times in agreement. Accused admitted that he had received this money and he admitted his shortage. His explanation was that he had thrown the collections into his desk without entering them in the cash book, that they had been stolen from his desk, and that he had forgotten them and had not realized they had been stolen. The explanation of carelessness, neglect and theft is not convincing. Too many items are involved during too short a space of time. One of these repayments was in the sum of \$50 and was made by check. Accused cashed this check. He said that he put the proceeds of this check in his desk drawer and that this \$50 was undoubtedly stolen. It is inconceivable that accused could not have noticed the loss of a sum relatively so large. All of this coupled with the fact that accused was not living within his income, as evidenced by his unconscionable loans to himself of \$275 from the fund, and by his borrowing \$100 from the bank, point unmistakably to his fraudulent intent and to his guilt. It has been held:

"An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting" (Dig. Op. JAG, Sec. 451 (17); CM 123492; Bull. JAG, sup. 1943, p. 341; CM 234153).

5. Accused is 37 years old, is married, and has one minor son. He is a high school graduate and holds the degrees of LL.B. and LL.M. from Benton College of Law. His last civilian employment was claim adjuster and investigator. He enlisted 15 July 1942 and after attending officer candidate school was discharged 28 January 1943 to accept a commission on 29 January 1943 as second lieutenant, 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 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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Lucy C. Gore, Judge Advocate.
John W. Trammell, Judge Advocate.
 (On Leave), Judge Advocate.

(182)

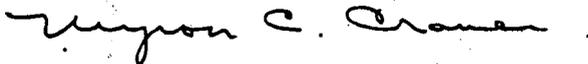
1st Ind.

War Department, J.A.G.O., 27 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 Robert C. Johnston (O-1309563), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed, but 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. 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 but forfeitures and one year of confinement remitted. G.C.M.O. 341, 5 Jul 1944)

(184)

Object for which drawn:

H. E. Heineke, Finance Officer, USA

By /s/ G. Mogus

210-428"

endorsed on the back as follows:

"Roy T. Jackson
Ray-Green, 01287516
FEFFER JEWELRY CO.
Mrs. Sidney Feffer"

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

Specification 2: (Nolle Prosequi Entered).

Specification 3: Same form as Specification 1, but alleging forgery, on 13 February 1943, at Fort Knox, Kentucky, of endorsements of James C. Constable, Davis I. Smith, K. J. McDonald and Joe Q. Watson to check in amount of \$127.05.

Specification 4: Same form as Specification 1, but alleging forgery, on 6 March 1943, at Louisville, Kentucky, of endorsement of William R. McMewen, to check in amount of \$29.25.

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

Specification 1: In that Second Lieutenant Ray Green, 90th Cavalry Reconnaissance Squadron (Mech), Camp Gordon, Georgia, (attached to Station Complement, Service Command Unit 1447, Fort Benning, Georgia), did, at Columbus, Georgia, on or about 8 March 1943, with intent to defraud, willfully, unlawfully and feloniously utter to Sydney Feffer, (Feffer Jewelry Company) Columbus, Georgia, as true and genuine, a certain check, in words and figures, to-wit:

"WAR Finance Fort Dix, N.J., Feb. 28, 1943 152,121
2 TREASURER OF THE UNITED STATES
15-51

(SEAL) PAY TWO HUNDRED THREE AND 13/100. . . . DOLLARS \$203.13

to the
order of ROY T JACKSON, 1ST LT...
717th MILITARY POLICE BN.
Vo.No.51384 TRENTON, N.J.

H. E. Heineke, Finance Officer, USA

By /s/ G. Mogus

210-428"

endorsed on the back as follows:

"Roy T. Jackson
Ray Green, 01287516

FEFFER JEWELRY CO.
Mrs. Sidney Feffer"

(185)

a writing of a private nature which might operate to the prejudice of another, which said check was, as he, the said Second Lieutenant Ray Green, then well knew, falsely endorsed, in that the name of Roy T. Jackson, on the back thereof was forged.

Specification 2: (Nolle Prosequi Entered).

Specification 3: Same form as Specification 1, but alleging uttering, on 13 February 1943, at Fort Knox, Kentucky, forged check in amount of \$127.05.

Specification 4: Same form as Specification 1, but alleging uttering, on 6 March 1943, at Louisville, Kentucky, forged check in amount of \$29.25.

He pleaded guilty to and was found guilty of all Charges and Specifications upon which he was tried. 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 eight years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's pleas of guilty, shows that on or about the dates stated in the Specifications, Charge I, the accused wrongfully acquired possession of the described treasury checks and forged the indorsements thereon. Duly authenticated photostatic copies of the checks bearing the forged indorsements were introduced into evidence as were also known examples of the accused's handwriting. A handwriting expert testified that the indorsements and the known examples of the accused's handwriting were written by the same person and the original payees in the three checks by deposition testified that they had neither indorsed nor negotiated the checks or authorized the accused or anyone else to do so (R. 12-16, 18-19, 20-26; Exs. 1-4, 5, 7, 12, 14, 15).

On or about the dates stated in the Specifications, Charge II, the accused uttered the three checks and received value therefor. One was cashed by a jeweler, another at a grocery store, and the third was forwarded to the accused's bank where it was applied upon the accused's indebtedness. The persons to whom the checks were uttered by the accused testified, likewise by deposition, that the accused uttered the checks and received value therefor (R. 12-16; Exs. 5, 8, 9, 10).

During the investigation, in which an agent of the United States Secret Service participated, the accused, after full explanation of his right to speak or remain silent, in the presence of such agent, the

organization's Judge Advocate and other witnesses, executed a full and complete confession which was admitted into evidence without objection. In the confession the accused admitted with particularity his guilt, but stated that he had made restitution, which statement is also supported by other testimony (R. 17-20; Exs. 11, 13).

4. The accused, after explanation of his rights as a witness, elected to make the following unsworn statement:

"Sir, I don't know why I ever did what I have done. I don't have any excuse for it. I am guilty of having done it. I spent quite a number of years in pursuing the art of military tactics and have been in active service since between the spring and summer of 1939. This is the first trouble I have ever been in and I know one thing, it will be the last of it. I dislike to ask the court's mercy on my having committed such a gross error and what I have done thus far. On all of the checks with which I have been charged with taking, I have made full restitution, to the best of my knowledge. Since I have been in confinement, I have tried to check and make certain that I have paid all of them. I haven't received an answer on one of them as yet but I have made restitution on all of the checks with which I am charged and which were included in my statement to Colonel LaFleur" (R. 26-27).

4. Specifications 1, 3 and 4, Charge I, allege that the accused on or about specified dates, with intent to defraud, falsely indorsed three described Government checks payable to persons other than himself and similar Specifications, Charge II, allege that the accused on or about the same dates, "with intent to defraud, willfully, unlawfully and feloniously" uttered the three described checks knowing that the indorsements thereon were forged. Forgery is defined as "the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice" and the offense is violative of Article of War 93. (M.C.M., 1928, par. 149j). The offense of uttering a forged instrument is violative of Article of War 96 and to constitute the offense "there must be a knowledge that the instrument is a forgery, and there must be an intent to defraud". (M.C.M., 1928, par. 152c).

The evidence for the prosecution abundantly supplements the accused's pleas of guilty and conclusively shows that he is guilty as charged. The indorsements were shown by competent evidence to be absolute and unauthorized forgeries by the accused and his utterance of such instruments, bearing the forged indorsements, was likewise conclusively shown. Since the accused himself forged the indorsements, he had knowledge thereof and his intent to defraud is readily implied therefrom. His confession, furthermore, fully admits his guilt as likewise is apparent from the admissions contained in his unsworn statement. All of the evidence, therefore, supplements his pleas of guilty, shows beyond a reasonable doubt that he is guilty of the offenses alleged and supports the findings of guilty of the Charges and Specifications upon which he was tried.

6. The accused is about 22 years old. The War Department records show that he has had enlisted service from 25 November 1940 until 14 July 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. 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 Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 93 or Article of War 96.

Abner E. Lipscomb Judge Advocate.

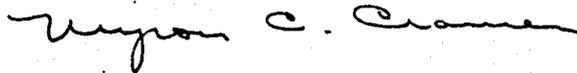
William A. Gambrell Judge Advocate.

Gabriel H. Golden 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 Ray Green (O-1287516), 90th Cavalry Reconnaissance Squadron (Mechanized).
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 but that the forfeitures imposed be remitted and the period of confinement be reduced to three years, that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.
3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.



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 Executive action.

(Sentence confirmed but forfeitures remitted and confinement reduced to three years. G.C.M.O. 272, 8 Jun 1944)

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

(189)

SPJGQ
CM 251280

UNITED STATES)

v.)

First Lieutenant JAMES E.
FIEDLER (O-1178791), 730th
Field Artillery Battalion.)

22 MAR 1944

75TH INFANTRY DIVISION

Trial by G.C.M., convened at
Fort Leonard Wood, Missouri,
19 January 1944. Dismissal
and total forfeitures.

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

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

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

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

Specification: In that First Lieutenant James E. Fiedler, 730th Field Artillery Battalion, did, at Fort Leonard Wood, Missouri, on or about 16 December, 1943, behave himself with disrespect toward, Captain Charles E. Neal, his superior officer, by saying to him, "You are a God Damn Liar," or words to that effect.

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant James E. Fiedler, 730th Field Artillery Battalion, was, at Barclay's, Highway Number 66, near Fort Leonard Wood, Missouri, on or about 16 December 1943, drunk and disorderly in uniform in a public place, to wit, Barclay's Cafe.

(190)

Specification 3: (Finding of not guilty).

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

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 3, Charge III, and guilty of all other Specifications and the Charges. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The record of trial was then authenticated and forwarded to the reviewing authority who, by 4th indorsement, 6 February 1944 returned it to the trial judge advocate "for revision in accordance with M.C.M., par. 83." The court thereupon reconvened on 6 February 1944, revoked its finding as to Specification 1, Charge III, and found the accused not guilty instead, but adhered to all prior findings and the sentence. The reviewing authority disapproved the finding of guilty of the Specification of Charge II and of Charge II and of Specification 4 of Charge III but 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 Highway No. 66, near Fort Leonard Wood, Missouri, is a road house, one side of which is known as "Barclay's" tavern and dance hall. It was under the management of Mr. Leo Ellenburg who catered exclusively to the patronage of enlisted men insofar as members of the military service were concerned. The other side of the same building was known as the "Pineroom" and was operated for the accomodation of officers only (R. 6, 7).

On the night of 15 December 1943 at about 10 o'clock p.m. the accused, in full uniform, entered "Barclay's" tavern and, without invitation, sat down at a table where the manager, Mr. Ellenburg and Miss Patterson, the assistant manager, were having a late dinner (R. 7, 9, 12). He was, at that time, so much under the influence of liquor that Mr. Ellenburg said he was "drunk" (R. 7) while Miss Patterson, who had apparently seen him at an earlier time in the evening when "he was not obviously drunk", stated that, when he approached Mr. Ellenburg and herself while they were at dinner, he was "awfully drunk" (R. 12).

There was "quite a crowd" present, including some civilians and the accused mingled, not only with the enlisted men there but, again without invitation, seated himself at a table where two civilians, a Mr. Henry Cohen and his friend, were drinking (R. 8, 17). The accused had one or two drinks while there, knocked over a glass, and picked up a drink belonging to Mr. Cohen's friend and poured it into his own glass. He "wasn't sober" and Mr. Cohen, thinking the accused was getting into trouble and not wanting to "stay around" then left with his friend "before any trouble started" (R. 8, 17, 18). He had left a fifty-cent piece on the table as a tip and this money the accused picked up and put in his pocket (R. 14).

Upon the accused's first appearance in "Barclay's" the manager had requested him to go over into the "Pineroom" where he would join him for a drink (R. 7).

After the episode with the civilians the accused was engaged in some discussion with a group of enlisted men during which he started to take off his blouse, remarking "take the God damn thing, I don't want it". While it is not shown what the conversation was about, Miss Patterson thought that he referred to the bars on his coat and Mr. Ellenburg indicated by his testimony that there had been disparaging remarks made about officers by the accused because Mr. Ellenburg remonstrated with him saying that some of the enlisted men "want to go to OCS" and that the accused was discouraging them by talking like that (R. 10, 11a, 13).

Later he approached the sandwich bar insisting upon being served with a drink. Miss Patterson refused to serve him and the accused then charged the establishment with being prejudiced. When told that it was not a matter of prejudice but a rule of the place the accused said that "as far as he was concerned the God damned place could go to hell". A sergeant then cautioned the accused not to talk that way in front of Miss Patterson whereupon the accused took off his glasses, unbuttoned his coat and "was going to go outside". Miss Patterson then called a military policeman who told the accused if he did not quiet down he (the policeman) would have to do something about it (R. 12, 13).

Having handed his glasses to an enlisted man, the accused later in the evening became involved in an argument with four or five enlisted men during which he demanded the return of his glasses and announced that he was going to fight them if they did not give them back to him (R. 19).

At midnight "Barclay's" became "off limits" to all military personnel and on the night in question when that time arrived preparations were made to close up the place. Notwithstanding the rules the accused demanded that he be served with a drink (R. 8, 15, 19). The military police informed him that the "place is 'off limits' for military personnel after 12 o'clock" whereupon the accused ordered him to "get out of the way". The military police then left for the purpose of getting a sergeant of military police who returned with them to "Barclay's" (R. 19).

Meanwhile the manager attempted to persuade the accused to leave and go to the "Pineroom" where he would join him in fifteen minutes and have a drink with him. It was difficult to reason with him, however, and before the manager could get him out of the place the accused again became involved in an argument with the military police (R. 8), who again told him that he had to leave. When the accused made an obscene remark to the policeman, the latter said "I'm sorry but I'll have to place you under arrest" (R. 9). The accused then demanded by whose authority the military police were trying to arrest him and when

(192)

asked by Staff Sergeant Lawrence H. Hager, Military Police Detachment, for his identification, refused to give it (R. 19, 22). The sergeant then called Captain Neal of the Military Police Detachment on the telephone (R. 22). Although the sergeant told him he was under arrest the accused wandered off into the "Pineroom" (R. 19, 20, 22).

When Captain Neal arrived at "Barclay's" he went into the "Pineroom" accompanied by Sergeant Hager. They found the accused at the bar with his blouse off. Captain Neal suggested that he put on his blouse and when accused refused Captain Neal gave him a direct order to do so but it is not shown if or when it was obeyed. Captain Neal then ordered the military police to take the accused to the hospital for a blood test and then bring him to the Provost Marshal's Office (R. 22).

When they arrived at the office of the Provost Marshal the accused seemed to think the military police had his glasses though Sergeant Hager had no recollection of seeing him wear any during the events at "Barclay's". When he asked Captain Neal for them and was told that he (Captain Neal) did not have them he called the Captain "a God damn liar". He then asked Sergeant Hager whether he had the eye glasses and when informed that he did not the accused, referring to Captain Neal and the police said they were "cheap sons-a-bitches, and you all stick together". Captain Neal then had the accused removed to the officers' quarters (R. 23).

Sergeant Hager was of the opinion that the accused was "grossly drunk" (R. 24).

4. The accused, having been informed of his rights, elected to remain silent and he offered no evidence in his own behalf.

5. It requires no discussion to demonstrate that the accused, according to corroborated and uncontradicted testimony, was on the night of 15 December 1943 drunk and disorderly in uniform in a public place. His condition at the time and place was variously characterized as "drunk", "awfully drunk" and "grossly drunk" by three different witnesses. His disorder was evident not only in his wrongful fraternization with enlisted men in a place where he had no right to be but in becoming embroiled in ridiculous situations with them as well as with employees of the tavern and civilians who were strangers to him. While the evidence may not have been sufficient to indicate that his conduct was such as to transcend the line of demarcation between service-discrediting conduct in violation of Article of War 96 and the more reprehensible conduct violative of Article of War 95 it certainly was such as to tend to bring discredit upon the military service and was clearly to the prejudice of good order and military discipline.

It was shown and not denied that the accused, without justification or excuse, called Captain Neal, who was his superior officer, a "God damn liar". Though he was drunk at the time there is nothing

in the record to show that he was mentally stupified and not conscious of his actions or surroundings. The evidence relating to all that transpired shows that the accused was conscious of rank when he was with the enlisted men and when an enlisted man tried to arrest him. There is nothing from which it could fairly be inferred that the accused did not recognize Captain Neal as a superior. Under all the circumstances and in the light of the failure of the accused to defend on the ground that he was, because of some nonapparent disability, unable to and did not recognize Captain Neal's superior rank, it cannot be said that there was any error in the finding of the court of his guilt on Charge I and its Specification.

6. Within the limitations imposed by Article of War 40, the reviewing authority may return a record of trial to the Court before the sentence becomes its final act for reconsideration in revision proceedings. Since nothing done by the Court in this case after reconvening for revision was in violation of the provisions of Article of War 40, their action was not a violation of any substantial rights of the accused.

7. Records of the War Department disclose that the accused was born in Nebraska and is now 30 years and 9 months of age. He was graduated from high school but nothing else as to his general education is shown. He worked in 1941 as a laborer loading lumber and in 1942 as a guard at Bonneville Dam in Vancouver, Washington. He was a private in the National Guard of Nebraska in 1932-33. From September 1934 to September 1937 he was a member of the 17th Infantry Band and from January 1938 until April 1940 was a member of Company B, 35th Infantry, attaining the grade of corporal. After pursuing a course at the Field Artillery School, Fort Sill, Oklahoma, he was commissioned a second lieutenant, Field Artillery, Army of the United States on 11 March 1943 and assigned to duty with the 75th Infantry Division. On 20 August 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 at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal and total forfeitures are authorized upon conviction of a violation of Article of War 96.

William A. Pounds, Judge Advocate.

Charles Stephum, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

(194)

1st Ind.

War Department, J.A.G.O., 8- 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 James E. Fiedler: (O-1178791), 730th Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and 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 good behavior.

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.

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

(Sentence confirmed but forfeitures remitted. Execution suspended.
G.C.M.O. 277, 30 May 1944)

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

(195)

SPJGV
CM 251311

2 MAY 1944

UNITED STATES)

v.)

First Lieutenant JOHN B.
WATTS (O-1287629), In-
fantry.)

THE INFANTRY SCHOOL

Trial by G.C.M., convened at
Fort Benning, Georgia, 4 and
18 February 1944. Dismissal.

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

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

Specification: In that First Lieutenant John B. Watts, Infantry Replacement Training Center, Camp Fannin, Texas, attached to 17th Company, 1st Student Training Regiment, The Infantry School, did, without proper leave, absent himself from his station and command at Fort Benning, Georgia, from about 0001 3 January 1944 to about 2200 3 January 1944.

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

Specification: In that First Lieutenant John B. Watts, Infantry Replacement Training Center, Camp Fannin, Texas, attached to 17th Company, 1st Student Training Regiment, The Infantry School, did, while in uniform in a public place, to wit, a passenger car on a train en route between Atlanta, Georgia, and Columbus, Georgia, on or about 3 January 1944, wrongfully sit down with several enlisted men (names unknown), did display a bottle of intoxicating liquor and did wrongfully invite said enlisted men, including a prisoner and his enlisted military guard, to drink intoxicating liquor with him, to the prejudice of good order and military discipline.

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

(196)

Specification: (Finding of not guilty).

He pleaded not guilty to all Specifications and Charges and was found not guilty of Charge III and its Specification but guilty of Charges I and II and their respective Specifications. No evidence of previous convictions was introduced. He was sentenced "to be dismissed the service and to forfeit all pay and allowances due or to become due". The reviewing authority approved only so much of the finding of guilty of Charge II and its Specification as involves findings of guilty of a violation of Article of War 96, approved the sentence but remitted the forfeitures of pay, and forwarded the record of trial for action under Article of War 48, recommending "to the confirming authority that the sentence of dismissal be commuted to a fine of seventy-five dollars (\$75.00) per month for six (6) months".

3. In support of Charge I and its Specification, competent evidence was introduced by the prosecution to show that it was announced to all student members of the 17th Company, 1st Student Training Regiment, Fort Benning, Georgia, of which the accused was one, that all students leaving Fort Benning over the week-end of 31 December 1943 were to return by 2400 on 2 January 1944. The accused left camp on that week-end and did not return by 2400 on 2 January 1944 (R. 10, 11). A duly authenticated extract copy of the morning report of the 17th Company, 1st Student Training Regiment, for 3 January 1944, was introduced into evidence and contained entries showing that the accused was absent without leave from 0001 on 3 January 1944 until 2200 on 3 January 1944 (Pros. Ex. No. 1).

In support of Charge II and its Specification competent evidence was introduced by the prosecution identifying the accused as one of the passengers on a train traveling from Atlanta to Columbus, Georgia, on the evening of 3 January 1944 (R. 25, 26, 37, 41). While en route he entered a coach where some enlisted men were seated and engaged in conversation with them (R. 26). He had a bottle in his hand and asked the enlisted men if they wanted a drink. One or two of them accepted and drank from the bottle with the accused (R. 26, 33). The accused spoke of the bottle and its contents "in such a manner as to identify it as an intoxicating beverage" (R. 58), although he did not make any "definite statement as to what was in the bottle" (R. 43). Its type and shape was that of a whiskey bottle. It was "either a fifth or a quart bottle" and it contained a darkish colored fluid (R. 57). The accused revealed that it cost him \$5 (R. 26, 43). One of the enlisted men warned the accused to beware of the MPs to which the accused replied in effect, "the hell with the M.P.'s. I don't like M.P.'s. They pulled me out of bed with a woman the other night" (R. 30, 31).

Shortly thereafter the accused departed from the coach only to return a little later and "again offered a drink to the enlisted men and seated himself with a couple of them on the left hand side of the car" (R.27).

Private First Class Robert Schoonhoven of The Parachute School, Fort Benning, Georgia, was riding in the same coach, a few seats to the rear of this group. He had a prisoner in custody whom he was returning to camp (R. 37). He was wearing a pistol and pistol belt (R. 40). Schoonhoven went to the forward section of the coach, where the accused and the enlisted men were seated, to obtain a drink of water (R. 27, 28, 29, 37, 41, 42). The accused asked Schoonhoven if he would like a drink which the latter refused, telling the group he had a prisoner in custody (R. 29). Schoonhoven saw a paper bag in the accused's hands which he was holding "by the neck" but he couldn't see what was in it (R. 39). The accused asked Schoonhoven if the prisoner would like a drink (R. 37, 38). The prisoner then approached the group and the accused extended the bottle towards him (R. 31).

At this point, Lieutenant Colonel J. H. Turner of Boca Raton Field, Florida, who was seated diagonally across the aisle from the group (R. 28), arose, walked over to them and inquired which one of them was the prisoner's guard. Schoonhoven identified himself as the guard and the colonel then told him to take the prisoner back to his seat (R. 31). The colonel requested the accused to accompany him to his seat and there asked him for his identification card. The accused said he had none but did exhibit several cards containing the name "Lt. Watts" (R. 31). The colonel selected a membership card in the Fort Benning officers' club and wrote down the name appearing on it (R. 31). The accused told him he belonged to "one of the STC units". The colonel rebuked him for his conduct and the accused thereafter left the coach without replying (R. 32). The colonel noticed that the accused's speech was slurred, he had the odor of alcohol on his breath and he "appeared to be under the influence of liquor" (R. 32).

Colonel Turner could not definitely identify the accused in court as the same officer who had tendered drinks to enlisted men as narrated above (R. 36). However, Schoonhoven, the guard, did identify the accused as the same person and identified Colonel Turner as the officer who intervened and who sent him back to his seat with the prisoner (R. 38, 41). About 21 January 1944 Colonel Turner received a letter from the accused stating, in pertinent particulars, the following:

"As a result of your letter regarding my conduct on the train the night of January 3rd. I am in very serious trouble. It is possible that I may be tried by Court Martial in which case you will be required to submit additional testimony. I do not blame you in the least for taking the action that you did on the train. I realize what an impression I must have made. However, during my three years army service I have, up to now, a perfect record and, naturally, am very worried about having it spoiled by this mistake. . . ." (R. 32, 33; Pros. Ex. No. 3).

All of the evidence offered by the prosecution in support of Charge III and its Specification was rejected by the court upon objection made by

the defense (R. 11, 12). The motion of the defense for a finding of not guilty of Charge III and its Specification was granted by the court (R. 23).

4. For the defense:

It was stipulated between defense counsel, accused and the trial judge advocate that if Private Weldon W. Rand, Company S, 1st Parachute Training Regiment, Fort Benning, Georgia, were present and sworn as a witness for the defense, he would testify as follows: He was the prisoner in the custody of Private First Class Schoonhoven on the night of 3 January 1944. There were about a dozen enlisted men, a lieutenant colonel, but no civilians in the coach in which Rand was seated. A lieutenant came into the coach. He did not have any bottle in his hands and Rand saw no bottle in his clothing or pockets. The lieutenant took a drink of water and stopped to talk to some enlisted men seated in the forward section of the coach. Rand had seen the enlisted men take a drink from a quart bottle before the lieutenant arrived. The lieutenant sat down and talked to them. Rand did not see the lieutenant take a drink nor did he see the enlisted men take a drink from the bottle while the lieutenant was with them. The lieutenant was there about fifteen or twenty minutes. Rand's guard went to the forward part of the coach to obtain a drink of water and stopped at the group. Rand did not see anybody offer the guard a drink. Rand was "certain the Lieutenant did not offer my guard a drink". The guard sat down with them and one of the enlisted men waved for Rand to join them. As he approached, the lieutenant asked how things were and Rand replied "fine". The lieutenant colonel then came over and asked which one of the group was the guard. Rand and his guard thereupon went back to their seats, and the lieutenant colonel called the lieutenant over to his seat, wrote something down and then the lieutenant thereafter left the coach. While Rand was with the group he did not see any bottle and the lieutenant did not show any signs of drinking that Rand noticed. "He talked all right and walked all right and he did not offer me any liquor or invite me to take a drink" (R. 50, 51).

Two members of a military police detachment at Fort Benning, Georgia, who were on duty patrolling all coaches of train No. 18 running from Atlanta to Columbus, Georgia, at 6 p.m. o'clock on 3 January 1944, testified that neither of them saw a lieutenant drinking with enlisted men on the train, saw no disturbance involving a lieutenant and none was reported to either of them.

The defense also introduced the testimony of Major Thomas M. Ward, Major Darwin L. Hagen, Captain Robert Fitch and Captain Fred H. Muret relative to the good character and the military record and standing of the accused. They were unanimous in their opinion that the accused bore the reputation among his associates of being an outstanding officer and gentleman (R. 15-19, 21, 55, 56).

5. At the inception of the trial, and before pleas to the general issue, the defense entered pleas in bar to all Charges and Specifications on the

ground that the accused had received previous punishment under Article of War 104 for all offenses alleged (R. 6). The evidence introduced by the defense in support of these pleas showed that the accused returned to his organization on 3 January 1944 at 2200; that on 5 January the battalion commander stated to accused that he had done a bad thing in not reporting back on time, that soldiers were fighting in Italy and accused should be ashamed of his actions; that on 8 January the battalion executive officer told him he was restricted to the regimental area pending investigation of his case; and that on 10 January the company commander changed the restriction to arrest in quarters (R. 7, 8, 9). When the battalion commander censured accused he did not tell him he was being reprimanded as punishment for the acts he committed nor did he tell accused that he could elect a reprimand under Article of War 104 as punishment. The accused received nothing in writing concerning a reprimand or advising him to report for a reprimand or informing him that he had been reprimanded (R. 9).

The procedure to be followed by a commanding officer in imposing punishment on an officer under Article of War 104 includes written notification to the officer of his offense and that the commanding officer proposes to punish under this Article unless trial by court-martial is demanded (M.C.M., 1928, par. 107). A written record is made by the immediate commanding officer as to any punishment so imposed (M.C.M., 1928, par. 109). Further, this Article does not apply to or limit nonpunitive measures that a commanding officer may use to further the efficiency of his command, such as reprimand, censures, reproofs and rebukes, not intended or imposed as a punishment for a military offense (M.C.M., 1928, par. 105). It is clearly apparent from all of the foregoing that the battalion commander was merely giving the accused a mild rebuke, not intended as punishment under Article of War 104 for the offenses committed. Accordingly, these special pleas were properly denied by the court.

The prosecution moved to reopen its case, after it had rested, to present additional evidence on Charge II and its Specification in accordance with a request previously made by the court that such additional evidence be produced. The defense immediately moved for findings of not guilty on Charges I and II and their Specifications (R. 22, 23, 24). The court granted the prosecution's motion and denied that of the defense. Where evidence adduced by the parties appears to the court to be insufficient for a proper determination of any matter before it, "the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination". (M.C.M., 1928, par. 75). The court may permit a case once closed by either or both sides to be reopened for the introduction of further testimony (M.C.M., 1928, par. 121). Accordingly, the ruling of the court on both motions was proper.

The defense objected to the admission of testimony that, when the accused first entered the coach, in response to a warning from one of the enlisted men that he had better beware of MPs, he stated to them, "the hell

with the M.P.'s. I don't like M.P.'s. They pulled me out of bed with a woman the other night" (R. 31). This statement was made by the accused during the course of events which are the basis of Charge II and its Specification. It indicated the frame of mind of the accused, his disposition to be unconcerned about military proprieties and their enforcement, and was relevant and admissible (Wharton's Criminal Evidence, 11th Ed., Vol. 1, sec. 511). The court properly admitted this evidence.

The defense moved that all of the testimony of Colonel Turner be stricken from the record on the ground the witness failed to identify the accused as the person concerned in the events testified to by the colonel. The identity of the accused was sufficiently established, however, by the letter written by the accused to the colonel relative to the accused's conduct "on the train the night of January 3rd" (Pros. Ex. No. 3). In addition, the testimony of Schoonhoven fully identified the accused as the person involved (R. 38, 41).

The defense also moved for findings of not guilty on Charge II and its Specification on the ground that the contents of the bottle were not proven to be intoxicating liquor. Sufficient circumstantial evidence had been introduced to warrant the court's conclusion that it was intoxicating liquor. The type and shape of the bottle was that of a whiskey bottle, it was a fifth or a quart bottle, it contained a darkish fluid, the accused stated it cost him \$5 and the accused spoke of the bottle and its contents in such a manner as to identify it as an intoxicant.

At one stage of the trial the defense also moved that the court was without jurisdiction to hear the case on the ground that no investigation of the charges had been made as required by Article of War 70. The provisions of Article of War 70 requiring an investigation of charges before reference to trial are not jurisdictional and the complete omission of such an investigation is not fatal error unless substantial rights of the accused have been injuriously affected thereby (CM 229477, Floyd; CM 229479, Lax; CM 229480, Mayo). Moreover, the record of this case demonstrates that the charges were referred to an investigating officer and were investigated in substantial compliance with the provisions of Article of War 70 (R. 45-49, incl.; Def. Ex. No. 4, Pros. Ex. No. 5). Accordingly, the motion was properly denied by the court.

6. The evidence conclusively shows, with respect to Charge I and its Specification, that the accused was absent without leave from 0001 on 3 January 1944 until 2200 on 3 January 1944.

The evidence shows, with respect to Charge II and its Specification, that the accused, with a bottle of liquor in his hand, entered one of the coaches on a passenger train traveling from Atlanta to Columbus, Georgia, on the evening of 3 January 1944. He invited several enlisted men to drink from the bottle and one or two accepted. The accused then left the coach but

returned shortly and again offered the bottle to the enlisted man. He seated himself with them and soon thereafter invited an enlisted man who was traveling with a prisoner in custody to drink from the bottle and also tendered the bottle to the prisoner. It is the opinion of the Board of Review that the conduct alleged in the Specification of Charge II and sustained by competent evidence is conduct prejudicial to good order and military discipline in violation of Article of War 96, as approved by the reviewing authority.

7. The accused is about 26 years of age. War Department records reveal that he had enlisted service commencing on 6 March 1941, which was terminated by appointment as a second lieutenant, Infantry, on 14 July 1942. On 10 May 1943 he was promoted to first lieutenant.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96.

Thomas W. Jaffy, Judge Advocate
Herbert M. Kidner, Judge Advocate
Robert B. Harwood, Judge Advocate

(202)

SPJGV
CM 251311

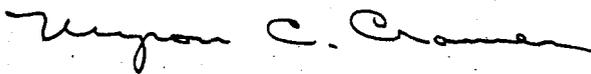
1st Ind.

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 First Lieutenant John B. Watts (O-1287629), 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. The accused was found guilty of being absent without leave from 0001 on 3 January 1944 until 2200 on 3 January 1944, in violation of Article of War 61, and of wrongfully inviting enlisted men, a military prisoner and his enlisted military guard, to drink intoxicating liquor with him while traveling on a passenger train on 3 January 1944, in violation of Article of War 96. The absence without leave was of short duration and no aggravated circumstances attended his conduct in drinking with enlisted men. All members of the court recommended clemency because from the accused's reputation, previous service, appearance and demeanor before the court, they believed he would make an excellent officer. The reviewing authority recommended that the sentence of dismissal be commuted to a fine of \$75 per month for six months. I recommend that the sentence as approved by the reviewing authority be confirmed but commuted to a forfeiture of \$75 per month for six months and 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 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. ltr. for
sig. S/W.

Incl.3-Form of action.

(Sentence as approved by reviewing authority confirmed but commuted to forfeiture of \$75 per month for six months and reprimand. G.C.M.O. 260, 3 Jun 1944)

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

10 MAY 1944

(203)

SPJGH
CM 251341

UNITED STATES)

v.)

Second Lieutenant ARTHUR)
M. FRENCH (O-752191),)
Air Corps.)

ARMY AIR FORCES)
WESTERN FLYING TRAINING COMMAND)

Trial by G.C.M., convened)
at Deming Army Air Field,)
Deming, New Mexico, 17)
January 1944. 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 Charge and Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that Second Lieutenant Arthur M. French, Air Corps, was, at Army Air Forces Bombardier School, Deming Army Air Field, Deming, New Mexico, on or about November 3, 1943, found drunk while on duty as a pilot in an AT-11 Army aircraft.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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: An extract copy (Ex. I) of Bombardier Operations Order, Training Section II, Squadron 18, Deming Field, New Mexico, for 3 November 1943, shows accused assigned to pilot plane No. 702 on a bombing mission scheduled for 6:30 that evening. Army Air Forces Regulation No. 60-5 (Ex. II), dated 3 March 1943, requires all occupants of aircraft to wear parachutes during flight, and places on the pilot of the plane the responsibility of enforcing the regulation (R. 6-11).

Second Lieutenant Melvin R. Hardin, bombardier instructor for the scheduled flight, reported to the plans, which was of the "AT-11" type, at about 7:00 p.m. The accused was not at the plane when he arrived. After

he and Cadets Harry E. Wilson and Frank J. Rolek "pre-flighted" the bomb sight Lieutenant Hardin went to the "ready room". When he returned to the plane he observed that accused, who was then sitting in the pilot's seat, did not have a parachute. Accused "seemed rather confused" in checking his instruments before taking off. He made a "fairly good" take off but Lieutenant Hardin "didn't think" accused had received a clearance from the tower. Accused "seemed" to climb at a lower air speed than usual and was "a little careless in making his turns". In gaining altitude he piloted the plane in a normal manner and Lieutenant Hardin did not observe anything else unusual until he discovered that accused had failed to bring an oxygen mask on the flight. He was "afraid" to let accused fly to the required bombing altitude of 11,000 feet without a mask and after instructing Cadet Wilson to turn off the bomb sight, he told accused that it would be necessary to return to the field as the bomb sight had developed a malfunction. The accused turned back and called the tower for a replacement. On the return trip accused entered the "traffic pattern" at an altitude of about 500 feet and had to fly in at a greater speed than if he had entered at the 1,000 foot altitude which Lieutenant Hardin thought was required. When the plane hit the field it bounced "pretty badly" a couple of times and accused took off again. His second approach to the field was from about the same low altitude, and after making "practically" the same landing, he again took off. In response to a call from the tower asking what was wrong, accused replied that he was having trouble with the "flaps". On his third attempt the accused approached the field from a higher altitude and made a "nice landing". The flight lasted approximately thirty minutes and on landing Lieutenant Hardin reported the actions of accused to First Lieutenant Benton M. Clay, an assistant flight commander. Lieutenant Hardin was of the opinion that accused was not in full possession of his physical and mental faculties (R. 14-21).

On cross-examination Lieutenant Hardin testified that although flights were scheduled for 6:30 in the evening, the planes seldom left before 7:00 o'clock or later, in order to arrive above the bombing target after dark. The accused checked all of the instruments before taking off but was slow and did not "seem" to know which instrument to check first. It was possible, however, that his confusion was due to his inexperience with an "AT-11" plane. Accused was a recent arrival at the training school and Lieutenant Hardin did not know whether he had made any previous night flights at Deming Field. Accused carried on a normal conversation with the tower before taking off and was having "a little fun" breaking in on another ship that was attempting to call the tower. According to Lieutenant Hardin this type of by-play was not unusual on the field. He further testified that it was not until he discovered that accused was making the flight without an oxygen mask that he told him to return to the field. On the attempted landings Lieutenant Hardin saw accused "try to work" the toggle switch controlling the flaps, but did not notice whether or not the flaps were down. He did observe, however, that the flaps were down on the third approach when accused made a normal landing. Lieutenant Hardin based an opinion that accused

was either "drunk or crazy" on his general actions that evening. About twenty minutes after they landed Lieutenant Hardin saw accused filling out his "clearance" for the next mission (R. 21-28).

Lieutenant Harry E. Wilson, a cadet in training at the time of the flight, observed that before the take-off that evening the accused did not check his instruments with the same "precision or attitude" as other pilots. The "take-off" was normal. When Lieutenant Wilson turned off the bomb sight and passed between accused and Lieutenant Hardin to the rear of the plane he thought he "smelled alcohol or something resembling alcohol". Considering that accused made three approaches to the field before landing and after smelling what he "thought" was alcohol, Lieutenant Wilson would not have made another flight with him that evening (R. 37-45).

Private First Class Robert H. Alchion, bomb sight maintenance man, met the plane on its arrival to correct the bomb sight malfunction that accused had reported. Accused inquired of Alchion the location of his replacement plane No. D-727. Alchion noticed an "alcoholic odor" about accused and observed that his speech was incoherent. Accused "staggered" off in the direction of plane D-727, taking "two steps to the left, approximately, and one step forward". Alchion was of the opinion that accused was drunk (R. 28-31).

First Lieutenant Benton M. Clay, Assistant Flight Commander, called accused into his office between 8:00 and 8:30 that evening and asked if he had been drinking. The accused told him that he had "one or two beers" before his flight and was not feeling well. Lieutenant Clay gave accused some work to do and after observing him for a time, concluded that he acted normally and was in complete control of his mental and physical faculties. An extract copy (Ex. IV) of operations report of Training Section II on 3 November 1943 shows that the plane piloted by accused that evening did not complete its mission because of the illness of the pilot (R. 32-37).

On 15 December 1943, the accused, after being advised of his rights by Major Jesse C. Duvall, made a sworn statement (Ex. V) that he started drinking at about 1:00 p.m. on 3 November 1943, had two "Tom Collins" at the "White House" and went to a movie. After the show he drank "about" four "Tom Collins" and returned to the field. He considered himself capable of flying a plane that evening but would not say that he had full control of his physical and mental faculties. The approaches he made in landing the plane were caused either by his "poor judgment" or "partially" by the failure of the flaps to come down. There was an extra parachute in the plane but he did not put it on. He did not have his oxygen mask on the flight as "somebody had lifted" it the day before (R. 45-48).

4. For the defense:

At about 8:00 p.m. on 3 November 1943, First Lieutenant Thomas V. Dechart, acting flight chief of "A" Flight, saw accused, a member of his

flight, land his plane on the runway and take off again. When the plane passed in front of him, he observed that the flaps were not down. Lieutenant Dechart then took off on a bombing flight and on his return from the mission talked with accused. He did not smell any odor of alcohol on the breath of accused, and as near as he could judge, accused was normal and in full possession of his mental and physical faculties. As flight chief it would have been his duty to report accused and take him to the hospital for an examination if he considered him under the influence of liquor. Lieutenant Dechart did not consider it unusual to make more than one approach at the landing field with a load of bombs in the plane and recalled that the first time he landed with a load of bombs he made two approaches. It was not an unusual occurrence for a pilot to fly at an altitude of 15,000 feet without an oxygen mask (R. 50-52, 57-58, 61-62).

On cross-examination Lieutenant Dechart testified that about two and one-half hours elapsed between the time he saw accused make the attempted landing and when he talked to him. When he returned from his mission he received a report that accused had been drinking. Accused admitted drinking a "couple" of beers and said that he did not feel well. Lieutenant Dechart noticed that his eyes were red but had seen them in the same condition before, especially after accused returned from flying two missions. He could not say that accused was drunk or sober during the time he was on the bombing mission. Lieutenant Dechart did not believe that the altitude at which a plane approached the traffic pattern would "necessarily" affect its landing. The regulations require that pilots approach from 1,000 feet, but he had seen landings made from approaches of 500 feet. He further stated that a plane making a landing from a low altitude would not "necessarily" have to make a faster approach than it would from a higher altitude, but the flaps might not lower if the plane came in "too hot". He further testified that a pilot landing a plane with a load of bombs is conscious of the cargo he carries, and it is the "psychological effect on the mind" that makes such a landing difficult. He did not believe he would "feel exactly safe" in a plane piloted by a man who, within a period of a few hours, had consumed six "Tom Collins", but had seen people who could drink that amount without effect. He did not consider that a man in full control of his physical and mental faculties would take a plane on a 11,000-foot bombing mission without an oxygen mask or without a parachute (R. 52-61).

Two soldiers of the military police who were on guard duty at the main entrance to Deming Army Air Field on 3 November testified that they did not observe any officer enter the field that afternoon who appeared to be intoxicated (R. 64-68).

Second Lieutenant Edwin P. Frye, roommate of accused, testified that the accused entered their quarters at about 5:00 o'clock in the afternoon of 3 November and said that he did not think he would eat supper

that evening as he was not feeling well. The accused talked "coherently" and appeared to Lieutenant Frye to be normal in every respect. When Lieutenant Frye returned from supper the accused was asleep (R. 68-73).

The accused testified that at about 1:00 o'clock on the afternoon of 3 November 1943, he had a drink at the "White House" and went to a motion picture show. He left the theatre at about 2:30 or 3:00 o'clock and had four drinks "at the most" before returning to camp. As he was not "feeling too good" when he arrived at his quarters he went to sleep. He went to the "line" at about 7:00 p.m., determined the number of his plane and got into the pilot's seat. He stated that he did not take the time to get his parachute as the cadets always placed an extra parachute in the plane. He did not have an oxygen mask because his had been stolen the day before. He made a normal take-off at about 7:30 p.m. and had climbed to about 8,000 feet when Lieutenant Hardin asked accused about his oxygen mask. When Lieutenant Hardin said the bomb sight had developed a malfunction he "naturally" returned to the field. He made his first approach "a little low and a little hot" and could not get the flaps down. The plane "bounced" twice and when he came around for his second approach the flaps still would not lower. The third time, he "jiggled" the switch, the flaps came down and he made a normal landing. It was the first time he had made a night landing at Deming Field with a load of bombs in the plane. After taxiing the plane to the parking area accused stated that he filled out his "Form one" and then reported to Lieutenant Clay that he did not "feel too good". He was on duty not involving flying 27 October and went to the hospital for approximately a week to receive treatment for "aerial sinusitis". If he acted "peculiar" it was because he was sick and not due to what he drank during the afternoon and "when I made that statement to the effect that I did not have full control of my physical and mental abilities, it was due to that and not due to what I drank that afternoon". He did not believe a sick man could act as normal as a man in good health (R. 74-76, 95).

On cross-examination the accused testified that he arrived at Deming Field on 19 October 1943, and started flying on bombing missions about a week later. He was not "habitually" a drinking man and understood that it was the "practice" in the Air Corps for pilots to refrain from intoxicants for a period of twelve hours before making a flight. He consumed approximately six "Tom Collins" about three and a half or four hours before making his flight that evening, but did not feel any effects from the drinks when he was at the "flight line". Accused stated that he did not go into the "ready" room that evening because he was late. He could have been relieved from duty by reporting his illness but did not do so because pilots were needed. Before starting on the flight he checked the instruments in his accustomed manner and received a final clearance from the tower to take off. On his return to the field he did not enter the landing pattern at the usual 1,000 feet because he "felt like" making a short approach which he did any time he felt he could "get away with it". He did not make a practice of disregarding regulations, but did violate regulations

that evening by failing to take a parachute and oxygen mask on the flight and by approaching the field at an altitude lower than 1,000 feet. He did not recall seeing the bomb sight maintenance man that evening and on leaving the plane he went directly to the "ready" room, not to his replacement plane. When he answered the question asked by Major Duvall on 15 December 1943 as to whether or not he had full possession of his mental and physical faculties, he "didn't know what that would mean". He gave the answer that he would not say he was in full possession of his faculties, because he was sick, and not because of what he had to drink. On further cross-examination accused testified that he was physically tired that day and the drinks he consumed made him more tired. When he stated he did not have possession of his mental and physical faculties he meant that the alcohol had caused the tired feeling and he was not quite as alert as he would have been without the drinks. A headache, resulting from his sinusitis, was the "main thing" that was the matter with him that evening. He further testified that it was the first time he piloted a plane after having consumed alcohol within twelve hours of making a flight, and the first time he failed to take his parachute on a flight (R. 76-96).

5. The evidence shows that during the afternoon of 3 November 1943, the accused consumed six "Tom Collins". Soon after 7:00 p.m., three or four hours after taking the last drink, he reported for duty to pilot a plane on a bombing mission that had been scheduled for 6:30 that evening. Contrary to regulations he failed to take a parachute and oxygen mask on the flight. He "seemed confused" in checking the instruments on the plane preparatory to taking off. After taking off he climbed at a lower air speed than usual and "seemed a little careless" in making his turns. His actions attracted the attention of the bombardier instructor, who upon discovering that accused did not have an oxygen mask was afraid to let him fly to the bombing altitude of 11,000 feet. Under the pretext that the bomb sight had developed a malfunction he told accused that it would be necessary to return to the field. The accused approached the landing field from an altitude of 500 feet instead of from 1,000 feet as required by regulations. The plane, loaded with bombs, came in fast, bounced a couple of times on the runway and accused took it into the air again. He could not lower the flaps on the plane. On a second approach his attempted landing was similar. On his third attempt he approached the field from a higher altitude, lowered the flaps on the plane and made a normal landing. There was an "alcoholic odor" about accused when he stepped from the plane. A witness observed that his speech was "incoherent" and he "staggered" away from the plane. This witness was of the opinion that he was drunk.

The accused testified that he had been ill, was suffering from the effects of "aerial sinusitis" at the time of the flight, and that any peculiar actions on his part were the result of his illness, not from what he had to drink during the afternoon. Other witnesses who talked to accused after the flight stated that he appeared to be normal and in full possession of his mental and physical faculties.

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).

The evidence shows that on 3 November 1943, the accused was under the influence of liquor to the extent that he was incapable of properly performing his duties as a pilot. The Board of Review is of the opinion that the evidence establishes beyond any reasonable doubt that the accused was found drunk on duty as alleged.

6. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 23 December 1940; aviation cadet from 17 October 1942; temporarily appointed second lieutenant, Army of the United States, and active duty, 28 July 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 mandatory upon conviction of a violation in time of war of the 85th Article of War.

Samuel M. Driver, Judge Advocate

H. West Warner, Judge Advocate

J. Lattin, Judge Advocate

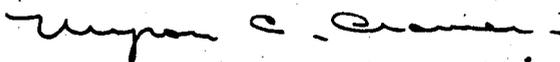
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War Department, J.A.G.O., 15 MAY 1944 - To the Secretary of War.

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 Arthur M. French (O-752191), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was found drunk on duty while piloting an Army aircraft in which there were several other crew members on a scheduled practice bombing mission. I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

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



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

- 3 Incls.
- Incl.1-Rec. of trial.
- Incl.2-Draft ltr. for sig.
S/W.
- Incl.3-Form of Action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 352, 15 Jul 1944)

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

(211)

26 APR 1944

SPJGH
CM 251348

UNITED STATES)

CAMP CAMPBELL)

v.)

Private HOWARD J. GASTON)
(15076788), 1580th Service)
Unit, Camp Campbell,)
Kentucky.)

Trial by G.C.M., convened at
Camp Campbell, Kentucky, 22
January, 7 and 21 February
1944. Dishonorable discharge
and confinement for fifteen
(15) years. Federal Reforma-
tory.

HOLDING by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Howard J. Gaston, 469th Service Squadron, 50th Service Group, having been duly placed in arrest at Lovell Field, near Chattanooga, Tennessee, on or about 23 June 1943, did, at the bivouac area, Campbell Army Air Base, Camp Campbell, Kentucky, on or about 23 August 1943, break his said arrest before he was set at liberty by proper authority.

CHARGE II: Violation of the 61st Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Private Howard J. Gaston, 469th Service Squadron, 50th Service Group, did, at Camp Campbell, Kentucky, on or about 23 August 1943, wrongfully appear at Camp Campbell, and at the Campbell Army Air Base, Camp Campbell, Kentucky, wearing Sergeant's chevrons, without proper authority, to the prejudice of good order and military discipline.

Specification 2: (Finding of not guilty).

(212)

**CHARGE IV: Violation of the 94th Article of War.
(Finding of not guilty).**

Specification: (Finding of not guilty).

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

Specification 1: In that Private Howard J. Gaston, 469th Service Squadron, 50th Service Group, for the purpose of obtaining pay and allowances of a higher enlisted rating than that actually held by him, did, at Foster Field, Victoria, Texas, or en route from there to his next station, on or about 1 October 1942, make and use a certain writing, to wit: An entry in his Service Record, promoting himself to the grade of Sergeant, which said record and statement was false and fraudulent in that he had not been promoted to Sergeant, and which statement was then known by the said Private Howard J. Gaston to be false and fraudulent.

Specification 2: In that Private Howard J. Gaston, 469th Service Squadron, 50th Service Group, for the purpose of obtaining the approval, allowance, and payment of a claim against the United States, did, on or about 30 November, 1942, at Oklahoma City, Oklahoma, falsely make oath or certificate as to the authenticity of an entry on the payroll that he, the accused, was a Sergeant, which said oath or certificate and entry was then known by the said Private Howard J. Gaston to be false.

Specification 3: Similar to Specification 2 except that the offense is alleged to have been committed 31 December 1942 at Winston Salem, North Carolina.

Specification 4: Similar to Specification 3 except that the offense is alleged to have been committed 31 January 1943.

Specification 5: Similar to Specification 2 except that the offense is alleged to have been committed 31 March 1943, and that the claim was for the months of February and March 1943.

Specification 6: Similar to Specification 2 except that the offense is alleged to have been committed 31 May 1943, at Nashville, Tennessee.

Specification 7: In that Private Howard J. Gaston, 469th Service Squadron, 50th Service Group, did, at his station at Oklahoma City, Oklahoma, on or about 30 November 1942, present for approval and payment a claim against the United States by presenting to H. D. Lloyd, Major, Finance Department, Finance

Officer at Oklahoma City, Oklahoma, an officer of the United States duly authorized to approve and pay such claims, said claim being in the amount of about seventy-eight dollars (\$78.00), by signing and being paid upon a payroll for the month of November, 1942, for services alleged to have been rendered to the United States by said Howard J. Gaston as a Sergeant, which claim was false and fraudulent in that Howard J. Gaston was at that time only a Private, and entitled only to pay as a Private, amounting to Fifty dollars (\$50.00), and which claim was then known by the said Howard J. Gaston to be false and fraudulent.

Specification 8: Similar to Specification 7 except that it alleges the claim was presented at Winston Salem, North Carolina, on 31 December 1943 to Major H. D. Lloyd, finance officer at Winston Salem, North Carolina, by signing the payroll for December 1942.

Specification 9: Similar to Specification 8 except that it alleges the claim was presented on 31 January 1943, to Major C. F. Hoover, finance officer at Winston Salem, North Carolina by signing the payroll for January 1943.

Specification 10: Similar to Specification 7 except that it alleges the claim was presented at a station undetermined but believed to be Oklahoma City, Oklahoma, on 31 March 1943, by signing the payroll for March 1943.

Specification 11: Similar to Specification 7 except that it alleges the claim was presented at Nashville, Tennessee, on 31 May 1943, to Colonel J. L. Tunstill, finance officer at Nashville, Tennessee, by signing the payroll for May 1943.

Specification 12: (Finding of not guilty).

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

Specifications 1 and 2: (Findings of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specification, Charge II and Charge II; Specification 2, Charge III; the Specification, Charge IV and Charge IV; Specification 12, Additional Charge I; Specifications 1 and 2, Additional Charge II and Additional Charge II; and guilty of all other Specifications and Charges. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen (15) years. The reviewing authority approved

the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50¹.

3. The evidence is legally sufficient to support the findings of guilty of the Specification, Charge I and Charge I; Specification 1, Charge III and Charge III; Specifications 1, 7 to 11, Additional Charge I and Additional Charge I. The only question requiring consideration is whether the evidence is legally sufficient to support the findings of guilty of Specifications 2 to 6, Additional Charge I, and the sentence.

4. The evidence for the prosecution in pertinent part is as follows: The service record of accused (Ex. B) under the heading "APPOINTMENT, PROMOTION, OR REDUCTION, WITH AUTHORITY THEREFOR" contains the following hand-written entry: "Sgt. 10-1-42 S.O. 77 Hq. F.F.V.T. KEK". It was stipulated that Special Orders No. 77, dated 31 March 1942 (Ex. C); Special Orders No. 17, dated 23 January 1942 (Ex. D); Special Orders No. 117, dated 14 May 1942 (Ex. E); and Special Orders No. 177, dated 21 July 1942 (Ex. F) (all issued by Headquarters, Foster Field, Victoria, Texas) did not contain the name of accused. Captain Ernest E. Kelley, Air Corps, testified by deposition (Ex. G) that about 29 September to 1 October 1942, he was Group Adjutant and Personnel Officer of the 75th Service Group Air Service Command, Foster Field, Victoria, Texas and as such in charge of service records of enlisted personnel. Captain Kelley knew accused as a member of that organization about the time accused was transferred from it. He did not make or authorize the entry in the service record of accused concerning his promotion to sergeant and had no knowledge of any such promotion. Any such promotion would have been made by Headquarters 75th Service Group, which was independent of the "base". Captain Frederick M. Sorenson, Air Corps, testified by deposition (Ex. H), that he was assigned as commanding officer of the 344th Service Squadron, 321st Service Group, 7 November 1942, at which time accused, a member of the organization, was on detached service in Woodward, Oklahoma. Captain Sorenson went to Woodward to pay accused and the only thing that Captain Sorenson could recall of the meeting was that accused complained of being mistreated by the doctor. Captain Sorenson never saw any order promoting accused to sergeant. "When he came to us, he was carried in the grade of sergeant on his service record". Captain Sorenson did not know how or when the entry was made in the service record of accused (R. 18-21).

Major William McCraw, Air Corps, Inspector General's Department, testified by deposition (Ex. I) that he interviewed accused about 1 July 1943. Accused "admitted" the "discrepancy in the alleged orders promoting him and the plainly evident forgery of the initials of his commanding officer", but denied he was guilty. Accused "admitted that it was remarkable that he should be jumped from the grade of buck private to sergeant" and that "there was no justification of the group making him a sergeant after he had been transferred". Accused "admitted" having drawn the pay of a sergeant since

1 October 1942. First Lieutenant John A. Butler, Air Corps, testified by deposition (Ex. P) that he had known accused since 5 March 1943 when accused joined the 50th Service Group, of which he was at the time commanding officer, and that accused brought with him his own service record showing his grade as sergeant (R. 21, 24).

First Lieutenant Enos C. Throop, Air Corps, testified by deposition (Ex. Q) he had known accused for five months and that in June 1943, accused was a member of the 469th Service Squadron of which Lieutenant Throop was commanding officer. He had observed the handwriting of accused, saw him sign the payroll and nightly passes, and that he "would say" that the entry in the service record of accused promoting him to sergeant was in the handwriting of accused. Lieutenant Throop identified the handwriting on a "Change of Address" card (attached to Ex. Q marked Ex. A) as that of accused. He had personally paid accused sergeant's pay around 1 July 1943 for the June payroll. Second Lieutenant Morris C. Laine, Air Corps, testified by deposition (Ex. R) that he had been adjutant of the 469th Service Squadron, had known accused since March 1943, had seen the handwriting of accused and that the entry in question in the service record of accused "appears" to be in the handwriting of accused. Second Lieutenant Robert M. Sitton, Air Corps, adjutant of the 469th Service Squadron, testified by deposition (Ex. S), that he had observed the handwriting of accused on numerous occasions and that it was his "belief" that the entry in question in the service record of accused was the handwriting of accused. First Sergeant Clifford C. Frye, 469th Service Squadron, testified by deposition (Ex. T) that he had observed the handwriting of accused on the service record and on his return address on mail and that the entry in question in the service record of accused was in the handwriting of accused. Captain Theodore J. Hines, 469th Service Squadron, testified by deposition (Ex. U) that he interviewed accused on 14 September 1943, warned him "of his rights as required under the 70th and 24th Articles of War" and had him write, "Sgt. 10-1-42 SO 77 HQ F F V T E E K E E K" on a piece of paper (attached to Exhibit "U", marked Exhibit "C"). Captain Hines had compared this writing with the similar entry in the service record of accused and in his opinion the "formation of the letters looks almost identical" (R. 24-26).

It was stipulated that accused signed the payroll and received the pay of a sergeant "as indicated in the Specifications 2 through 11, Additional Charge I" except that the place of signing the payroll and the place of payment referred to in Specification 5 was Orlando, Florida, rather than Oklahoma City (R. 27).

5. Accused testified that he was transferred from Foster Field to Oklahoma City the first part of October and on the day of his arrival at the latter station, he was placed on detached service at Woodward, Oklahoma. Between 20 and 23 November 1942 the first sergeant and the acting first sergeant told him he had been promoted to sergeant and they had seen the order

"back at the headquarters" at Oklahoma City. When Captain Sorenson came to Woodward accused asked him about the matter and he told accused he was carried on the rolls as sergeant and should "go ahead and sign the payroll". When Captain Sorenson returned to Woodward with the payroll, on pay day, he told accused he had checked into the matter, had talked to the first sergeant, and that the first sergeant had said he had seen a copy of the order promoting accused to sergeant. Accused denied he had made any entry in his service record and stated that his service record had never been in his personal possession. Whether the entry was false and fraudulent or not accused could not say as he had no means of knowing. This was what he had told Major McCraw. He had signed the payrolls on the dates alleged in the Specifications, drew sergeant's pay and he thought he was entitled to it (R. 28-37).

On cross-examination and examination by the court accused testified he thought the initials "EEK" referred to Captain Kelley, Adjutant or Personnel Officer of the organization in Texas, and he assumed Captain Kelley made the entry although he had no personal knowledge of it. He had been told that until June 1943 a noncommissioned officer received a warrant upon promotion. Accused had asked the first sergeant for a warrant or order but he said there was only one copy of the order in the office and it had to remain there for a record. He thought he was transferred from Texas to Oklahoma in the grade of private (R. 42-59).

6. The evidence shows that accused was a member of Headquarters and Headquarters Squadron, 75th Service Group, Foster Field, Texas, and that in the first part of October 1942 he was transferred to Oklahoma City, Oklahoma. Here he was assigned to the 344th Service Squadron, 321st Service Group. When he was transferred to the 344th Service Squadron his service record showed him to be of the grade of sergeant. The entry in the service record under the heading referring to promotions read: "Sgt. 10-1-42 S.O. 77 Hq. F.F.V.T.EEK". Special Orders No. 77, Headquarters, Foster Field, Victoria, Texas, contained no reference to accused nor did Special Orders 17, 117 or 177 of that headquarters. Captain Ernest E. Kelley, Group Adjutant and Personnel Officer of the 75th Service Group about the time accused was transferred did not make this entry and had no knowledge of any such promotion. It was shown that subsequently, in 1943, when accused joined the 50th Service Group, he had his service record in his possession. Several officers and noncommissioned officers familiar with the handwriting of accused testified that in their opinion the entry in the service record was in the handwriting of accused. The court had before it for comparison with the entry in the service record of accused, two proved specimens of his handwriting, one of which consisted of the identical words appearing in the service record. It was stipulated that accused had signed the payroll and received the pay of a sergeant as alleged in the Specifications except that as to Specification 5 the place of payment was Orlando, Florida, rather

than Oklahoma City. Accused denied making the entry in his service record or any knowledge of it except that about 20 to 23 November 1942, while on detached service at Woodward, Oklahoma, his organization being at Oklahoma City, he was told by the first sergeant he had been promoted, that a copy of the order was at headquarters in Oklahoma City, and thereafter he had signed the payrolls and received pay as a sergeant.

The evidence is sufficient to show that accused forged an entry on his service record purporting to promote himself to sergeant and thereafter signed the payroll and received the pay of a sergeant, on the dates alleged in the Specifications. By signing the payroll under these circumstances accused was guilty on each occasion of presenting a false claim against the Government, and Specifications 7 to 11, Additional Charge I, alleging this offense, have accordingly been sustained. However, accused is alleged in Specifications 2 to 6, Additional Charge I, to have, for the purpose of obtaining approval, allowance and payment of a claim against the United States, falsely made an "oath or certificate" as to the authenticity of an entry on the payroll that he was a sergeant, knowing the oath or certificate to be false.

Copies of the payrolls signed by accused were not offered in evidence nor is there any evidence in the record of their contents. The Board may, however, take notice of the payroll form (W.D. No. 366a-December 9, 1933) in use at the time in question and prepared under the provisions of Army Regulations 345-155. The form discloses that the enlisted man signs the payroll opposite his name and grade in a column with this heading:

We hereby acknowledge receipt of the amounts in column "Balance paid" set opposite our respective names, IN CASH, and in case of payment of quarters allowances we certify that we actually occupied quarters at the addresses shown during the period for which allowed.

It will be seen that in signing the payroll the enlisted man makes no oath or certificate except that in reference to quarters. In the absence of any evidence to show that accused made an oath or certificate to the authenticity of the payroll entry that he was a sergeant, Specifications 2 to 6, Additional Charge I, are not sustained.

7. It becomes necessary to determine the maximum limit of punishment applicable to the offenses of which accused was found guilty and as to which the Board of Review has held the record of trial legally sufficient.

a. In Specifications 7-11, Additional Charge I, it is alleged, in each instance, that accused did "present for approval and payment" a claim against the United States in the amount of \$78 for services alleged to have been rendered as a sergeant, "which claim was false and fraudulent in that"

(218)

he was at the time "only a Private, and entitled only to pay as a Private, amounting to fifty dollars (\$50.00), and which claim was then known" by him "to be false and fraudulent". The prescribed limit of confinement is one year, when the "amount involved is \$50 or less, and more than \$20"; and five years, when the "amount involved is more than \$50" (MCM, 1928, par. 104c). Although it is alleged that accused presented a claim for \$78, yet the offense charged is limited by further language to an amount involved of \$28, because it is set out that the claim was false and fraudulent "in that" accused was entitled "only" to \$50 as a private.

Section 279, Title 28, United States Code, has been considered. However, it is the opinion of the Board that, in view of the wording of the Specifications involved, it is unnecessary to decide whether that section has the effect of forfeiting the pay of accused as a private. The offense with which he was charged included in terms the condition that he was entitled to \$50. It therefore follows that the maximum limit of confinement for each of these Specifications is one year.

b. The offense charged in Specification 1, Charge III, that of wrongfully wearing sergeant's chevrons (without other elements), is not listed in the Table of Maximum Punishments, nor is it included in or closely related to any offense there listed. Therefore, it remains punishable as authorized by statute or by the custom of the service (MCM, 1928, par. 104c). The federal statute most nearly applicable (18 U.S.C. 76a and b) prescribes a punishment not exceeding a fine of \$250 and confinement for six months for the unauthorized manufacture, sale or possession of any badge, identification card, or other insignia prescribed by the head of any department of the United States for use by any officer or subordinate thereof. The term "insignia" includes "chevrons" or other distinctive devices worn on the uniform to show rank (TM 20-205). Based on the mentioned statute, Army Regulations provide that the unauthorized wearing of any insignia prescribed by the War Department is prohibited, and that any person violating this provision is subject to punishment not exceeding a fine of \$250 and confinement for six months (par. 12, AR 600-90, 24 February 1944). The same provision was in effect at the date of the offense committed by accused. Authorized War Department regulations have the force of law (Standard Oil Co. v. U.S., 316 U.S. 481). Such regulations have the force of law within their proper scope, not beyond it; they are law to the Army and those whom they concern, and so far are binding and conclusive (par. 1a(1), AR 1-15, 12 December 1927).

The Board of Review is of the opinion that the limitation of punishment prescribed by Army Regulations for the offense of which accused was found guilty under this Specification constitutes a legal maximum, inasmuch as the regulation has the same effect as a statute, so far as the Army is concerned.

c. The maximum limit applicable to the Specification, Charge I, is three months, and to Specification 1, Additional Charge I, five years.

Accordingly, the limit of punishment applicable to accused is dishonorable discharge, total forfeitures and confinement at hard labor for ten years and nine months.

8. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of forgery (Spec. 1, Add. Chg.I), recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22-1401, District of Columbia Code. Since the authorized confinement adjudged is in excess of ten years, a penitentiary should have been designated as the place of confinement instead of a Federal reformatory.

9. The accused is 29 years of age. The Charge Sheet shows that he enlisted on 8 April 1942.

10. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 2-6, Additional Charge I, legally sufficient to support the findings of guilty of all other Specifications and Charges, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years and nine months.

Samuel M. Dwoir, Judge Advocate.

Walter Connor, Judge Advocate.

J. Lottcher, Judge Advocate.

1st Ind.

War Department, J.A.G.O.,
Camp Campbell, Kentucky.

30 MAY 1944

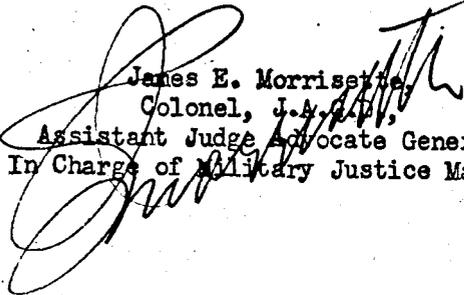
- To the Commanding Officer,

1. In the case of Private Howard J. Gaston (15076788), 1580th Service Unit, Camp Campbell, Kentucky, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Specifications 2-6, Additional Charge I, be disapproved and that only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years and nine months be approved. Thereupon, under the provisions of Article of War 50 $\frac{1}{2}$ and Executive Order 9363 dated July 23, 1943, you will have authority to order the execution of the sentence.

2. A penitentiary rather than a Federal reformatory should be designated as the place of confinement, unless you should see fit to reduce the period of confinement to ten years.

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

(CM 251348).


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

1 Incl.
Record of trial.

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

SPJGK
CM 251370

(221)

4 MAY 1944

UNITED STATES)

THIRD AIR FORCE

v.)

Trial by G.C.M., convened at
Hunter Field, Georgia, 14, 21
January 1944. Dismissal.

Second Lieutenant JAMES K.
BLANTON, JR. (O-667922),
Air Corps.)

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

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

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

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

Specification 1: In that James K. Blanton, Jr., 2nd Lieutenant, Air Corps, attached unassigned to Staging Project Detachment, Hunter Field, Georgia, was, while in uniform, at Savannah, Georgia, on or about 6 December 1943, in a public place, to wit, a common carrier street bus of the Savannah Power and Electric Company, drunk and disorderly.

Specification 2: In that James K. Blanton, Jr., 2nd Lieutenant, Air Corps, attached unassigned to Staging Project, Detachment, Hunter Field, Georgia, did, at Savannah, Georgia, on or about 6 December 1943, in a public place, to wit, a common carrier street bus of the Savannah Power and Electric Company, conduct himself in an obscene, indecent and disorderly manner with a female.

He pleaded not guilty to and was found guilty of the Specifications and Charge. There was no evidence of any previous conviction. He was sentenced "to be dismissed from the service subject to the approval of the reviewing authority". The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Antonias G. Tsongranis, the proprietor of a wine shop "at 39th and Waters Ave.", testified that at about 11:30 p.m., on or about 6 December (apparently in 1943), accused entered the shop with a colored woman, who was "a sort of mulatto" (R. 8-10). Witness knew the woman, as she had worked in the shop on occasion, sweeping and mopping (R. 8,10,37). Accused and the woman bought a bottle of wine, procured two glasses from witness, and at witness' request went into the room reserved for colored people (R. 8-10). At the time of their arrival, both were drunk, but throughout their stay in the shop, they gave no trouble and conducted themselves in an orderly manner (R. 9,36,37). Speaking of accused, witness testified that he was "not real drunk but maybe half drunk" (R.36). The couple remained in the shop until shortly before closing time, which was at midnight (R. 36).

Mr. M.W.W. Bramlitt, a bus operator for the Savannah Power and Electric Company, testified that on or about 6 December he was driving one of the company's busses. The bus had seating accommodations for 23 people. All the seats ran crosswise except that in the front there were two seats running parallel with the bus, holding two persons each (R.11,13). At about 11:30 p.m., the bus stopped at 36th Street and Waters Avenue. A colored soldier and colored civilian boarded the bus. Accused and a colored girl "who was not very dark" also entered the bus. There were no other passengers on the bus at that time. The girl told accused to get her a transfer. Accused threw a fifty-cent piece into the fare box. Witness told him that it would not fit. Witness gave accused two dimes, a nickel, and four tokens in change, and accused tried to put all of it into the box, and asked whether it was enough. Witness said it was too much, gave accused two transfers, and told him to sit down. Thereupon, accused went back to where the girl was sitting. On the way back, he stumbled into a seat twice, but witness testified to having seen people who were not drunk do the same thing. Witness could see what occurred behind him by reason of a rear view, adjustable mirror (R. 11,13, 37,38).

The seat occupied by accused and the girl was directly in back of the rear exit door on the right-hand side of the bus, in a section reserved for colored people. There was "a fairly wide space" in front of the seat. When accused arrived at the seat, where the girl already was sitting, he sat down beside her, pulled off his cap, and threw it into the aisle (R. 12-14). Then he put his arms around her and started hugging and kissing her. This continued all the way to Henry Street, where the bus picked up a white soldier and his wife and a white civilian (R. 12,13).

The soldier and his wife, each of whom testified, were Private and Mrs. John Klima (R. 24,25,26,30). He was a member of the 312th Airdrome

Squadron, Hunter Field, Georgia (R. 29). They sat directly behind the driver, in the seat running parallel with the bus (R. 24,26,30). They saw accused sitting with the colored girl, whom Klima described as "a light complected negro" (R. 24,25,26,30,31,35). Mrs. Klima testified that accused kept kissing the colored girl on her neck and ears (R. 24, 25). Klima corroborated this and added that when the girl faced accused, he would kiss her mouth (R. 30,34). He had his right arm around the girl's shoulders and was leaning over against her (R. 25,30). She seemed to be enjoying the hugging and kissing (R. 34).

Both Private and Mrs. Klima saw accused put his left hand under the girl's dress and feel up her left leg (R. 24,25,27,29,30,31). Mrs. Klima testified that accused "was going up her leg" (referring of course to the colored girl's leg) and that he was "starting to get fresh with her" (R. 27). He repeated this conduct during the whole trip (R. 28,29,30,31). Klima testified that accused "played about the middle of her leg" (R.30). The girl's dress was "up above her knees". When she saw Private and Mrs. Klima looking at her, she pulled her dress down and crossed her legs, and when she thought they were not looking, she opened them again (R. 35). Mrs. Klima was so shocked and upset that she cried (R. 24,25,28,32,33).

At "Oglethorpe and East Broad", the bus picked up two white girls. They sat opposite Mrs. Klima, noticed and talked about the conduct of accused and the colored girl, and appeared to be "shocked" (R. 12,25,27,38). Mrs. Klima complained to Bramlitt, the bus driver, who looked in the rear view mirror and saw that accused had his hand up under the girl's dress (R.12,13,14,31,37,38). Bramlitt then drove to a point across the street from police headquarters and hailed a policeman (R. 12,24,38). Klima testified that when the bus stopped near the police station, accused "stopped except for kissing her", but continued the kissing even after the arrival of the police on the bus (R. 32).

About ten minutes elapsed between the time when accused and the colored girl boarded the bus and the time of its arrival near the police station (R. 12,31). Bramlitt "could not say" whether accused and the girl were drunk (R. 37). He did not hear any boisterous or loud talking, "or anything of that nature" (R. 38).

Three members of the Savannah police force, responding to Bramlitt's summons, saw accused and the colored woman sitting in the bus. All three testified that he had his arm around the back of the seat and that his hand was on her shoulder (R. 15,17,18,22). He was not otherwise disorderly and not boisterous (R. 15). Officer John P. Cone described the girl as of a "sort of ginger cake color" (R. 18), which he defined as a "sort of a bright copper color" (R. 40). Officer G.C. Key testified that the woman was drunk (R. 22,23), and each of the three officers testified that accused was drunk. Key stated that accused "was real

drunk and did not know what he was doing" (R. 21,22). Officer C. C. Floyd testified that accused "was very much under the influence of whiskey, to the extent he did not know what he was doing" (R.15). At one point in his testimony, Cone stated that accused was drunk (R. 39,40), and at another point that he was "pretty well drunk" (R. 18). Cone smelled "some kind of intoxicant" on accused's breath, and saw a bottle in which there remained about a half pint of wine (R. 40). Inferentially, the bottle was in accused's possession.

Accused and the girl were placed under arrest, removed from the bus, and taken to the police station (R. 15-17,21). When taken from the bus, accused asked what the trouble was, but made no resistance (R.15,18). Cone took him "by the shoulder and took him out" (R. 18). Between the bus and the police station, a distance of about 70 feet, accused staggered (R. 16,18,39). At the door of the police station, accused hesitated and said he didn't think he was "going in there". However, he was not disorderly. The officers took him by the arm and "sort of pushed him on in" (R. 15,16,18).

It was stipulated between the prosecution and defense that accused was given an alcoholic blood content test, which revealed "three point zero milligrams per hundred cc's of blood". The stipulation further stated that such a blood content would be "indicative of drunkenness" to the average person, but that the test cannot be considered as conclusive evidence of drunkenness, since "one man having this much in his blood would be drunk while another man would not" (R.40).

The record shows that during the trial the court left the courtroom and went to view the bus for the purpose of re-enacting the scene and substantiating the testimony of the witnesses (R. 35).

Captain Julian R. Abernathy, Staging Project Detachment, Hunter Field, Georgia, testified for the defense. In substance his testimony was as follows: He was the Officer-in-Charge of the Flight Test Section. About four weeks before the trial, and after 6 December, accused was sent over to that section for duty. While there, accused has flown with a number of officers, including witness, and they "have not had cause for any complaint". Accused is a likeable chap, who always has done what he was asked to do and whose conduct while in the section has been that of a gentleman. Witness has not been out with accused socially, and their contact has been "merely on the line". Witness did not know accused before his detail to the section. Witness intends to request that accused be assigned permanently to the section (R. 46,47).

Second Lieutenant John E. Lawyer, Flight Test Section, Hunter Field, Georgia, a witness for the defense, testified in substance as follows:

He has known accused at the Flight Test Section for about a month. Most of their association has been "on the line", although witness has talked and played cards with accused. He has not been out socially with accused. On one occasion witness allowed accused to fly his plane, and accused "proved to be a good flyer". In the opinion of witness, accused is "a good boy and a regular fellow" and witness has not seen any conduct on the part of accused which would be "unbecoming a gentleman" (R. 48,49).

With the consent of the prosecution, the defense counsel introduced in evidence a signed statement made by Second Lieutenant E. C. Jones, Jr., Air Corps. In substance the statement is as follows: He has known accused for a period commencing four months prior to 3 January 1944, during which period he served as accused's co-pilot in a B-26 Group, training at Barksdale Field. He has "never come in contact with anyone of finer character, more possessing traits of a gentleman, superior to those of" accused. In addition, accused "was energetic, possessed the qualifications of a leader and was untiring in his efforts of perfecting a perfect crew to engage in combat overseas". He has never known accused "to do anything out of line or to conduct himself other than as a gentleman". All the men of the group will substantiate "each and every statement herein", and all realize that accused's qualifications "would be of a considerable asset to crews and units overseas" (R. 50).

His rights having been explained to him, accused elected to remain silent (R. 51).

4. The undisputed evidence shows that at the place and time alleged, accused was drunk, and was hugging, kissing, and "feeling up" the leg of a girl on a public bus, in the view of several passengers and of the bus driver. Although no witness testified directly that accused was in uniform, the evidence justifies an inference that he was; indeed, no other inference would be reasonable in the light of the testimony. In the opinion of the Board of Review, his conduct was unbecoming an officer and a gentleman and violated Article of War 95.

5. Some matters of procedure require comment.

a. After the arraignment of accused, the prosecution asked for a continuance for one week in order to secure certain civilian witnesses. Counsel for the accused objected to the continuance upon the ground that witnesses who could testify for the defense might not be present at that time. The court granted the motion (R. 4,5). In the opinion of the Board of Review the court's action was proper. Whether a continuance shall be granted is a matter for the court's discretion, and unless there has been an abuse of discretion and substantial prejudice to the accused, the action

of the court should not be disturbed. In the present case the court acted upon good grounds. If there was danger that defense witnesses then present at the base might be transferred, the defense counsel could have had their depositions taken, and, if necessary, he could have obtained a further continuance in order to procure depositions from distant witnesses (A.W. 25). When the court convened after the continuance, he appeared ready to proceed with the case. No prejudicial injury to the accused is disclosed.

b. The defense moved to strike out Specification 2 in that it was "merely cumulative" and "fully covered by Specification 1" (R. 6). The motion was overruled (R.7). In the opinion of the Board of Review, the court's ruling did not constitute error. It is true that, in general, one transaction should not be made the basis for an unreasonable multiplication of charges (MCM, 1928, p. 17). But the 1928 Manual does not attempt to explain the legal consequences of duplicitous charging. However, resort to the 1921 Manual makes it clear that where the same act in its different aspects is charged as constituting two or more offenses, it is not error for the court to find the accused guilty of all the specifications, but punishment may be imposed with reference to the act in its most important aspect only (MCM, 1921, par. 66). This limitation on punishment is carried into the 1928 Manual (MCM, 1928, par. 80a). In the present case, dismissal was mandatory for either offense.

c. At the conclusion of the prosecution's case, the defense filed a "motion to dismiss". The motion was based upon two grounds: first, insufficiency of evidence; secondly, that, at the time of the investigation of the charges, accused did not have an opportunity to cross-examine any of the witnesses (R. 40). No comment is necessary with reference to the first ground. With reference to the second ground, the investigating officer, First Lieutenant John T. Collins, Guard Section, Hunter Field Base Detachment, Third Air Force Staging Wing, Hunter Field, Georgia, was sworn as a witness. He testified that all statements of the witnesses were shown to accused and that accused on several occasions was asked whether he wanted to examine any of the witnesses, of which opportunity he did not avail himself. Lieutenant Collins testified further that when he interviewed the various witnesses, accused was not present, and that he did not offer accused an opportunity to accompany him upon his investigatory trips (R. 43). The court denied the motion (R. 43). Despite the absence of accused from the interviews, the testimony of Lieutenant Collins discloses that Article of War 70 and paragraph 35a of the Manual for Courts-Martial were substantially complied with (CM 238138, Brewster). The court's action, therefore, was correct.

d. As noted, the court sentenced accused "to be dismissed from the service subject to the approval of the reviewing authority" (R. 57). This sentence is incorrect in form, but its meaning is so obvious that there

appears to be no necessity to return the record for correction.

6. Attached to the record of trial is a recommendation for clemency signed by eight of the nine members of the court. In this document, attention is called to the previous good record of accused and the cost to the Government of having trained him as a combat pilot. The document recommends suspension of the dismissal and the imposition of the maximum "fine" permissible, restriction to the limits of the base for the maximum time permissible, and denial of the right to promotion for the maximum time permissible. The trial judge advocate joined in the recommendation.

Major William A. Ward, Jr., Air Corps, special defense counsel, filed a request that accused be released and ordered to combat duty. The letter stressed the flying ability and previous good character of accused. It is attached to the record. A plea for clemency filed by accused is also attached to the record.

7. War Department records show that accused is 23 years old. He graduated from high school and attended college for 6 months. He served as an aviation cadet from 28 March 1942 until 13 December 1942, at which time he was appointed a second lieutenant, Air Corps Reserve, and immediately entered upon active duty.

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

Lucy C. Zan, Judge Advocate.
Wm. Turnbull, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

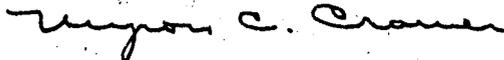
War Department, J.A.G.O., 9 - MAY 1944 - To the Secretary of War.

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 James K. Blanton, Jr. (O-667922), 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. Accused is a trained bomber pilot, 23 years old, and of previous good character. According to the defense counsel, accused's misconduct occurred on the eve of his departure for overseas. The trial judge advocate, "special" defense counsel, and eight of the nine members of the court joined in recommending clemency. Although the conduct of accused was deplorable, I believe that he may be of further value to the service as an officer and that under the circumstances a suspension of the sentence will satisfy the demands of justice. I therefore recommend that the sentence to dismissal be confirmed but that the execution thereof be suspended during good behavior.

3. Consideration has been given to a letter dated 18 March 1944 from Mrs. May W. Blanton, accused's mother, to the President. The letter accompanies the record.

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.

4 Incls.

- 1-Record of trial.
- 2-Dft. ltr. sig. of S/W.
- 3-Form of action.
- 4-Letter from Mrs. Blanton dated 18 March 1944.

(Sentence confirmed but execution suspended. G.C.M.O. 263, 6 Jun 1944)

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

(229)

SPJGN
CM 251409

UNITED STATES)

v.)

Captain EDWIN E. CLARK)
(O-517404), Medical)
Administrative Corps.)

24 MAR 1944

SEVENTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Camp Hale, Colorado, 18 and
24 February 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL 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 Captain EDWIN E. CLARK, MAC, Station Hospital, 1758 SU, Camp Hale, Colorado, did, without proper leave, absent himself from his command at Camp Hale, Colorado from about 6 December 1943, to about 17 December 1943.

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

Specification 1: In that Captain EDWIN E. CLARK, MAC, Station Hospital, 1758 SU, Camp Hale, Colorado, did, at Camp Hale, Colorado, on or about 13 January 1944, feloniously embezzle by fraudulently converting to his own use two hundred and fifty-seven dollars and fifty cents (\$257.50), lawful money of the United States, the property of the Officers Mess, Station Hospital, Camp Hale, Colorado, entrusted to him by the said Officers Mess, Station Hospital, Camp Hale, Colorado.

Specification 2: In that Captain EDWIN E. CLARK, MAC, Station Hospital, 1758 SU, Camp Hale, Colorado, did, at Camp Hale, Colorado, on or about 13 January 1944, feloniously embezzle by fraudulently converting to

his own use sixty-six dollars (\$66.00), lawful money of the United States, the property of the Officers Mess (Club), Camp Hale, Colorado, entrusted to him by the said Officers Mess (Club), Camp Hale, Colorado.

The accused pleaded not guilty to, and was found guilty of, each of the Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence, but remitted the forfeiture of all pay and allowances and the confinement imposed, and forwarded the record of trial as thus modified for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, who was attached to the Station Hospital, 1758th Service Unit, Camp Hale, Colorado, went from "dy to AWOL as of 1400 6 December 1943". He "voluntarily returned to military control" on 17 December 1943 at Camp Carson, Colorado (R. 23; Exs. 1-2).

Some time prior to 1 November 1943 he had been detailed as mess officer of the Officers Mess at the Station Hospital. In that capacity it was his duty to collect bills owed to the mess by its patrons and also to collect monthly dues owed by officers as members of the Camp Hale Mess (Club). He was accountable for these monies to the commanding officer of the Station Hospital (R. 22-23; Ex. 3).

Prior to 3 December 1943 all sums belonging to the "Mess Fund" had been held jointly by the accused and one Sergeant Joseph W. Crosby. On that date the accused was given exclusive possession. Certain sums which had not as yet been deposited in the Mess Fund's bank account were then turned over to him. In the ensuing three days he collected several additional amounts in payment of mess bills. As of 6 December 1943 he had thus received cash in the net sum of \$257.60 and checks aggregating \$131.50. None of this money was deposited to the credit of the Mess Fund or accounted for otherwise (R. 22-23; Ex. 3).

On 3 December 1943 Sergeant Crosby had also turned over to the accused another \$62.00 in cash and \$30.00 in checks forming part of the Club Dues Fund. During the next three days the accused was paid \$4.00 more in dues, making a total of \$96.00. This sum, too, was not deposited in the bank or accounted for otherwise (R. 22-23; Ex. 3).

As soon as it was apparent that the accused was absent without leave, his personal belongings, which included a foot locker, were removed from his quarters and placed in a storage-room for safekeeping. After his return to military control, the foot locker was on 7 January

1944 opened by Captain Adolf M. Geyer and Lieutenant Herman M. Vetterling, the Adjutant and Billeting Officer respectively at Camp Hale. A manila folder was found containing ten cents in cash and \$131.50 in checks belonging to the Mess Fund and \$30.00 in checks belonging to the Club Dues Fund (R. 26-28, 32; Ex. 4).

The recovery of these sums still did not account for \$257.50 in cash belonging to the Mess Fund and \$66.00 in cash belonging to the Club Dues Fund. Colonel Edwin R. Strong, the commanding officer of the Station Hospital, accordingly directed Captain Geyer, as Adjutant, to prepare and serve upon the accused a written demand for the payment of the shortage. These instructions were complied with on 13 January 1944. The instrument presented to the accused alleged the total unaccounted for collections to be \$355.75. This figure was based upon a different method of computation and was slightly in excess of the total comprised of \$257.50 in mess dues and \$66.00 in club dues. After having read the demand, the accused was asked "what his pleasure was in disposing of the matter". His reply was, "I have no funds and the only funds that I have or know anything about are in my foot locker in my quarters" (R. 24-26; Exs. 5-6).

4. The accused, after he had been advised of his rights relative to testifying or remaining silent, took the stand on the single issue raised by Charge I and the Specification thereunder. He explained his absence without leave as follows:

"On or about 3:30, November 29, 1943 I was informed by the Hospital Adjutant, Captain Geyer, that beginning with breakfast December 1st, the consolidated messes would start to function. During this period and within that period it necessitated transferring equipment and stores or stocks from the officers' mess to the nurses mess, the checking of the messes, the equipment of the messes and then having them consolidated for the benefit of the medical supply. These two messes, the mess hall of the officers' club and the nurses' mess hall were quite a distance apart.

* * * * *

"We had to transfer by medical carts, dishes, pots and pans, boilers and so forth which necessitated my continual running back and forth. On this particular day, December 6th, 1943 we had moved, with the assistance of K.P.'s, the desks and typewriter, having had a new room off this new mess hall which is of a temporary capacity, consisting of a chair and a small stool or ottoman. It had been a room used by one of the nurses as quarters. At about 4:00 P.M. in the afternoon on December 6th I recall speaking to Captain Geyer, who, at the time, was in the

officers' club which is adjacent to our mess hall and he informed me at the time that I had been assigned two additional duties, such as postal officer and billeting officer of the officers' barracks. At the time I left him I was on my way immediately, I should judge four or five minutes or thereabouts. I recall going to the mess office, our newly formed mess office. * * * That was my last recollection until approximately 3:00 A.M. on the morning of December 17th. I was in my own home and my wife had me by the hand. I had just come in the house approximately 5 minutes or 10 minutes before. I had gotten out of a taxicab and had entered my house. I had no recollection of where I had been or ever having left Camp Hale or the vicinity of the officers' club mess hall. My wife put me to bed at about somewhere approximately 8:00 A.M. in the morning. She had informed me that the Provost Marshal and one of the other officers from Camp Carson had been there at the house two days prior to see if I had been home or she had been in contact with me which she had not. She had agreed that if she had gotten in contact with me or if I had returned home she would immediately notify them. At about 8:00 o'clock she called Camp Carson and tried to contact Major LARSON, who was the Provost Marshal, and at the time she was unable to get him but left word that she would call back a little later when they had expected the Major to be in. I believe it was around 9:00 o'clock that she had contacted the Major. He asked if I was in a physical condition to come out to the post myself. She said she did not think I was. I appeared in a very nervous condition and had four blocks from the house to walk to the bus. He said that he would arrange to have an ambulance from the post come to my home and pick me up which was done. The ambulance and the medical officers and, I believe, two attendants, came and I was taken to the Camp Carson hospital on a stretcher and placed in the officers' ward at the Station Hospital.

This loss of memory may have been attributable to a head injury sustained in an automobile accident on 14 May 1943*. In rebuttal the prosecution offered the testimony of First Lieutenant Manuel Sall, M.C. He was of the definite opinion that the accused was not suffering from any type of amnesia with which he was familiar. He was not interrogated as to his qualifications as an expert, but he did state that he was the Chief of the Neuropsychiatric Section of the Station Hospital (R. 36-37, 43-47).

The testimony previously adduced by the prosecution disclosed that the keys to the foot locker had been found lying "up on a two by four" in the accused's quarters; that they had been placed in an uncovered cardboard box; that both the foot locker and the box had been removed

to the storage-room; that the latter was not used merely for the safe-keeping of personal belongings but "for all purposes"; and that the door to it was closed with an "ordinary" and "inexpensive" lock, one of the keys to which was in the possession of an orderly. With this background the defense offered evidence that civilian contractors were engaged in construction work near the accused's quarters; that they occasionally came into the building to use the latrine; that one of them even entered the accused's room for the purpose of obtaining some drinking water; that everyone had access to the key to the storage-room which was hung on a nail over the nearby door of a utility room; and that the funds of at least one other officer had been stolen from quarters during the month of December 1943 (R. 36-40, 48; Ex. F).

5. Specification 1 of Charge I alleges that the accused "did without proper leave, absent himself from his command - - - from about 6 December 1943, to about 17 December 1943". This offense is laid under Article of War 61. Specification 1 of Charge II alleges that the accused on or about 13 January 1944 did "feloniously embezzle by fraudulently converting to his own use" \$257.50, "lawful money of the United States, the property of the Officers' Mess, Station Hospital, Camp Hale, Colorado, entrusted to him by the said Officer's Mess . . .". Specification 2 of Charge II alleges that the accused on the same day did "feloniously embezzle by fraudulently converting to his own use" \$66.00, "lawful money of the United States, the property of the Officers Mess (Club), Camp Hale, Colorado, entrusted to him by the said Officers Mess (Club) . . .". These embezzlements are charged in violation of Article of War 93.

Both the absence without leave and the shortage in the Mess and Club Dues Funds are admitted, but the accused seeks to avoid the logical consequences flowing from these derelictions of duty by pleading that he was suffering from amnesia when he left the Station Hospital on 6 December 1943 and that the missing funds were stolen from him. Neither contention can prevail.

The court-martial gave no credence to the accused's testimony with respect to amnesia, and there is nothing in the record which reflects unfavorably upon their decision. The rebuttal evidence introduced by the prosecution completely exploded the hypothesis of a mental lapse. While Lieutenant Sall was not qualified as an expert, the defense did not object to his testimony and the fact that he was a member of the Medical Corps and Chief of the Neuropsychiatric Section of the Station Hospital lends great weight to his opinion. Even in the absence of his testimony, however, the defense advanced might well have been considered dubious and desperate.

The argument that the missing funds may have been purloined is even more far-fetched. Obviously many things may have occurred. The fact remains that there was no evidence before the court tending to show that the foot locker contained any of the missing monies at the commencement of the accused's absence without leave. The prosecution proved that a shortage existed, and no satisfactory explanation was ten-

(234)

dered. A prima facie case was thus presented. As was said in CM 185046 (1929), Dig. Op. JAG, 1912-1940, sec. 452 (3),

"Upon the trial of a finance officer charged with embezzlement of Government funds intrusted to him it was shown that there was a shortage in his accounts on the date he was relieved from duty at his station. He failed to deliver or turn over the funds covering this shortage although proper demand therefor was made. Held, that under the provisions of paragraph 10, AR 35-180, and sec. 94, Criminal Code (35 Stat. 1106), accused's failure to transfer to his successor the funds intrusted to him as finance officer constituted prima facie evidence of embezzlement."

The following quotations from Dig. Op. JAG, 1912-1940, sec. 451 (20) are also pertinent:

"Any adult man who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, cannot complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence. CM 123488 (1918); 203849 (1935).

"An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting. * * * (CM 123492 (1918))."

The prima facie case of embezzlement established by the prosecution has not been successfully rebutted or even mitigated by the evidence introduced on behalf of the accused. The record, therefore, abundantly supports the findings of guilty of all Charges and Specifications.

6. The accused is about 45 years of age. The records of the War Department show that he had enlisted service in the Navy from 23 October 1917 to 27 September 1919 and in the Regular Army from 9 February 1922 to 29 January 1925 and from 16 February 1925 to 6 April 1943; that he was commissioned a captain on 7 April 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 legally sufficient to support the findings and the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 61 or Article of War 93.

Abner E. Lipscomb Judge Advocate

William H. Hamrell Judge Advocate

Gabriel H. Golden Judge Advocate

(236)

SPJGN
CM 251409

1st Ind.

War Department, J.A.G.O., 1 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 Captain Edwin E. Clark (O-517404), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence of dismissal 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,
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. 273, 8 Jun 1944)

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

(237)

21 APR 1944

SPJGH
CM 251423

UNITED STATES)

v.)

Private First Class THOMAS
A. PIASECKI (16065580),
Company C, 323rd Infantry.)

81ST INFANTRY DIVISION

Trial by G.C.M., convened at
Camp San Luis Obispo, Cali-
fornia, 21 and 22 February
1944. Dishonorable discharge
and confinement for life.
Penitentiary.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class THOMAS A. PIASECKI, Company "C" 323d Infantry did, at San Luis Obispo, California, on or about 13 February 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. CLARA R. FREEMAN.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 13 February 1944, Mrs. Clara R. Freeman, whose husband had been at sea two and a half months in the "Merchant Marines", resided at 1124 Mill Street, San Luis Obispo, California, with her two daughters, respectively 10 and 15 years of age. At about 10:40 p.m. she and her daughters returned home from a visit with relatives in Santa Maria. "Private Scholl" and his wife, who lived with Mrs. Freeman, were there. Right after reaching home Mrs. Freeman started to walk to the home of Miss Dorothy Hill, 870 Mill Street, to tell Miss Hill, a co-worker at the Camp San Luis Obispo laundry, that she was not going to drive her car to work the next day. Mrs. Freeman wore a suit and top coat.

She had her arms through straps in the coat and wore it as a cloak. When she had gone a block or more she realized that someone was behind her, and then observed that it was a soldier. She walked faster, but the soldier overtook her and grabbed her. He struck her and knocked her down; then placed his left hand over her mouth. The soldier was behind her, pushing her down, told her not to scream, and said that he had a knife, would kill her if she screamed, and that he had "one already in the General Hospital for resisting" him. Her top coat was thrown off her and the strap broke. The soldier kept one hand over her mouth, and was grasping her tightly with the other arm. He kept hitting and threatening Mrs. Freeman, and dragged her, "pushing and pulling", toward the back of a house. He told her not to look at him and threatened to kill her. She could not call out because of his hand over her mouth. The soldier took her to a corner of the house near the rear steps, where there was a brick walk or floor (R. 5-15, 43).

When they reached this spot, the soldier turned Mrs. Freeman toward the house and tied a handkerchief around her mouth so she could "mumble words out" but could not call out. He seemed very strong. He continued to strike her and threaten to kill her. She believed he would do it. He told Mrs. Freeman to take off her under garments, but she refused. She was menstruating at the time and told him she was "sick", but did not explain to him what she meant. He had her "in the back" and was "punching" her. He was "exposed" and "had" her underclothing, which consisted of "briefs" tight around the leg. From fear she pulled her "under garments" about "half down" on her thigh. By threatening her life he made her remove her sweater and loosen her brassiere, and he "started to molest" her on the breast with his mouth. He then told her to "get down" but she refused. He pushed her and grabbed her ankles so that she fell on her back. Her head struck the bricks and she was knocked out for a "few minutes" or "for a second or so". As soon as she regained consciousness she knew he was indulging in sexual intercourse with her. When he had finished, he stood up and said "Get up". When she stood up, he removed the handkerchief. He told her not to move or look at him. When he was ready to go he told her to count to 50 before leaving and that if she tried to follow him, he would kill her. He stated "Remember, I have a knife". She said to him "you dog" several times. She was "very scared" all the time. There were no lights on in the house or "adjoining" houses; "It was all in darkness", although the street in front of the house was lighted. Later, Mrs. Freeman found her left cheek swollen, her knees bruised, her ankle swollen, her lip cut and swollen and one of her stockings torn. Her head and the back of her neck hurt. The bruises and sore places were caused by the "punches" the soldier gave her (R. 15-24, 37, 39-40).

When the soldier left, Mrs. Freeman was arranging her "suit coat" and found a fountain pen (Ex. F) with the name "Tom A. Piasecki" impressed

upon it in gold print. The pen was in the neck of her suit. She walked slowly to the front of the house and found her bag and top coat. She did not want to go home and let her daughters see the condition she was in, so she proceeded to Miss Hill's house. When she arrived there, Miss Hill took her to the bathroom. When Miss Hill asked "What is the matter?", Mrs. Freeman could not talk at first. Then she told Miss Hill what had happened. Mrs. Freeman took a douche. Miss Hill suggested that Mrs. Freeman go to the police station, but she thought it would be embarrassing and did not want to go. Mrs. Freeman then went to the police station with Corporal Donald Elbert, who was in Miss Hill's "sitting room". At the police station Mrs. Freeman made a report of "the attack". She then went to a hospital where a doctor examined her; returned to the police station, where "the Provost Marshal" interviewed her; and then went to the scene of the attack with a police officer, the provost marshal and Corporal Elbert. They found one of her combs and a hair ribbon. While they were looking for her watch, she found it in her pocket with the crystal gone. She did not know how it got there. Mrs. Freeman then returned home (R. 24-31, 53).

On cross-examination, Mrs. Freeman stated that she did not see or feel a knife or other weapon in the possession of the soldier and that the handkerchief was quite tight on her mouth so that she could "just mumble" (R. 34-38).

Corporal Elbert observed that when Mrs. Freeman returned to the room where he was, about 20 minutes after she came to Miss Hill's house, she was "highly nervous", her face was flushed, and her eyes "unusually large". On the way to the police station, her voice was "very trembling" and she talked "jerky talk". Miss Hill noted that she was excited and her hair "all messed up". Miss Hill testified that previous statements she had made to the effect that she was alone that night and that Corporal Elbert came to her house with Mrs. Freeman, were false (R. 44-56).

When Mrs. Freeman was at the hospital that night she was examined by Dr. Herbert Bauer, who took a vaginal smear for laboratory examination. He found no scratches or bruises around the genital organs. The smear was transmitted to a public health laboratory, and found to contain a few spermatozoa. This indicated that intercourse had probably taken place within a few hours (R. 92-105).

At about 12:30 a.m. on 14 February, Second Lieutenant Clarence T. Miller, assistant provost marshal, Camp San Luis Obispo, went to the police station in response to a call. He talked to Mrs. Freeman, examined the pen (Ex. F) which she had found, and went to the scene of the attack. He observed some red spots, apparently blood, on the bricks where Mrs. Freeman had been attacked. Later that morning Lieutenant Miller learned that accused, a member of Company C, 323rd Infantry, was of the same name as that

on the fountain pen. He then called on the commanding officer of the 323rd Infantry, who, after checking the classification card of accused, sent Lieutenant Miller and another officer to Company C. At about 7:30 or 8:00 a.m. Staff Sergeant Edmund A. Dettloff, supply sergeant of Company C, conducted them to the bed of accused. Among his clothes they found a cotton khaki shirt (Ex. J) and cotton trousers (Ex. L) on a hanger. The shirt was marked "P-5580". Near the fly of the pants were some dark spots. Accused, who was out on a practice march, was brought back to camp. Nothing was said to accused as to why he was picked up. At about 10:40 a.m. they arrived at the provost marshal's office, where Lieutenant Miller, accused and Lieutenant Colonel Maurice A. Wolf, camp provost marshal, went into a side room. Lieutenant Miller told accused that under the 24th Article of War he was not required to make any statement that would incriminate himself, and "covered the contents" of the 24th Article of War. Lieutenant Miller, without telling accused that he was suspected of crime, asked him to account for his actions in town from the previous Saturday (12 February). Accused recounted the places he had been on Saturday and Sunday up to attending a show at the "U.S.O." on Sunday night. He stated that after the show he began to wander around the streets, and then said, "I think I know what you have me here for". When asked what he meant he said "he had molested a lady", and gave an account of what had happened, "similar" to what Mrs. Freeman had told Lieutenant Miller the night before. Accused said he had never committed "any act like this" before, it was "just a sudden impulse", and he had not been drinking. Lieutenant Miller wrote down the substance of what accused said, and the statement (Ex. G) was signed by accused. Accused was then placed in confinement. That afternoon Colonel Wolf, Lieutenant Miller, Captain Roland M. Ness, provost marshal of the 81st Division, and another officer, made a further examination of the shirt and trousers (Exs. J and L). In a pocket of the pants they found a handkerchief (Ex. K), marked "P-5580", on which there were some red spots and some other "foreign material". Later in the day, a hair about eight inches long (Ex. N) was found in the handkerchief. On a later day, sample hairs (Ex. M) were obtained from the head of Mrs. Freeman (R. 56-91, 107-116).

At about 7:00 p.m. on 14 February, Mrs. Freeman was taken to an office at the camp stockade, where four prisoners (including accused) of similar appearance and about the same size were lined up facing the wall. They were directed to turn around. Mrs. Freeman could not at first identify the man who attacked her, as she had not seen the man straight in the face, but only in profile. After a time she pointed out accused as the man, as best she could remember, because he had the same profile (R. 32-34, 134).

On 15 February, Second Lieutenant Woodrow A. Schmitz, investigating officer, interviewed accused at the stockade, after explaining his rights under the 24th Article of War. Accused made an oral statement, and also a

written statement (Ex. O), which he signed, after reading it. In these statements, accused recounted his movements in San Luis Obispo from Saturday evening (12 February) to Sunday evening. He left the "U.S.O. club" about 11:30 p.m. on 13 February to return to camp. In walking down town he met "this woman" near Santa Rosa Street, grabbed her from the back, held her mouth shut, and told her to keep quiet as he carried a knife. They walked off the sidewalk about 10 feet. When she started to scream, he slapped her several times to keep her quiet. He had intercourse with her and she was cooperative. Accused picked her up and she rearranged her clothes. The whole affair was over in about eight minutes. Accused identified the fountain pen (Ex. F) as one he had with him that night but could not find when he returned to camp (R. 128-136).

About 17 February, Mr. David Q. Burd, chemist and ballistic expert, California State Division of Criminal Identification and Investigation, received several of the exhibits, and made scientific examinations of them. He testified as to his findings, substantially as follows: The handkerchief (Ex. K) contained a great many human spermatozoa and the dark stains on it were human blood. The spots on the trousers (Ex. L) were probably blood, but there was not a sufficient quantity present to make the tests conclusive. The hair found in the handkerchief (Ex. N) was compared microscopically with the hairs from Mrs. Freeman's head (Ex. M) and Mr. Burd found them to be human head hairs, of about the same color, and with "very great similarity between them" (R. 116-128).

4. Captain George R. Wagner, commanding Company C, 323rd Infantry, testified for the defense that the record of accused as a soldier in the field had been "very satisfactory", and his character "satisfactory". Accused was "AWOL" once for about 48 hours, but Captain Wagner knew of no "moral violations". Accused "got along very well" with the men of the company, but at times was a "little sullen" (R. 137-141).

Accused elected to remain silent (R. 141-142).

5. The evidence shows that at about 11:30 p.m. on 13 February 1944 accused overtook Mrs. Clara R. Freeman, a married woman, as she was walking along Mill Street in San Luis Obispo. He grabbed her, placed one hand over her mouth, told her not to scream, that he had a knife and would kill her if she screamed, and pulled her behind a house near the spot where he accosted her. He struck her a number of times and continued to threaten to kill her. There were no lights in the houses nearby. Accused took Mrs. Freeman to a point near the back steps of the house, tied a handkerchief tightly around her mouth, and forced her, by threats, to remove her sweater, loosen her brassiere and expose her breasts, as well as to pull

(242)

down her underclothing. Mrs. Freeman was afraid he would kill her. She was menstruating and told accused she was "sick". After placing his mouth on her breast, accused threw her to the ground and had sexual intercourse with her. He then removed the handkerchief from her mouth, threatened to kill her if she tried to follow him, and left the scene. The blows struck by accused and the force used resulted in the following injuries to Mrs. Freeman: her left cheek and her ankle were swollen, her knees were bruised, her lip was cut and swollen, and her head and the back of her neck were sore.

Rape is the unlawful carnal knowledge of a woman by force and without her consent (M.C.M., 1928, par. 149b). The evidence clearly shows that accused was guilty of rape as alleged.

6. The charge sheet shows that accused is 25 years of age, and enlisted 16 June 1942, with no prior service.

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

Samuel M. Driver, Judge Advocate

Robert L. Cannon, Judge Advocate

J. P. Lott, Judge Advocate

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

(243)

SPJGQ
CM 251451

29 MAR 1944

UNITED STATES)

13TH ARMORED DIVISION

v.)

Trial by G.C.M., convened at
Camp Bowie, Texas, 3 February
1944. Dismissal, total for-
feitures, and confinement for
two (2) years.

First Lieutenant JOSEPH A.
MONAGHAN (O-1011439), 13th
Armored Division.)

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 I: Violation of the 61st Article of War.

Specification: In that First Lieutenant Joseph A. Monaghan, Headquarters, 13th Armored Division, Camp Bowie, Texas, did, without proper leave, absent himself from his organization and station at Camp Beale, California, from about 17 November 1943, until he was apprehended at San Francisco, California, on or about 8 December 1943.

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

Specification 1: In that First Lieutenant Joseph A. Monaghan, Headquarters, 13th Armored Division, Camp Bowie, Texas, then a member of Army Ground Forces Replacement Depot #2, Fort Ord, California, did, at Fort Ord, California, on or about 24 October 1943, with intent to defraud wrongfully and unlawfully make and utter to the Fort Ord Exchange, Fort Ord, California, a certain check in words and figures to wit:

McDowell County National Bank
Welch, West Virginia

NO _____
FORT ORD, CALIFORNIA Oct 24 1943

PAY TO THE
ORDER OF Cash \$10.00

(244)

Ten ----- no/100 DOLLARS

/s/ Joseph A. Monaghan
1st Lt. O-1011439

ARMY BRANCH MONTEREY COUNTY TRUST & BANK
SAVINGS

and by means thereof, did fraudulently obtain from the Fort Ord Exchange, Fort Ord, California, currency of the United States of the value of \$10.00, he, the said First Lieutenant Joseph A. Monaghan then well knowing that he did not have and not intending that he should have, sufficient funds in the McDowell County National Bank, Welch, West Virginia, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging that check dated October 24, 1943, payable to the order of Cash, was made and uttered to the Fort Ord Exchange, Fort Ord, California, at Fort Ord, California, whereby accused fraudulently obtained \$10.00.

Specification 3: Same form as Specification 1, but alleging that check dated October 28, 1943, payable to the order of Cash, was made and uttered to the Fort Ord Exchange, Fort Ord, California, at Fort Ord, California, whereby accused fraudulently obtained \$10.00.

Specification 4: Same form as Specification 1, but alleging that check dated October 28, 1943, payable to the order of Cash, was made and uttered to the Fort Ord Exchange, Fort Ord, California, at Fort Ord, California, whereby accused fraudulently obtained \$10.00.

Specification 5: Same form as Specification 1, but alleging that check dated October 30, 1943, payable to the order of Cash, was made and uttered to the Fort Ord Exchange, Fort Ord, California, at Fort Ord, California, whereby accused fraudulently obtained \$10.00.

Specification 6: Same form as Specification 1, but alleging that check dated November 2, 1943, payable to the order of Cash, was made and uttered to the Fort Ord Exchange, Fort Ord, California, at Fort Ord, California, whereby accused fraudulently obtained \$10.00.

Specification 7: Same form as Specification 1, but alleging that check dated November 7, 1943, payable to the

order of Cash, was made and uttered to the Hotel San Carlos, Monterey, California, at Monterey, California, whereby accused fraudulently obtained \$10.00.

Specification 8: Same form as Specification 1, but alleging that check dated November 12, 1943, payable to the order of Cash, was made and uttered to the Hotel San Carlos, Monterey, California, at Monterey, California, whereby accused fraudulently obtained \$15.00.

Specification 9: Same form as Specification 1, but alleging that check dated November 14, 1943, payable to the order of Cash, was made and uttered to the Hotel San Carlos, Monterey, California, at Monterey, California, whereby accused fraudulently obtained \$10.00.

Specification 10: Same form as Specification 1, but alleging that check dated November 15, 1943, payable to the order of Cash, was made and uttered to the Hotel San Carlos, Monterey, California, at Monterey, California, whereby accused fraudulently obtained \$15.00.

Specification 11: Same form as Specification 1, but alleging that check dated November 17, 1943, payable to the order of Palace Hotel Company of San Francisco, was made and uttered to the Palace Hotel Company, San Francisco, California, at San Francisco, California, whereby accused fraudulently obtained \$25.00.

Specification 12: Same form as Specification 1, but alleging that check dated November 17, 1943, payable to the order of Palace Hotel Company of San Francisco, was made and uttered to the Palace Hotel Company, San Francisco, California, at San Francisco, California, whereby accused fraudulently obtained currency of the United States and services of the value of \$15.00.

Accused pleaded guilty to Charge I and its Specification, but not guilty to Charge II and its Specifications. The court initially, on 3 February 1944, found accused guilty of Charge I and its Specification, and made the following finding as to each Specification of Charge II, to wit: "Guilty, except the words 'with intent to defraud'; of the excepted words, not guilty; of the remaining words, Guilty". It also found accused guilty of Charge II. No evidence of previous convictions was introduced. Accused 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 two years. The findings and sentence were announced in open

(246)

court, and the court adjourned. On 4 February 1944, the court reconvened of its own motion to reconsider its findings. Upon opening after closed session, it was announced that the court had vacated its former findings and sentence, and found accused guilty of all Charges and Specifications. The same sentence as formerly was again imposed. The reviewing authority approved the sentence, and forwarded the record of trial for action under Article of War 48.

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

Charge I and its Specification:

Pursuant to orders of Army Ground Forces Replacement Depot Number 2, Fort Ord, California, transferring accused to 13th Armored Division, Camp Beale (near Marysville), California (Pros. Ex. B), accused left Fort Ord (near Monterey), California, 14 November 1943. (Pros. Ex. C). He was not granted delay en route or any other authority to be absent (Pros. Ex. A), but failed to report to his new station. He was entered AWOL as of 17 November on the morning report of Headquarters, 13th Armored Division, Camp Beale, California (Pros. Ex. E), and the morning report of that organization for 8 December 1943 discloses his status as changed from AWOL to arrest in quarters (Pros. Ex. F).

Charge II and its Specifications:

By stipulation (R. 15) and documentary evidence, the following facts were established:

On the dates and at the places shown, accused made and uttered his personal checks, in a total amount of \$150.00, drawn on the McDowell County National Bank, Welch, West Virginia, for amounts, and to persons or firms, as follows: To the Fort Ord Exchange, Fort Ord, California, he gave six checks for a total of \$60.00 made up as follows; on 24 October 1943, two checks for \$10.00 each (Pros. Exs. G, H, S, T), on 28 October 1943, two checks for \$10.00 each (Pros. Exs. I, J, S, T), on 30 October 1943, one check for \$10 (Pros. Exs. K, S, T), and on 2 November 1943, one check for \$10 (Pros. Exs. L, S, T). He gave the Hotel San Carlos, at Monterey, California, four checks totalling \$50.00 as follows; on 7 November 1943, one check for \$10.00 (Pros. Exs. M, U, W), on 12 November 1943, one check for \$15.00 (Pros. Exs. O, U, W), on 14 November 1943, one check for \$10.00 (Pros. Exs. N, U), and on 15 November 1943, one check for \$15.00 (Pros. Exs. P, U, W). To the Palace Hotel Company of San Francisco, California, he gave two checks totalling \$40.00, as follows; on 17 November 1943, one check for \$25.00 (Pros. Exs. R, V), and another for \$15.00 (Pros. Exs. Q, V). All of these checks were payable to the order of "cash", except the last two mentioned, which were made payable to the order of "Palace Hotel Company of San Francisco". For the \$15.00 check given the Palace

Hotel last above mentioned, accused received cash and services; for all others, cash (R. 15). Accused did not have sufficient funds on deposit in the McDowell County National Bank, Welch, West Virginia, either at the time the respective checks were made and uttered, or at the time they were presented for payment, to pay any of them (R. 15). All of the checks were presented for payment to the bank upon which they were drawn, and were returned by that bank unpaid, together with a slip showing that they were returned unpaid because of insufficient funds (Pros. Exs. G through R).

4. Defense evidence:

Accused elected to take the stand as a sworn witness in his own behalf, after his rights had been explained to him by the law member in open court (R. 16). His testimony was substantially as follows:

He failed to report to the 13th Armored Division in the first instance because he had twice wired the commanding officer, Camp Beale, requesting a five-day leave (R. 19, 20, 21, 22; Def. Exs. 1, 2). He felt sure of being granted the requested leave, and "took it for granted" he "had the leave" (R. 23). The reply to his second wire commanded him to report as ordered (R. 24). At the time he received that order, he was already four or five days late. He got excited, "and from then on, it was putting it off from one day to the next" (R. 24). He made three or four attempts to return to camp, but, as he expressed it: "I got as far as the station. I checked out of the hotel, but for some reason I would meet friends, or for some unknown reason, I would put it off. As a matter of fact, I was putting it off from one day to the next" (R. 23). He was arrested by military police at the Hotel Sir Francis Drake, in San Francisco (R. 23) on 8 December 1943 (R. 22).

At the time he made and uttered the checks at Fort Ord (between 24 October to 2 November 1943), accused did not realize they would be returned because of insufficient funds (R. 17). Sometime before 10 October, he being then on order to go overseas and in need of some special equipment, and expecting "to cash a few checks", accused wrote his sister, Mrs. O. B. Pruitt, of Raysal, West Virginia, "letting her know that I would write the checks so she could be prepared to pick them up before they were returned to me". He felt confident she would do this "because on occasions before she did the same" (R. 17). On 15 November (R. 18) he learned that the checks written on 10 October at Fort Ord had been returned for insufficient funds (R. 17) and so advised his sister (R. 18). He continued, however, to write checks, "about \$700 worth" (R. 18) before he arrived at Camp Beale (R. 19). At some time during this period he received a telegram from his half-brother telling him "to have all checks re-entered at the bank - that they would be taken care of" (R. 22). The last check, returned by the bank because of insufficient funds, was dated 17 November 1943 (R. 19).

In reply to examination by the court, accused testified that he knew at the time he wrote the checks in question that he did not have money in the bank to cover them (R. 24, 25), and also knew that it was necessary that the money be there (R. 24), but he was "quite sure" his "sister would cover the checks" for him. He testified further as follows:

"I felt it was practically the same as my money being in the bank. I felt sure of her covering the checks. She would have got the checks, but I don't know, for some error, the checks were returned. Usually the bank would have notified her that they had a check on me, and she was, more than likely waiting on this notification from the bank after I had written her. I had written her before, telling her I was going to do that" (R. 24).

It was stipulated that if present in court, accused's sister would testify as follows:

"Sometime before 10th October, 1943 I received a letter from my brother, Lt. Joseph Monaghan, telling me that he was going to write some checks, and asking me to cover them for him. This was not unusual as I had covered checks to the amount of about \$100.00 for him within the past year. Upon receiving another communication from my brother sometime in November, stating that the checks he had written were returning, and once again asking me to take care of them, I then immediately notified the bank and found out that some of his checks had been returned. I notified the bank I would take care of any checks written by him from then on. I assumed my brother would be able to take care of the checks which had returned, as they were in small denominations. From the time I notified the bank and about Dec. 12th, 1943 I picked up \$634.00 worth of checks written by my brother." (Def. Ex. 3, R. 26).

5. The accused pleaded guilty to Charge I and its Specification (AWOL), and offered no evidence inconsistent with these pleas. In addition, the prosecution introduced competent evidence into the record sufficient to prove beyond reasonable doubt that accused was guilty of absence without leave for a period of three weeks. Accused had no reasonable grounds for believing that he would be granted a leave of absence merely because he telegraphed his requests for one, and such belief, even though actually entertained, neither excuses nor extenuates the offense.

Before discussing Specifications 1 to 12, inclusive, of Charge II, on their merits, it becomes necessary to determine the legality of the procedure followed by the court in reconvening, of its own motion, to reconsider its findings and sentence, and in then finding accused guilty of all Specifications and Charges as originally drafted, after it had, by proper vote and by use of exceptions, first found him not guilty of the words "with intent to defraud" as to each Specification of Charge II, and had announced its findings and sentence in open court. The question presented for determination by this procedure is whether a court-martial which has, by proper vote, found an accused not guilty of a Specification, or has, by exceptions, or by exceptions and substitutions, acquitted him of the offense charged and found him guilty of a lesser included offense, and has announced its findings and sentence in open court, thereafter, but prior to authenticating the record or forwarding it to the reviewing authority, may reconvene and reconsider and change its findings, so as to substitute a finding of "guilty" for one of "not guilty", or so change its previous findings as to substitute a finding of guilty of the offense charged for a former finding of guilty of only a lesser included offense.

"Whenever the court has acquitted the accused upon all Specifications and Charges, the court shall at once announce such result in open court. An acquittal automatically results from findings of not guilty of all Charges and Specifications" (M.C.M. 1928, par. 78a, p. 63-64).

"Neither an acquittal nor a finding of 'not guilty' requires approval or confirmation; and neither should be disapproved. Such disapproval cannot in any event affect the finality of a legal acquittal or of a legal finding of not guilty" (M.C.M. 1928, par. 87b, p. 74).

It is also well established that by a finding of not guilty of an offense as charged, but guilty of only a lesser included offense, the court acquits of the greater offense, and places it beyond the power of the reviewing authority legally to order a rehearing and trial for the more serious offense. C.M. 145606 (1921), C.M. 159219 (1924); Dig. Ops. JAG, 1912-1940, sec. 408 (6).

It follows that a legal finding of "not guilty" by a court-martial of any offense, or of any facts alleged as an element of that offense, is conclusive and final, and operates automatically as an acquittal of such offense or element thereof. The only issue to be determined in this case is at what stage of the proceedings the court ceases to have the power to alter or change such a finding. The Manual for Courts-Martial provides that, "a court may reconsider any finding at any time before the same has been announced or the court has opened to receive evidence of previous convictions" (par. 78c, p. 65). Therefore, the court may not, upon its own motion, reconsider any

finding after it has once announced its findings, or after it has received evidence of previous convictions. This rule is reasonable. If the court were permitted to reconsider its findings after receiving evidence of prior convictions then a fundamental rule of criminal law that the prosecution may not evidence the doing of an act by showing the accused's bad character or former offenses would be violated. Furthermore, if a court-martial were permitted to reconsider a finding of not guilty, or one which is tantamount to a finding of not guilty, after announcing its findings in open court the result would be that a finding of not guilty would no longer operate automatically as an acquittal.

The rule referred to appears for the first time in the Manual for Court-Martial of 1928. It overrules a prior decision of The Judge Advocate General published in 1925 in C.M. 166782 (Dig. Ops. JAG, 1912-1940, sec. 395 (37)), which held that the court might properly revise its findings and sentence on its own motion prior to the completion of the record of trial and its transmission to the convening authority, evidently basing the decision upon a similar rule with respect to sentences previously set forth in C.M. 152731. It is well established military law that the sentence of a court-martial may be revised by the court, on its own motion, so as to increase or decrease its severity at any time prior to authentication of the record and transmission to the reviewing authority (C.M. 227580, C.M. 225364 (1942)) but not thereafter, (C.M. 233806 (1943)), except, (as provided in Article of War 40) where the sentence is less than the mandatory sentence fixed by the Article of War as the penalty for the offense upon which the conviction was had. The Manual of 1928 does not change this rule with reference to sentences but clearly prohibits the revising or changing of findings after announcing them or after receiving evidence of previous convictions.

There was no evidence of previous convictions in this case; but, the court having made and announced its findings and having determined upon and announced the sentence, it was error to thereafter attempt to make new findings of more serious import. Therefore, the findings as to Specifications 1 to 12 inclusive of Charge II (AW 96) can be approved only to the extent of the original findings which held the accused guilty, in each instance, excepting the words "with intent to defraud".

This holding is distinguishable from the holding in C.M. 236275 (1943), wherein the court reconsidered a finding, prior to its announcement in open court, changing it from "not guilty" to "guilty", which action was approved and held legally valid.

In this case, having excepted from the Specifications laid under Article of War 96 the words "with intent to defraud", the court legally acquitted the accused of "fraudulently" obtaining the money alleged to have been obtained by the worthless check or checks. C.M. 122546 (1918), Dig. Ops. JAG 1912-1940, sec. 453 (24). However, the

elimination of fraud from the Specifications by the court's findings does not affect the finding of guilty of a violation of Article of War 96 (Charge II). The passing of worthless checks without the intent to defraud may nevertheless be conduct of a nature to bring discredit upon the military service in violation of Article of War 96. C.M. 202601 (1935) Sperti; C.M. 224286 (1942) Hightower.

The accused admitted that he did negotiate the checks when he knew that he did not have sufficient funds in the drawee bank for their payment and that he had made no reasonable arrangement to have funds therein when the checks were presented.

The evidence therefore was legally sufficient to support the findings of guilty of Charge II and its Specifications as amended by the court.

6. War Department records disclose that this officer is 24 years of age and is single. He graduated from high school and attended West Virginia Mining Bureau for one year. He entered the service on 2 September 1940 and attained the grade of sergeant before being admitted to the Armored Force Officer Candidate School, at Fort Knox, Kentucky, during the early part of 1942. He was commissioned temporary second lieutenant, Army of the United States, on 4 July 1942, and entered on active duty the same day. He was promoted to the grade of first lieutenant on 29 December 1942.

7. The court was legally constituted. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, and of Charge II, and legally sufficient to sustain the findings of guilty of Specifications 1 through 12, Charge II, except the words "with intent to defraud". It is legally sufficient to support the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 96.

William A. Pounds, Judge Advocate.

Earle Stephum, Judge Advocate.

Herbert B. Rudeman, Judge Advocate.

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 First Lieutenant Joseph A. Monaghan (O-1011439), 13th Armored Division.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications, except the words "with intent to defraud" in each of Specifications 1 to 12, inclusive, of Charge II; that it is not legally sufficient to support the findings of guilty of the words excepted from these Specifications; and that it is legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but, in view of the fact that, as a result of the holding of the Board of Review, this officer stands acquitted of any intent to defraud in making and uttering the checks in question (Specifications 1 to 12, inclusive, of Charge II), and that his previous military and civil record has been good, I further recommend that the sentence to forfeiture of all pay and allowances due or to become due, and to confinement be remitted, and that, as thus modified, the sentence be carried into execution.

3. The interest of Senator Kilgore and of Representative John Kee, both of West Virginia, in this case, as evidenced by telephone conversation, and the attached letter from Representative Kee, has been considered. Consideration has also been given to the attached communications delivered to The Judge Advocate General by Mr. O. B. Pruett, brother-in-law of accused, and a Mr. Mitchell.

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

Myron C. Cramer.

Myron C. Cramer,
Major General,

The Judge Advocate General.

13 Incls.

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|--|-------------------------|
| 1 - Record of trial | |
| 2 - Dft. ltr. for sig. S/W | |
| 3 - Form of Executive action | 11-Ltr. from H.H. Swann |
| 4 - Ltr. from Cong. John Kee dated 10 Mar. 44 | dated 29 Feb. 44 |
| 5 - Ltr. from R.E. Salvati dated 25 Feb. 44 | 12-Ltr. from B.M. Stone |
| 6 - Tlgm. from John Scanlon dated 11 Dec. 43 | dated 26 Feb. 44 |
| 7 - Ltr. from R.L. Page dated 29 Feb. 44 | 13-Ltr. from G. Pile |
| 8 - Ltr. from T.A. Johnston dated 28 Feb. 44 | dated 26 Feb. 44 |
| 9 - Ltr. from C.E. Walker dated 28 Feb. 44 | |
| 10 - Ltr. from N.H. Dyer, M.D., dated 29 Feb. 44 | |

(Findings of guilty of the words "with intent to defraud" as to each of Specifications 1 to 12, inclusive, of Charge II, disapproved. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 304, 17 Jun 1944)

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

(253)

SPJGV
CM 251459

25 MAY 1944

UNITED STATES

v.

Second Lieutenant ANGELO
G. SPRINO (O-806541), Air
Corps.

ARMY AIR FORCES
EASTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Gunter Field, Montgomery, Alabama,
9 February 1944. Dismissal.

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Angelo G. Sprino, 85th Basic Flying Training Squadron, Army Air Forces Pilot School (Basic), Gunter Field, Montgomery, Alabama, did, at Gunter Field, Montgomery, Alabama, on or about 1 November 1943, wrongfully borrow Fifty Dollars (\$50.00), in cash, from Aviation Student (Sergeant) Norman W. Black, said Aviation Student (Sergeant) Norman W. Black, being at the aforesaid time an Aviation Student, receiving flight instruction by the said Second Lieutenant Angelo G. Sprino.

Specification 2: In that Second Lieutenant Angelo G. Sprino, * * *, did, at Gunter Field, Montgomery, Alabama, on or about 30 November 1943, wrongfully borrow Twenty-five Dollars (\$25.00), in cash, from Aviation Student (Sergeant) Norman W. Black, an enlisted man.

Specification 3: In that Second Lieutenant Angelo G. Sprino, * * *, being indebted, in the sum of Seventy-five Dollars

(\$75.00), in cash, for a personal loan, to Aviation Student (Sergeant) Norman W. Black, a student undergoing flying instruction from the said Second Lieutenant Angelo G. Sprino, which amount became due and payable on or about 10 December 1943, did, at Gunter Field, Montgomery, Alabama, from 10 December 1943, to 11 January 1944, dishonorably fail and neglect to pay said debt.

Specification 4: In that Second Lieutenant Angelo G. Sprino, * * *, being indebted, in the sum of Fifty Dollars (\$50.00), in cash, for a personal loan, to Second Lieutenant James H. Gamble, a student officer undergoing flying instruction from the said Second Lieutenant Angelo G. Sprino, which amount became due and payable within a reasonable length of time from the latter part of October 1943, did, at Gunter Field, Montgomery, Alabama, dishonorably fail and neglect to pay said debt.

Specification 5: In that Second Lieutenant Angelo G. Sprino, * * *, being indebted, in the sum of Thirty Dollars (\$30.00), in cash, for a personal loan, to First Lieutenant James E. Merk, a student officer undergoing flying instruction from the said Second Lieutenant Angelo G. Sprino, which amount became due and payable on or about 10 December 1943, did, at Gunter Field, Montgomery, Alabama, from 10 December 1943 to 11 January 1944, dishonorably fail and neglect to pay said debt.

Specification 6: In that Second Lieutenant Angelo G. Sprino, * * *, being indebted, in the sum of Thirty Dollars (\$30.00), in cash, for a personal loan, to Second Lieutenant Ernest H. Vickers, Jr., a student officer undergoing flying instruction from the said Second Lieutenant Angelo G. Sprino, which amount became due and payable on or about 10 December 1943, did, at Gunter Field, Montgomery, Alabama, from 10 December 1943 to 10 January 1944, dishonorably fail and neglect to pay said debt.

Specification 7: In that Second Lieutenant Angelo G. Sprino, * * *, did, at Gunter Field, Montgomery, Alabama, on or about 30 October 1943, wrongfully borrow Fifty Dollars (\$50.00), in cash, from Second Lieutenant James H. Gamble, said Second Lieutenant James H. Gamble, being at the

aforesaid time, an aviation student officer receiving flight instruction by the said Second Lieutenant Angelo G. Sprino.

Specification 8: In that Second Lieutenant Angelo G. Sprino, * * *, did, at Gunter Field, Montgomery, Alabama, on or about 30 October 1943, wrongfully borrow Thirty Dollars (\$30.00), in cash, from First Lieutenant James E. Merk, said First Lieutenant James E. Merk, being at the aforesaid time, an aviation student officer receiving flight instruction by the said Second Lieutenant Angelo G. Sprino.

Specification 9: In that Second Lieutenant Angelo G. Sprino, * * *, did, at Gunter Field, Montgomery, Alabama, on or about 5 November 1943, wrongfully borrow Thirty Dollars (\$30.00), in cash, from Second Lieutenant Ernest H. Vickers, Jr., said Second Lieutenant Ernest H. Vickers, Jr., being at the aforesaid time, an aviation student officer receiving flight instruction by the said Second Lieutenant Angelo G. Sprino.

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

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

a. Specifications 1, 2 and 3.

Sergeant Norman W. Black testified he was assigned to Gunter Field, Alabama, as an aviation student from 1 September 1943 to about 6 December 1943 for basic flying instruction. Accused became his instructor on or about 12 October 1943. About 1 November 1943 accused, while Black was one of his students, asked Black for a loan of \$100. Black told accused he could let him have only \$50, and did lend accused this amount, telling accused he wanted the money repaid around the first of December. Accused told Black as soon as he received his pay at the end of November he would repay the loan (R. 36-38). Around the middle of November Black, being in need of money, asked for a partial repayment from accused who at first seemed angry at Black's request, but

later explained "in a gentlemanly manner" that it was impossible for him to repay any part of the loan at the time (R. 38). Again, on 30 November, accused requested and obtained from Black a loan of \$25, telling Black he expected his check in a couple of days and would repay the total amount of the two loans made to him by Black (R. 40). Accused did not repay these loans during December. Black spoke to accused once or twice toward the end of November about the loans and was told his check had not come in, and about 5 or 6 December 1943, after he learned he was to be transferred from Gunter Field, Black asked accused if it would be possible to get his money before he left, and was again told by accused that his check had not yet come, but he had Black's address and as soon as his check came he would mail him a check (R. 40). After he had been transferred to Columbus Army Air Field, Columbus, Mississippi, Black received a letter from accused on or about 17 January requesting his correct address and informing Black he wanted to pay him as soon as he could. On 6 February 1944 accused came to Columbus and paid Black in full (R. 41, 42). Black testified he was familiar with the normal relationship that should exist between instructor and student, and thought he and accused had been too friendly, probably resulting from the fact that both had been enlisted men during their military careers (R. 41).

On cross-examination Black stated that at the time of the second loan of \$25 he was no longer a student under accused, having been assigned to a new instructor at his own request as he was not learning enough about instruments from accused (R. 44).

b. Specifications 4 and 7.

Second Lieutenant James H. Gamble testified that while he was a student flier at Gunter Field, and during the time accused was his instructor, he loaned accused \$50 upon accused's request on 31 October 1943. No particular date was set for the repayment of this loan (R. 14). Lieutenant Gamble was transferred to Columbus Army Air Field, Columbus, Mississippi, on 6 December 1943 and on that date he, Lieutenant Merk and Lieutenant Vickers had a conversation with accused apparently with reference to repayment of the loans, but the only part of the conversation Lieutenant Gamble heard was the accused telling them he had their addresses, was going to send them their money, and that his money had not arrived at the bank as of that date (R. 15). At Columbus Lieutenant Gamble received a letter from accused postmarked 17 January 1944, in which accused said he was prepared to repay the loan, and asking for his correct address. On 6 February 1944 accused came to Columbus and repaid the loan in person. At this time he

mentioned he was being court-martialed (R. 16).

c. Specifications 6 and 9.

On 5 November 1943, accused and one of his students, Second Lieutenant Ernest H. Vickers, Jr., were on the way out to their take off position in an airplane and accused asked Lieutenant Vickers over the interphone system if Lieutenant Gamble, his roommate, had any money in the bank. Lieutenant Vickers replied he did not know. Later that day on the flight line accused requested and obtained a loan of \$30 from Lieutenant Vickers. Accused told Lieutenant Vickers at this time that he would pay him when his next pay check reached the bank around the 10th of December 1943. On the 5th of December Lieutenant Vickers asked accused "in a roundabout way" if he was going to pay the money back, and accused said he had his address and would get in touch with him at Columbus. About 17 January 1944 Lieutenant Vickers received a letter from accused saying he was ready to start paying the debt if Lieutenant Vickers would send him his correct address. Lieutenant Vickers did not answer this letter as "Lieutenant Merk was answering for the three of us" (Lieutenants Gamble, Vickers and Merk). On 6 February 1944 Lieutenant Vickers was paid by accused in person at Columbus (R. 27-30).

d. Specifications 5 and 8.

On 30 October 1943, at Gunter Field, Alabama, accused requested a loan of First Lieutenant James E. Merk, whom he was at that time instructing as a student flier. Accused stated he was "in a jam". Lieutenant Merk borrowed \$40 from another officer and loaned accused \$30 of this amount. Accused gave Lieutenant Merk "the understanding I would get it back when he got his next pay", which would be around 1 December 1943. On 5 December Lieutenant Merk asked accused if he had any money to pay on the loan, and accused told him he did not have any money as he had to wait until his check got to the bank, that he had Lieutenant Merk's address and would send the money to him. Lieutenant Merk was transferred shortly thereafter to Columbus Army Air Field, Columbus, Mississippi, and on 6 January 1944 he made a return trip to Gunter Field. He was unable to locate accused at this time, so he went to Captain Greenert, Flight Commander, and told him of the situation. Thereafter Lieutenant Merk received a letter from accused dated 15 January 1944 saying that if he would send his forwarding address accused would send the money that he owed him. Lieutenant Merk then wrote the accused his address. On 6 February 1944 accused repaid Lieutenant Merk on his trip to Columbus (R. 19-23).

Captain Leroy Greenert, formerly Flight Commander of accused's organization, testified that on 6 January 1944 Lieutenant Merk talked to him concerning accused's borrowing money from some officers and one cadet. The next day Captain Greenert talked to the accused and told him that "some of the boys were pretty burned up about not receiving the money that had been borrowed from them and that he had better get straightened out" because they were going to make it uncomfortable for him (R. 52, 53).

First Lieutenant John H. Bone, Finance Officer, Gunter Field, Alabama, testified that accused had been paid in cash for the months of September, October, November, December 1943, and January 1944 (R. 54, 55). The accused's monthly pay was \$246. However, accused had made allotments so that the remaining cash payments made to him for the above-mentioned months amounted to \$100 plus a few additional cents. Salary payments are authorized and available on the last day of each month (R. 55, 56).

Major Webster W. Plourd, Director of Training, Gunter Field, testified that accused has been assigned as an instructor at Gunter Field since approximately 1 August 1943. Accused's duties require him to instruct students in flying, and at the end of each instruction he graded the students, either satisfactory, unsatisfactory, or failing. The student takes orders from the instructor who completely dominates the situation when they are together, regardless of relative rank. Instructors at Gunter Field have frequently been informed at meetings that the relationship between student and instructor is one of friendliness but that there is a barrier between them because one is instructing and grading and the other is attempting to qualify as a flyer (R. 9, 10). No written instructions regarding the relationship between instructor and student were ever issued, but there has always existed a moral code. Borrowing by an instructor from a student is prohibited by this code (R. 11).

4. For the defense:

Accused, after having his rights as a witness explained, elected to testify under oath. Accused testified he had finished high school and had worked at odd jobs until 12 December 1941 when he enlisted in the Army. After receiving his basic training he was assigned to Key Field, Mississippi, where he was a mechanic and assistant crew chief until he was appointed an aviation cadet in

September 1942. Immediately after being commissioned he was assigned to Gunter Field and went into a squadron as an instructor. He is now 20 years of age. His rate of pay is \$246 per month. Late in July or early August 1943, after his arrival at Gunter Field, accused bought an automobile for \$1500. He had \$400 in cash, obtained \$300 from his parents, and also obtained \$200 from the First National Bank of Montgomery. This \$900 constituted the down payment he made on the automobile and the balance was payable \$73 per month. Because of his age he was unable to make a loan, so he made an allotment of \$120 per month to the First National Bank, out of which \$40 was to be paid to the bank and \$73 to the automobile loan company each month. This allotment was to run through January 1944. He also had made allotments of \$6.50 per month for insurance and \$18.75 per month for war bonds (R. 58-61). In October 1943 he had not made arrangements to buy winter uniforms, which were required. He asked the bank for another loan but was told the original loan would have to be paid up first. He also tried to get the money from his family, but they were unable to help him. After exhausting these sources he turned to his closest friends, his students (R. 61). He had promised everyone he would pay them back at the end of his November pay as the man at the bank had assured him he could start another loan, but as it turned out he had to wait until his first loan was cleared (R. 62). After a conversation with Captain Greenert he wrote Black and Lieutenant Gamble saying he was in a position to repay the loans and mailed the letters on the 14th of December 1943 (R. 64).

He has never had any moral code existing between instructor and student explained to him in any way (R. 66). Under his allotment to the bank he paid \$40 per month to the bank and \$73 per month as the balance due on the car, a total of \$113. These payments were to end in January. He knew this when he told his students he would repay them. He went to the bank following his pay in December, about the 8th, and then found out he could not get another loan until his first loan was paid (R. 70). He knew his check was earmarked for his creditors, but gave his student creditors the impression he would repay the loans when his check was received in the bank (R. 70). He felt under the circumstances it was all right to borrow from his students (R. 74).

On cross-examination and examination by the court accused said he had attempted to borrow the money from small loan companies, his people and the bank before he went to his students for a loan, as he was reluctant to ask them for a loan (R. 76, 77, 83).

It was stipulated that following the loans there was no change in the grading by accused of the students from whom loans were obtained (R. 85).

5. The accused borrowed various amounts, totaling \$185, from an enlisted man and three officers, all of whom were his flying students. Because of their status as students, these three officers, regardless of their relative rank to accused, should be considered as occupying positions analogous to that of enlisted men. It is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man of his organization. However, such conduct constitutes an offense under the 96th Article of War and not under the 95th Article of War, unless the conduct of the officer is such as to indicate a moral delinquency on his part (Dig. Op. JAG, 1912-40, sec. 453 (5); Bull. JAG, April 1943, sec. 454 (19)). It is therefore necessary to examine the character of the conduct of accused in making these loans to determine if such constituted a violation of the 95th Article of War. Accused did not disclose to his students at the time of negotiating these loans that he had made allotments out of his pay of \$246 totaling \$145.25. Sergeant Black and Lieutenants Merk and Vickers testified accused promised at the time of making the loans to repay them around the first part of December 1943, when his check reached the bank. Lieutenant Gamble said no time was mentioned for the repayment of his loan, though the accused testified he promised everyone to pay them "at the end of his November pay". The accused attempted to justify his conduct by saying he had been told by the bank that he could obtain another loan, and it was his intention to repay his students out of this second loan. However, the accused testified several times that he had tried to borrow the money from the bank prior to approaching his students, and had been told he could not negotiate a second loan until his first loan of \$200 was paid up, which would not be accomplished until January 1944. The accused's testimony concerning his knowledge as to his inability to obtain a second loan from the bank is contradictory, but the Board of Review is of the opinion that the accused's testimony as a whole indicates he knew he could not obtain any additional money from the bank at the time he made his representations as to repayment of the loans to the students. Accordingly, the Board is of the opinion that the accused's conduct at the time he obtained the loans from his students was a violation of Article of War 95. The Board is of the further opinion that the failure of the accused to repay the loans until 6 February 1944 was dishonorable in view of his promise at the time the loans were made to repay them in the early part of December 1943, his second promise made on 6 December 1943 to pay them when his check reached the bank, his relationship toward the lenders, and the additional fact that the

loans were not paid until after his commanding officer had discussed with him the seriousness of his delinquency in meeting these obligations, and court-martial proceedings had been instituted.

6. War Department records show that accused is 21 years of age. He graduated from high school (name not shown). In February 1942 he entered the military service as a private, and was appointed aviation cadet in September 1942. Upon completion of the Flying Training Command Course at Napier Field, Alabama, he was appointed second lieutenant, Air Corps, Army of the United States, effective 30 June 1943.

7. 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, 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.

Thomas W. Jolly, Judge Advocate.

I. Arthur Stuckler, Judge Advocate.

Robert M. Harwood, Judge Advocate.

(262)

SPJGV
CM 251459

1st Ind.

War Department, J.A.G.O., **5 - 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 Angelo G. Sprino (O-806541), 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 the execution thereof be suspended during good behavior.

3. Consideration has been given to the attached letter from Senator Lister Hill in which he quotes excerpts from a letter received by him from Mr. Richard T. Rives, an attorney of Montgomery, Alabama, urging clemency for 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 recommendation hereinabove made, should such action meet with approval.



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

- 4 Incls.
Incl.1-Record of trial.
Incl.2-Ltr. fr. Sen. Hill
12 Feb. 44.
Incl.3-Dft. ltr. for
sig. S/W.
Incl.4-Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 325, 27 Jun 1944)

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

(263)

25 MAY 1944

SPJGH
CM 251490

UNITED STATES)

v.)

Second Lieutenant GRAYDON
H. CLIFT (O-1318017), In-
fantry.)

INFANTRY REPLACEMENT TRAINING CENTER
CAMP BLANDING, FLORIDA

Trial by G.C.M., convened at
Camp Blanding, Florida, 18
February 1944. 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 on the following Charges and Specifications:

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

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

Specification 2: In that Second Lieutenant Graydon H. Clift, Infantry, Company "C", 226th Infantry Training Battalion, did, on or about May 10, 1943, become indebted to Technician 5th Grade Leonard E. Szykowny, 9th Company 3rd Student Training Regiment, Fort Benning, Georgia, in the sum of twenty dollars (\$20.00), for a loan, and did without due cause, at Camp Blanding, Florida, from September 1, 1943 to about January 12, 1944, dishonorably fail and neglect to pay said debt.

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

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

Specification: In that Second Lieutenant Graydon H. Clift, Infantry, Company "C", 226th Infantry Training Battalion, did, at Fort Benning, Georgia, on or about May 10, 1943, wrongfully borrow from Technician 5th Grade Leonard E. Szykowny, 9th Company, 3rd Student Training Regiment, Fort Benning, Georgia, an enlisted man, the sum of twenty dollars (\$20.00), to the prejudice of good order and military discipline.

He pleaded not guilty to Charge I and the Specifications thereunder, and guilty to Charge II and the Specification thereunder. He was found guilty of all Charges and Specifications and sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 1 and 3, Charge I, approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution: It was stipulated that accused was commissioned a second lieutenant on 23 April 1943, and that his base pay as such was \$150 per month. The court was requested to take judicial notice that a second lieutenant also receives seventy-seven cents per day rations allowance and is provided with quarters (R. 6, 9).

Technician Fifth Grade Leonard E. Szykowny, Fort Benning, Georgia, testified he had known accused as a "pretty good friend" before the latter had been commissioned. On 10 May, "about four days" after accused had been commissioned, he asked for a loan of \$20 to use on a leave of absence. Corporal Szykowny "loaned" accused the money and he promised to repay it when he returned. After his return accused was sent, in June, to "Officers Communication School". Corporal Szykowny called accused by telephone "five times", "talked about how he was getting along", and "the last three times" asked accused to repay the loan. Accused said "he had intentions of sending it to me twice during that time" and that "he was just getting ready to send it out to me". The "last time" Corporal Szykowny called, accused was gone. "He had moved down here". Corporal Szykowny wrote "down" to him and asked for the money six times and not receiving his money wrote a "letter through channels". He received payment of the loan on 12 January (R. 11-14).

4. Evidence for the defense: Accused testified that he had been an aircraft worker prior to entering the Army on 12 June 1942. He received \$50 per month as a private and after December, 1942, he received \$87.50 as a staff sergeant. He was commissioned a second lieutenant 23 April 1943. When he came into the Army he owed about \$298 to a bank and various individuals. He had paid all of this amount except a \$25 balance owing the bank. His "folks" had been unable to care for themselves because his father had been in the hospital and had to close down his grocery store. Accused sent them about \$30 a month while an enlisted man and larger amounts every month after he was commissioned. The total amount he had sent them was about \$560. He also paid \$125 on the father's hospital bill and sent them some money to have their home repaired. The money he gave his parents was usually sent in the form of cash. In May 1943 he went home which cost him \$52. After being commissioned his meals cost him \$31 per month; laundry and cleaning about \$5 and after he arrived at Camp Blanding \$10; insurance deductions \$7.25 per month; and he had purchased three \$18.75 bonds. Since entering the Army he had earned about \$2,100. He had totalled up "everything I paid since June 12, 1942" and it came to

around \$1,600. He could not account for the balance (R. 16-25).

On cross-examination and examination by the court accused testified that he kept no record of his debts or of the money he had paid out. He was not "sure" of the exact amounts or the dates paid but it was "the best of his knowledge". He had begun a checking account in September, 1943, but he did not have it now. He had deposited part of his pay checks in the checking account but had never made any payments to his creditors or his folks by check. He had borrowed money since coming into the Army because his expenditures had exceeded his income. Corporal Szykowny had phoned him twice and written him twice concerning his loan. Accused answered the first letter and told him he did not have the money but would try to pay him "as soon as possible". Accused was unable to repay him. He repaid this loan after "Major Webb" interviewed him (R. 25-32).

It was stipulated (Def. Ex. 1) that Mrs. Erma Clift, if present at the trial and sworn, would testify that she is the mother of accused; that his father was confined to the hospital and his home by reason of illness from May, 1942 to 1 February 1943; that as a result their grocery store was closed and their home sold by foreclosure of a mortgage thereon; that accused contributed \$125 between June and November 1943 towards the medical expenses of his father, \$125 toward improving their present home in 1943, and usually sent a cash contribution home each month (R. 32).

Lieutenant Colonel Tuttle F. Smith, battalion commander of the accused since September 1943, testified that his conduct, except for the present "incident", was that of an officer and a gentleman. His work was "very satisfactory". Accused was not "the best platoon leader I have ever seen but he is far from the worst". Accused carried out orders promptly, efficiently and to the best of his ability. Similar testimony concerning the character and ability of accused was given by Major William J. Bryson, Jr., battalion executive officer, and First Lieutenant Theodore F. Locke, Jr., company commander of accused (R. 33-35).

5. The prosecution having reopened its case at the close of the defense testimony, Miss Dorothy W. Oakley, bookkeeper for the Camp Blanding Facility Office of the Atlantic National Bank of Jacksonville, identified the bank statement (Pros. Ex. F) of accused for the period from 1 September 1943 to 7 January 1944. The statement shows deposits of \$460 during that period with withdrawals of approximately the same amount.

6. a. Specification, Charge II: The evidence establishes without contradiction and accused admitted by his plea of guilty that on or about 10 May 1943 he borrowed the sum of \$20 from Technician Fifth Grade Leonard E. Szykowny at Fort Benning, Georgia. Accused had been commissioned only a

short time prior to making the loan and he and Corporal Szykowny had been good friends as enlisted men. The record indicates that accused was not the commanding officer of the enlisted man. Although by reason of these circumstances the more serious aspects of this offense usually found are lacking, nevertheless the act of accused was an offense to the prejudice of good order and military discipline in violation of Article of War 96.

b. Specification 2, Charge I: The evidence for the prosecution shows that at the time accused obtained the loan from Corporal Szykowny he was going home on a leave of absence and promised to repay the money on his return. As he failed to do so Corporal Szykowny called him by telephone on three occasions and asked for payment. Accused said he had intended to send it and that "he was just getting ready to send it". The next time Corporal Szykowny called he found that accused had been transferred. He wrote accused "six times" at Camp Blanding and as he did not receive his money he wrote "a letter through channels". Accused thereupon paid the loan on 12 January 1944.

Accused admitted that Corporal Szykowny had phoned him twice and also written him twice about the loan. He testified he answered the first letter stating he did not have the money but that he would pay "as soon as possible". He contended he was unable to pay the loan because of his current expenses, his payments on past debts, and because he was sending money home each month to assist his folks who were in straitened circumstances by reason of his father's illness.

Mere neglect on the part of an officer to pay debts contracted with persons with whom he has dealt upon an equal footing is not of itself sufficient ground for charges against him. This rule does not apply where the money was borrowed from an enlisted man. In such instance an unreasonable delay in repayment is a violation of Article of War 96 (CM 117782, Dig. Op. JAG, 1912-40, sec. 454(19)). Where 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 under Article of War 95 (CM 121207, Dig. Op. JAG, 1912-40, sec. 453(14); CM 221833, Turner, 13 B.R. 239; CM 220642, Smith, 13 B.R. 15).

The evidence shows that accused did not repay the loan until approximately eight months had elapsed, an unreasonable delay under the circumstances, and then only when the matter was brought to the attention of his military superiors. It is difficult to believe that accused could not have discharged such a small obligation in this period of time if he had made a serious effort to do so even with his contributions to the support of his parents and repayment of old obligations and his failure to discharge it is to some extent indicative of bad faith on his part. Nevertheless, the Board of Review does not believe that under all the circumstances his conduct can

be characterized as dishonorable. The evidence does not clearly show deceit or evasion by accused in his failure to repay the loan. There was only one definite promise of repayment, that made at the time the loan was contracted, and of itself this is believed insufficient to constitute dishonorable conduct. In the absence of circumstances showing that his failure to pay was dishonorable, a violation of Article of War 96 only is proven.

7. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 12 June 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 23 April 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 2, Charge I, and Charge I as involves a violation of Article of War 96; legally sufficient to support the findings of guilty of the Specification, Charge II, and of Charge II; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Nixon, Judge Advocate

Robert Colman, Judge Advocate

J. J. Lott, Judge Advocate

(268)

1st Ind.

1 - JUN 1944

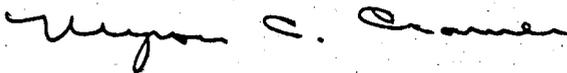
War Department, J.A.G.O.,

- 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 Graydon H. Clift (O-1318017), 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 Specification 2, Charge I, and Charge I as involves a violation of Article of War 96; legally sufficient to support the findings of guilty of the Specification, Charge II, and Charge II; and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused borrowed \$20 from an enlisted man (Spec., Chg. II) and failed and neglected to repay the loan until approximately eight months later (Spec. 2, Chg. I). The findings of guilty of Specifications 1 and 3, Charge I, were disapproved by the reviewing authority. I recommend that the sentence to dismissal be confirmed but, in view of all the circumstances, commuted to a reprimand, and that the sentence as thus commuted be carried into execution.

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



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

3 Incls.

Incl.1-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 commuted to reprimand. G.C.M.O. 333, 27 Jun 1944)

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

SPJGN
CM 251541

24 MAR 1944

UNITED STATES)

HAWAIIAN DEPARTMENT)

v.)

Trial by G.C.M., convened at
A.P.O. #958, 1-2 December
1943. Death.

Private First Class SIMPLICIO
Q. QUILPA (30103998), Company
L, 298th Infantry.)

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Simplicio Q. Quilpa, Company L, 298th Infantry, did, at APO 957, on or about 5 November 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Harry Kaina, Company L, 298th Infantry, a human being, by shooting him with a rifle.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. The offense was committed in time of war. He was

sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence but recommended its commutation to life imprisonment by the confirming authority and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that both the accused and the deceased at about 1745 o'clock on the evening of 5 November 1943 boarded the Schofield Barracks bus at the Army and Navy Y.M.C.A. in the city of Honolulu. En route they both appeared to have been drinking and engaged in some scuffling between themselves during which a knife was taken from the accused and he was throttled and struck by the deceased who forced the accused to remain seated with him. When the bus reached the gate to the field, the deceased attempted to straighten accused's tie which was disarranged but was repulsed by the accused who was still crying as he had been since the blow. After entering the gate the bus proceeded on its route until it reached Theater No. 4 where the accused, alone and unassisted, dismounted shortly before 1900 o'clock. The deceased and several other soldiers dismounted a block beyond the theater which is within the 298th Infantry Area where both the accused and the deceased were quartered. These facts were established by the testimony of three eye witnesses who also testified that the accused appeared to be angry at the deceased because of the events taking place on the bus trip but that they attributed no particular significance to the episode (R. 17-29, 29-40, 41-49).

The deceased went directly to his barracks, a drawing of which was admitted into evidence, and arrived there a few minutes after 1900 o'clock. He waved a greeting to some 10 or 12 inmates of the barracks who were variously engaged in reading, writing letters, resting and playing cards and went to his bunk. A few minutes later the accused was observed casually approaching the barracks with his M-1 rifle slung over his shoulder. He met one of the inmates of the barracks at the door while entering, unslung his rifle, addressed the deceased as "you son-of-a-bitch" and shot him four times causing instantaneous death according to competent medical testimony which included proper identification of the body, the autopsy findings, commitment of the body to the morgue and other relevant testimony. After the shooting the accused unhurriedly walked out of the barracks, proceeded to another nearby barracks where he crawled under its floor and remained until about 1945 o'clock when he came out and surrendered himself stating to several witnesses that he had just killed a man and was sorry about it. About fifteen minutes had elapsed between the accused's leaving the bus and shooting the deceased. The facts of the shooting and the accused's apprehension were established by the testimony of numerous

eye witnesses, all of whom substantially so testified (R. 5-8, 8-16, 49-53, 53-62, 62-73, 73-78, 79-84, 84-91, 92-105, 106-113, 114-121, 122-126, 129-133, 134-140, 140-142, 142-145, 145-148, 149-154; Exs. "A"- "C").

The accused shortly after his arrest was given a blood test at the station hospital for alcoholic content and was thereafter incarcerated in the stockade. All of the numerous witnesses for the prosecution who had observed his actions were of the opinion that he was not intoxicated because he walked, talked and acted normally, although some of them believed that he had been drinking. (Id).

4. The evidence for the defense shows that a staff sergeant and a private, both of the accused's organization, attributed good conduct to him during the time they had known him and that another enlisted man, who had been on the bus, saw the deceased "choking" the accused who thereafter commenced to cry (R. 155, 156-157, 181-186).

The accused, after explanation of his rights as a witness, testified that prior to taking the bus he had been in Honolulu on a pass where he, during the afternoon, had drunk some 44 intoxicating drinks at various places, that after boarding the bus he sat near the aisle on a seat with the deceased, that he became sleepy and probably leaned against the deceased who thereupon struck him about the neck causing him to fall into the aisle where the deceased struck him again, that he regained his seat and commenced to cry because of his treatment by the deceased, that he remembered leaving the bus by himself but was unable to recall where he had dismounted and that the next thing he remembered was being under the barrack with a rifle, the acquisition of which he was unable to recall. He disclaimed any recollection whatsoever of his acts between the time he left the bus and his apprehension and avowed no knowledge of the deceased's demise until two days later but recalled being searched, being transported in a jeep to an office in the 3rd Battalion Command Post where someone said "This is the man", and being carried to the hospital where some of his blood was taken. It was stipulated that the blood test showed 2.5 milligrams of alcohol per 100 c.c. of blood (R. 157-180, 194).

5. In rebuttal the prosecution offered the testimony of several witnesses. The Officer of the Day at the Post Stockade testified that he saw the accused at about 2300 o'clock after he had been placed in the stockade, that he smelled liquor on the accused's breath, that the accused did not appear to be drunk and that the accused in response

to the question of why he did such a trick replied that "he got mad" and also said "What would you do in a case like that?" A corporal, who had observed the accused crawling under the barrack after the shooting and had assisted in enticing him to come out about 1945 o'clock, testified that at such time "He told us that he killed a fellow; he told us to take him to the Stockade, that he killed a corporal, but he was sorry for it". The accused then had his rifle and 42 rounds of live ammunition and, although speaking normally, had the odor of liquor on his breath. A medical officer, although not offered as an expert witness, was permitted to testify that "the interpretation of 2.5 milligrams per cent of alcohol in 100 c.c. of blood does not necessarily mean that the individual is drunk or intoxicated" because it would depend on the individual person as to how drunk he would be (R. 187-190, 190-194, 195).

6. The accused is charged with murder. The Specification alleges that the accused "did * * * with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill * * * the deceased "by shooting him with a rifle". If the evidence is legally sufficient to support the finding of guilty under this Specification, it must support the conclusion that the accused unlawfully killed the deceased with malice aforethought. Subjected to such test and viewed in the light of pertinent authorities, the legal sufficiency of the evidence cannot be successfully challenged.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful as used in such definition means * * * without legal justification or excuse". "A homicide done in the proper performance of a legal duty is justifiable". Consequently, a homicide without legal justification is one not done in the performance of a legal duty. Also, an excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray * * *". The definition of murder requires that "the death must take place within a year and a day of the act or omission that caused it, * * *" (M.C.M., 1928, par. 148a). The most distinguishing characteristic of murder is the element of "malice aforethought". This term, according to the authorities, is technical and cannot be accepted in the ordinary sense in which it may be used by laymen. The Manual for Courts-Martial defines malice aforethought in the following terms:

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor the actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that

the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark).

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

Indicative of authorities supporting the principles set forth in the Manual for Courts-Martial are the words of Chief Justice Shaw, who in the leading case of Commonwealth v. Webster (5 Cush. 296; 52 Am. Dec. 711) explains the meaning of malice aforethought as follows:

"* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malò animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden" (Underscoring supplied.)

The authorities to the same effect are manifold and further citation thereof would be superfluous.

(274)

Under the foregoing legal principles, the evidence establishes beyond a reasonable doubt every element of the crime charged and that the homicide was unlawful as it was committed without legal justification or excuse. The accused and the deceased on the bus trip had a minor altercation to which no one except the accused attributed any particular significance in that it, under the circumstances, was neither an unusual nor a particularly provoking episode. The accused nevertheless as a result thereof clearly formulated his plan for revenge which he, notwithstanding the passage of a period of time within which his desire for revenge reasonably should have abated, deliberately and with premeditation carried out by brutally killing the deceased in cold blood. The nature and sequence of the events permit no other conclusion.

The defense in essence is that the accused was intoxicated to such a degree that he did not know what he was doing. Such defense is without merit for two reasons. First, the crime committed is one of the so-called "general intent" crimes to which intoxication, even to the degree claimed by the defense, is no defense whatsoever and second, upon abundant and competent evidence the court, as it was entitled, resolved such contention against the accused (Wharton's Criminal Law, 12th Ed., Sec. 66 and cases therein cited).

The evidence for the defense establishes no legal defense whatsoever, sounding weakly even in extenuation, while the evidence for the prosecution competently and conclusively establishes every element of the offense charged and amply sustains the court's findings of guilty of the Specification and the Charge.

7. The accused is about 29 years of age. He enlisted at Wailuku, Maui, T.H., 19 June 1942. His record shows no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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. A sentence either of death or imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92.

Abner E. Lipscomb Judge Advocate.

William A. Lambell, Judge Advocate.

Gabriel H. Golden 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 Private First Class Simplicio Q. Quilpa (30103998), Company L, 298th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. In view, however, of the probable drunkenness of the accused at the time of his crime, and of the recommendation of the reviewing authority that the sentence be commuted to one of life imprisonment, I recommend that the sentence to death be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, and that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

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



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

3 Incls.

Incl.1 - Record of trial.

Incl.2 - Dft. ltr. for sig. S/W.

Incl.3 - Form of action.

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 446, 21 Aug 1944)



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

SPJGK
CM 251542

(277)

13 April 1944

UNITED STATES

v.

First Lieutenant JOHN M.
BALL (O-562452), Air Corps.

CARIBBEAN WING
AIR TRANSPORT COMMAND

Trial by G.C.M., convened
at Morrison Field, West
Palm Beach, Florida, 16
February 1944. Dismissal.

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

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

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

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

Specification: In that First Lieutenant John M. Ball, Air Corps, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, did, at Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, on or about 26 December 1943, wrongfully strike Private First Class Rigoberto (NMI) Salinas, Supply and Services Unit, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, on the face with his fist.

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

Specification 1: In that First Lieutenant John M. Ball, Air Corps, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, did, at Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, on or about 26 December 1943, while under the influence of intoxicating liquor, wrongfully and to the prejudice of military discipline drill enlisted personnel of the Security Unit, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida.

Specification 2: In that First Lieutenant John M. Ball, Air Corps, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, did, at Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, on or about 26 December 1943,

wrongfully order the apprehension and confinement of First Sergeant John G. Bowman, Master Sergeant John (NMI) Draughan and Sergeant Robert E. Sheperd, Security Unit, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, non-commissioned officers under his command, without cause or justification for said order.

Specification 3: In that First Lieutenant John M. Ball, Air Corps, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, did, at Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, on or about 26 December 1943, wrongfully and unlawfully order enlisted men of the Security Unit, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida, to aim pistols at and fire upon Staff Sergeant Paul E. Zane, Administrative Unit, Station #8, CAR-ATC, Homestead Army Air Field, Homestead, Florida.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction for wrongfully and unlawfully keeping gambling devices in the day room of the Transient Detachment at his field, and for wrongfully and unlawfully inducing, inciting and permitting enlisted men to bet or play upon these gambling devices, in violation of Article of War 96, 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.

All the offenses of which accused was found guilty occurred on the night of 25-26 December 1943. In order to set forth these offenses in chronological sequence, it will be necessary to alter somewhat their order as found listed by the charges and specifications on the Charge Sheet.

a. Specification 1, Charge II.

Testimony concerning this offense was offered by Staff Sergeant Raymond W. Darneal, and Private Robert L. Holloway, both of the Security Unit, Station Number 8, Homestead Army Air Field, Homestead, Florida. Accused was commanding officer of this organization, while Darneal and Holloway were, respectively, sergeant and a private of the guard on the night of December 25-26 (R. 28,34). Shortly before midnight on 25 December a telephone call came to Darneal through the desk sergeant asking that five guards be taken to the Officers' Club to report to accused. Darneal took five enlisted men, including Holloway, marched them to the entrance of the club, left them outside, and reported to accused just inside the door of the lobby (R. 28,29,31,34,38).

A dance had taken place there that evening, but had concluded, and most of the guests were gone. Perhaps eight officers and one or two women were

still present in the lobby, which adjoined the dance floor. Accused told Darneal to bring in his squad, and after Darneal had done so, to line them up next to the hat check counter (R. 29,30,31,32,34,35,42). Accused then called the squad to attention, and gave them the command, "Inspection, Arms". They were armed with revolvers. All members of the squad removed the shells from the cylinders, and stood with their ammunition in their right hands and their weapons in their left. Accused then asked "Private Hensley", a member of the squad, for his gun. Hensley gave it to him. No order to reload their pistols was given to the squad, but most of them did so and put the weapons back in their holsters (R. 30,35,38,39).

b. Specification 3, Charge II.

Testimony concerning this offense, which occurred immediately after the giving of the commands previously described, was offered by Holloway, only, who testified that he remembered hearing accused say when they first came in "that he had a guy there he wanted to shoot" (R. 34). Technical Sergeant Paul E. Zane, Signal Corps, Administration Unit, Station Number 8, Homestead Army Air Field, was then standing with his back to the wall opposite the counter at which the squad lined up, and about fourteen or fifteen feet away from them. Witness stated that Zane did not appear frightened. After giving the command of "Inspection, Arms", accused gave the command, "Ready, Aim, Fire". The squad did nothing on this order. Accused said, "What the Hell's wrong with you guys, can't you take an order?", but gave no further orders, and the squad did nothing (R. 35,36, 38,41,43).

"Major Brecht", who had come in from the dance floor while the squad was at Inspection Arms, had called Sergeant Darneal over to him for an explanation and had instructed him to dismiss the men, which Darneal did (R. 30).

While he was giving these orders, accused had in his hand "a glass of hard liquor about the color of coke". There was an odor of an alcoholic beverage, probably whiskey, on his breath, but his posture was erect, his uniform was neat, his tone of voice was not unusual, and he was smiling as he gave the commands. He did not explain to Darneal his reason for summoning the squad (R. 30-33,35,36,41).

c. Specification, Charge I.

It appears that accused left the Officers' Club without further incident, and went to the orderly room of his organization, the Security Unit, which was in the same building as the post Provost Marshal's office. About 0015 or 0030, Private First Class Rigoberto Salinas, Supply and Services Unit, Station Number 8, was brought in by a military policeman. Salinas testified that he worked at the Officers' Club on the post, but that he had spent the evening at the U.S.O. in the nearby town of

Homestead, Florida. He had left the post on a pass which he thought was good until 0500 on 26 December, but which it appears had, erroneously and unbeknown to Salinas, been made out only for 2300 of 25 December. While he had been in Homestead, Salinas had drunk a bottle and eight glasses of muscatel wine, and had been removed from the inbound camp bus when it arrived at the gate. He was taken to the Provost Marshal's office by Sergeant Frank Brignole, but apparently thought he was being taken to the guardhouse, and was making loud protests to Brignole and to Staff Sergeant Wayne D. Pittman, also of the Security Unit, on duty as desk sergeant. Salinas was not struggling or fighting, however (R. 7-13,16,17,18, 20,22,23).

Brignole left Salinas standing, and still protesting, outside the rail of the office. Accused, who had been in the orderly room, came into the marshal's office, and a conversation ensued, the details of which were not given by any of prosecution's witnesses, but it appears that accused reached across the rail, grabbed Salinas by the shirt collar, and commenced to shake him. He told Salinas that he (Salinas) was drunk, and that he (accused) was going to put him in the guardhouse. Salinas stated that he told accused, "I don't give a damn!", and may also have used some mildly obscene language, but did not threaten or abuse accused. He protested in a loud voice that he was not drunk (R. 8,9,13,15,18,20,21,23,24). Somehow Salinas got inside the railing; accused held him, still shaking him, against a filing cabinet at the side of the desk, and struck him in the face with his closed fist. The blow was described as a short, "quick and deliberate" punch, causing Salinas' head to snap back. He half slumped to the floor, but accused reached out, grabbed him by the shoulders, and braced him. Salinas was "almost knocked out", and started crying. Accused took out his handkerchief, wiped Salinas' mouth, and offered him a cigarette. Salinas was then taken under guard to the guardhouse, where he spent the night (R. 8-10, 13-16,18,19,21-23,26,27).

d. Specification 2, Charge II.

Testimony concerning this offense, which occurred about an hour later was offered by Corporal Nicholas N. Gaich and Corporal Joseph W. Conger, both of the Security Unit. Conger was on guard duty at the main gate that night, while Gaich had gone with accused, at the latter's order, to the supply room of their organization. About 0100 or 0200 accused telephoned the main gate and asked for "Private Conger". He told Conger to pick up "Private Bowman", "Private Draughan" and "Private Sheperd", and to confine them in the guardhouse. The prospective inmates of the guardhouse thus referred to were actually, First Sergeant John G. Bowman, Master Sergeant John Draughan and Sergeant Robert E. Sheperd, all of accused's organization. (R. 44-46, 48-51). Conger asked whether it was an order, and accused said it was (R. 46). Conger asked how long the three men had been privates, and accused said either "Five minutes" (R. 50) or "Ten minutes" (R. 46). Conger then asked what he was to do if he had trouble with them, to which accused replied that Conger was on duty, had two hands and a gun, and that

he was to carry out the orders (R. 51). Some time later, at the most an hour, accused phoned Conger again and told him to "disregard" the previous order. Conger had not seen the men in the meantime (R. 47,50).

Gaich testified that there were others in the supply room at the time, laughing and joking, and that he was of the opinion accused had been drinking. There was an odor of liquor on his breath and his eyes were "kind of groggy" (R. 46,48).

Evidence for defense.

a. Specifications 1 and 3, Charge II.

Technical Sergeant Paul E. Zane, who was the man upon whom accused ordered the squad of guards to fire, testified that he had gone to the Officers' Club about 2000 on 25 December in order to set up the public address system for the dance. He had no conversation with accused during the evening, until about midnight, when the dance was over. At that time he told accused that he was finished with his work and that he was going to his barracks. Accused told him to wait awhile, that he (accused) wanted him. Accused gave him a bottle of beer. He remained in the lobby, and was sitting in a chair in the lobby of the club when the guards came in. Accused had told Zane that he was going to have Zane shot, but Zane was not frightened, because "I knew it was mere horseplay and fun and --- it didn't bother me in the least" (R. 62-64, 67,68). Zane's description of the incident did not differ from that given by the prosecution's witnesses, except for his insistence that he was laughing and unworried throughout. He stated that he "would say he (accused) had a little too much to drink", though he talked intelligibly and was steady on his feet.

b. Specification, Charge I.

Sergeant Zane then went with accused to accused's office. On the way accused told Zane he was going to put him in the guardhouse, but Zane also considered this to be in jest. While Zane and accused were sitting in the office they heard the commotion in the next room caused by the arrival of Salinas and Sergeant Brignolo of the Military Police, and accused left the room to see what had caused it (R. 64,65,69).

Sergeant Brignolo testified that Salinas had been taken off the last bus into camp because of his incorrect pass, and that he had become noisy and excited when this was discovered. He continued to protest loudly while being taken from the gate to the Military Police station, and was told to sit down while Brignolo talked to Sergeant Pittman at the desk. He continued in his excited manner, and accused stepped up, saying, "You can't talk to my men that way" (R. 71-73). Zane testified that he heard loud talking, crying, and cursing, had heard accused tell Salinas that he

intended to put him in the guardhouse for the night to "cool off", and heard Salinas say that he did not want to go to the guardhouse because there was nothing wrong with him. Brignolo testified that accused shook Salinas in an effort to quiet him, and finally struck him with his hand, but witness did not see whether accused's hand was open or closed. Zane only heard the blow - it was similar to a bang or a rattle, "like the noise of someone striking a set of filing cabinets" (R. 65-67, 71, 73).

Salinas quieted down, but kept on whining. Accused took out his handkerchief, wiped the saliva from Salinas' mouth, and told him he was going to the guardhouse for the night. Brignolo gave Salinas a cigarette. Salinas did not fall to the floor after the blow, and did not hit the filing cabinet, according to Brignolo's testimony (R. 73, 74). Both Zane and Brignolo admitted knowing and being quite friendly with accused, but each denied that he would lie or shade his testimony in order to favor accused (R. 66, 74, 75).

Accused's rights were explained to him, and he elected to be sworn as a witness (R. 52). He stated that he had been rather depressed all that day, having become involved in difficulties with his divorced wife over the future permanent custody of their six-year-old son, brought about by the wife's threats to have the child formally adopted by her second husband, and by accused's mother's written exhortations to him that he come home to Detroit, Michigan, to oppose this (R. 52-54). He spent most of Christmas Day in his office, leaving about 1630 to go to the Officers' Club, where he had "four or five" drinks of rum and Coca Cola. He then went to his quarters to wash and change his clothes for the evening's dance. He returned to the club at about 1930, having had nothing to eat since 1030, and had more to drink. He stated that he recalled having enjoyed himself with friends at the dance, until about 2330, and having talked with Sergeant Zane after the dance; that Zane wanted to go home, but that he told Zane to wait awhile (R. 54, 56-58, 60). He recalled no other incident concerning Zane, but there was no argument between them. The only other incident of the evening which he recalled, hazily, was his telephone call to the main gate to instruct Conger to pick up the three "Privates". He stated that he woke up the next morning feeling "healthily good", without any hang-over, and was astonished when told on Monday morning, 27 December, of what he had done two nights previously (R. 56, 57, 59). He attributed his acts to his being under the influence of intoxicating liquor, and explained his reference to the three noncommissioned officers as privates as a jesting habit among officers and ranking noncommissioned officers of the organization of so referring to each other (R. 61).

Stipulated testimony which would have been given by Captain Vincent E. Hickey, Air Corps, Assistant Base Administrative Inspector at accused's field, was read into the record by defense counsel. Captain Hickey corroborated accused's statements concerning the latter's marital difficulties

and his worry over them. He also stated that accused was not a drunkard, that accused had made and kept a pledge to the Catholic chaplain, since the Christmas night incidents, to abstain from liquor, and that he "would be more than willing to serve with him in any sort of capacity or in any theater of operations" (R. 76, 77).

4. The evidence is clear and undisputed. Even the defense witnesses testified that accused gave orders to fire upon Sergeant Zane and that he struck Salinas in the face. No witness for the defense denied that accused attempted to put the guard squad through the Manual of Arms, or that he telephoned Corporal Conger to apprehend the three noncommissioned officers. Accused suffered from lack of memory of the night's incidents, except for the telephone call to Conger. The finding that accused committed all four offenses is amply sustained by the evidence.

That accused's conduct in calling out the guard at midnight for the purpose of drilling them in the Manual of Arms, in ordering them to fire upon Sergeant Zane, and in ordering Conger to apprehend the three fictitiously reduced noncommissioned officers, all were disorders to the prejudice of military discipline, is obvious. Even if they were known only to the individuals concerned, it is certain that the opinions which must have thereby been formed in the minds of those enlisted men with respect to accused would be such that he could no longer command respect or hope to maintain discipline. If they were known to others than the men concerned, the morale and proper relationship between officers and enlisted men were correspondingly endangered over an area and to the extent to which they became a matter of public knowledge. Nor is it important whether the men knew accused to be jesting or thought him to be in earnest. If the former, it was an ill-conceived subject about which to jest; if the latter, accused was guilty of much more serious offenses than those for which he was tried.

The Board of Review is of the opinion, however, that accused's conduct in striking Private Salinas fell short of a violation of Article of War 95. While it has been held (Dig. Op. JAG 1912-30, par. 1490; p. 341; Dig. Op. JAG 1912-40; sec. 453 (3); CM 238970, Handley) that an officer may be charged under either Article of War 95 or Article of War 96 for an assault upon an enlisted man, a comparison of the Handley case, supra, and CM 215734, Rush, will show that the state of sobriety of the officer and the flagrancy of the circumstances surrounding the commission of the offense are the factors which determine whether the act is to be considered conduct unbecoming an officer and a gentleman, or only a disorder prejudicial to good order and military discipline. The Board of Review is of the opinion that the circumstances of the present case fall short, in comparison with those of the Handley case, supra, of constituting a violation of Article of War 95, and that the record is sufficient only to support a finding of guilty of the Specification in violation of Article of War 96.

5. War Department records show that accused is 36 years of age. He

1st Ind.

War Department, J.A.G.O., 20 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 John M. Ball (O-562452), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and the Specification thereof as involves a finding of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specifications, and legally sufficient to support the sentence and to warrant confirmation thereof. This was accused's second conviction by a general court-martial within nine months, and in view of the circumstances attending his misconduct in both instances, I believe that his usefulness as a commissioned officer is ended. 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.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 317, 19 Jun 1944)



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

(287)

SPJGK
CM 251546

6 APR 1944

UNITED STATES)

FORT HUACHUCA, ARIZONA

v.)

Trial by G.C.M., convened at
Tucson, Arizona, 23 and 24
February 1944. Dishonorable
discharge, total forfeitures
and confinement for life.
Penitentiary.

Sergeant ELGEN BURLERSON
(38199033), Special Unit
Number 1, Service Command
Unit 1922, Fort Huachuca,
Arizona.)

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Elgen Burlerson and Private Smitty Sutton, both members of Special Unit No. 1, Service Command Unit 1922, Fort Huachuca, Arizona, acting jointly and in conjunction with one another, did, at Tucson, Arizona, on or about 27 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Virgil Williams, a human being, by striking the said Virgil Williams on the face and head with their fists, and by kicking the said Virgil Williams on the face, head and body with their feet.

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

Private Smitty Sutton (33029813), tried jointly with accused on the same Charge and Specification, pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for life. The reviewing authority approved only so much of the finding of guilty as involved a finding of guilty of manslaughter in violation of the 93rd Article of War, and only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement for ten (10) years, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$. The Board of Review has held the record of trial legally sufficient in the case of Private Sutton, and it was not necessary to prepare a review as to him.

3. Summary of the evidence.

Virgil Williams, the proprietor and manager of the Rainbow Grill, a combination restaurant and beer parlor in Tucson, Arizona, died as a result of injuries received by him during an altercation with accused and Private Sutton. Testimony concerning the fight and the events leading up to it was offered by Corporal Hugh Bates, Service Unit Number 1, Service Command Unit 1922, and Private J. C. Bolton, Post Stockade Military Police Detachment, Fort Huachuca, Arizona, and by Miss Dessalyn Leggett and Mr. A. Emerson Foster, civilians, of Tucson.

The fight occurred about 2030 on the evening of 27 December 1943 (R. 65), but Corporal Bates and Private Bolton had had some difficulties of a minor nature with accused Burleson earlier in the evening. Bates and Bolton were on patrol duties as military policemen in Tucson and had seen both accused at 1845 and 1945 at the Elk's Club and the Beehive Cafe. Burleson had been boisterous, argumentative and profane at these places, saying that he was "going to get drunk tonight", but he had subsided on both occasions upon being admonished by the witnesses (R. 17, 18, 20, 23, 24, 25, 32, 33, 52-54).

Miss Leggett testified that she was the cashier and waitress at the Rainbow Cafe, which accused and Sutton entered around 2030. Burleson went to the back of the room and asked Williams for change for a dime. Williams told him to go to Miss Leggett in her cage at the front of the restaurant, to the left as one entered the door. Some words were exchanged in argument between accused and Williams, but witness was not close enough to know what was said. Accused came to the front and asked for change, but witness did not have it, and so she asked Williams to come and get it for her. The argument between accused and Williams continued while Williams went into a little compartment on the other side of the front door to obtain change. Accused continued to curse in a loud voice, shook the swinging gate to the compartment, and

took out his pocket knife. This he opened, then returned it to his pocket, still open. Williams saw him do so, and took a "gun" out of his cash drawer, putting it in his pocket. He then came out of his little office, told witness to give accused his dime back, and told accused to leave the place (R. 40-47).

Williams started for the rear of the room, accused following him. About half way back, Williams told accused to "stand back", pulled out the gun and aimed it at accused, which "seemed" to make accused "angry" (R. 43). At this point Mr. Foster entered the cafe. The editor and publisher of a weekly negro journal, he had come from his office next door when a young man had run from the Rainbow Grill shouting that a fight was brewing there. Foster found a crowd of fifteen or twenty patrons stampeding out the front door, and entered as they left, to find only Miss Leggett, Sutton, accused and Williams in the Grill. Sutton was shoving accused towards the front entrance in an attempt to keep him away from Williams. Accused kept "charging towards" Williams, cursing, while Sutton repeatedly pushed him back (R. 44, 64-67, 74). Williams backed and side-stepped towards the doorway which led to a corridor or recess in the back of his shop, saying, "Mr. Foster, will you call the police?" Foster turned, obtained a nickel, ran into the B and W Cafe next door, telephoned for the police, and returned to the Rainbow Grill, where the altercation was continuing (R. 66-68, 74, 75). Accused threatened to cut off Williams' head (R. 68). At that time Williams had a revolver "down by his side" (R. 69, 79).

Bates and Bolton, attracted by the crowd outside the Grill, entered at this moment, to find Williams standing holding his gun down at his right side. Accused said, "I ought to take my pocket knife and cut his head off!" or "This man got a gun drawn on me and I will cut his head off" (R. 27, 28, 56), to which Williams said to the military police, "M.P., you know I don't bother anybody and I can't stand to let those fellows come in my place and run over me". He told Bates to "get them out". Sutton was still trying to get accused out, using "all the force he could", and saying, "Come on, let's get out" (R. 27-29, 30, 35, 36, 56, 68, 69). Accused refused to go until he had told "his side of the story", and Williams said, "Take him out of here, because if he hits me I will kill him" (R. 27, 36, 37, 57, 69).

At this point Sutton turned and said to Williams, "I will hit you, you son-of-a-bitch!" and struck Williams a full blow in the face with his fist. Williams fell backwards into the corridor, or recess, firing his gun as he did so. The shot struck Sutton in the left shoulder, and he lunged or fell on top of Williams (R. 27, 30, 32, 44, 57, 70). Accused broke away from the military police, knocked over a big glass case, and piled onto Sutton and Williams in an attempt to get the gun. The three struggled for it, during which time Sutton hit Williams several times. Another shot was fired, but it hit no one. The military

police had joined the melee and when accused finally got the gun away from Williams, they both joined in an effort to wrest it from accused (R. 27, 31, 57, 58, 61, 70, 71, 79). In this latter struggle Bates and Bolton wrestled accused all the way to the front of the shop and out through the front door, where Bolton finally wrenched the pistol from accused's hand. Bolton and Bates returned to the corridor in the back where Sutton and Williams had been left lying on the floor, picked up Sutton, and carried him out. Meanwhile accused had broken away from police and had re-entered the cafe. He picked up his cap, put it on his head, went to the prostrate body of Williams, and kicked him three or four times. He then left and went down the street by himself (R. 27, 28, 30, 31, 58-63, 71-73).

Bates testified that while the struggle on the floor was going on, Williams was badly beaten in the face. Sutton had hit him on the right side of the jaw with his fist. "His eyes was (sic) closed, one side of his face was all swollen up, * * * and he was out" (R. 28, 31). While Foster did not state where accused kicked deceased, he testified that after the kicking, both sides of his face and both eyes were swollen, the right side in particular. "He just wasn't describable as Virgil Williams" (R. 73).

Doctor N. K. Thomas, a surgeon of Tucson, treated Williams in the hospital on 29 December, while Doctor George Hartman, a pathologist, performed an autopsy following Williams' death on 1 January 1944. Doctor Thomas testified that Williams "obviously had received severe head injuries" and was partly irrational, that both his eyes were swollen almost shut and that he had numerous abrasions and contusions upon his face, head, and scalp (R. 48-50). Doctor Hartman testified that a thorough examination of deceased's body and organs disclosed a considerable number of bruises over the entire scalp and face, loose blood and clots throughout the entire scalp from front to back and from ear to ear, blood under the scalp, and on and under the surface of the brain. The left eyeball was ruptured. Death was due to hemorrhage causing pressure on the brain, especially at the base. The hemorrhage resulted from "external violence" (R. 13-16).

Evidence for defense.

Accused's rights were explained to him by the trial judge advocate, and he testified in his own behalf (R. 102). It should be noted, in explanation of the difficulty experienced by the military police in controlling him, that accused is six feet, two inches in height and weighs 270 pounds (R. 118).

Accused and Sutton had visited several drinking places on the evening of 27 December, before they arrived at the Rainbow Grill with Sutton's wife. Accused denied telling the military police that he was going to get drunk, and denied using other threatening or abusive language, but admitted that he had drunk two bottles of beer and one "swallow" of whiskey at the Beehive Cafe and that the police had told him to keep quiet (R. 102-104, 106, 119, 125).

Accused testified that upon entering the Rainbow Grill, Sutton and Sutton's wife commenced playing an electrically operated target gun device, while accused went on to the rear of the cafe towards the kitchen enclosure, where deceased was seated on a stool. He asked deceased for change for a dime, but did not understand deceased's first reply. Deceased then said, "God damn you, you seem you don't want to understand what I said. You go up front and get your change" (R. 106-108).

Accused and deceased walked separately to the front of the cafe, deceased mumbling to himself, and saying when accused spoke to him, "God damn it, go up to the front and get your change". Accused replied, "You don't have to talk to me like that, you can talk to me like a man", and continued towards the front. He denied having cursed or shaken the gate, and stated that he did not remember having taken out his knife, although possibly he could have done so (R. 108, 109, 120-122). Accused gave Miss Leggett the dime at her cashier's cage, but she returned it, telling him that she did not have change and that he would have to get it from deceased. Deceased opened a drawer and pulled out a pistol, which he pointed at accused's stomach, saying, "God damn it, I told you to get your change over here" (R. 110, 111). Accused denied that deceased had told him to get out (R. 122).

Accused said to deceased, "If you shoot me with that pistol and don't kill me I will raise plenty hell with you", but he denied saying he would kill deceased (R. 111, 123, 125). Deceased said, "I will damn sure shoot you", and walked towards accused, who began backing towards the rear of the cafe. Deceased followed, still pointing the gun. About half way back, Sutton came between them, threw up his arm, and asked deceased not to shoot accused. At this moment Bates and Bolton entered, and Bates asked accused what was the matter. Neither they nor Williams told him to leave. As he was attempting to explain to Bates, the pistol was fired, the powder from the blast searing accused's lips (R. 112, 113, 123). Accused admitted, however, that he was not between deceased and the back door at this time (R. 123).

He turned and saw Sutton and deceased stagger towards the rear of the building and fall into a corner, Sutton across deceased, holding deceased's right hand in the air in their struggle for the pistol (R. 113-115, 127, 129). Bolton joined the struggle between Sutton and deceased, while Bates stood between accused and the other three. Accused then stepped across deceased, knelt on deceased's thigh, and, seizing the barrel of the pistol, twisted it from his grasp. Bates then seized the pistol in accused's hand, asking accused to give it to him. Accused did not do so, and the two "walked" up the center aisle of the cafe, out to the jeep in front of the cafe, where Bates "just asked" him for the gun. Here accused "turned the pistol loose", and went back into the building" (R. 116, 117, 126, 127).

About three or four minutes elapsed between his departure from the cafe and his return thereto (R. 128). He found deceased lying on his right side in a corner in the rear with his legs half drawn up, his arms stretched out, and groaning "just as if he was choking to death". He did not see Sutton, for whom he had returned, and denied having hit or kicked deceased or injured him in any way (R. 117, 118, 127-129). He then walked out of the cafe, met Mrs. Sutton, who refused to accompany him, went across the street to a car in which another sergeant was sitting. This sergeant took him out to "Randolph Park", where accused reported the trouble in town to "Major Laursen" (R. 118, 124).

Private Sutton and his wife, Mrs. Mary Sutton, also testified for the defense. Mrs. Sutton's testimony added nothing to the facts in evidence, for she observed only that deceased pointed a gun at accused, and she left the cafe when her husband intervened in the dispute. She did not hear deceased tell accused to get out (R. 96-101). Sutton's testimony likewise contributed little new. They had seen the military police earlier in the evening, but had not talked with them prior to the trouble in the Rainbow Grill. Witness observed nothing there until his attention was distracted from the target machine by deceased's pointing the gun at accused. Witness "begged" deceased not to shoot accused; at that point deceased lowered the revolver. When Bates and Bolton came in, deceased said, "You better get that big fellow out of here before I kill him" (R. 134-138). There was not enough time to do anything, for deceased shot witness while they were talking. Witness said that he thought the shot was intended for accused (R. 138, 139, 144, 152). He was hit in the left shoulder, and grabbed hold of deceased's arm with his right hand and they went back until they hit the wall, where they "went down" together (R. 138, 139). He did not see accused again after accused took the pistol from deceased's hand and asked witness if he was all right. Sutton "struggled" out of the cafe, got in the jeep, and was taken to the Military Police station and thence to the hospital (R. 140, 141, 143). Witness denied striking deceased at any time other than when they were falling, denied hearing accused curse, shake the gate, or say he would cut off deceased's head, and denied stamping on deceased while the latter was on the floor (R. 144-148).

Colonel Ernest L. Danielson, Special Unit Number 1, Service Command Unit 1922, Fort Huachuca, testified that accused had an excellent reputation for veracity and sobriety, and had been a trustworthy and reliable soldier (R. 155). Captain Homer N. Davis, Service Command Unit 1982, Phoenix, Arizona, testified that accused had been under his direct command for approximately four months and had an excellent reputation (R. 156, 157). First Lieutenant John J. Fox, Service Command Unit 1948, Santa Anita, California, testified that accused had been under his command for about six months, and that his character was excellent (R. 158).

4. The record thus contains evidence tending to prove that Williams and accused engaged in an argument over the matter of changing a dime, during the course of which accused took out and opened a pocket knife and placed it in his pocket, whereupon Williams took a revolver from a drawer and put it in his pocket. When Williams ordered accused to leave the restaurant and started toward the rear of the room, accused followed him. Halfway back, Williams told accused to stand back. Williams then pulled out his revolver and aimed it at accused. This angered accused. At Sutton's request not to shoot accused, Williams lowered the revolver to his side. To keep accused away from Williams, Sutton shoved accused toward the front entrance, during which proceeding accused kept cursing and "charging toward" Williams, threatening to cut off his head. After the arrival of the military police, and after Williams had requested the police to remove accused and had threatened to kill accused if accused should hit him, Sutton suddenly turned on Williams and hit him in the face. Williams fell back firing his revolver. The bullet hit Sutton in the left shoulder. He and Williams fell to the floor. Accused "piled" onto them and attempted to get the revolver. During the general struggle for the revolver, Sutton hit Williams several times. Accused obtained the revolver. The military police succeeded in removing accused from the cafe and getting the revolver away from him. Accused returned to the cafe and kicked the prostrate Williams in the face and head several times. Williams died from hemorrhage caused by injuries on the head and face. Accused said that he returned to the restaurant three or four minutes after his exit therefrom, and that the purpose of his return was to find Sutton. He denied kicking or striking Williams.

It is obvious that the court could properly find that the kicks administered by accused were either the sole or a contributing cause of Williams' death. On the issue of malice aforethought, let it be assumed, but not decided, that the events prior to accused's first removal from the restaurant amounted to a "sudden quarrel", and thus constituted a provocation sufficient to reduce to manslaughter a death resulting from a blow then executed (Winthrop, Military Law and Precedents, 2nd ed. rev., p. 675). Even upon that assumption, the subsequent conduct of accused warranted the court in concluding that the killing was committed with malice aforethought. By accused's own admission, three or four minutes elapsed between his leaving and re-entering the restaurant, and the purpose of his return was to find Sutton. These facts, plus the brutal and calculated nature of the kicks administered to the helpless Williams, justify the belief that any heat of anger engendered by an assumed provocation had disappeared, and that the killing was in cold blood. Although intent to kill is not an essential element of murder (MCM, 1928, pp. 163, 164), it was alleged in the Specification and might properly have been inferred from the evidence.

It was also alleged that accused and Sutton acted jointly and in conjunction with one another. This alleged concert of action amply appears from the evidence.

In the opinion of the Board of Review, accused was properly convicted as charged.

5. a. The defense moved for a continuance for one week for reasons not necessary to enumerate in this opinion. After a conference between the court and counsel, a continuance for one day was granted (R. 9-11). Upon the convening of the court on the following day, the defense counsel declared his readiness to proceed. There is nothing in the record tending to show that the one day's continuance was insufficient, and, especially in view of the defense counsel's concurrence, the court's action was correct.

b. On behalf of accused, the defense moved for a severance. The motion was denied (R. 7, 8). When later renewed, it was again denied (R. 94, 95). The motion was made because accused desired the testimony of Sutton and Mrs. Sutton, and contended that a joint trial "makes it more difficult * * * to answer the charges", and that Sutton would be prevented by fear of self-incrimination from presenting his complete story. The court ruled correctly. The granting of the motion and consequent trial of accused alone would not have affected Sutton's right to refuse to answer questions by reason of their tendency to incriminate him, and the record shows that the testimony of Sutton and his wife was not qualified or circumscribed by the joint trial.

c. Certain exhibits of the defense were not introduced in evidence, although they were marked as exhibits and referred to during the trial, especially a model of the building in which the crime took place. It is not shown in the record that accused's counsel ever offered them in evidence, and their failure to be included in the record cannot under the circumstances be considered to have prejudiced accused's substantial rights.

d. Other minor errors claimed by counsel for accused to have occurred during the trial have been considered by the Board of Review and in the opinion of the Staff Judge Advocate, and found to have caused accused no harm.

6. Attached to the record is a recommendation for clemency signed by the defense counsel and assistant defense counsel, and submitted to the reviewing authority.

7. The Charge Sheet shows that accused is 34-1/2 years of age, had no prior service, and was inducted at Tyler, Texas, on 4 August 1942.

8. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence 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 Title 18, sections 452 and 454, United States Code.

Lucy G. 307

Judge Advocate.

John F. 307

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 251549

29 MAR 1944

UNITED STATES)

FIRST AIR FORCE)

v.)

Trial by G.C.M., convened at
Mitchel Field, New York, 22
February 1944. Dismissal.

Second Lieutenant HENRY G.
ALLMEROOTH (O-798736), Air
Corps.)

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

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

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

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

Specification 1: In that Second Lieutenant Henry G. Allmeroth, Air Corps, attached to First Air Force Provisional Staging Squadron, having been alerted for overseas duty and having been restricted to the limits of Army Air Base, Mitchel Field, New York, from about 0800, 6 February 1944, until his departure for overseas, scheduled for 0800, 7 February 1944, did, at Mitchel Field, New York, on or about 1700, 6 February 1944, break said restriction by going to Hempstead and Garden City, New York.

Specification 2: (Finding of not guilty).

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

Specification: In that Second Lieutenant Henry G. Allmeroth, Air Corps, attached to First Air Force Provisional Staging Squadron, did, while in alert for overseas service, without proper leave, absent himself from his organization at Army Air Base, Mitchel Field, New York, from about 1700, 6 February 1944 to about 1030, 7 February 1944.

ADDITIONAL CHARGE I: Violation of the 69th Article of War.

Specification: In that Second Lieutenant Henry G. Allmeroth, Air Corps, attached to First Air Force Provisional Staging Squadron, having been duly placed in arrest at Mitchel Field, New York, on or about 7 February 1944, did, at Mitchel Field, New York, on or about 12 February 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Second Lieutenant Henry G. Allmeroth, Air Corps, attached to First Air Force Provisional Staging Squadron, did, without proper leave, absent himself from his station at Mitchel Field, New York, from about 12 February 1944 to about 15 February 1944.

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

3. The evidence for the prosecution shows that the accused was attached to the First Air Force Provisional Staging Squadron, Mitchel Field, New York. This organization was activated on 17 November 1943, and its authorized strength fixed at twenty-four officers and four hundred enlisted men. Its personnel was to be furnished by the First Air Force and its equipment supplied by the Commanding Officer of the Army Air Base, Mitchel Field, New York (R. 9, 26, 39, 40, 45, 51, 55; Pros. Ex. 7).

As of 1 February 1944, the Commanding General of the First Air Force had issued the following order:

"1. Effective this date all combat crew personnel being staged by the First Air Force Provisional Staging Squadron, Mitchel Field, New York, are restricted to the immediate limits of Army Air Base, Mitchel Field, New York.

2. The above action is necessitated because combat crew personnel in the past have flagrantly abused their pass privileges to the extent that departure of aircraft for overseas movement has had to be delayed."

Some time thereafter, the accused executed a certificate required of all newly arrived members of combat crews stating that "I am familiar with ltr. 1st Air Force, dd 1 Feb, 1944 regarding the restriction of Combat Crews to the limits of Mitchel Field". A copy of the order was placed on the bulletin board, bordered in red, and a copy was placed on the counter next to where the individuals signed the certificate" (R. 11-14; Pros. Ex. 3-4).

The accused was a member of crew AW-5 and the co-pilot of a plane of which Second Lieutenant Grant L. Jensen was the pilot. On 5 February 1944 the Operations Officer of the First Air Force Provisional Staging Squadron issued "Memorandum Number 70". This provided in pertinent part that:

"1. Pilots and crews, as listed below, having reported to this station are ALERTED and will closely follow the schedule for 6 February 1944 listed below.

ON PROJECT NO. 96331-R. Electronically Trained Replacement Crews.

NO.	PILOT	CREW	AIRCRAFT NO.
*	*	*	*
4	2nd Lt. Grant L. Jensen	AW-5	42-100041

SCHEDULE FOR 6 FEBRUARY 1944

1315 - Physical examination for entire crew at Bldg. T-12. * * * NO crew will be cleared unless ALL crew members and passengers are present.

(300)

1400 - Pilot will report to Processing Bldg T-83, Personnel Section, to receive all personnel records.

1500 - All personnel baggage and equipment will be taken to the respective aircraft by the crews. * * *.

1700 - Sectional Clearance. * * *.

2. ALL Officers and Enlisted Men, Upon being Alerted, are Restricted to Mitchel Field * * * (R. 12, 26-28; Pros. Ex. 5).

About 8:30 o'clock on the morning of 6 February 1944, the executive officer of combat crews for the First Air Force Provisional Staging Squadron delivered a copy of the memorandum to the navigator of crew AN-5 who passed it on to his pilot, Lieutenant Jensen. The processing was commenced at the hour specified and was participated in by the accused. While the latter may not have seen the copy, he was "present throughout the clearance procedure" (R. 8-9, 14, 18-19).

Lieutenant Jensen was instructed during the course of the day that he was to depart for an overseas station at 8:00 a.m. the following morning. The accused was informed of "the take-off time". Immediately after completing his processing he left the Field and went to Garden City, New York. He registered at the Garden City Hotel at 5:18 p.m. and left a request that he be called at 6:00 a.m. o'clock. At about 9:30 p.m. he cashed a Western Union draft for \$25 at the Western Union Telegraph Company in Hempstead, New York (R. 8, 24-25, 47).

At 7:00 a.m. on 7 February 1944 he should "have been turning in his bedding equipment preparing to depart" and at 8:00 a.m., he should have been on the flying line. He was absent from both places of duty at the time specified. An effort was made to locate him, but he was not seen until around 11:00 a.m., when he entered his barracks for the purpose of changing his clothes. He was then asked by Captain Charles P. Hood "whether he knew he was restricted", and he replied in the affirmative. He was promptly placed in arrest and the following order, signed by Lieutenant Colonel Philip L. Mathewson, the Commanding Officer of the First Air Force Provisional Staging Squadron, was served upon him:

"1. You are hereby placed in arrest in quarters effective at 1100 hours this date, and

until such time as you are released by competent authority.

2. You will remain in quarters at all times except for three periods of one half hour each daily at which time you will go to Bldg. T-100 for meals. Your presence in your quarters will be checked every two hours. Any absence except as stated above will be regarded as a breach of arrest by this headquarters. * * *".

Receipt of this document was acknowledged by 1st indorsement (R. 9-10, 15, 21-24, 29-30, 47; Pros. Exs. 1, 2, 6).

The accused was "Relieved from duty with crew FZ 722 AW-5 and placed in combat excess pool (attached unassigned)". Between 11:15 and 11:30 p.m. on 11 February 1944 he was in the cafeteria. He "walked up to the table" at which Captain Hood was sitting and stated "in a questionable voice" that "he was getting tired of sitting in quarters and came [sic] over to the cafeteria". He was told to return to his quarters "since he was in arrest" (R. 10, 45, 48-49; Pros. Ex. 1).

Staff Sergeant Walter F. Brockman was in charge of quarters at squadron headquarters that night. He testified that he had been given special orders to check the accused's presence every two hours and that:

"At 6:00 o'clock I went out and personally checked his barracks. I had an assistant charge of quarters. I found no one in his barracks in his bunk. I asked for the man I was supposed to check, but no one professed to know him. At 1800 the assistant charge of quarters told me that [the accused] had called and reported that he was not in his barracks.

* * *
 "At 2015 there was a telephone call by a man who identified himself as [the accused] and asked to be checked in.

* * *
 "Approximately 2130" "I got a glimpse of a man who identified himself as [the accused] to the assistant charge of quarters.

"There was a telephone call at 11:30 * * * which I answered in which the man identified himself as /the accused/ stating that he was at the cafeteria and that he would be in later.

* * *
"At 0130 February 12th a man called to report to me as /the accused/, stating that he was not in his barracks, and then I carried on a further conversation with him and he reported to me, told me, that he had met Captain Hood in the cafeteria earlier in the evening.

* * *
"I was led to believe that he was in the cafeteria. He stated that he was still there. I told him that I was supposed to check for his presence in the barracks and that I had not found him in, and I suggested that he go back. I didn't have any authority to say anything, but I had not found him there yet. He led me to believe that he would return shortly."

The bed checks were continued at two-hour intervals throughout the night, the last one being made at 8:00 a.m. on 12 February 1944. The accused was not in his quarters at any of these times. Additional checks made later in the day and on 13, 14, and 15 February 1944 showed him to be still absent. On this last date he returned to Mitchel Field. He came "to the orderly room, at about a quarter to ten in the evening * * * and said that he had just returned to the base, that he had been off and got back about two hours ago and came to the orderly room because he wanted to talk to somebody". The commencement of his absence without leave was fixed by him at "a quarter of two on Saturday morning * * * the 12th of February" (R. 45-46, 50-56; Pros. Exs. 1-2).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, took the stand on his own behalf. He stated that prior to 7 February 1944 he had never seen either the letter of 1 February 1944, which is Prosecution's Exhibit 3, restricting combat crew personnel to the immediate limits of Mitchel Field, or Memorandum Number 70 dated 5 February 1944; that, as he followed the processing schedule, each of his duties was explained to him by Lieutenant Jensen who had the only copy of the Memorandum; that he had never looked at the Squadron's bulletin board; that he had signed the certificate acknowledging familiarity with the order of restriction

at approximately 3:00 p.m., on 6 February 1944; that he had not been "given any idea" as to the significance of the instrument; that he had obtained permission to leave the field from Lieutenant Jensen; that he had been directed to return at "7:00 o'clock the following day"; that he intended to return in time for the take-off and accordingly "left a call at the Garden City Hotel desk for 6:00 o'clock the next morning"; that when he awoke late, he was "plenty worried"; that he did not communicate with his organization because he "didn't want to get the pilot in trouble"; that he was "going to call but * * * thought [he] would be out here in about 20 minutes"; that he did not arrive at Mitchel Field until 10:15 a.m. on 7 February 1944; that upon finding that his plane was still there he "was happy" because he "thought everything would be all right"; that he "went to the PX Cafeteria, had a cup of coffee and a roll, went to [his] barracks and got into [his] flying clothes; that at 10:30 a.m. he was told to report to Lieutenant Jensen in the orderly room; that after being kept waiting about half an hour, he was placed in arrest; that he had never admitted to anyone that he had known that he was restricted to the field; that between 4:30 and 5:30 p.m. he signed the indorsement acknowledging receipt of the order of arrest; that each day thereafter,

"I just waked up usually late in the morning because I couldn't sleep very well at night; ate about two meals a day, I wrote a few letters. The rest of the time - it was pretty cold in there; I just sort of tried to relax";

that his quarters were in an "open barracks"; that he caught cold and was nervous; that on the night of 11 February 1944 he "ate dinner" and "drank some beer" at the PX Cafeteria; that he left between 2:00 and 2:15 a.m. and started walking down the street to the barracks; that he "stopped a taxi" and was driven "off the field" to "someplace on the other side of town in Hempstead"; that upon realizing what he had done, he "was afraid to come back"; that at the time he had no money; that he made no attempt to walk back because he "had not shaved since Friday"; that he had no authority to be absent from Mitchel Field between 12 and 15 February 1944; and that as soon as funds were made available to him he returned of his own volition (R. 69-85).

5. Specification 1 of Charge I alleges that the accused, "having been alerted for overseas duty and having been restricted to the limits of Army Air Base, Mitchel Field, New York" did on "or about 1700, 6 February 1944, break said restriction by going to Hempstead and Garden City, New York". This offense was set forth as a violation of Article

of War 96. The Specification of Charge II alleges that the accused did, "while in alert for overseas service, without proper leave, absent himself from his organization * * * from about 1700, 6 February 1944 to about 1030, 7 February 1944". This act was charged under Article of War 61. The Specification of Additional Charge I alleges that the accused "having been duly placed in arrest at Mitchel Field, New York, on or about 7 February 1944, did * * * break his said arrest before he was set at liberty by proper authority". This offense was laid under Article of War 69. The Specification of Additional Charge II alleges that the accused "did, without proper leave, absent himself from his station at Mitchel Field, New York, from about 12 February 1944 to about 15 February 1944. This act was set forth as a violation of Article of War 61.

The proof required for a conviction under Article of War 61, when the accused is charged with absenting himself without proper leave, is that "(a) * * * the accused absented himself from his command, guard, quarters, 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). Both elements were present in this case. The absence without leave covering the period between 12 and 15 February 1944 was taken without even a pretense of authority. The preceding absence without leave from 1700 on 6 February 1944 to about 1030 on 7 February 1944 may have been commenced with the permission of Lieutenant Jensen, but he clearly had no power or right to contravene the express orders of restriction issued by the Commanding General of the First Air Force and the Commanding Officer of the First Air Force Provisional Staging Squadron. Even, if he had had the authority to modify the commands of his superior officers, he had explicitly fixed 7:00 a.m. as the time of return, and the accused was absent without leave from that hour until his return at 10:30 a.m. The delay was short, but every moment lost was vital. The gravity of the offense depends not only upon the length of the absence but also upon the degree of importance attached to the accused's presence at the designated time and place. Obviously one who is alerted and ordered to report at a specified hour for departure for overseas duty is under a greater obligation to avoid delay than one who, for example, is directed to attend a practice march in basic training. Flagrantly willful absence from an overseas shipment inspired by desire for personal pleasure is inexcusable.

The breach of restriction in violation of Article of War 96 has been clearly shown. It is inconceivable that the accused did not know the contents of the order of 1 February 1944 issued by the Commanding General of the First Air Force. The certificate acknowledging familiarity with its contents refutes the claim of ignorance.

A breach of arrest under Article of War 69 has also been demonstrated beyond a reasonable doubt. The proof necessary to support a conviction of this offense is "(a) That the accused was duly placed in arrest; and (b) that before he was set at liberty by proper authority he transgressed the limits fixed by A.W. 69 or by the orders of proper authority. An arrest is presumed to be legal" (M.C.M., 1928, par. 132a).

Defense counsel has struck at one of the main pillars of the prosecution's case by ably arguing that Lieutenant Colonel Mathewson did not have authority to place the accused in arrest. This contention is based upon the context of paragraph 20 of the Manual for Courts-Martial, 1928, which states, in pertinent part, that:

"The following classes of persons subject to military law will be placed in arrest or confinement under A.W. 69, as follows:

* * *

"Officers, Members of the Army Nurse Corps, Warrant Officers. - By commanding officers only, in person, through other officers, or by oral or written orders or communications. The authority to place such persons in arrest or confinement will not be delegated. Subject to such limitations as may be imposed by superior competent authority the term 'commanding officer' includes the commanding officer of a garrison, fort, camp, or other place where troops are on duty and the commanding officer of a regiment, detached battalion, detached company, or other detachment, and their superiors."

Cl, 29 June 1943, AR 95-10, 27 July 1942, provides that:

"C. For all purposes of administering military discipline and the exercise of inferior court-martial jurisdiction under the provisions of Articles of War 9 and 10, a squadron will be considered a battalion, a group will be considered a regiment, and a wing will be considered a brigade. Commanding officers of squadrons, groups, and wings will have all of the corresponding powers conferred by Articles of War 9 and 10 upon commanding officers of battalions, regiments, and brigades, respectively."

The First Air Force Provisional Staging Squadron "was a unit in itself" but "was assigned to the First Air Force". As was said by the Trial Judge Advocate, the "First Air Force Provisional Staging Squadron is an independent unit, separate and apart, except insofar as it constitutes a part of the First Air Force". The Commanding Officer of the Squadron was subordinate to the Commanding General of the First Air Force in all tactical matters and to the Base Commander, Army Air Base, Mitchel Field, New York, in all administrative matters. All three organizations, the Squadron, the First Air Force, and the Army Air Base were located at the same field and shared many of the same physical facilities (R. 29, 33-34, 40-41, 62; Pros. Ex. 7).

From these facts it is apparent, and Defense Counsel admits in his Memorandum of Law, that the legal status of the Squadron for purposes of military justice was the equivalent of a "separate" battalion as distinguished from a "detached" battalion. This conclusion cannot benefit the accused. The words "regiment, detached battalion, detached company, or other detachment" appearing in paragraph 20 of the Manual are exactly the same as those employed in Article of War 10 and, under universally recognized rules of legal construction, must be given an identical interpretation. The Judge Advocate General, in passing upon that Article has held that:

"* * * so far as the regiment to which a battalion normally belongs was concerned, the latter became 'detached', within the meaning of the summary court act, when removed from the immediate command of the regimental commander, and remained 'detached', so far as the administration of justice through summary courts was concerned, until it again came under the disciplinary control of the regimental commander, even though while so 'detached' from the regiment such battalion came under the general command and control of an officer commanding a garrison, fort, or other place. * * * Within the meaning of the same act any body of troops was a 'detachment in the Army' when designated, pointed out, or separated from other troops in such manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same." (30-730, Mar. 11, 1913; Dig. Ops. JAG, 1912-1940, sec. 367 (1)).

To give varying and conflicting shades of interpretation to the same phrases would lead to a chaotic and arbitrary administration of military justice. Regard for precedent and sound policy required that the word "detached" be given the same meaning for the purpose of determining the scope of a battalion commander's authority to arrest an officer as in cases involving his authority to appoint summary courts. We must conclude, therefore, that the Commanding Officer of the First Air Force Provisional Staging Squadron had authority at the time and under the conditions stated to place the accused in arrest.

6. The accused is about 25 years of age. The records of the War Department show that he had enlisted service in the New York National Guard from 28 October 1937 to 20 March 1940; that he was an aviation cadet from 22 January 1942 to 25 March 1943 when he was appointed a Second Lieutenant; 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 legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Articles of War 61, 69, and 96.

Abner E. Lipscomb, Judge Advocate.

William H. Samwell, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(308)

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 Henry G. Allmeroth (O-798736), 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,
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. 276, 8 Jun 1944)

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

(309)

SPJGQ
CM 251554

27 MAR 1944

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

THIRD AIR FORCE

v.)

) Trial by G.C.M., convened at
) Morris Field, Charlotte, North
) Carolina, 22 February 1944.
) Dismissal.

) Second Lieutenant HUGH T.
) RILEY (O-687398), 510th
) Fighter Bomber Squadron.)

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Hugh T. Riley, Air Corps, 510th Fighter Bomber Squadron, 405th Fighter Bomber Group, AAF, WAAF, Walterboro, South Carolina, did at Statesboro, Georgia on or about 21 November 1943, wrongfully and unlawfully violate paragraph 16 a, (1) (d), Section II Army Air Forces Regulations 60-16, dated 9 September 1942 by flying a military aircraft at an altitude of less than 500 feet above the ground.

Specification 2: In that 2nd Lieutenant Hugh T. Riley, Air Corps, 510th Fighter Bomber Squadron, 405th Fighter Bomber Group, AAF, WAAF, Walterboro, South Carolina, did at Statesboro, Georgia, on or about 21 November 1943, wrongfully and unlawfully violate paragraph 1, Section I, Army Air Forces Regulations 60-16, dated 9 September 1942, by operating a military aircraft in such a careless and reckless manner as to endanger property and persons on the ground.

Specification 3: (Finding of not guilty).

(310)

He pleaded not guilty to the Charge and Specifications. He was found not guilty of Specification 3, but guilty of Specifications 1 and 2 of the Charge 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, briefly summarized, is as follows:

Army Air Forces Regulations 60-16, 9 September 1942, among other things, provides:

"Section I - General Flight Rules.

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."

"Section II - Contact Flight Rules.

16. Minimum altitudes of flight.

a. Except during take off and landing aircraft will not be operated

(1) below the following altitudes:

(a) 1000 feet above any building, house, boat, vehicle, or other obstruction to flight.

(b) At an altitude above the congested sections of cities, towns and settlements to permit an emergency landing outside of such sections in the event of complete power failure.

(c) 1000 feet above any open air assembly or persons.

(d) 500 feet above the ground elsewhere than as specified above.

(2) Within 500 feet of any obstructions to flight.

b. Any maneuver may be conducted at such altitude above the ground or water as is necessary for its proper execution in places other than specified above, when such maneuver is required to accomplish an ordered tactical flight, engineering or training mission."

On 21 November 1943 the accused was a second lieutenant on duty with the 510th Fighter Bomber Squadron stationed at Walterboro Army Air Field, Walterboro, South Carolina and as such was given the mission of flying from Walterboro, South Carolina to Statesboro, Georgia as evidenced by Operations Order No. 130, Headquarters 510th Fighter Bomber Squadron, 21 November 1943 (R. 11; Pros. Ex. 1).

The accused was flying an AT6 airplane and was accompanied by Corporal John N. Iacovetta (R. 12; Pros. Ex. 1). The operations order directed a take off at Walterboro at 1630 and a landing at Statesboro at 1700 on 21 November 1943 (Pros. Ex. 1).

On the afternoon of the same day First Lieutenant Alexander D. Serur, 127th Liaison Squadron, was on duty at the Statesboro Army Air Field, Statesboro, Georgia, as Assistant Operations Officer. Some-time after four o'clock p.m. his attention was attracted by the noise of what appeared to be a low-flying airplane. Upon going outside he saw an AT6 plane flying from the North across the field to the South at an altitude of approximately 200 or 300 feet and in the direction of the control tower. The plane then pulled up in a steep climb before it reached the tower and circled the field. It then circled to the left and came in from the East, again toward the control tower and the parking ground where several airplanes were then parked, and flying at an altitude as low as 50 feet. After passing to the right of the tower the plane circled to the left, got up to a safe altitude off of the East edge of the field, "performed a roll" and then left. Lieutenant Serur went immediately to the Base Operations office to discover who was the pilot of the plane and upon checking the clearances learned that it was Lieutenant Hugh T. Riley, the accused, and that he had cleared from Walterboro, South Carolina (R. 5, 6). No other AT6 planes were seen at the Statesboro Army Air Field that day (R. 10, 11). Operations Order No. 130, Headquarters 510th Fighter Bomber Squadron, 21 November 1943, was received in evidence (R. 11; Pros. Ex. 1).

Stipulated testimony of Second Lieutenant John B. Gaffield, Squadron Operations Officer, 127th Liaison Squadron at the Statesboro Army Air Field, is as follows: At 1425 on 21 November 1943 he was sitting in the operations tent on the flying line of the field. He heard the roar of an airplane and looked up from his desk just in time to see an AT6 plane cross the field at a very low altitude. He immediately went outside and watched the ship which "was pulled up in a steep climb northwest of the field". It then turned sharply and headed back down toward the field and passed over the parking ramp at an altitude of not more than 100 feet. On this pass the ship was headed in a southwestern direction (R. 11).

It was also stipulated that, if present, Private First Class Frederick H. Smith, 127th Liaison Squadron, would testify that he was on duty in the control tower of the Statesboro Army Air Field on 21 November 1943. During the afternoon he saw an AT6 airplane taxi out for a take-off and he gave the pilot a green light. After a normal take-off he did not notice the ship until it came back over the field headed South and flying at an altitude of about 150 feet. A minute or two later he heard the roar of an engine and then saw the AT6 coming back over the field going West. It came down low over the ramp and as it passed the control tower, which is 60 feet high, it was even with the top of the tower. Thereafter it made a climbing turn to the left and disappeared (R. 12).

Stipulated testimony of Corporal John A. Iacovetta is as follows:

"On 21 November 1943 I went to Statesboro Army Air Field, Statesboro, Georgia with Lt. Hugh T. Riley. We made the trip in an AT6 airplane and I was riding in the back seat. We were there

(312)

about half an hour while I changed batteries in another airplane. After completion of the work we took off. Lt. Riley was the pilot. After the take off we circled the field and then (sic) a pass at the field. On this pass we went over a runway at an altitude of about 200 feet. We made another circle of the field and then made another pass at the field. This pass was made at about the same place as the first one, but the altitude was a little higher. We made another circle of the field and then headed for Walterboro Army Air Field, S. C. After we had gotten a good distance from Statesboro Army Air Field we did a barrel roll. After this we came straight to Walterboro" (R. 12).

4. The accused having been informed of his rights testified substantially as follows:

On 21 November 1943 he was an officer of the 510th Fighter Bomber Squadron at Walterboro, South Carolina and in the furtherance of a mission which had been assigned to him he flew from Walterboro, South Carolina, to Statesboro, Georgia.

"At approximately 2 o'clock I flew an AT-6 with a mechanic down to Statesboro, Georgia, to take a battery to replace in an A-25. At about 5,000 feet I circled the airport once and then at about 200 or 300 feet to gain recognition of the tower. They shot me a green light and I peeled off and landed. After landing the mechanic fixed the airplane and the man in the operations room filled out the clearance for me and when I got ready to take off I went in and signed the clearance and got in the plane and took off. I turned on traffic to the left, gained about 100 feet, made a slow right turn and passed the tower, pulled out a little ways further, made another turn to the left and came down and made another pass at the tower. After pulling up the second time I gained an altitude of about 2000 feet and made another left turn and made course for Walterboro, and then I did a barrel roll" (R. 14).

He attempted to contact the tower by radio as he arrived at Statesboro Army Air Field but was unable to do so, probably because his radio was out of commission. There were sergeants and mechanics on the field but after he landed he made no effort to have his radio repaired. After he took off on his return flight he was anxious to check out and wanted to check his radio so that he would know it was in proper working order, and it was solely to obtain recognition from the control tower that he flew at an altitude less than 500 feet. Both of his passes at the field were at an approximate altitude of between 100 and 200 feet (R. 14-16).

He admitted having a "Pilot's Information File" but did not remember signing Form 24-A to the effect that he had read and understood the information therein contained (R. 17). However, although he had only been with the 510th Fighter Bomber Squadron for 20 days prior to 21 November 1943, the squadron had discussed flying regulations and he had attended

some of the conferences. He had never before done any low flying, as he had been cautioned not to do so; and members of his squadron never made a practice of doing so (R. 19).

5. The evidence is amply sufficient to sustain the findings. Irrespective of the testimony of the accused in which he admitted flying the airplane at a much lower altitude than is prescribed as the minimum in the safety regulations of the Army Air Forces, there is abundant and mutually corroborative evidence of the accused's guilt in the testimony of the witnesses of the prosecution.

After a successful take off the accused on two occasions, without justification or excuse, flew toward the Statesboro Army Air Field control tower at a speed of 160 miles an hour. On the first occasion he pulled into a steep climb just before reaching the tower; on the second, he veered to the side but was flying so low that his plane was on a level with the top of the tower. At the time planes and enlisted men were on the field near the tower.

The conduct of accused was a demonstration of purposeful and deliberate disobedience to well known and thoroughly understood regulations governing the elimination of hazards to air force personnel and equipment and providing protection against unnecessary accidents to other persons and property on the ground. There is no mitigating fact or circumstance apparent in the testimony of witnesses for the prosecution and nothing that the accused could say is in anywise exculpatory.

6. Records of the War Department disclose that the accused was born in Sherburne, New York, and is now 21½ years of age. After graduation from Sherburne High School in 1939, he was employed as a machine operator with the Scintilla Magneto Corporation at Sidney, New York, and as an engineer's helper with the Torner Construction Company at Rome, New York in 1941 and 1942. He was enlisted at Fort Niagara, New York on 21 September 1942 and became an aviation cadet on 14 October 1942. After completion of his preflight primary, basic and advanced training at Army Air Forces Gulf Coast Training Center, Randolph Field, Texas, he was commissioned a second lieutenant, Air Corps, Army of the United States, on 29 July 1943 and later was assigned to the 405th Fighter Bomber Group, Wolterboro Army Air Field, North Carolina. He is unmarried.

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

(314)

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. Bonds, Judge Advocate.

Earle Stephen, Judge Advocate.

Hester B. Friedman, Judge Advocate.

1st Ind.

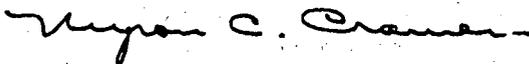
War Department, J.A.G.O., 11 APR 1944 To the Secretary of War.

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 Hugh T. Riley (O-687398), 510th Fighter Bomber Squadron.

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

3. Six of the nine members of the court and the trial judge advocate recommended clemency. The recommendation reached the reviewing authority after action had been taken but a notation on the letter of clemency states that "the letter was brought to the attention of the Commanding General, who stated he did not desire to change the action heretofore taken in the case." The Commanding General of the Army Air Forces, by letter of 6 April 1944 hereto attached, recommends that, notwithstanding the plea for clemency made by the six members of the court and the trial judge advocate, the sentence of dismissal be confirmed and executed, based on the following reasons; that this is an aggravated case wherein the officer concerned deliberately violated flying regulations, jeopardized not only his own life but also the lives of his enlisted passenger and of the men working on the ground and endangered his own plane as well as the planes on the ground.

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.

6 Incls.

- Incl.1 - Record of trial.
- Incl.2 - Dft. ltr. for sig. S/W.
- Incl.3 - Form of action.
- Incl.4 - Memo. dated 6 Apr. 44
from CG, Army Air Forces
- Incl.5 - Ltr. dated 28 Feb. 44
from Jesse Jacobs, U.S.
Marshal to the President
- Incl.6 - Ltr. dated 26 Feb. 44
from Mrs. Wm.H.Piley
to the President

(Sentence confirmed. G.C.M.O.'244, 30 May 1944)



(318)

He pleaded not guilty to the Charge and the Specification, but guilty of involuntary manslaughter, in violation of the 93rd Article of War. He was found guilty of the Charge and the Specification, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that during the evening hours of 1 February 1944, a blackjack game was in progress in hut 18 of Company C, First Battalion, First Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama. The accused, Private Roscoe A. Rogers, and three other enlisted men, including the deceased, Sergeant Lee Taylor, were playing in the game. They were playing for money. The accused entered the game at about 9 o'clock. At about 11 o'clock the accused, Rogers, stated that cheating was going on. Taylor, the deceased, was dealing and Rogers stopped the deal and demanded to see the deck. Taylor offered to give Rogers his money back, which Rogers declined to accept. The game was resumed and Rogers continued to play until he lost his money. He then sat and watched the game for about five minutes. By this time it was about 12:15 a.m. The accused got up from his place at the table and said "I guess I will go". He picked up an M-1 rifle from behind a foot-locker, which had not been within his reach while he was playing, took the rifle at sling arms and started toward the door of the hut. He paused and talked a while, the game being still in progress, and then walked over and sat down on a bunk with the rifle pointing in the air. One of the soldiers present, who had dropped out of the game, started to go out of the door, whereupon the accused said "I wouldn't leave if I were you * * *. You might get hurt if you do. You might tell the duty officer I have this rifle". The soldier did not go. The game continued and the accused sat and watched (R. 12-14, 25-27, 86-87).

The accused then placed the rifle across his knees, holding it with his left hand under the stock and with his right hand on the guard, and pointing it toward Taylor, the deceased. He pushed off the safety of the rifle and said, looking at Taylor, "Don't anyone take any money from me". Taylor replied "If you thought I took your money I will give it back to you". The accused said "This is something I thought I'd never have to do in the Army". Taylor then said "M-1 rifle ain't scaring me". The rifle, still in the position last described, was then fired by the accused, hitting Taylor, who was

sitting in a chair at the card table four or five feet from the muzzle of the gun, in the region of the heart, the bullet taking a downward course through the liver and exiting on the right side of Taylor's back just below the liver. The shot was fired at about 12:30 a.m. 2 February 1944, and Taylor died one and one-half hours later, in the Station Hospital, as a result of the wound so inflicted (R. 8-11, 14, 20, 27, 28).

Immediately after the shooting the accused went to the orderly room of Company C and told the Charge of Quarters that the Military Police should be called and that he (the accused) had shot a man. He also told the Charge of Quarters that Taylor, the deceased, had been dealing from the bottom of the deck, and he demonstrated it with pieces of paper. The accused also told Second Lieutenant Harold Noruk, the Regimental Officer of the Day, in substance that he had tried to hit Taylor in the guts (R. 32-34, 39).

4. The evidence for the defense corroborates the evidence for the prosecution as to the time, place and act of the shooting and as to the substance of the statement made by the accused at the time of the shooting. The defense strenuously contends, however, that the accused in making such statement had no reference whatever to Taylor and that the shooting of Taylor was entirely accidental (R. 43-47).

The accused, having had his rights with respect to testifying or remaining silent explained to him by counsel and by the court, elected to testify under oath. The substance of his testimony is as follows: During the early evening of 1 February 1944, he was in a fight in a latrine with one Private Ferguson. Ferguson threatened to get a gun and kill him. A sergeant present at the fight told the accused to get out of the Company. The accused left the latrine, went to a hut where he secured a rifle, loaded it with ammunition and then went about fifteen feet from his own hut to hut 18 where the blackjack game was in progress. He put the rifle behind a footlocker in hut 18 and joined in the game, sitting first on the bed beside Taylor and moving later to a point on the other side of the table where he could watch the door. He caught Taylor cheating and exposed it to those playing. Taylor offered him a dollar, which he declined to take. The game was resumed and Taylor won the next hand but the accused took a "free ride". Accused then quit playing and did not play another hand. He watched the game for about five hands, when the game broke up. Accused got up and took the rifle at sling arms and started to go out. He feared that Ferguson was outside, so came back and sat down on a bed. There was some general conversation. Sergeant Scott started

to go out, but accused warned him not to go, saying that Scott might get hurt and remarking that if Scott told the duty officer that accused had a rifle accused would get into trouble. He also told Corporal Jordan not to come near him. When Jordan opened the door accused put the rifle across his knees, pointing it in the general direction of the door. When the accused put the rifle across his knees he kicked the safety off and glued his eyes on the door and said "Well, this is something I never thought I'd be doing in the Army", meaning that he did not think he would have to protect himself in the Army. He decided then that perhaps there was no danger outside and started to get up, keeping his eyes still glued on the door until he felt the recoil of the gun. Turning around, he saw Taylor upon the floor. Immediately he went to the Orderly Room, delivered the rifle to the Charge of Quarters, reported that he had shot a man and requested that the Military Police be called. Accused also related that during the evening a soldier had come to hut 18 and warned accused about Ferguson, and accused sat facing the door so as to be able to guard the entrance (R. 43-49).

Accused also testified respecting three convictions which he had received in civil life, all of them involving assault and battery, and one of them involving a cutting.

Accused also identified five memoranda, each addressed "To Whom it May Concern" and each signed by a superior officer, certifying generally that accused's service while he was attached to Umpires Headquarters, Talladega Maneuver Area, was of good quality. The originals of such memoranda are attached to the record and they bear dates between 21 October 1943 and 6 November 1943. (R. 49-53; Exs. a, b, c, d, e).

On cross-examination, accused testified that he did not tell the Charge of Quarters that he caught Taylor cheating, that he did not tell Lieutenant Noruk that he intended to shoot deceased in the guts, that the shooting of Taylor was entirely accidental, that Taylor made no remark to accused after accused got out of the game, that Taylor did not rise from his chair at the table and that accused did not intend to fire the rifle at all (R. 63, 64, 66, 71).

Other defense witnesses corroborated accused's testimony as to the fight between accused and Ferguson in the latrine, the warning given the accused in hut 18 during the evening and the statement "I didn't think I'd have to do this in the Army" (R. 75, 78, 81).

5. The accused is charged with murder. The Specification alleges that the accused "did * * * with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill * * *" the deceased by shooting him with a rifle. In order to determine the legal sufficiency of the evidence to support the finding of guilty under this Specification, it is necessary that the evidence support the conclusion that the accused killed the deceased deliberately and with malice aforethought.

Murder is defined as " * * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means " * * * without legal justification or excuse". A justifiable homicide is "A homicide done in the proper performance of a legal duty * * *". Furthermore, an excusable homicide is one " * * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, * * *". The definition of murder requires that the death of the victim " * * * take place within a year and a day of the act or omission that caused it, * * *" (M.C.M., 1928, par. 148a). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities, in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which the terms may be used by the layman. In the famous Webster case, Chief Justice Shaw explained the meaning of malice aforethought as follows:

" * * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * * * *
 " * * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, there-

fore, that the words 'malice aforethought', in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denotes purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

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

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

The uncontradicted evidence shows that the accused shot and killed the deceased at about 12:30 a.m. on 2 February 1944, the deceased dying within a little more than an hour after the shooting. An analysis of the evidence reveals ample proof that the killing was done deliberately and with malice aforethought. Justifiable homicide is not claimed by the defense.

The only defense or excuse asserted by the accused for his act is that the shot was fired accidentally. To have accepted the defense's theory of accidental shooting it would have been necessary for the court to have disregarded the strong inferences to the contrary arising from the altercation between the accused and Taylor regarding Taylor's alleged cheating and from the exchange of words between the accused and Taylor immediately preceding the shooting and to have disbelieved entirely the testimony of Lieutenant Noruk that the accused told him shortly after the shooting that he (the accused) intended to shoot the deceased in the guts and the testimony of the Charge of Quarters that the accused, immediately following the shooting, told him that he had caught the deceased cheating and demonstrated with pieces of paper how the cheating was accomplished. Obviously, the evidence as to the accused's guilt, if believed by the court, was overwhelming. There appears no reason why such evidence should not have been believed.

6. No question was raised as the sanity of the accused. His record in the Army has been satisfactory. Accused himself, however, voluntarily testified regarding his conviction of three crimes, all involving violence, prior to the time of his induction into the Army. His intelligence appears to be average. His testimony is clear, and his answers to the questions propounded, both on direct and on cross-examination, were responsive and showed no lack of intelligence.

7. The accused is 34 years of age. He was inducted into the Army at Philadelphia, Pennsylvania, on 29 December 1942 with no prior service.

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

Abner E. Lipscomb Judge Advocate.

William H. Lambrell, Judge Advocate.

Gabriel H. Golden Judge Advocate.



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

(325)

SPJGV
CM 252075

1 MAY 1944

UNITED STATES)
)
 v.)
)
 Second Lieutenant JAMES)
 E. MCPHERON (O-1316493),)
 Infantry.)

84TH INFANTRY DIVISION

Trial by G.C.M., convened at
Camp Claiborne, Louisiana,
7 March 1944. Dismissal
and total forfeitures.

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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant James E. McPheron, Cannon Company, 333d Infantry, did, at J. E. LaCombe's Cafe on United States Highway 165 near the Main Gate of Camp Claiborne, Louisiana Cantonment Area, on or about 16 February 1944 deliberately remove the insignia of rank from his outer garment, to wit, a field jacket and did later appear in front of said cafe without proper insignia of an officer visible on his uniform.

Specification 2: In that Second Lieutenant James E. McPheron, Cannon Company, 333d Infantry, did, at J. E. LaCombe's Cafe on United States Highway 165 near the Main Gate of Camp Claiborne, Louisiana Cantonment Area, on or about 16 February 1944 drink intoxicating liquors with certain enlisted men, namely, Master Sergeant James I. Rae 32022731, Service Company, 333d Infantry, Staff Sergeant Thomas J. Corridan 32022321, Cannon Company, 333d Infantry, Staff Sergeant Patrick J. Holmes 32009096, Headquarters Company Third Battalion, 333d Infantry, Technician 5th Grade Evan B. Jones 33457450, Service Company, 333d Infantry, in a public place, to wit, said cafe.

Specification 3: (Finding of not guilty).

Specification 4: In that Second Lieutenant James E. McPheron, Cannon Company, 333d Infantry, did, at the Station Hospital, Camp Claiborne, Louisiana, on or about 16 February 1944, use abusive and obscene language toward Corporal Nello J. Pacioni, Private First Class Harry R. Suppes and Private First Class Clarence J. Lowry by saying in the presence of other enlisted men, "fuck these MP's, I'll be a buck-ass private along with you," and "we aren't afraid of these God-damn MP's," or words to that effect.

He pleaded not guilty to the Charge and all Specifications, and was found guilty of the Charge and Specifications 1, 2 and 4, and not guilty of Specification 3. 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:

On the night of 16 February 1944 accused and four or five enlisted men entered LaCombe's Cafe outside the main gate of Camp Claiborne, Louisiana. The accused first sat alone but later, at the invitation of the enlisted men, joined them at their table. Accused who was under the influence of liquor when he entered the cafe, ordered a Coca-Cola and mixed with it rum from a bottle brought in by the group. Accused drank from the glass thus mixed. During this time he removed the bars from his field jacket and laid them on the table (R. 10-14). The enlisted men apparently ordered beer (R. 15). One of the enlisted men fell out of his chair, was picked up and the group, including accused, went outside the cafe where the enlisted personnel got into a fight. The enlisted men involved in the fight were Technician 5th Grade Jones, Staff Sergeant Corridan, Master Sergeant Rae and Staff Sergeant Holmes.

Pfc. Thomas K. Rush and Pfc. Harry R. Suppes, military policemen, saw the fight and attempted to quell it. When the fight continued they placed the men under arrest. M/Sgt. Rae resisted and Pfc. Rush struck him on the head with his club, and the others attacked the policemen. The accused attempted to stop the fight and prevent the policemen from being hit. The military policemen then went for help and returned with several other military policemen (R. 19, 37).

Observing that M/Sgt. Rae was bleeding from the blow inflicted by the military policeman the accused's attitude changed and he became

antagonistic toward the policemen, saying: "These god-damn pricks shouldn't be carrying those clubs around. I would like to have one of them hit me with that club". He was then placed under arrest. Accused was bareheaded and without insignia during the melee outside the cafe (R. 20).

The entire group were taken by the military police to the station hospital where they were given blood alcohol tests (R. 21, 42). At the hospital the accused became "very profane and boisterous" and said in a loud voice "Fuck these MP's. I will be a buck-ass private along with the rest of you boys" (R. 21) and "The hell with the god-damn MP's, we aren't scared of them" (R. 42). From the station hospital the enlisted men were taken to the stockade, and the accused to the 333rd regimental guardhouse (R. 21). Accused appeared to be under the influence of liquor while at the hospital (R. 22, 43).

4. For the defense:

First Lieutenant John W. Fallon, Commanding Officer, Cannon Company, 333rd Infantry, and Lieutenant Colonel Ivan Hardesty, Executive Officer, 333rd Infantry, testified that accused's reputation as an officer and as a platoon leader was excellent (R. 46, 47). A letter signed by Colonel T. A. Pedley, Jr., Commanding Officer, 333d Infantry, commending accused because of superior instructional and troop leading ability displayed while on detail at AATC, Fort Bliss, Texas, was received in evidence (R. 46; D. Ex. 1).

The accused, after having his rights as a witness explained elected to remain silent (R. 47).

5. The evidence shows that on the night of 16 February 1944 accused entered LaCombe's Cafe, outside the main gate of Camp Claiborne, Louisiana, with four or five enlisted men. At their invitation accused joined the enlisted men at their table where he drank a mixture of rum and Coca-Cola. Accused had been drinking at the time he entered the cafe. While at the enlisted men's table accused removed his lieutenant's bars from his field jacket and placed them on the table. After one of the enlisted men who apparently were drinking beer, had fallen out of his chair, the group moved outside the cafe. There a fight ensued which attracted the attention of two military policemen, who tried to quell it. The accused attempted to aid the military police in their efforts, but it was necessary for one of the military policemen to hit one of the enlisted men over the head with his club. Unable to control the group the two military policemen left but returned shortly with several other military policemen. Accused, observing that the enlisted man who had been struck was bleeding, became antagonistic toward the military police, and made remarks to the effect that "These god-damn pricks shouldn't be carrying those clubs around. I would like to have one of them hit me with that club". Accused was placed under

arrest along with the rest of the group. During the melee outside the cafe accused was without insignia of any kind, and was bareheaded. The entire group were taken to the station hospital where the injured enlisted man was treated and alcohol blood tests were run on all of them. At the hospital the accused was profane and boisterous, and made statements in a loud voice to the following effect. "Fuck these MP's. I will be a buck-ass private along with the rest of you boys", and "The hell with the god-damn MP's, we aren't scared of them". Accused appeared to be under the influence of liquor while at the hospital.

The evidence establishes beyond all reasonable doubt that accused was guilty of removing his insignia as a second lieutenant and appearing in public without same, of drinking in public with enlisted men, and of using vile, obscene and profane language toward enlisted men as charged in Specifications 1, 2 and 4.

The Charge and all Specifications thereunder are laid under Article of War 95. It is, therefore, necessary to consider whether the conduct of the accused was such that in dishonoring or disgracing him personally as a gentleman, it seriously compromised his position as an officer and exhibited him as morally unworthy to remain a member of the honorable profession of arms (MCM, 1928, par. 151). Drinking with enlisted men in a public place is not per se a violation of Article of War 95, and in the absence of gross drunkenness or conspicuously disorderly conduct, constitutes a violation of Article of War 96 (CM 236209, Jordan). It has been held that where an accused officer and a group of enlisted men of his command, who were on a detail to conduct a bomb disposal demonstration, spent several hours at a bar drinking together, that such conduct by the officer constituted a violation of Article of War 96 rather than Article of War 95 (CM 234558, Field). The evidence shows that the conduct of this accused while drinking with enlisted men was not, in light of the above cases, of such a character as to warrant his conviction under the 95th Article of War. It has also been held that where an officer used threatening and abusive language toward employees of an officers' mess that such conduct did not warrant a finding of guilty of violation of Article of War 95 (CM 220642, Smith). By analogy the conduct of the accused in using obscene and profane language toward enlisted men (military police) should also be deemed not to constitute a violation of Article of War 95. The Board is of the further opinion that the conduct of accused in removing his insignia and thereafter appearing in public without same was not misconduct of such a gross character as to warrant a finding of guilty of a violation of Article of War 95. The Board of Review is, therefore, of the opinion that the record is legally sufficient to support only so much of the findings of guilty of the Charge and Specifications 1, 2 and 4 thereunder as involves findings of guilty of the Specifications in violation of Article of War 96.

6. War Department records show that accused is 23 years of age. He graduated from the Perry County High School, Marion, Alabama, and attended the Marion Military Institute, Marion, Alabama, for two (2) years. Accused attended The Infantry School, Fort Benning, Georgia, as a trainee and was commissioned second lieutenant, Army of the United States, 22 March 1943. In accused's 201 file there is a Special School Report, The Infantry School, Fort Benning, Georgia, showing that on 28 August 1943 accused received an academic rating of "unsatisfactory" in the Officers' Cannon Course.

7. The court was legally constituted and had jurisdiction of the person and 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 only so much of the findings of guilty as involves findings of guilty of the Specifications in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffy, Judge Advocate

Herbert M. St. Clair, Judge Advocate

Robert M. Harwood, Judge Advocate

SPJGV
CM 252075

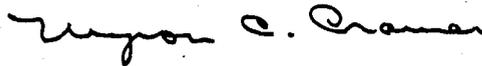
1st Ind.

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 James E. McPherson (O-1316493), 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 the Charge and Specifications 1, 2 and 4 thereunder as involves findings of guilty of the Specifications in violation of Article of War 96 (the accused was found not guilty of Specification 3), 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 execution of the sentence as thus modified be suspended during good behavior.

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



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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 355, 15 Jul 1944)

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

SPJGQ
 CM 252086

13 APR 1944

UNITED STATES)

FORT BENNING, GEORGIA

v.)

Trial by G.C.M., convened at
 Fort Benning, Georgia, 18

Private ALBERT W. KISSELL)
 (20281989), Airborne Infantry.)

August 1943. Dishonorable dis-
 charge, total forfeitures and
 death by hanging.

 OPINION of the BOARD OF REVIEW

ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Albert W. Kissell, Headquarters and Headquarters Detachment, 1st Airborne Infantry Brigade, Fort Benning, Georgia, did, in conjunction with Private First Class Erschel Hunt, Company E, First Parachute Training Regiment (then of Headquarters and Headquarters Detachment, 1st Airborne Infantry Brigade), Fort Benning, Georgia, and Private Raymond Fortney, Shenango Zone of Interior Replacement Depot, Shenango, Pennsylvania (then of Headquarters and Headquarters Detachment, 1st Airborne Infantry Brigade), at Columbus, Georgia, on or about January 8, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Claude A. Alexander, Casual Company, The Parachute School, Fort Benning, Georgia, a human being, by cutting him on the leg with a knife, striking him on the head with rocks and throwing him into the Chattahoochee River.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be hanged by the neck until dead.

The reviewing authority approved the sentence but recommended that the death sentence be commuted to confinement at hard labor for the term of his natural life and forwarded the record of trial for action under Article of War 48.

3. The competent and pertinent evidence for the prosecution shows that on 28 February 1943 the body of Private Claude A. Alexander was found on the East bank of the Chattahoochee River near a place known as Cooper's Dairy in Columbus, Georgia (R. 7, 18). It was clothed in an O.D. uniform, civilian shoes and raincoat. A wrist watch was on the left wrist. An overseas cap was tucked under the belt. Photographs of his body were taken and prints thereof appear in the record as Exhibits 1 and 2 (R. 15-17). The body was partially decomposed but was positively identified as that of Private Claude A. Alexander by a comparison of the fingerprints taken from the hand with the official fingerprints of Private Alexander appearing on the latter's Personal Identification Card (R. 96-106; Exs. 20-27, 32-44); by a comparison of the teeth of the body with the dental record of the deceased and an examination thereof by a dentist who had performed work on the teeth of the deceased during 1942 (Exs. 45; R. 132-134); by the pocketbook, dog tags, the wrist watch, a letter and a pen knife contained in the clothing or on the body (Exs. 3, 4, 5, 10; R. 31); by the tattoo mark on the left arm (R. 30, 50); and by the weight and height of the body (R. 50).

Captain Ira Gore, Medical Corps of the Station Hospital, Fort Benning made an examination of the body on 28 February 1943 the same day upon which it was found. It showed signs of marked decomposition as it had been exposed for some time. Because of the extent of decomposition he considered an autopsy as worthless. He examined the body for signs of violence but there was nothing that he could recognize as a knife or bullet wound and there were no bone deformities or fractures. He observed that the bone of the left leg was exposed from the rear but assumed this may have been caused by decomposition of the soft tissues. The exposure in the back of the left leg was about 3 inches wide and extended one-half of the length of the lower leg (R. 108). This could have been caused by a knife wound. It also could have been caused after death in the river. He could not determine the cause of death but assumed it to be from drowning (R. 109). He estimated that death occurred 6 or 8 weeks prior to 1 March 1943 (R. 111) and that Alexander died an unnatural death (R. 113).

The body was shipped to Valparaiso, Indiana, and there buried by Private Claude A. Alexander's mother who testified that her son was born 21 May 1921 and when inducted into the service in July 1942 was 5 feet, 11 inches tall and weighed about 175 pounds (R. 92-96). He was her only child.

In May 1943 the coroner of Porter County, Indiana, Hallard A. Flynn, pursuant to a court order, disinterred the body, performed an autopsy and held a coroner's inquest during which an open verdict was rendered with an accompanying opinion that death was the result of a loss

of blood from a cut on the lower left leg and a blow on the head. The autopsy performed by Dr. C. H. DeWitt disclosed a bruise on top of the head a little forward of the center and to the right side - "about the middle of the head" - an inch to an inch and a half in size (R. 119, 122, 124, 127; Def. Ex. 1).

It was shown from the official geological records of the District Engineer in Georgia that the Chattahoochee River remained at approximately the same level from 8 January 1943 until 17 January 1943 when it rose to a crest of 31.9 feet (R. 38-43) and that the place where the body was found had been submerged by the river and that the body was washed ashore as indicated by marks on the trees and shrubs in that area (R. 20).

On 1 March 1943 a 1937 Ford Sedan was discovered parked in the driveway of Mr. Cooper's home near Cooper's Dairy (R. 22). The vehicle proved to be that of Private Erschel Hunt, Company B, First Parachute Training Regiment, Fort Benning, Georgia (R. 70). Stains appearing on the floor mat and on the upholstery of the rear seat of the automobile were tested and found to be blood (R. 69, 72).

Miss Jean Autry testified that she was employed as a waitress at the Victory Tavern in Columbus, Georgia; that she knew and lived with Shirley Kissell, wife of the accused, and also knew the deceased (Alexander). On 8 January 1943, which date she had figured out with the aid of the military police, she saw the accused at the Victory Tavern in company with Privates Erschel Hunt and Raymond Fortney. On one occasion during the evening she saw the accused leave the tavern alone and later observed all three leave together. The three returned later to the tavern and took the witness and Mrs. Kissell home. She had also seen Alexander at the tavern that evening (R. 56-65).

On 13 March 1943 accused, having been placed under arrest, was brought to the investigation room of the Provost Marshal in Fort Benning, Georgia where he was questioned by Sergeant L. A. Spector, an investigator for the military police, and by Lieutenant M. E. Christoffel, who was assisting in the determination of the line of duty status of Private Alexander, the deceased. The accused was warned of his right to remain silent and advised that whatever he might say could be used against him. During that day, and for four days thereafter, the accused was questioned at intervals, but from time to time during this period of questioning the accused was warned that what he said might be used against him. During the course of these interviews Kissell admitted that he was married and his wife was employed at the Victory Tavern. One evening he called there for her but she was not present, so he went to the house where she lived and waited for her. A car drove up and his wife got out. There were some soldiers in the car. He berated his wife and one of the soldiers "cursed him out". The next night he was at the Victory Tavern and his wife introduced him to Alexander, the deceased. By his voice he recognized him to be the same soldier who was in the car the night before. Kissell fixed these nights to be January 7th and 8th with the assistance of Sergeant Spector, using as a basis the established fact that Kissell was AWOL the morning of 9 January 1943 (R. 136-

139). On the third day of questioning Kissell admitted that he had engaged in a fight with Alexander as a result of the mutual interest shown between Alexander and Kissell's wife (R. 143). On the fourth day Kissell voluntarily accompanied Sergeant Spector and Lieutenant Christoffel to the vacant lot where he alleged the fight had taken place, and he then and there demonstrated the position of Alexander's body as he lay unconscious on the ground at the end of the fight. Kissell placed Spector in a similar position and a photograph was taken (Ex. 52). On that occasion Kissell also further stated that later on, the night of the fight, he had carried Alexander's body down to the river and placed it as close to the water as he could (R. 146).

On the 18th of March a typewritten statement was prepared. On the 19th of March Kissell was taken before Major W. D. Veal, the Provost Marshal, by Sergeant Spector, to sign and swear to this statement. Major Veal read and explained to him the provisions of the 24th Article of War and advised him that he did not have to make any statement, but that if he did it could be used against him. Kissell was given the statement to read and sat down by himself and read it. In the presence of several witnesses Kissell then signed the statement (R. 148; Ex. 53).

Sergeant Spector testified that during the period of questioning of Kissell and at the time he signed the statement Kissell was not intimidated or coerced in any way, nor were any promises made to him by anyone. He was told, however, to tell the truth because his "life might depend on it" (R. 147), and upon several occasions, was told that he was lying when it appeared to his questioners that his statements were contradictory (R. 156). During this period of questioning Kissell was kept in solitary confinement in the stockade when he was not actually being questioned. When removed from the stockade Kissell was handcuffed on and after the 15th of March while questioned (R. 159). The questioning was done equally by Sergeant Spector and Lieutenant Christoffel (R. 153). Kissell was not told that he could communicate with counsel, but he did not ask for any (R. 155). During the first two days of questioning Kissell was told that Alexander was alive. It was not until the third day that he was told that he was charged with the murder of Alexander (R. 156, 158).

Lieutenant M. E. Christoffel corroborated Sergeant L. A. Spector concerning the questioning of Kissell - its manner, place, and length of time - over a period of five days (R. 169-184). Lieutenant Christoffel was investigating the cause of death of Alexander to establish whether he died in line of duty or not (R. 170). He added the fact that Kissell himself dictated the statement on the 18th (R. 183).

Major Willie D. Veal, Provost Marshal, Fort Benning, Georgia, then testified that the accused signed a statement before him on March 19, 1943, after having had the 24th Article of War read and explained to him, that the accused read the statement first, and then signed it voluntarily and that he (Major Veal) witnessed it. He identified the statement as Prosecution Exhibit 53. A further statement made on March 22, 1943,

under like circumstances also identified by the witness (Exhibit 54). Another statement made 8 July 1943, reduced to writing at the request of the accused and signed by him was identified as Exhibit 55. This exhibit was introduced and admitted in evidence (R. 184-191).

At this point, by request of the defense, Sergeant Julian F. Dey, Military Police Detachment, Fort Benning, Georgia, was called by the defense for examination with respect to the voluntary nature of the statements of the accused. He testified he was the Desk Sergeant at the Post Stockade and in charge of prisoners there, that the accused was kept segregated during the period of his questioning - about seven days - in a solitary confinement cell. This was described as "the black box" having an aperture in the door eight inches wide and twelve inches long.

There were six such cells in the stockade. In the runway in front of these cells were three windows looking out on a corridor. The accused's cell was about seven feet high and three or four feet wide. It was equipped with a metal bunk and a mattress. He was taken out to meals three times a day and given toilet facilities upon request. He was confined in solitary upon the order of the Provost Marshal (R. 192-196).

Over the objection of the defense counsel the confessions or admissions against interest of the accused of 18 March and 22 March 1943 (Exs. 53, 54) were admitted in evidence (R. 196-209).

It was further shown that during a mental examination made of the accused on or about 17 August 1943, by Captain N. R. Shulack, Medical Corps, the accused stated that he had caught the deceased (Alexander) sitting in an automobile with his wife and had warned him to keep away from his wife. On the following day he saw the deceased talking to his wife at the Victory Tavern and followed him out. He got into a fight with the deceased and picked up a rock as the deceased was besting him and hit the deceased on the head causing him to fall to the ground. He then picked up the deceased, carried him to the river and left him lying on the bank.

In the written confession, dated 18 March 1943 (Ex. 53), the accused stated in substance that on 15 December 1942 he married his present wife in New York and brought her back to Columbus, Georgia. She obtained a job in the Victory Tavern. On 6 January 1943, while waiting for his wife to appear at the place where she was living, a car drove up and his wife got out. He started to argue with his wife about going out with other soldiers, because there were two other soldiers in the car, one of whom he believed was called "Alex". On the following day the accused went to the Victory Tavern and there his wife introduced him to the deceased, whom he recognized as one of the soldiers who was with her in the car the preceding night. During the evening his wife paid constant attention to Alexander and he, the accused, did not like it. On the following evening he again was in the Victory Tavern and again saw Alexander talking to some of the men around him and his, (Kissell's), wife. Fortney and Hunt were present and Fortney teased the accused about the situation concerning his wife. They drank a couple of bottles of beer. When Alexander got up and left accused followed him and caught up to him near the bus station and asked

him if he knew that it was his wife that he was out with the other evening. Alexander said that he did not know that. The accused then said "you should know, my wife introduced me to you". Alexander then said "what if she did, do you want to make anything out of it". One word lead to another until the two came to a vacant lot where they engaged in a fist fight. Alexander made the first swing. The accused struck him seven or eight blows causing him to fall to the ground. When the accused asked him if he needed any more Alexander did not answer. The accused thereupon returned to the Victory Tavern and told Hunt and Fortney about having had a fight with Alexander. At that time he stated that he told them that Alexander might be dead, but he was not sure. He then left the tavern alone and returned to the vacant lot where he found Alexander lying in the same position as when he left him. When nobody was in sight he picked up Alexander's cap and tucked it in his belt and then picked Alexander up, swung him over his shoulder and carried him down under the Dillingham Street Bridge and laid him next to the water where he figured the water would carry him away.

He again returned to the Victory Tavern and told Hunt and Fortney what he had done. Fortney told him that Alexander was liable to be found in that place. After the tavern had closed for the night the three, Hunt, Fortney and the accused, took some girls home in Hunt's automobile and then drove down to the river and accused showed the other two Alexander's body. Alexander was lying in the same position as when the accused had left him. Fortney said "he must be dead" and felt Alexander's heart. Fortney said "it isn't beating". Hunt then reached down and felt Alexander's heart and said "Yes, his heart is beating". The accused then said "we might as well finish him off". Thereupon Fortney and the accused picked up stones and hit Alexander over the head. Hunt took out his knife and cut Alexander's leg several times. Fortney felt Alexander's heart again and said "his heart isn't beating now. * * * We can't leave him lying here". Kissell and Fortney then decided to throw his body into the river from off the bridge. The three picked the body up and carried it to Hunt's automobile and placed it upon the back seat of the car in a sitting position. The accused removed 75 or 80 cents of change from the deceased's pocket. Fortney removed his pocketbook and took from it an undisclosed amount of money and put this money in his own pocket. Both Fortney and accused struck the deceased's body and face several times while sitting on the back seat. Hunt drove the car onto the bridge. The three of them then carried the body from the car and raised it over the cement rail of the bridge and dropped it in the river.

Two or three weeks later Kissell, Fortney and Hunt decided to look for Alexander's body along the banks of the river. They drove in Hunt's car to the Dillingham Street Bridge, from there they walked downstream along the river bank about three miles and found Alexander's body in the same place where it was subsequently discovered by others. In order to identify the body Hunt picked up a stick and pushed up the left leg to see where he had cut Alexander. The gash in the leg was apparent as they could see the bone.

On 28 February 1943, Fortney and Hunt had an automobile accident and Hunt was taken to the hospital. The following day an article appeared in a local newspaper to the effect that two boys had found the body of Alexander. Kissell, Fortney and Hunt thereupon drove in Hunt's car near the spot where they had last seen Alexander's body and walking the rest of the way found that Alexander's body was gone. Hunt returned to the hospital. Fortney then suggested to the accused that Kissell and Fortney take Hunt's car and leave it near the spot where the body was found so that if the car were found then Hunt would get the blame. Accused objected to this, but notwithstanding, he accompanied Fortney in Hunt's car to Cooper's Dairy and parked it about 25 or 30 feet past the driveway, got a ride back to town and then rode the bus to camp.

In his supplemental statement, 22 March 1943 (Ex. 54), accused stated that he and Fortney had discovered Alexander's body on the bank of the river at a time prior to the time they visited the body with Hunt and about two weeks after 8 January 1943. At that time accused recognized the body as Alexander's from its face which had not been completely decomposed. Fortney at that time placed Alexander's wallet back into the back left pocket to prevent suspicion of robbery. It was several days later that they accompanied Hunt to the body but did not then tell Hunt that they had previously found Alexander's body.

On 8 July 1943 the accused voluntarily made an additional statement in which he stated that his previous statements involving Privates Fortney and Hunt were untrue and that they had had nothing to do with the death of Alexander and that the last time he, the accused, saw Alexander was when he picked him up from the vacant lot, carried him down by the river and left him there (R. 189; Ex. 55).

4. The competent and pertinent evidence offered by the defense may be summarized as follows:

Mr. Kyle Williams of Phenix City, Alabama, testified that he had on one occasion been a passenger in Hunt's 1937 Ford automobile during February 1943 and did not observe any blood stains or notice anything unusual about the floor mat or rear seat (R. 234-237). Mrs. Velma M. Whittaker of the same city testified that she also had been in the same automobile during February 1943 and did not observe any stains of any kind on the floor mat or rear seat (R. 239-240).

Private Raymond Fortney testified that he was riding with Hunt in Hunt's automobile on 27 February 1943 when it became involved in a collision. After the collision Hunt drove the car toward Fort Benning. Fortney fell asleep on the back seat. When he awakened the car had stopped and some members of the military police were beating Hunt with their clubs. Thereafter Hunt got into the back part of the car and lay down on the back seat at which time he was bleeding profusely. Both of them were taken into custody but the witness was released and shortly thereafter was transferred to Shenango, Pennsylvania (R. 246-248). On cross examination the witness stated that he spent the evening of 8 January 1943 with his wife at their home in Columbus, Georgia (R. 249).

When he was shown his own written statement dated 14 April 1943 to the effect that on the night of 8 January 1943 he was with Kissell and Hunt he stated that that was not true and that he had signed the statement under duress when beaten with a blackjack at the Provost Marshal's office by several sergeants (R. 251-253). He admitted that in 1939 he had been convicted of forgery in Illinois and had been arrested for passing a bad check in Iowa (R. 263). He further stated that when he was brought back to Fort Benning from Shenango he stopped in Atlanta, Georgia and telephoned a Ruth Bennett Williams. He denied that he told her in that conversation that he was being held on a charge of murder because at that time he did not know that he was being brought back on such a charge. He learned of the charge of murder about the second day after his return (R. 264). He also denied that he told Sergeant Spector, when he appeared before the sergeant for questioning, that he stated "I know you've got me charged with the murder of Claude A. Alexander" (R. 265).

Accused himself having been advised as to his rights to testify or to remain silent elected to make an unsworn statement in writing (R. 266; Def. Ex. 3). In his unsworn statement the accused reiterated the facts contained in his written statement of 8 July 1943 wherein he described having a fight with Alexander as a result of an argument concerning accused's wife. "We fought a few minutes and, as he was getting me down, I felt a rock, picked it up and hit him with it. He fell on the ground and did not move. I picked him up and carried him down to the river bank and laid him down. I don't know if I did it because I was so mad or just didn't want anybody to find him." He denied that he told anybody about the fight until questioned at the military police station. In this statement he averred that he involved Hunt and Fortney in his first statement because he thought that if he involved them it might go easier with him.

5. In rebuttal the prosecution recalled Sergeant L. A. Spector who testified that when Fortney was brought back to Fort Benning and came to the investigation room for questioning he already knew that he was to be questioned regarding the alleged murder of Alexander in that he stated "I don't know anything about the murder". The witness asked, "What murder", and Fortney added, "The guard told me" (R. 268). Mrs. Ruth Bennett Williams was also called and testified that on or about 3 April 1943 she received a long distance telephone call from Atlanta, Georgia made by Raymond Fortney, who stated that "they were bringing him back for murder, that he didn't know what for".

6. It was clearly established by the evidence that the body found on the bank of the Chattahoochee River, Columbus, Georgia on 28 February 1943, was that of Private Claude A. Alexander. This was conclusively shown by the fingerprints and teeth, the tattoo mark on the arm, the clothing, the wrist watch and articles in the pockets. Claude A. Alexander disappeared on the night of 8 January 1943. The evidence also clearly established that the body had been in the river and had washed up on the bank during the rise of the river that occurred on 17 January 1943. The condition of the body with regard to its decomposition indicated that death took place in early January. The condition of the left leg and the bruise or mark on the top of the skull was some evidence that Alexander had met his death prior to being

immersed in the river and by other than natural causes. It was the opinion of the coroner that the injury on the back of the left leg and the blow on the head indicated by the mark on top of deceased's head caused Alexander's death. Captain Gore, the medical officer at Fort Benning, Georgia, who first examined Alexander's body on 28 February 1943 refused to draw such a conclusion for the reason that in his opinion the injury to the leg could have been incurred after death and he did not discover the mark on the skull. Due to the advanced decomposed state of the body he could not arrive at any definite conclusion regarding the cause of death, but "assumed" it was caused by drowning (R. 109).

Nevertheless it is the opinion of the Board of Review that the evidence produced was sufficient to establish a corpus delicti and legally sufficient to warrant the admission in evidence of any confession, if properly obtained, explaining Alexander's death.

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 (M.C.M. par. 114a, p. 115). Where an unlawful homicide is charged, as in the subject case, evidence of the death of the person alleged to have been killed coupled with evidence of circumstances indicating the probability that he was unlawfully killed will satisfy the legal requirements for the admission of a confession of the killing.

Apart from the confession and sworn admission made by the accused, the accused made an unsworn statement to the court in explanation of the offense charged. Such statement may be considered as evidence in the case. (M.C.M. par. 76, p. 61). In this statement accused admitted that about the middle of January he discovered Alexander and his wife together in an automobile; that on the following evening he met Alexander in the Victory Tavern in Columbus and observed that he paid considerable attention to the accused's wife; and that the same thing occurred the following night. When Alexander left the tavern accused followed him and, following an argument about the accused's wife, engaged in a fist fight with him in a vacant lot near the river. When Alexander was getting the better of the accused the latter picked up a rock and struck Alexander with such force as to knock him unconscious. He then picked Alexander up in that condition, carried him to, and laid him down on, the bank of the Chattahoochee River, near the Dillingham Street Bridge in Columbus, Georgia.

From these admissions alone the court could properly and legally have concluded and found that accused did during January 1943 kill Private Claude A. Alexander. The accused, however, is charged not only with having killed Alexander, but that he did so with "malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation". The specification also alleges that the accused killed Alexander in conjunction with Privates Erschel Hunt and Raymond Fortney "by cutting him on the leg with a knife, striking him on the head with rocks and throwing him into the Chattahoochee River". In other words that accused murdered Alexander.

(340)

It, therefore, becomes necessary to determine whether Kissell had the malice necessary to constitute the killing murder, and also to determine when and in what manner Alexander met his death.

The evidence of malice and premeditation is amply supplied by the accused's confession of 18 March 1943. In that confession the accused in full detail described how he, together with Hunt and Fortney, returned to the body of Alexander and believing him to be alive decided to "finish him off", and with that intent he and his companions deliberately assaulted Alexander by striking him on the head with rocks, slashing the back of his left leg with a knife, and throwing his body into the river. This evidence alone proves beyond any reasonable doubt that the accused acted with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, as averred in the Specification.

This same confession of 18 March 1943 is the determining factor as to the time and manner of Alexander's death. According to Kissell's unsworn statement made to the court and his sworn statement of 8 July 1943, he claimed that during his unwitnessed fight with Alexander the latter was getting the best of it, so Kissell picked up a rock and struck Alexander such a blow that he knocked him unconscious; that he then carried his unconscious body down to the river and laid it near the water's edge and that that was the last he saw of Alexander. He would therefore have the court believe that Alexander met his death during this fight or as a result of being washed away by the river while unconscious. The confession of 18 March 1943, however, relates an entirely different story. In it he makes no mention of striking Alexander with a rock during the fight but states that he struck Alexander with his fists. He further tells of returning to the Tavern after the fight and of telling Hunt and Fortney that Alexander "might be dead" but "he was not sure". Later on, after he had carried Alexander's body down to the river, in response to the inquiry of Hunt and Fortney "Do you suppose he is dead?", he replied, "I don't know, I didn't take time to see". Finally, when all three gathered around Alexander under the bridge, "Fortney reached down and felt Alexander's heart. He said 'It isn't beating'. Then Hunt reached down and felt Alexander's heart. He said, 'Yes, his heart is beating'. I took Hunt's word for it. Then I said, 'We might as well finish him off'. They agreed. Fortney picked up a stone and hit Alexander with it over the head. I did the same. Hunt took out a knife and cut Alexander's leg several times. Hunt sliced at the same spot two or three times. I saw blood come from his head when I hit him with the stone I had. Fortney felt Alexander's heart again and said, 'His heart isn't beating now'. We then took Fortney's word."

As between this confession and the other statements of the accused the weight of the evidence favors the confession as containing the more accurate description of the events of the evening. This confession explains the laceration in Alexander's leg, the absence of money in Alexander's pockets, and the fact that Alexander's body floated downstream many miles before it washed ashore. The unsworn statement of the accused and other similar statements are inconsistent with these three established facts. The court, therefore, correctly adopted the facts contained in the confession as the true facts. The facts set forth in this confession and quoted above are convincing that Alexander was still alive when Hunt reached down and felt his body and announced that his heart was still beating. The fact that his head started to bleed when Kissell subsequently struck him with a rock and that all three of them by their conduct considered him to be alive corroborates this conclusion. By the same token Alexander was dead when his body was cast into the river. It is not necessary to determine which blow or blows or cuts caused Alexander's death as Kissell was a party to all of them. It, therefore, follows that the finding of guilty of the Specification of the Charge is supported by the evidence in so far as the manner of death is concerned and in naming those instrumental in Alexander's death.

The only remaining question that warrants discussion is whether the confession of 18 March 1943 was admissible in evidence. This depends upon whether it was made voluntarily by the accused. Counsel for the defense objected to the admission of this confession on the following grounds: (1) that the solitary confinement to which accused was subjected preyed upon his mind and led him to make the confessions involuntarily, (2) that no opportunity was afforded accused to communicate with friends or to obtain counsel, and (3) that the investigating officer exercised coercion by telling the accused that he was lying and that he had better tell the truth. For authority, counsel relied primarily upon C.M. 131194 (1919) and C.M. 152444 (1922) cited in paragraph 395 (10) Dig. Ops. J.A.G. 1912-40.

The fundamental reason for the exclusion of a confession not voluntarily made is because there is a reasonable probability that the accused would make a confession that may not be true (Winthrop, Military Law and Precedents, 1920 Reprint, p. 328; Vol. 2, Wharton's Criminal Evidence, par. 603, p. 1007). The meaning of the word "voluntary" as applied to confessions is thus defined in Vol. 2, Wharton's Criminal Evidence, par. 592, p. 980:

"The question is more fully comprehended by stating that the confession is voluntary where it is not the result of any improper inducement. Hence, the term 'voluntary', as used in the development of the law of confessions, means that the accused speaks of his free will and accord, without inducement of any kind, and with a full and complete knowledge of the nature and consequences of

(342)

the confession; and when the statement is thus free from influences affecting the will of the accused, at the time the confession was made, it is rendered admissible in evidence against him."

The voluntary or involuntary character of a confession is a question of law to be determined from the facts adduced in the particular case (Vol. 2, Wharton's Criminal Evidence, par. 594, p. 982).

In the instant case, there is no evidence that any improper inducement was held out to accused. At the outset of the questioning on 13 March 1943, Sergeant Spector informed him that "he had the right to make a statement or not to make a statement; that if he did make a statement anything he said could be used for or against him in the event of a court-martial." (R. 135). This warning was repeated by Lieutenant Christoffel on 15 March 1943 (R. 163) and was reiterated by the Provost Marshal on 19 March 1943 and 22 March 1943, on the occasions when the two confessions were signed and sworn to by accused. The record discloses no threats made against accused and no promises held out to him.

Taking up the objections interposed by the defense, two of the grounds advanced may be eliminated without great difficulty. First, as to the objection that no opportunity was afforded accused to communicate with friends or counsel, it is sufficient to state that there is no evidence in the record to show that accused ever made a demand or request to communicate with anyone, or, if such a request was made, that it was denied. Furthermore, Vol. 2, Wharton's Criminal Evidence, par. 628, is authority for the statement that "despite the fact that a confession is made in the absence of counsel, it is admissible; in fact, it has been held in a number of cases that it is not error to admit in evidence a confession of the prisoner, over the objection that, before making the confession, the prisoner had been refused an opportunity to communicate with counsel." Secondly, with regard to the objection that the investigating officers told accused that he was lying and that he had better tell the truth, it is well settled law that a mere adjuration to speak the truth does not vitiate a confession when neither threats nor promises are applied (Vol. 2, Wharton's Criminal Evidence, par. 625). There is no evidence that threats or promises were used in connection with any of the investigating officers' statements to accused; in fact, the investigators explained that the accusation of lying was injected only when accused made contradictory statements, or statements inconsistent with facts already known to the investigators.

The most serious objection offered to the admissibility of the confession of 18 March 1943, is the fact that it was obtained at the conclusion of five days of questioning, during which, when he was not actually in the presence of the investigating officers, accused was kept in solitary confinement. This objection must be considered in the light of all of the facts. The record shows that all of the meetings with the investigating officers were held in the daytime, either in the morning or afternoon, or both, with rest periods in between, and that none of them were so prolonged as to tire the prisoner or to overcome his will. While it is true that, during intervals between questioning, accused was segregated from other

prisoners, evidence discloses that he was kept in a cell with a bed, toilet facilities, and was allowed to go to meals in the mess hall three times daily. Whether or not these conditions imposed upon accused a hardship so intolerable that, at the end of five days, he made a false confession to escape them, was properly a question for the court to decide.

A confession of guilt is one of the strongest forms of proof known to the law (MCM, par. 114, page 114). In order to make it admissible in evidence it must appear that the confession was voluntary on the part of the accused. If made to a military superior, as in the subject case, a full inquiry into the circumstances should be made. In the opinion of the Board the record discloses all of the circumstances surrounding the obtaining of the confession and they do not indicate in any way that it was made involuntarily. It was within the power of the accused himself to testify regarding the circumstances surrounding the obtaining of the confession and explain, if he could, in what way he was coerced into making the confession, or why it was not voluntary. There being no evidence that it was made involuntarily and as all of the circumstances of its making and signing were disclosed, the confession of 18 March 1943 was properly admitted in evidence by the court. See also CM 210693 (1938); Dig. Op. J.A.G., 1912-40, sec. 395 (10).

With this confession properly in the record the record is legally sufficient to support the findings of guilty of the charge and its Specification.

7. The accused is 21 years of age. He enlisted at Corning, New York on 2 January 1940 and at the time of the alleged murder was a member of Headquarters and Headquarters Detachment, 1st Airborne Infantry Brigade.

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

William A. Rouns, Judge Advocate.

Paul Hedlum, Judge Advocate.

Herbert B. Fisher, Judge Advocate.

(344)

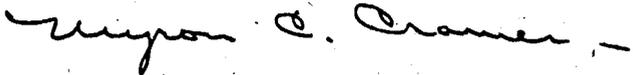
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War Department, J.A.G.O., 25 MAY 1944 - To the Secretary of War.

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 Private Albert W. Kissell (20281989), Airborne Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification - alleging murder in violation of Article of War 92. The reviewing authority has recommended that the death sentence be commuted to confinement at hard labor for the term of accused's natural life. I concur in the recommendation of the reviewing authority, and recommend that the sentence be confirmed, but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. I further recommend that the United States Penitentiary, Atlanta, Georgia, 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,
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 dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 444, 19 Aug 1944)

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

(345)

SPJGQ
CM 252087

15 MAY 1944

UNITED STATES)

FORT BENNING, GEORGIA

v.)

Trial by G.C.M., convened at
Fort Benning, Georgia, 22-24
November 1943. Death by
hanging.

Private RAYMOND W. FORTNEY,
JR. (19055791), Shenango Zone)
of Interior Replacment Depot)

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Raymond W. Fortney, Jr., Shenango Zone of Interior Replacment Depot, Shenango, Pennsylvania (then of Headquarters and Headquarters Detachment, 1st Airborne Infantry Brigade), did, in conjunction with Private Albert W. Kissell, Headquarters and Headquarters Detachment, 1st Airborne Infantry Brigade, Fort Benning, Georgia, and Private First Class Erschel Hunt, Company E, First Parachute Training Regiment (then of Headquarters and Headquarters Detachment, 1st Airborne Infantry Brigade), Fort Benning, Georgia, at Columbus, Georgia, on or about January 8, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Claude A. Alexander, Casual Company, The Parachute School, Fort Benning, Georgia, a human being, by cutting him on the leg with a knife, striking him on the head with rocks and throwing him into the Chattahoochee River.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced at the trial. He was sentenced to be hanged by the neck until dead. The

(346)

reviewing authority approved the sentence but recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, and forwarded the record of trial for action under Article of War 48.

3. The competent and pertinent evidence for the prosecution shows that on 28 February 1943, almost three weeks after the alleged date of the homicide, the body of Private Claude A. Alexander was found on the East bank of the Chattahoochee River near a place known as Cooper's Dairy, about seven miles down stream from the Dillingham Street Bridge in Columbus, Georgia (R. 13). It was approximately 15 yards from the edge of the water and had evidently washed ashore from the river. It was clothed in an O. D. uniform, civilian shoes, and a raincoat. An overseas cap was tucked under his belt and was covered by the closed coat. The body was badly decomposed and both hands were well eaten away. One hand was closed and retained considerable of its skin, but the fingers and skin of the other hand were gone. There was a hole, or opening, through the flesh into the bone on the back of the lower portion of the left leg. This gash was about seven inches long and three or four inches wide (R. 7-10). There were no tears or cuts in the uniform (R. 14). The features were unrecognizable and so darkened that the two small boys who discovered the body were under the mistaken belief that it was that of a colored person (R. 12). On the left leg "the trouser was up the leg and right where the leg of the trouser started is where the wound began" (R. 13).

It was stipulated that the body thus found and described was that of Private Claude A. Alexander, the soldier named in the Specification of this Charge, and that it had been subsequently interred in the Graceland Cemetery, Kouts, Indiana (R. 14).

Photographs of the body, as it lay on the bank of the river, were taken and prints thereof appear on the record as Prosecutions Exhibits 1, 2 and 3.

In addition to the above stipulation as to the identity of this body, it was further identified as that of Private Claude A. Alexander by a "dog tag" with the name "Private Claude A. Alexander" thereon (Pros. Ex. 11), a pocket book (Pros. Ex. 4), a wrist watch (Pros. Ex. 5), a letter (Pros. Ex. 6), and a pocket knife (Pros. Ex. 7), all of which were discovered on the body, either attached thereto or in the clothing thereon; and also by a tattoo mark on the left arm (R. 21).

Major Ira Gore, Medical Corps, an expert pathologist, who was stationed at Fort Benning on the date when the body was discovered,

examined this body on about 1 March 1942 but made no autopsy. It showed evidence of considerable decomposition and of having been in the water for some time. There was a large laceration or gash in the calf of the left leg exposing the bones. He discovered no marks to indicate external violence. There were no broken bones or skull fracture. The features were unrecognizable and Major Gore estimated from the stage of decomposition that Alexander had been dead from six to eight weeks (R. 25). He reported "drowning" as "the presumptive cause of death". Because of the condition of the body it was impossible to determine the actual cause of death without an autopsy and for the same reason he considered an autopsy as worthless. In his opinion the chief cause of the gash on the left leg was post mortem decomposition. It was impossible for him "to determine whether there had been a previous wound which might have accelerated it" (R. 26). On 1 March 1943 Major Gore issued a certificate, in his official capacity, to the effect that there were no recognizable evidences of wounds or cuts on the body at the time (R. 28, Def. Ex. A).

Hallard A. Flynn, mortician and coroner of Porter County, Indiana, disinterred Alexander's body pursuant to a court order and on 30 April 1943 Dr. C. H. DeWitt of Valparaiso, Indiana, performed an autopsy in the presence of Dr. George Douglas, Secretary of the County Board of Health, Dr. Jones, Lieutenant Christoffel, representing the Army and others (R. 61). Dr. DeWitt made a report to the effect that there was, at that time, no recognizable evidence of wounds or lacerations of the skin; that an examination of the skull revealed no evidence of fracture; and that, from the autopsy, the cause of death could not be determined (Pros. Ex. 16). Mr. Flynn did, however, observe a bad wound on the lower leg and, after the scalp had been removed, a bruise about one inch to $1\frac{1}{2}$ inches across, on the top of the head two inches to the left of and one inch forward of the center (R. 60, 136). This bruise or mark was on the skull and could not be seen before the scalp was removed (R. 136). Photographs were again taken of the body and prints thereof were attached to the record (Pros. Exs. 13, 14, 15).

Mrs. Marie Alexander of Valparaiso, Indiana, testified that the deceased Private Claude A. Alexander was her only son, having been born to her on 21 May 1921, and she identified Prosecution's Exhibit 12 as his photograph (R. 59). She had not seen him since his induction into the Army 31 July 1942 and she received her last letter from him postmarked 8 January 1943 at Fort Benning (R. 58).

Private First Class James T. Browning knew Alexander intimately, having bunked next to him in the same barracks at Fort Benning. They went together occasionally and two or three times they went to the Victory Tavern, Columbus, Georgia. Here Browning came to know Shirley Kissell in a casual way, but Alexander more intimately. Browning did know, however, that Shirley was the lawful wife of Private Albert W. Kissell (R. 32, 33). The last time Browning saw Alexander alive was

8 January 1943. He saw Alexander's dead body when he was called to the morgue at the station hospital on 1 March 1943 to identify it, at which time his identification was based upon the tattoo mark on the right arm of the body and by the peculiar type of slippers that were on its feet. He had allowed Alexander to wear his wrist watch when he had last seen him and he identified the watch which was found on the body as the watch which he had loaned Alexander (R. 34, 35; Pros. Ex. 5). He and Alexander had gone to the Victory Tavern on the night of 7 January 1943 where both of them talked to Shirley Kissell and where they remained for about two hours. They had also been in the tavern on 6 January and, although they both returned to camp from Columbus by bus, he was not certain whether it was on the 6th or the 7th when he left a bit earlier than Alexander, who met him about an hour later at the bus terminal. He had never, on any occasion, gone with Alexander when he took Shirley Kissell home from the Victory Tavern. Browning did not know the accused and could not recall ever seeing him before the day of the court-martial trial of Private Albert W. Kissell for the homicide of Alexander. He did not remember seeing the accused or Kissell at the Victory Tavern on the last night he was there with Alexander, but he accounted for this by saying that he was not with Alexander all the time while he was in the Victory Tavern because "he was around drinking and having a good time". He did not go with Alexander to the Victory Tavern on the night of 8 January 1943 because Alexander had not asked him to accompany him and he had no clean clothes to wear (R. 38-40).

Miss Jean Autry testified that during January 1943 she was employed as a waitress at the Victory Tavern, Columbus, Georgia. She knew Privates Albert W. Kissell, Erschel Hunt, and the accused, Raymond W. Fortney, Jr. (R. 41, 42). Shirley Kissell, the wife of Albert Kissell was also employed at the Victory Tavern and she and Jean Autry roomed together (R. 42, 51). She did not personally know, but had seen, Alexander, the deceased, "a time or two", but she could not recall when (R. 42). Being uncertain of the dates of events as to which she had previously made a statement, she was allowed, over objection by defense counsel, to read this statement to refresh her memory (R. 45). She then stated that she has seen the accused at different times between 1 January and 15 or 16 January 1943, in the Victory Tavern in company with Kissell and Hunt. The last time she saw them there together was "about a week" before she quit work at the tavern on Saturday, 16 January 1943. She also fixed this occasion by recalling that it was a week after New Years. Although the President announced that the court would allow leading questions because the witness appeared hostile, or was manifestly unwilling to give evidence as to dates (R. 48), no precise testimony as to dates was elicited from her. Though she had previously testified as a witness in the case of United States v. Private Albert W. Kissell, when asked

whether she had, on that occasion, stated that the accused, together with Kissell and Hunt, was in the Victory Tavern on the night of 8 January 1943 she now answered "I might have, if I did, I don't remember". She did testify, however, that Fortney was in the tavern "sometime around the 7th or 8th but I can't say for sure," (R. 48, 49, 53, 57), and at that time he was accompanied by Kissell and Hunt (R. 50). On that night Kissell left the tavern alone, after dark, while the accused and Hunt remained. Kissell later returned to the tavern and he, the accused, and Hunt took her and Shirley Kissell home when the tavern closed (R. 50). This occurrence took place on the night following a party at the Beauty Rest Cabins near Phenix City, Alabama, on which occasion and at which place she, Shirley Kissell and another girl, accompanied by the accused, Kissell and Hunt, spent the night together (R. 47, 50, 53). Although she had previously gone with this same group to a place called the Pines (R. 53, 54) she was never in the company of the three men (Kissell, Hunt and Fortney) who had accompanied the girls to the Pines and the Beauty Rest Cabins, after the night when they met in the Victory Tavern and following the night spent at the Beauty Rest Cabins (R. 50). On cross-examination she stated that she had seen the deceased, Alexander, go out with Mrs. Shirley Kissell, and she saw him talking with her, but she was never with them when Alexander took Mrs. Kissell home (R. 55). She did, however, see Alexander in the Victory Tavern on either 7 or 8 January 1943 (R. 53). She had never seen Kissell and Alexander, or the accused and Alexander, together, and she had no recollection of Fortney ever talking about Alexander (R. 56). When asked how she "happened to remember so well the night Private Kissell left the Victory Tavern alone" she replied, "Because I know it was the 7th or 8th he was in there and it wasn't so long after that I quit working there", and because that was the night following the party at the Beauty Rest Cabins (R. 57).

Sergeant Leonard A. Spector, Corps of Military Police, Fort Benning, Georgia, testified that he first saw the accused on 5 April 1943 in the Provost Marshal's office at which time he fully warned him of his rights under Article of War 24, advising him "that he had a right to make, or not to make, a statement and that if he did make a statement anything he said could be used for him or against him in the event of a court-martial". The accused was then asked if he knew why he was there, and he answered that he was accused of murder, whereupon Sergeant Spector told him to tell about it (R. 64). This first questioning lasted for about an hour during which period the accused was alone with Sergeant Spector. On later occasions, apparently 6 and 7 April, and again on 13 and 14 April, the accused was again questioned by Spector, but on these occasions Lieutenant Christoffel, of the Parachute School and Sergeant Sarno, another military policeman, were present (R. 66, 69). The accused's story was finally consolidated in a typewritten statement which he signed on 14 April 1943. This statement, and the substance of the answers to questions propounded to the accused on the various prior occasions when he was examined, were substantially the same as the story he had told on the first day,

5 April 1944 (R. 64). No force was used upon the accused at any time (R. 65). On cross-examination Spector denied hitting the accused with a blackjack or threatening him. There were some blackjacks in the files of the Provost Marshal's office. These had been taken from soldiers who were found in possession of them but were locked up in the file room which was not used during the examination of the accused (R. 69). This statement was admitted in evidence without objection (R. 66; Pros. Ex. 17). Sergeant Spector further explained, on cross-examination, that Fortney's first statement was not reduced to writing until all of the various examinations had been completed because he "didn't think he (Fortney) was telling the truth". During the intervals Spector had time to check the story given by the accused (R. 67). He would then again question the accused who, when Spector proved to him that he had lied in a former statement, admitted he had done so and said, "Well, what are you going to do about it" or words to that effect. On one particular matter the accused admitted he had lied about incidents surrounding his visit to the Beauty Rest Cabins after Spector had shown him he had other evidence (R. 67, 70, 71).

During the examination the accused was at first uncertain about dates, but he did recall a morning when he was AWOL though not the date. Spector "showed him the morning he was AWOL from the records - that that certain day was the only time he was AWOL - and that established the date * * *". The date thus established was 8 January 1943 (R. 67, 68).

According to the accused's statement, on the night of 7 January 1943 he had gone, in company with Mary, Gene (Jean), Bonnie Fay, Shirley, Erschel Hunt and Albert Kissell, to the Beauty Rest Cabins. The next morning he came into camp at twenty minutes to eleven. He then worked all day and that night (8 January 1943) he again went to Columbus with Kissell and Hunt. They went first to the Victory Tavern and then to Wimpy's for a short while and drank beer. When the girls were through with their work at the Victory Tavern, Shirley, Bonnie Fay, Gene (Jean), Hunt, Kissell and the accused got into Hunt's car and drove into the country where they parked for an hour and a half or two hours. They then took the girls home and returned to camp early in the morning. He did not see Kissell leave the Victory Tavern during the night of 8 January 1943 and denied that he ever heard anything about Private Kissell having a fight with anyone on that night, but, he admitted that he was with Kissell and Hunt during the entire evening and early morning until they all returned to camp. He denied knowing anything about Alexander's death. He also relates in his statement how he and Hunt had gone to town in Hunt's car on 27 February 1943 and had an accident in which no one was hurt. Later, after police had taken Hunt to camp, the accused tried to run Hunt's car back to camp but it got hot and stopped somewhere along the right side of the old Fort Benning road facing toward Fort Benning (Pros. Ex. 17).

Private Erschel Hunt, one of the three accused named in the Specification of the Charge in this case, was called as a witness and, having had his legal rights with respect to compulsory self-incrimination explained to him by the court, voluntarily testified. He became acquainted with the accused and with Private Albert W. Kissell in September 1942 and had been out socially with both. In doing so they frequently used a Ford automobile which Hunt had purchased in January 1943. On the nights of 7 and 8 January 1943 he had gone, with Kissell and the accused, to the Victory Tavern in Columbus, Georgia. He knew that Kissell was married and was acquainted with Shirley Kissell, his wife. On the night of 8 January they arrived at the tavern at 8 o'clock and, after staying there about an hour, went to Wimpy's Place for some drinks, returning again to the Victory tavern in a half an hour. The accused and Hunt left Kissell at the tavern returning once more at 11:30 p.m. The tavern closed at 11:45 at which time the accused, Kissell and Hunt, accompanied by Shirley Kissell, Jean Autry and Bonnie Fay Brown, went to Jumbo's and had something to eat after which they drove into the country, returning to town at about 1 o'clock a.m. They took the girls home and proceeded back to camp (R. 73-76).

"We were coming over through Phenix City, through Alabama. Kissell said, 'Let's stop down by the river.' When we got down there I saw a body laying on his face. I asked who he was. Kissell said it was Private Alexander, and he said he had a fight with him and beat him up. Fortney said, 'What do you want to do with him?' Kissell said, 'We'll finish him off.' Then Fortney and Kissell started hitting him in the head with rocks. They was standing three feet above him, and dropping rocks on his head. They felt his pulse and said he was dead. They asked me what I was going to do. They said, 'You have to do something and you can't talk.' Then, after they said he was dead I felt his pulse and heart and I saw he was dead and I took my knife and cut his left leg. Then we took his body in the back of the car and took him on the bridge and threw him in the Chattahoochee River."

Alexander was alive as he lay on the river bank because Kissell had felt his heart and Hunt saw deceased move his legs (R. 77). The accused, Kissell and Hunt all helped carry the body. Hunt had never seen the deceased before (R. 78). On the previous night (7 January 1943) Hunt, Kissell and the accused had gone with the same three girls to the Beauty Rest Cabins where they remained until 6 a.m. the following morning. The same group had also gone to the Beauty Rest Cabins on the night of 14 January 1943. Hunt could not remember anyone registering at the cabins on the night of 7 January 1943 but recalled the accused registering there on 14 January 1943 (R. 79), because Fortney himself told him he had done so (R. 88).

Hunt was placed in confinement on 15 March 1943 and made a statement to the military police officials shortly thereafter (R. 79, 80). He admitted on cross-examination that he was first arrested and imprisoned in the station prison at Fort Benning (R. 80). Here he remained until 7 September 1943 when, on the order of Major Fink (Trial Judge Advocate), he was sent to the station prison at Fort McClellan, Alabama, where he remained until the day of the instant trial (R. 81). Mr. Harrell, Hunt's attorney, after he had talked with Major Fink, advised Hunt to testify in the present case. Based upon this conversation Harrell urged Hunt "to tell the truth about the whole thing". Hunt denied that he was now testifying because he expected "to get off lighter than if he did not testify" and insisted that he was doing so merely "to tell the truth". In fact, Hunt had promised Major Fink and Major Veal to testify in this case before he had been promised immunity on the murder charge in return for his testimony and before acceptance by the trial judge advocate, with the knowledge and consent of the appointing authority, of a plea of voluntary manslaughter (R. 82, 83).

Hunt testified that the weather on 7 January was clear; that it rained on 8 January and was also clear on 14 January (R. 88).

He stated also that the accused had been riding from camp to town with a man by the name of Desso until 7 and 8 January when he rode with Hunt. Thereafter he ceased riding with Hunt because his wife was going away but, when she left on 13 January, he resumed riding with Hunt. He fixed the time when the accused began to ride with him as 7 and 8 January because this occurrence took place just one week after he bought his car, which was on 1 January 1943 (R. 89). He knew that 8 January 1943 was a Friday (R. 94). Hunt claimed that during the course of the examination by Sergeant Spector the latter had "slapped" him one time but this did not cause him to change his story, although he thought the reason he was slapped was because he did not tell Spector what he wanted to hear. Spector had suggested no dates to Hunt during the questioning and all dates given by Hunt were from his own memory. He saw no "slap jack" at any time, nor did he tell anyone he had been beaten (R. 90, 91).

Hunt's statement was admitted in evidence on cross-examination, for impeachment purposes, as Defense Exhibit B (R. 84). It is set forth at length herein because under examination by the court Hunt specifically indicated the portions thereof which he says are true and those which he claims are false (R. 104-114). For convenience the portions stated by Hunt to be true, in his testimony in this trial, are underscored and those he claims to be untrue are enclosed in parentheses.

"Having been warned of my rights under the 24th Article of War, I make this statement freely:

"About 7:30 P.M., January the 8th, 1943, Pvt. Albert Kissell, Pvt. Raymond Fortney and I, left camp and went to the town of Columbus, Georgia. The first place we went to was the Victory Tavern. We had some beers, and then the three of us went to Wimpy's Cafe and had a drink of liquor. Kissel, Fortney and I then went back to the Victory Cafe. Fortney saw his girl friend, Gene Autry, while Kissel and I went to sit down in a booth. We had a few beers, while we were sitting there.

(Kissel then said, 'there's a guy here I'm watching. He's been fooling around with my wife and I think I'll settle up with him.') We sat there for about an hour talking and drinking beer. (Then Kissel said to me, 'See this guy here? That's him,' and I looked around and saw Alexander going out the door with a raincoat on. Kissel went out right behind him and was gone about twenty or twenty-five minutes the first time. When Kissel came back, I said to him, 'what did you do?' Kissel said, 'I was beating Alexander with my fists,' holding up his right fist. I said, 'Did you kill Alexander?' He said, 'I don't know for sure.') Then we had several more beers. (I said to Kissel, 'are you going back there?' Kissel said, 'yes, I have to go out and see him.' He was gone about thirty or thirty-five minutes. When Kissel returned, I said, 'what did you do with him? Is he dead?' And then Kissel said, 'I think he is.' I said, 'what did you do with the body?' Then he said, 'I took Alexander down to the river underneath the bridge, and then came back here.' We stayed at the Victory Tavern until it closed and then Kissel, Fortney, Gene, Shirley and I drove to 843 First Avenue and let the girls out.) Kissel walked up to the porch with Shirley. (While he was up there, I told Fortney that Kissel had killed a guy. When Kissel came back, we all decided to go down and take a look and make sure if Alexander was dead. Kissel directed me to drive down there next to the Columbus Iron Works.) We all got out of the car and went down to the river where the body laid. Kissel said, 'this is the guy.' (I felt his heart to see if Alexander was still alive. All three of us felt it. His heart was still beating.) Kissel and Fortney started working on Alexander and decided to finish him off. Fortney and Kissel started hitting Alexander over the head with rocks several times, and I took out my pocket-knife and cut him on the leg (three or four times until I felt the knife hit the bone. Blood got all over my hands, so I washed my hands and knife there in the river.) When we finished we felt to see if his heart was still beating. It had stopped. Then we started to bring Alexander up the hill to the car. (Fortney said, 'are we going to search him?' Kissel and I said, 'Yes'. So when we got Alexander into the car, Fortney took his

bill-fold out, and also his change. Fortney removed the money from the bill-fold and put the bill-fold back into Alexander's pocket. Kissel and I, both said to Fortney, 'Are you going to give us any of the money?' Fortney said, 'No.' Kissel and I asked, 'Why?' Fortney said, 'why should I when you didn't help me take it out of his pocket.' We didn't mention the money again, but began to place the body in the car.)

(Then Kissel and Fortney hit Alexander several times apiece with their fists. We then felt his heart again, but it was not beating.) Kissel and Fortney then told me to drive down to the bridge and stop. We then, all three of us, got out to see if anyone was coming. We then took the body out of the car and threw it into the river. (Then we started off to camp, but before we did, stopped and washed our hands. When we got into camp, we all three of us, got out of the car. Fortney went into his tent, Kissel went into his tent, and I went into the tent with Fortney. Fortney and I started arguing about the money and I asked Fortney to divide the money with myself and Kissel. Then Kissel came over and asked Fortney why he didn't give him any of the money. Fortney said, 'it's mine and I'm keeping it.' Then Kissel and I went back to our tent. The next day Fortney gave me five dollars of the money. Later on in the day, Kissel asked Fortney for some of the money. Fortney said, 'No.' Kissel asked me, 'did Fortney give you any money?' I said, 'Yes, I had borrowed five dollars from him.' Then Fortney said to Kissel, 'Kissel, I'm not going to give you any of the money because you can't talk.)

(About two weeks later, Kissel, Fortney and I got to wondering about what had happened to the body, as we hadn't heard anything about it. So we decided to go and search for it. We got into my car and drove to town down to the Dillingham St. Bridge. We got out of the car, went down to the river and walked along the river bank about three miles until we found the body. We didn't know at first whether or not it was Alexander. Kissel said, 'there's a raincoat like the one Alexander had on.' Fortney and I said, 'let's look at his leg.' I picked up a stick and pulled his left pants leg up and saw the place where I had cut him. Fortney pulled up Alexander's raincoat and took his bill-fold out of the body's pocket. Fortney said, 'this looks like the same bill-fold.' Kissel said, 'this is the bottle he had in his pocket.' We then climbed up the bluff, and saw we were behind a dairy and not far from the Post. Then we walked back to town and got into the car and drove back to the Post by way of the Old Benning Road. When we got to the dairy we had seen from the river, we looked at the sign as we went by and knew it was Cooper's Dairy.)

On February the 28th, 1943, Fortney and I had a minor accident in Columbus, and the Military Police took me to the Station Hospital. Fortney kept my car. (On March the 2nd, 1943, during the afternoon, Fortney and Kissel came to my bed in the hospital to see me, and they showed me the account in a newspaper article and told me to read it. I read the article that stated that 'two boys had found the body of Pvt. Claude A. Alexander near Cooper's Dairy'. I slipped out of the hospital with Kissel and Fortney and got into my car which was parked out front. While Fortney drove my car, I sat in the back seat and put on a uniform that Kissel and Fortney had brought for me to wear. We drove out to Cooper's Dairy, took a dirt road and parked in back of the dairy. We all got out of the car and walked down to the river to where we had found the body, and we saw it wasn't there. The reason we went there this time was to see if they had found the same body that we had found before, and whom we believed to be Alexander. Then we went back to the car and Kissel and Fortney brought me back to the hospital. We all then agreed, on the way back, if anything ever came up about it, that we would never say anything about it. When they brought me back to the hospital, they left me.)

My car is a black 1937, Ford V-8, two-door sedan, Georgia license #D66513. (As they drove my car from the hospital, I saw the tag was still on it.)

I never say my car again, until March the 16th, when I saw it at the M.P. parking lot, and identified the car as mine.

I have made this statement without any fear of punishment and without any promises. No threats have been made against me and it is all true."

Hunt accounted for much of the falsity of his written statement by saying that he did not make all the statements contained therein (R. 85). He claimed to have been threatened by a lieutenant "of the Parachute Troops" whose name he did not know but whom he identified as the officer appearing on Prosecution Ex. 15. This officer (who is Lieutenant Christoffel) told Hunt he would run him through the third degree if he didn't talk and since Hunt had seen "a third degree" at home he feared the lieutenant. According to Hunt, the lieutenant "wrote the statement down and put a lot in it I didn't say." (R. 95, 117, 118). "They'd ask me something and I said Yes; I was afraid not to." When asked this question: "The Paratroop officer would ask you something and you would say 'Well, I don't know for sure.' Then he would ask you the same thing again and you would say 'Yes.' Is that what happened?" he answered "Yes". (R. 119).

On cross-examination Hunt thought that he had told the investigators when they had first arrested him that the accused, Kissell and himself had gone to the Beauty Rest Cabins with girls on two different occasions and he again repeated facts regarding the trips in detail (R. 87, 88). These facts he had told to Major Fink in

(356)

September 1943 (R. 88). He admitted, however, that his sworn statement was in error in saying Kissell and Fortney "pounded him on the head with rocks" (the actual words of the statement are "Fortney and Kissell started hitting Alexander over the head with rocks several times") and stated that the true statement should be they "dropped rocks" (R. 91).

He also insisted that he never told the investigator that Kissell had left him and followed Alexander from the Victory Tavern on 8 January 1943. If such a remark was in his written statement it was there only because he feared to object to it when he signed the statement (R. 92). He detailed how he had determined Alexander was dead by feeling both his heart and pulse, neither of which were beating, and stated that all three of the men (Fortney, Kissell and himself) had agreed Alexander was dead at that time. He then cut Alexander's leg because he was scared and did what they told him to do (R. 93). He did not feel Alexander's pulse before Fortney and Kissell dropped the rocks on him, but afterward. He knew Alexander was alive before the rocks were dropped because "they felt his pulse and said he wasn't dead". It was not raining at the time but it had rained earlier that night and Alexander was wearing a raincoat (R. 101). He had seen the legs of Alexander move while Fortney and Kissell "were beating on him". The size of the rocks dropped on Alexander's head was about five inches in diameter (R. 103). When Hunt cut Alexander's leg it did not bleed until the body was placed in the car (R. 104). After the dropping of the rocks Kissell and the accused felt Alexander's heart and said he was dead and then Hunt felt the deceased's heart. All three had agreed Alexander was then dead (R. 93, 109).

The accused, Kissell and Hunt had left the girls after one o'clock on the night of 8/9 January and it was "about twenty minutes to two" when Alexander's body was carried from the river back to Hunt's car, a distance of about 75 yards (R. 109-110). From this place to the point where Alexander's body was thrown from the bridge is a distance of about 100 yards (R. 100). After they had thrown the body from the bridge they "picked up" Toney Greer, brought him back to camp, and then they went to their tents, Kissell and Greer in one, and the accused and Hunt into separate tents (R. 111). He had been with Kissell on Tuesday prior to the murder of Alexander when Kissell went home to get his wife and found she was not there. They never did find her that night. He also recalled another incident when Mrs. Kissell came home with another man and Kissell had an argument with her; but, he did not see the man who accompanied Mrs. Kissell. This incident also took place before the murder of Alexander (R. 94).

On 28 February 1943 he and the accused had an automobile accident in Columbus and Hunt was arrested and beaten by the Military Police. He was drunk at the time and did not remember all the details of what happened, except that he and Fortney were alone, and, at the time of the arrest, he abandoned his car at the scene of the accident (R. 96, 97, 111).

Mr. George Y. Harrell, attorney at law, of Lumpkin, Georgia, private counsel for Erschel Hunt, then took the stand and, with the full consent of Hunt (R. 121), testified that he was retained as counsel by Hunt's family in July 1943. Sometime in September 1943, after hearing the trial of Albert W. Kissell for the homicide of Private Claude A. Alexander, he had his "own reason for approaching Major Fink", the trial judge advocate, and discussing with him the prospective trial of Erschel Hunt. He stated to Major Fink that he did not believe Hunt was guilty of murder but offered "the proposition" that he would have Hunt enter a plea of involuntary manslaughter. Major Fink did not agree, though it was discussed at some length, during which Mr. Harrell stressed the good character of Hunt and his good record of army service. Major Fink finally stated that, "in view of Hunt's record and other circumstances", he would allow him to plead guilty to voluntary manslaughter. Mr. Harrell then reported this offer to Hunt and told him "You think about it and see what you want to do about it". Later Hunt stated "I will tell the truth" and this was reported to Major Fink who insisted, however, that Hunt should testify in the Fortney case. Mr. Harrell then told Hunt "he would have to take the stand and tell what took place" and upon his advice Hunt agreed to do so. Mr. Harrell had not seen Hunt since (R. 122-124).

Major Ira Gore, Medical Corps, was recalled and testified that, from the facts presented to him in a hypothetical question, involving injuries suffered by Private Claude A. Alexander, subsequent to which his body was thrown into the Chattahoochee River, he was unable to determine whether death was due to a head injury, a hemorrhage or drowning, but any, or all three of those factors, could have resulted in the death of the deceased. This conclusion he reached because, assuming that the laceration of the leg of Alexander was sufficiently deep to reach the bone, several important blood vessels would have been severed, and without any attention to the wound, Alexander would have bled to death; as to the blows upon the head, from rocks dropped upon it from a height of three or three and a half feet, he was of the opinion that such injuries would be sufficient to cause a great deal of brain damage, even concussion though there was no fracture. He testified further that it was possible for a soldier, without professional qualifications to determine whether or not there was life in a body, by close examination to determine respiration and heart action. To determine the latter, examination of the pulse and placing of the hand in the region of the heart would be required (R. 125-218).

(358)

However, there are times when the heart action is so quiet that only a stethoscope will disclose it and this is usually true for a period just before death. With regard to blood flow after death he stated that as soon as the heart action ceases blood only oozes from cuts or wounds. He further stated that a person would die within fifteen minutes from a hemorrhage of the leg of the sort under discussion (R. 131). In his opinion any knots which might have appeared on the scalp of Alexander because of the blows from the rocks would, quite likely, have disappeared before his examination, because of long immersion in the water (R. 133). He was also of the opinion that the brain had no control over the leg if life had ceased to exist and that the leg would not move if the person were dead (R. 134).

Mr. Hallard A. Flynn, the coroner and mortician from Indiana, was recalled and testified that he had been in the funeral business for forty years during which time he handled about five hundred coroner cases arising from accidents. He again testified about the spot on the skull of Alexander, pointing it out on Prosecutions Exhibit 15. He also testified that there was no fracture or indentation. In his opinion the spot was caused by a blow (R. 136-137).

J. H. Davidson, Assistant Chief of Police, Columbus, Georgia, testified that on 2 March 1943, while on patrol duty, he found Hunt's automobile containing some Army shoes and blankets partly on the old Fort Benning Road and partly in the driveway of Cooper's Dairy. It was badly damaged and was hauled away (R. 22-24).

4. For the defense the pertinent and material evidence may be summarized as follows:

Second Lieutenant Dillard W. Thompson, Base Weather Officer at Lawson Field, Georgia, who was called out of order, for his convenience, before the prosecution rested, testified from official records that on 7 January 1943 there was moderate rain from 6:30 p.m. to 11:30 p.m. Thereafter the rain was light and ceased at about midnight. Rain fell lightly at 3:30 a.m. and continued to 7 a.m., 8 January 1943. On 8 January there was a light rain at 6:30 p.m. which stopped at 7:30 and so continued unchanged until 10:55 when it rained until midnight. At 1:30 a.m. 9 January 1943 the rain stopped and conditions remained unchanged until 4:30 a.m. At 6 p.m. on 14 January 1943 the weather was clear and continued so until midnight and there was no rain from 5 p.m. 14 January to 6:30 a.m. 15 January 1943. In his opinion rainfall at Columbus, Georgia and Phenix City, Alabama would be the same on a given occasion as at Lawson Field (R. 137-140).

Mrs. Ruth B. Williams, residing in Phenix City, Alabama, also called out of order, testified that she had known the accused since January 1942. On 3 April 1943 she received a phone call from the accused who was in Atlanta. He informed her that they were bringing him back "for murder". On cross-examination she stated that

"he said that they was bringing him back but he didn't know what for and he asked me if I heard of anybody being killed". She admitted she had been riding in an automobile with the accused on a Saturday night in the middle of February and that they had a collision with another car. When asked with regard to the phone call: "Did he ask you about the collision and whether the reason he was being brought back had anything to do with the collision" she answered "Well, he asked me about anybody being killed that way. He talked that way". On redirect examination the following colloquy took place.

- Q. "You say he told you one time they were bringing him back for murder and one time he didn't know why they were bringing him back?"
- A. "He said they were bringing him back for murder but he didn't know what for."
- Q. "Did he tell you they were bringing him back for murder and that he didn't know why they were bringing him back for murder?"
- A. "Yes, that's it."

W. C. Roney, proprietor of a tourist camp called "Camp Beauty Rest" located in Alabama about five miles from Columbus on the Seale Road, testified that it was not operated under his personal supervision but by his agent, Mrs. Mattie English. Under his instructions she was to allow no one to have a cabin unless they registered for the same (R. 145). Mattie English left his employ in August 1943 and at that time turned over the register of "Camp Beauty Rest" to him. It remained in his possession until produced in court and admitted in evidence as Def. Ex. C (R. 146).

Technician Fifth Grade Paul W. Desso, Company H, 517th Infantry, testified that he and the accused were in the same organization in the month of January 1943 (R. 147). Both were married. Desso was the owner of a car and this was the means of his transportation from camp (Alabama Area) to Columbus, where his wife resided. He customarily took other soldiers along with him and among these was the accused (R. 148), who rode with Desso whenever he was ready to go home at the same time Desso wished to leave. Accused was not a regular passenger and did not ride with him every day, but as far as he knew "he didn't miss any certain days"; nor did he know of any certain days when he did go along. When asked by the court "All you know is sometimes he went to town with you and sometimes he didn't?" he replied, "That's right, Sir" (R. 150).

Mr. Edward D. Hurd, of Norfolk, Virginia, yard clerk for the Norfolk and Western Railroad, became acquainted with the accused in January 1943 when both were members of the 1st Parachute Infantry Brigade. Around 1 January 1943 certain construction work was going

on in the Alabama Training Area and Hurd drove civilian workers to and from Columbus in a truck (R. 151). He did pick up the accused several times, but on 3 or 4 January he ceased driving his truck and began to ride back and forth with Corporal Desso about six nights a week "more or less". The accused also rode with Desso and, according to Hurd, rode in Desso's car "The same as I - approximately six nights a week - five or six nights a week" (R. 152). After 13 January 1943 the accused ceased riding with Desso and Hurd (R. 153). On cross-examination Hurd identified a written statement which he had made before the investigating officer and it was received in evidence as Pros. Ex. 18 (R. 154). In that statement Hurd swore that Fortney and he were members of the same organization and, since both lived "in town", they would "occasionally" ride into town together in Desso's car. He further stated therein that he did not remember definitely whether he rode with Fortney on the night of 8 January 1943. He made no attempt to reconcile his testimony on direct examination with his statement but went on to say that "if Desso did leave us, we made other arrangements" and that he only rode with the accused in Desso's car if he (Desso) was not present. He remembered Fortney being with them "on a number of occasions up to the 13th". When asked on recross examination: "You say you rode with him every night in Corporal Desso's car, is that correct?" he answered "Yes Sir" and to the question "Then your written statement that you rode occasionally isn't true?" he replied "Well, occasionally could mean five or six times a week" (R. 155). When questioned as to specific dates he was unable to testify to the accused's presence in Desso's car. He did not remember whether or not Desso picked up Fortney on or about 7 January 1943 (R. 157).

James M. Johnson, salesman, of Columbus, Georgia, testified that he and his wife came to Columbus on 5 January 1943 and took up their abode with his step father and mother, Mr. and Mrs. J. L. Bush. At that time, accused and his wife were occupying the front bedroom in the Bush home, and continued to do so until a little more than a week later (R. 159-161). He remembered seeing accused in the house on every evening but one and that was Friday, 8 January 1943 (R. 161). He recalled seeing him on the other nights because generally they played cards after he reached home between 8 and 8:30 p.m. (R. 162). He specifically remembered seeing him on the night of 5, 6 and 7 January, the family and the Fortneys usually retiring at 9:15 or 9:30 p.m. On Friday, 8 January, he arrived home at 8:45 p.m. He never saw the accused in the morning because he left before Johnson got up (R. 164). On cross-examination he admitted that he talked about the case and discussed it in detail, pro and con, with Mrs. Fortney, Mr. Churchill, her father and two or three others (R. 167). They mutually told one another what they knew about the case (R. 168).

From 7 January to sometime during the weekend (the court was asked to take judicial notice of the fact that 9 January 1943 was a Saturday) Johnson did not see the accused (R. 178, 179). Upon examination by the court he stated that although he had testified in great detail, in so far as "time" was concerned he was relying upon his ordinary routine and that of the Bush Household (R. 180, 181). He also stated that he and his wife occupied the dining room as their bedroom and that anyone leaving the house would do so by the front door without passing through the dining room (R. 181). The accused usually ate breakfast at home and was obliged to pass through the Johnson bedroom to go to the kitchen, yet Johnson never saw him in the morning (R. 182).

Mr. J. L. Bush, sales manager, of Columbus, Georgia, testified that he met accused and his wife on 8 November 1942 when they rented a room from him at his house. They remained as tenants until 12 January 1943. On 5 January 1943 witness' stepson and wife (the Johnsons) returned to live in the house though the Fortneys continued to live there (R. 203-204). He was at home on every evening from 5 to 12 January 1943 and "to the best of (his) knowledge" he did not remember "any particular night" when the accused was not at his house. Quite often he engaged in card playing with the accused during the evenings. He thought he was at home every evening between 5 and 12 January because "I never miss an evening unless it is a business evening, but I'm sure I was home all the time" (R. 205). Witness arrived home from work at about 8 or 8:30 p.m. each day. When it came time to retire Mr. Bush would be the first, as a rule, sometimes leaving the others in conversation (R. 206). He never saw the accused in the morning in January 1943. He was unable to fix the night of 8 January 1943 or distinguish it from any other night (R. 207). He admitted, on cross examination, that he had talked about the accused's case with Mrs. Fortney, members of his family and Edward L. Hurd (R. 208).

Mrs. J. L. Bush, the wife of the previous witness, testified that the accused and his wife rented a room in the Bush home in November 1942. On 5 January 1943 her son and his wife (the Johnsons) came back to live with them but the Fortneys stayed on until 13 January 1943. She could not "recall any particular night during that period of time that Private Fortney was not there" (R. 215). She remembered Mrs. Fortney making a long distance telephone call to her home in Shreveport but could not remember the date (R. 216). On cross-examination she admitted discussing the case with Mrs. Fortney, her family and Mrs. Fortney's father. She could not state positively that the accused was at home every night from 4 to 13 January 1943 but they did play cards together when he was there.

Mrs. J. M. Johnson, testified that she is the wife of J. M. Johnson who had previously testified. When she and her husband returned to Columbus to live with Mr. and Mrs. J. L. Bush she met the accused and his wife who were residing in the Bush home (R. 221, 222). She spent all of her evenings at home, arriving home from work

(362)

at about 6:30 or 7 o'clock p.m. She thinks the accused was usually at home when she arrived, but she couldn't say definitely. She had discussed the accused's case with Mrs. Fortney, and her father, and other people she knew but could not state specifically and positively that the accused stayed in the house every night between the dates when the Johnsons returned and the dates when the Fortney's left (R. 225).

Hardy James, a carpenter residing in Columbus, Georgia, and employed as a carpenter at Fort Benning, testified that during the month of December 1942 the accused rode back and forth between Columbus and camp with him and others in a truck provided for civilian employee transportation (R. 184, 185), but he was not positive that the accused rode in that truck every day with him (R. 186).

Mrs. Mattie English, of Georgetown, Georgia, testified that, in January 1943, she was "running" Camp Beauty Rest, consisting of ten, one room cabins (R. 195) located on the "Scale Highway" about $4\frac{1}{2}$ miles west of Phenix City, Alabama. She maintained a guest register in conducting the business. When shown Defendant's Exhibit C (which was later admitted in evidence (R. 190)) she stated that it was the only register kept by her at that camp while she was employed there and that it had not been altered since she delivered it to Mr. Roney, the proprietor in June 1943 (R. 187-189). Every person applying for accommodations was supposed to register and when a man and woman applied for accommodations they were obliged to register as man and wife and produce a marriage certificate (R. 193). Each couple had to be registered and just one couple was allowed in a room (R. 189). She was assisted in the work by two girls (R. 189), but since she retired each night around midnight, the conducting of the business then devolved upon the girls (R. 194) and under these circumstances either of the girls could have placed persons in cabins without registration and pocketed the money paid (R. 194, 195). Mrs. English was present at the camp on the 7th and 14th of January (1943) during the night, but she could not say whether all the entries appearing on the register, as of that date, were made in her presence (R. 190). She herself did not escort the persons who registered to the rooms and, therefore, she did not know whether some persons who had not registered were accommodated by the girls (R. 190) and it was, therefore, possible for persons to occupy the cabins without her knowing it (R. 191). Since no date appears upon the register between 6 and 8 January 1943, she assumed that no one came to the cabins on 7 January or that those who registered forgot to set down a date (R. 191). She could not remember whether or not there were any guests on 7 January 1943; nor did she remember the registration on 14 January of the persons signing the register as "Howard Brook, & R.P." "Mr. and Mrs. Albert Kissell" and "Mr. and Mrs. Howard R. Brooks", nor why the first entry named therein (Howard Brook) had been crossed out (R. 192). Under examination by the court it was shown from a comparison of the dates, names of persons and amounts paid as they appeared on the register, and the testimony of Miss English regarding the rates customarily charged, that the system was inaccurate, and

it was impossible to determine from the register whether all persons who used the cabins had signed or, having registered, whether they remained one or more nights (R. 200-202).

Howard R. Churchill, of Shreveport, Louisiana, Yard Conductor for Louisiana, Kansas City Southern Railroad (R. 226) testified that he was the father-in-law of the accused. On 12 January 1943 he had received a collect call from Mrs. Fortney at Columbus, Georgia (R. 227), advising him that she was coming home because her husband was being transferred (R. 232). He was positive of the date of this call because he had checked it at the telephone company's office (R. 226). His daughter arrived home in Shreveport on 14 January 1943 (R. 227) and returned again to Columbus, Georgia in March or April (R. 227-228), remaining there until sometime in September 1943. She then returned to Shreveport and remained there until this trial (22 November 1943) (R. 232). An affidavit made by the witness before a summary court officer on 30 August 1943 was admitted in evidence as Defense Exhibit B (R. 233).

Mrs. Raymond Fortney, Shreveport, Louisiana, testified that she and the accused were married on 30 April 1942. She and her husband came to Columbus, Georgia in November 1942 because he was then stationed at Fort Benning. They rented a room from Mr. and Mrs. Bush on 7 November where they continuously resided until 13 January 1943 (R. 233, 234). During this period the accused came home from camp and spent the night with her every night except one, on which he was in charge of quarters. This occasion was prior to New Years 1943 (R. 235). At no time did he leave her, after retiring, until morning (R. 238). Every morning, without exception, the accused would get up at about 5:30 or 6 o'clock, except on Sundays, and there was no morning when he did not do so (R. 236). Although she first stated that she and the accused did not go out together on any evening between 5 and 13 January 1943 she later said she was "not quite sure" whether they had gone to pictures together during that time but "didn't believe so". She did say that her husband had not left her alone at night at any time in that period (R. 237). She had never been in the Victory Tavern (R. 238). On cross-examination she admitted that (on 18 August 1943 at Fort Benning, Georgia) she had attended the court-martial trial of Albert W. Kissell, jointly charged with the accused for the murder of Alexander, and remained present throughout the trial until the end, hearing the testimony of every witness including that of her husband, the accused (R. 239). She later discussed the accused's case with her father, Mr. Churchill, and with Mr. and Mrs. Bush, Mr. and Mrs. Johnson and defense counsel (R. 239, 240). She did not hear from her husband for a week after she left Columbus on 13 January 1943. She later heard from him when he was at Shenango, Pennsylvania but she received a long distance call from him in Washington, D. C. when the authorities were returning him to Fort Benning, requesting her to come to Fort Benning (R. 255). In this

(364)

conversation the accused stated that the guards had told him he was being brought back for murder (R. 256, 257). She did not know Kissell or Hunt before the Kissell trial but had met them since her return to Columbus (R. 256, 257). She had not read about Alexander's death and her husband had never discussed it with her nor mentioned murder in any way before she left for home on 13 January 1943 (R. 256). Upon examination by the court she admitted having gone to visit and talk with Jean Austry during a recess in the Kissell trial (R. 257). Upon her return to Columbus from Shreveport in April 1943 she was shown a newspaper account of the murder of Alexander and that fixed the date of 8 January 1943 in her mind and she again maintained that the accused was with her, at home, every hour from 7 or 7:30 p.m. on that date until 5:30 a.m. on 9 January 1943. That he was at home on that night was recalled to her mind by the fact that he polished his boots in a corner of the front room though "he always kept his boots shining" (R. 261, 262). In response to a question, she did not know that her husband was AWOL from his organization until 11 a.m. on the morning of 7 January 1943. (R. 262).

The accused having been informed of his rights, elected to be sworn as a witness and testified as follows:

He had been in the Army since December 1941. In civil life he had worked on farms, in cafes as a cook and also labored in a brickyard. He is an adopted child of Raymond Fortney, Sr., of Otho, Ohio and attended school to and including the eighth grade. He has been twice married. After a divorce obtained in February 1942 by his first wife (R. 266) for non-support (R. 296) he married his present wife in April 1942. They took up a residence with Mr. and Mrs. J. L. Bush in Columbus, Georgia and remained there until 13 January 1943 when he was about to be transferred (R. 264-269). He paid Corporal Desso to ride in Desso's car between camp and Columbus, Georgia from the latter part of November 1942 until he obtained free transportation by riding in a truck driven by Private Hurd. He continued riding with Hurd until the first part of January 1943 when he resumed riding with Desso six nights a week until his wife left on 13 January 1943 (R. 270-272).

During the period between the time when Mr. and Mrs. Johnson came to live in the Bush home and the day his wife left, he never left the house after returning from camp without Mrs. Fortney accompanying him. He remembered a long distance telephone call on 12 January 1943 because that was the day his wife received her allotment check. He spoke, at the time, to his mother-in-law and father-in-law telling them his wife was returning home next day (R. 273).

He met Albert Kissell on 12 September 1942 and Erschel Hunt a week later. Hunt owned a 1937 Ford Coach but the accused never

rode in that car until 14 January 1943. On this occasion, which was the day after his wife left, he went to town with Kissell in Desso's car. After they arrived they got something to eat and then went to the Victory Tavern (R. 275) where he was introduced to Shirley Kissell, Kissell's wife, who sat with them while they drank beer. Later he was introduced to Jean Autry, a waitress in the Victory Tavern, and they, together with Kissell and his wife went to a restaurant for something to eat some time between 8:00 p.m. and 1:00 a.m. (R. 276). They then went to a movie where he saw the same picture he and his wife had seen on the previous day (R. 277).

At about 11:30 or 11:45 p.m. they returned to the tavern and there met Erschel Hunt. They all sat together and drank beer until the tavern closed. The accused had a pass until 8 a.m. the next morning and he had planned to go to the Bush house, sleep there and then bring his clothes out to camp in Desso's car. Instead, Kissell, Hunt and himself accompanied by Shirley Kissell, Jean Autry, Bonnie Fay and a girl named Mary got into Hunt's car and drove to Beauty Rest Cabins in Phenix City, Alabama. On the way Jean and Bonnie Fay purchased a pint of liquor (R. 278, 279). When they arrived at the camp the accused went to the office and registered, representing Jean Autry as his wife and signing as "Howard Brooks" because he had a Class A pass in that name (R. 279, 280). He identified his signature on the register (Def. Ex. 6) and explained that the first registration was crossed out because when the woman in charge said she would take them to the cabin the others got out of the car and the woman insisted that all of them had to go and register, and that Fortney had to reregister (R. 280). Thereupon the woman drew a line through the first signature, and the accused and Kissell then registered (R. 281).

Hunt took Bonnie Fay home and left Mary at the cabins with the understanding he would return later. He did so but failed to register though he later occupied a cabin with others of the group (R. 282). Accused denied ever having been to the Beauty Rest Cabins before (R. 282), and stated that he had not signed any of the names appearing on page 3 of Defense Exhibit C (R. 285). There were three women in the office when he registered and he had never seen any of them before or since, except one, who testified in this trial (R. 283). They arose at about 8 or 8:30 a.m. next morning and after taking the girls back to town Kissell, Hunt and the accused returned to the post, where they were each given restrictions for a week and K.P. for the following Sunday.

Notwithstanding, all three again went into Columbus that evening (15 January) in Hunt's car (R. 284). They proceeded at once to the Victory Tavern but left to go to Wimpy's Tavern and drank some beer (R. 285). They then returned to the Victory Tavern and remained there until it closed at 11:45 p.m. Shirley Kissell, Bonnie

(366)

Fay and Jean Autry then accompanied them to Jumbo's for something to eat after which they drove out in the country where they parked for two or three hours, when, after awakening, Jean Autry and the accused got back in the car and the girls were taken home (R. 286). Thereafter Kissell, Hunt and the accused picked up Tony Greer in Phenix City and returned to camp. The accused and Kissell served as K.P. on Sunday, 17 January 1943. Fortney saw Jean Autry about six times after this party and last saw her on the street in Columbus some time in February 1943. He had seen her working in the Victory Tavern shortly after pay day in February.

He was brought back under armed guard from Shenango, Pennsylvania and arrived in Columbus on 3 April 1943 (R. 288). One of the guards told him that he "was to be a witness or asked about a murder" but warned the accused not to tell the other guard he had been told. In Washington he called his wife on the telephone and told her "Mary, I don't know what I am going back for; one of the guards told me I was to be questioned or be a witness about a murder * * * I will try to send you the money to come to Fort Benning" (R. 289). In Atlanta he telephoned to Ruth Bennett, in Phenix City, Alabama to inquire whether anyone had been there to question her about the accident they had on 27 February 1943 when the accused and Miss Bennett had been out with Erschel Hunt in his car (R. 290).

Questioned about this accident, the accused stated that after the wreck Hunt and accused had taken Miss Bennett home and the accused then fell asleep in the rear seat and remembered nothing until he was awakened by the fact that Hunt had driven over the embankment of the Chattahoochee River and almost into the water (R. 291). Both had been drinking. After trying unsuccessfully to right the car they both went to sleep in it. They were awakened by Military Police who took them to the station where Hunt was detained and Fortney released. The accused then got a wrecker to pull Hunt's car out and then started toward Fort Benning (R. 293). Suddenly the car stopped because of overheating and being unable to start it, the accused again went to sleep in it. He awoke at 6:30 or 7 o'clock next morning and got a ride back to camp with a colored soldier (R. 294). He stated that he did not know Private Claude Alexander and when shown the deceased's picture (Pros. Ex. 12) he said he thought it looked like Sergeant Hamm of the 515th Parachute Infantry (R. 294, 295).

The accused's testimony in the case of United States v. Private Albert Kissell was then admitted in evidence, without objection, as Prosecution Exhibit 19. He then admitted that in the Kissell trial he had stated he knew nothing about the reason why he was brought back until he was examined by the Military Police of Fort Benning, but that this statement was untrue (R. 303). He also admitted that in the former trial he had stated that in the phone

message to Miss Bennett he had not used the word "murder" (R. 304).

Although he had stated as a witness, in the Kissell trial, that he had not been convicted of crime he now admitted that he had been, though he denied changing this testimony for the reason that he had learned the prosecution had possession of a copy of a record showing conviction by a civil court for forgery. He admitted having been tried in a civil court but stated that the word forgery had not been brought up (R. 305). A duly authenticated copy of a bill of information and judgment of the District Court of Webster County, Iowa, relating to accused was admitted in evidence, without objection, as Prosecution Exhibit 20, which shows a conviction of forgery (R. 305). Though he had known both Hunt and Kissell since September 1942 he never went out with them until the night of 14 January 1943 and that was the first time he had ever been in the Victory Tavern or seen Jean Autry (R. 307). He maintained that he never left the house in Columbus where he was residing on any night from 5 January to 13 January 1943, after retiring, and denied that he, in company with Kissell, Hunt and a drunken soldier by the name of Jaloway signed in with the Charge of Quarters between 2 and 3 a.m. on the morning of 7 January 1943. He admitted knowing Staff Sergeant Fryckholm, but did not know whether or not he was in charge of quarters on that day (R. 310).

He had been to Tony Greer's house in Phenix City once or twice with Kissell in Hunt's car (R. 311). The accused drank 7 or 8 pint bottles of beer between 6:30 and 11:45 p.m. on the night of 14 January 1943 and later had some of the pint bottle of liquor which Jean Autry and Bonnie Fay had purchased on the way to the Beauty Rest Cabins (R. 319, 323). The group occupied two rooms in a four room cabin, Kissell and his wife taking one and the accused and Jean Autry the other. Hunt and the girl Mary later occupied the cabin with Kissell and his wife though there was only one bed. (R. 324, 326). This was the first time the accused had ever been to the Beauty Rest Cabins and he has never been back since (R. 325). With regard to the episode of 27 February 1943 when the car in which the accused, Hunt and Miss Bennett were riding, was wrecked he stated he did not know where, on the Fort Benning Road, the automobile had finally stopped when he was trying to take it back and he denied ever seeing or knowing about Cooper's Dairy (R. 333). He kept the car key and gave it to Tony Greer on the night of 2 March 1943 though he knew that Hunt, the owner of the car, was then in the station hospital.

When shown Prosecution Exhibit 17 on redirect examination he admitted that he had signed the statement (R. 338) but denied that the dates 7 and 8 January 1943 were true. He did not know the dates were incorrect when he signed the statement but discovered the error on the first Sunday they allowed him to see his wife which was on about 17 or 18 June 1943. It was then that he was told when

(368)

his wife had received her allotment check in January 1943 and, when his memory was thus refreshed, he knew he could not have been with Kissell and Hunt on 7 and 8 January 1943 because he had never been with them until his wife had left and she did not leave until after she received her allotment check. He stated that wherever the statement contained the date 7 and 8 January it should be the 14th and 15th of January (R. 340).

When he was brought back to Fort Benning he was first officially questioned on 4 or 5 April 1943 and thereafter was taken to the Military Police Station "for six days in a row" and questioned each day. He was shown the statements of Hunt and Kissell and told by Sergeant Spector and Lieutenant Christoffel, Military Police examiners, that he did stay at the Beauty Rest Cabins on 7 January 1943. He did not accept those dates from his own recollection but, as he said: "I had two choices - either keep getting beat or say it was the 7th and 8th". Sergeant Spector had beaten him on the first occasion (R. 341) on the arms and head with his open hand and a slap-jack, five or six times (R. 356, 357). The following afternoon he was hit once or twice by Spector with his open hand (R. 357). On the fifth day he was struck with a slap-jack seven or eight times by Spector, on the arms, shoulders and head (R. 358). Lieutenant Christoffel had called him a "lying son-of-a-bitch" (R. 359). Sergeant Mooring may have hit him once or twice. When the accused said he did not see Kissell leave the Victory Tavern the examiners tried to make him say he did (R. 342). This he never admitted to them (R. 343). With respect to the telephone call he had made to Ruth Bennett from Atlanta on his return to Fort Benning he stated: " * * * Then I asked if anyone had been to see her and questioned her about the car accident and had she heard anything about the car accident we had the last night she had seen me, and she said, 'No, Why?' I said, 'They are bringing me back and I don't know what for, but they say it's murder - I want to know if it's about the car wreck.'" (R. 344). He did not recall, however, whether he had mentioned "murder" but "it might be" (R. 345).

On recross examination the accused stated that, so far as he then knew, his statement of 14 April 1943 was true and correct when he signed it but later, after his wife returned, he found it was incorrect as to dates (R. 347). He could not account for Jean Autry's testimony that she saw the accused, Kissell and Hunt on the night of 8 January 1943 at the Victory Tavern, but thought her attitude as a witness was "awful snotty" (R. 361).

On redirect examination the accused explained his testimony regarding conviction for crime by saying he did not know a plea of guilty amounted to a conviction and he had understood from his father's explanation that he had not been convicted of forgery (R. 345). He admitted, however, that he had served six months in an Iowa jail for

the crime to which he pleaded guilty and he knew why he was being tried but he didn't think it was forgery (R. 354, 355). When examined by the court he admitted that he knew what forgery was and that he had signed some checks in 1939 but he did not know at that time what it meant when he was tried for the offense. He had discussed the matter with his father prior to the Kissell trial and his father had told him he had not been convicted of forgery (R. 366). The accused denied knowing anyone by the name of Jose Ruiz, while at Shenango, Pennsylvania, or anyone of Mexican or Spanish name or descent. He stated that there were four or five of such character in a platoon he was training while there but he never came in close personal contact with them, never had any trouble with them and was always on friendly terms with them or all civilians while in Shenango (R. 336).

After the findings by the court the prosecution offered in evidence a certified copy of a record of previous conviction of the accused by Summary Court Martial on a charge of attempting to strike Jose Ruiz with clenched fists and threatening him with a knife at Shenango, Pennsylvania, during March, 1943 (R. 339; Pros. Ex. 22).

Raymond Fortney, Sr. a car salesman of Otho, Iowa, testified that the accused is his adopted son. He never knew the accused had ever been involved in a forgery charge but thought it was a "bad check" case (R. 367, 368). On cross examination he admitted that the accused had written checks and signed his father's name to them but he never knew such an offense was forgery (R. 369).

Douglas Kelly McLeod, of Columbus, Georgia, testified that he had driven between Columbus and the Alabama Training Area (between Fort Benning and Phenix City) during December 1942 and January 1943 sometimes in an automobile and sometimes in a truck. It took one hour, on the average, to make the trip and the condition of the road was "awful" (R. 373).

In rebuttal, the prosecution called Staff Sergeant John R. Fryckholm, of Headquarters Company, 515 Parachute Infantry, who testified that on 6 January 1943 he was in charge of quarters for Headquarters, Detachment of the 1st Airborne Infantry Brigade. Around 3:30 o'clock in the morning of 7 January 1943 while still in charge of quarters, he was awakened by a stamping and loud noises in the rear of the building where he was sleeping and there he found a drunken private by the name of Jalloway accompanied by the accused and Private Albert Kissell. While this incident was not officially noted on the report, Fryckholm did relate it to Staff Sergeant Benson. The Charge of Quarters duty roster of the detachment was then admitted in evidence as Prosecution Exhibit 21 (R. 374-377).

Upon cross-examination he admitted that he had been in Charge of quarters on other occasions, usually every 14 days. According to his recollection he served only once in charge of quarters during

(370)

January 1943 (R. 378, 379). On redirect examination he stated that he had recalled the incident as having happened on 8 January 1943, independent of any reference to the duty roster (R. 382).

Staff Sergeant John P. Benson, Headquarters Company, 2nd Battalion, 517th Parachute Infantry testified that in January 1943 he was acting first sergeant of Headquarters Company, 1st Parachute Infantry Brigade and as such prepared the duty roster of the detachment. No one serving as charge of quarters ever signed the duty roster unless he had performed the services (R. 386, 387). He recalled the incident on 7 January 1943 when Sergeant Fryckholm reported to him, as charge of quarters, that Private Jaloway was brought back to camp in a drunken condition by Privates Kissell and Fortney. To the best of his recollection Fryckholm served only once as charge of quarters in January 1943 (R. 388).

Jean Autry was then recalled and again testified that she had seen the accused in the Victory Tavern before 7:30 p.m. some time in the first part of January 1943. She had dates with him three or four different times.

5. The evidence in this case portrays a sordid picture of brutality and cold-blooded murder without disclosing any possible motive on the part of two of the three soldiers who are charged with its perpetration.

Fortney, the accused, denied ever seeing or knowing Alexander, the deceased, and Hunt never saw him before the night of the murder; but Alexander had undoubtedly been intimate with Kissell's wife, Shirley, and, presumably in a jealous rage, Kissell had a fight with him on the night of 8 January 1943, during which Alexander received blows sufficient to render him unconscious.

What transpired later on that fateful night whereby Fortney and Hunt became enmeshed in the web of circumstances which later caused them to be accused, with Kissell, of the murder of Alexander, is detailed by the testimony of Hunt. There is no other direct evidence in the record which positively connects the accused, Fortney, with the death of Alexander.

The body of Alexander was found on the banks of the Chattahoochee River on 28 February 1943 where it had evidently been washed ashore at a spot seven miles downstream from the Dillingham Street Bridge in Columbus, Georgia. From the stage of its decomposition it was evident that the body had been immersed in the water for about six or eight weeks. Identification of the body by physical features was well nigh

impossible, but an identification tag bearing Alexander's name and serial number, a tattoo mark upon one arm, a watch attached to the wrist of one hand, peculiar slippers on the feet and sundry articles found in the clothes on the body all tended to show that the body was that of Private Claude A. Alexander. It was stipulated that the body so found was that of the deceased person named in the Specification of the Charge upon which the accused was tried.

Alexander was last seen alive on 8 January 1943 and the last letter received by his mother was postmarked at Fort Benning, Georgia, on the same date. His "bunk-mate", Browning, had been with him and they had visited the Victory Tavern in Columbus, Georgia, on 6 and 7 January 1943; but, although Alexander went to Columbus on 8 January 1943 after borrowing Browning's wrist watch (later found on Alexander's dead body) Browning did not go along on this occasion and he never again saw Alexander alive.

That Alexander lost his life through foul play is unquestioned, but the exact and specific cause of his death was a mere matter of conjecture on the part of expert opinion witnesses. A dark spot on the top-center of the skull of the deceased, an incised wound on his left leg and the plain evidence of the body's long immersion in the river indicated that death might have been the result of a blow upon the head, bleeding of the cut on the leg, or drowning; or it could have been the result of a combination of all three.

This dilemma is resolved by the testimony of Erschel Hunt, one of the accused soldiers, who as an eye-witness not only told of the manner in which Alexander met his death but, in doing so, furnished the link which bound Fortney to the crime.

According to Hunt, on the night of 8 January 1943, after Kissell, the accused and himself had taken girls home from a petting party in the country, they proceeded toward camp at about 1:00 a.m. Kissell told them of having had a fight with Alexander and asked Hunt, in whose car they were riding, to stop by the Chattahoochee River near the Dillingham Street Bridge in Columbus, Georgia. There they found the unconscious body of a man whom Kissell identified as Alexander. Both Kissell and the accused felt Alexander's heart and Hunt saw his legs move. Kissell and Fortney then "started working on Alexander and decided to finish him off". To do so they dropped seven or eight rocks, five inches in diameter, upon Alexander's head from a distance of about three feet. When they had finished all three felt for Alexander's heart beat and, finding none, all agreed that he was then dead. At the suggestion of the others Hunt then made a deep gash in Alexander's leg with a knife, but it did not bleed until the body was carried by the three from under the Dillingham Street Bridge to Hunt's automobile and thence to the top of the bridge from which they threw it into the Chattahoochee River.

This testimony of Hunt, who, if he spoke the truth, is a self confessed accomplice in the murder, is under a cloud of suspicion for several reasons. The fact that he is an accomplice alone requires that his tale be cautiously examined. It is true that an accused may be legally convicted upon the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution (par. 124a, M.C.M. 1928). This is in accord with the practice in the Federal courts of the United States where there is no rule of law which prevents the conviction of an accused person on the testimony of an accomplice alone if the jury believe the accomplice has spoken the truth (Harrington v. United States, 207 Fed. 97; Caminetti v. United States, 242 U.S. 470; Bishop Criminal Procedure, 2d Ed., par. 1031). In addition, Hunt recanted and denied certain parts of his sworn statement made to investigating officers, and at the trial admitted that they were untrue. Also, the fact that he was, with the consent of the appointing authority, to be allowed to enter a plea of guilty of voluntary manslaughter in lieu of standing trial for murder, provided he testify in this case, further tinges his testimony with doubt.

But, whatever suspicion may attach to it, because of attendant circumstances, Hunt's testimony is not thereby rendered incompetent and its credibility is to be determined by the application of the same rules that govern the weighing of the testimony of any other witness (Wharton's Criminal Evidence, Vol. 2, par. 727, 730). If, in the application of these rules, important elements of Hunt's testimony are corroborated by the testimony of other credible witnesses or are independently worthy of credibility, such portions are entitled to belief and need not be rejected or discarded because of the maximum falsus in uno, falsus in omnibus. Under that rule, which is merely one of evidence affirming a rebuttable presumption of fact, the Board is obliged to consider all the evidence of the witness Hunt, other than that which is found false, and it is their duty to give effect to so much of it, if any, as is relieved from the presumption against it, and found to be true. (Lewine Brothers v. Montell, 111 S.E. (W. Va.) 501; Shecil v. United States, 226 F. (C.C.A.) 134).

The accused having boldly asserted a complete alibi, the most careful consideration should be given to the question as to where he was on the night of 8 January 1943, since all of the evidence in the case touching the date of the crime, when carefully analyzed, leads to the conclusion that the murder of Alexander occurred on that date.

Browning, Alexander's friend, was in the Victory Tavern with Alexander on 6 and 7 January 1943 and he loaned Alexander his wrist watch when Alexander went to Columbus on 8 January 1943. Jean Antry saw Alexander in the Victory Tavern on 7 or 8 January 1943. The last

letter received from Alexander by his mother was postmarked at Fort Benning, Georgia on 8 January 1943. Thus, it is reasonably apparent that Alexander was alive on that date and there is nothing in the evidence of record to show that anyone had ever again seen Alexander alive thereafter. His dead body was, however, discovered on 28 February 1943 in a spot where it had washed ashore from the Chattahoochee River, after it had been in the water, according to a medical officer's opinion, for a period of from six to eight weeks.

Hunt, the accomplice, swore that on the night of 8/9 January 1943 at about 1:30 a.m. he saw the unconscious but living body of Alexander on the bank of the Chattahoochee River; that he stood by and saw him stoned to death by Kissell and the accused and then, after cutting a gash in the leg of the body he helped to throw it from the top of the Dillingham Street Bridge, Columbus, Georgia, into the river.

Thus we find corroboration of important facts in Hunt's testimony both as to the physical aspects of the murder and material and parallel circumstances of time and place. The body of the deceased was found seven miles down stream from the Dillingham Street Bridge, in a state of decomposition which indicated it had been in the water since some time in the forepart of January 1943. When found there was, on the left leg of the body, a deep, incised wound. One disinterested witness had seen Alexander in Columbus, Georgia, on 7 or 8 January and another knew he had gone to Columbus, Georgia on 8 January.

But there are other more potent corroborations of Hunt's testimony and while they do not directly serve to connect the accused with the crime they leave no other logical inference than that he was an accomplice.

The accused categorically denied any knowledge of Alexander's disappearance or death and, on the trial, asserted an alibi for the nights of 7 and 8 January. He maintained that he was at home with his wife on every night between 5 and 13 January 1943 and never left her presence at any time during those nights. But, during the investigation of the Charges against Kissell, Hunt and himself, he made a sworn written statement in which he stated positively that he was with Kissell and Hunt during the entire evening following the night when they had taken Shirley Kissell, Jean Autry, Bonnie Fay and "a girl named Mary" to the Beauty Rest Cabins and spent the night with them. In order to fix the date of these occasions the accused's memory was refreshed by the investigating officer who testified: "When I showed him the morning he was AWOL from the records - that that certain day was the only time he was AWOL, and that established the date * * * once establishing that, it was easy to remember from there on and we worked on that basis". The date thus established was 8 January 1943 and the occasion, by accused's own testimony, was his failure to return

to camp until 11 o'clock a.m. on the morning following the night at the cabins with the girls. For this infraction he was punished by being given a week's restriction and K.P. on the following Sunday; but he testified that he broke the restriction that same day and returned to Columbus with Kissell and Hunt that evening and was with them constantly during the night until they again returned to camp.

At the trial the accused attempted to repudiate the dates "7 and 8 January 1943" which appear in his written statement, alleging that coercion and force had been used against him on the part of the investigators, and mainly because, after he had been given the opportunity of seeing his wife some two months subsequent to the date of the statement, she had called his attention to the date (12 January 1943) on which she had received her allotment check. With his memory thus prompted he knew that the dates "7 and 8 January" in his statement should be "14 and 15 January" instead. Mrs. Fortney returned to Columbus, Georgia in April 1943 where she, for the first time, read a newspaper account telling of the murder of Alexander on 8 January 1943, and that circumstance, as she testified, fixed the date 8 January 1943 in her mind. Later she attended the trial of Albert Kissell, jointly charged with the accused and Hunt (but tried separately) for the murder of Alexander, heard the testimony of every witness who testified therein and took occasion to meet and speak with Jean Autry, a witness in both that trial and this one. She also discussed the case freely with most, if not all, of the witnesses called by the defense to establish the alibi. These circumstances must be borne in mind when considering the defense offered by the accused.

Of all exculpatory defenses that of an alibi clearly established by credible testimony is the most conclusive and the loyalty of Fortney's wife is not criticized because of any effort she may have made to assist in establishing an alibi on behalf of her husband respecting the 7th and 8th of January 1943. In this she followed the normal and humane instincts of any loving wife. But it is this very personal and intense interest which raises a presumption of her bias and, to that extent, affects both her credibility and the weight to be attached to her testimony. Mrs. Fortney was positive in her statement that the accused was with her, at home, on every night from 5 January until she went home on 13 January 1943. Seven other witnesses were called to support her claim, most of them friends or relatives with whom she had freely discussed the case, but not one,

save Mrs. Fortney, could positively assert that he or she had seen the accused on the night of 8 January 1943. Two witnesses called in rebuttal, however, did cast grave doubt upon the accuracy of Mrs. Fortney's memory. A sergeant in charge of quarters of the accused's organization on the night of 6/7 January 1943, testified that on 7 January 1943 the accused, Kissell and a drunken soldier by the name of Jaloway had come into camp at 3:30 a.m. and aroused him by the disturbance created by Jaloway trying to kick down a door of the building where the sergeant was sleeping. This incident was corroborated by the testimony of the acting First Sergeant to whom the matter was reported and the date alleged by these witnesses was corroborated by the duty roster which was received in evidence. The evidence thus presented to establish the alibi falls far short of raising a reasonable doubt as to accused's presence in the Victory Tavern in Columbus, Georgia on the night of 8 January 1943 and the court was, therefore, justified in rejecting it.

In order, then, to determine whether the accused is worthy of credibility and belief with respect to his claim that the dates of 7 and 8 January 1943 given in his sworn statement are erroneous, and were either inadvertently made or suggested to him under fear of violence if he refused to accept them, it becomes necessary to weigh, examine and compare all of the testimony in the record bearing upon this question.

In doing so it is noteworthy that Jean Autry, Erschel Hunt and the accused are in remarkable accord with respect to their testimony as to minor incidents surrounding the occasions when they went with Kissell, his wife, Shirley, and another girl, to the Beauty Rest Cabins to spend the night, followed by another party on the next night.

Jean Autry testified that the occasion when she saw the accused with Kissell and Hunt at the Victory Tavern was the night after they all had visited the Beauty Rest Cabins. Kissell, at some time during the evening, got up and left the tavern alone. Upon his return later, the three men, Kissell, Fortney and Hunt, took her and Shirley Kissell home. She was somewhat uncertain and indefinite in her dates but it reasonably appears that she believed these things happened on 7 and 8 January 1943.

Hunt testified that on the night of 7 January 1943, he, Kissell and the accused went to the Beauty Rest Cabins with Jean Autry, Shirley Kissell and "a girl by the name of Mary" and stayed there until morning. Kissell, Hunt and the accused again went into Columbus the next evening, Friday (8 January 1943) and visited the Victory Tavern. After staying there about an hour they went to Wimpy's Place for some drinks. After about half an hour Hunt and the accused then went to a dance hall,

returning to the tavern at about 11:30 p.m. Kissell, Hunt and the accused then took Jean Autry, Shirley Kissell and Bonnie Fay to Jumbo's for something to eat after which they drove into the country and parked for a while and then took the girls home. Thereafter, on the way back to camp the murder of Alexander occurred. Subsequently they picked up Private Greer in Phenix City and took him along back to camp.

The accused testified that, on the night of 14 January 1943, Kissell, Hunt and himself, in company with Jean Autry, Shirley Kissell, Bonnie Fay Brown and "another girl named Mary", went to the Beauty Rest Cabins. Bonnie Fay did not stay with them but the rest remained and occupied cabins for the night. On the next night, Friday (15 January) Kissell, Hunt and he drove to Columbus in Hunt's car and went to the Victory Tavern but left shortly to go to Wimpy's Tavern where they had some beer. They returned to the tavern and at 11:45 the men took Jean Autry, Shirley Kissell and Bonnie Fay to Jumbo's for something to eat. Thereafter they all drove to the country and parked a while. After taking the girls home they went to Phenix City, picked up Private Greer and returned to camp.

This astonishing similarity in the chain of events which transpired on the Friday night when Alexander lost his life as well as on the night immediately preceding it, as portrayed by the three witnesses who were parties to the events and therefore familiar with them, leads to the inescapable conclusion that Fortney, the accused, was with Kissell and Hunt on the Friday night in question. They were each talking about the same two successive nights, and Fortney was with Kissell and Hunt during those nights, both leaving and returning to camp with them.

Returning now to a further consideration of Hunt's testimony, upon the truth or falsity of which much depends in arriving at a just decision of this case, it should be noted that his statements with regard to relatively insignificant details are corroborated not only by Jean Autry but by the accused as well. While such corroboration is not essential it is certainly of probative value in a case of this kind and serves to lift the weight of suspicion which attaches to Hunt's evidence because he testifies as an accomplice under promise of partial immunity. Looking into the question of Hunt's grant of immunity, it should be noted that Hunt's civilian counsel of the Georgia Bar, who attended the preceding trial of Albert Kissell, one of the accused's accomplices, and heard all of the testimony given therein, "had reason", as he said in this trial, to make the initial approach to the trial judge advocate and to suggest the acceptance of a plea from Hunt of involuntary manslaughter. The compromise, whereby Hunt agreed to testify and tell the truth in this case, in return for which he was to be allowed to plead guilty to voluntary manslaughter, does not bear the stigma which might have attached to this arrangement had it been initiated and accomplished by the trial judge advocate in an effort to induce Hunt into testifying against Fortney. Hunt

also testified that he had promised the trial judge advocate "to tell the truth" about the matter before any promise of immunity was given to his counsel.

Where statutory corroboration of the testimony of an accomplice is required by law before a conviction can be legally sustained, the rule, in determining whether there has been sufficient corroboration, is to eliminate the evidence of the accomplice and then, if, after examination of all the other evidence in the record, there is sufficient inculpatory evidence tending to connect the defendant with the commission of the offense, there is sufficient corroboration (Wharton's Criminal Evidence, Vol. 2, par. 752). In this connection it must be observed that under the term "all the other evidence" is included evidence of the accused himself. "A defendant's own statements, admissions and confessions, made in connection with other testimony, may afford corroboratory proof, sufficient to sustain a verdict" (Wharton's Criminal Evidence, Vol. 2, par. 750).

A careful weighing and comparing of all the testimony in the case convinces the Board that Hunt spoke the truth as to the time, the place and the manner in which Alexander was murdered, and further convinces the Board that the accused likewise spoke the truth with regard to time and place when he made his sworn statement to the investigators. There is no persuasive evidence that Fortney was mistreated in any manner while being interrogated, or that any of the facts he sets forth in his sworn statement were involuntary because of coercion, fear or promise of favor. The efforts of his wife to correct his damaging admission as to date, by urging him to change it and his attempt to support such change by offering an alibi, were unavailing. Against her faulty, but loyal, memory stands the testimony of a disinterested sergeant in charge of quarters who swore that on the morning of 7 January 1943 Kissell and the accused in company with a drunken soldier came into camp at 3:30 a.m. As to this fact he is corroborated by the testimony of the acting first sergeant to whom the matter was reported and also by the duty roster of the organization to which the accused belonged. When, during the pre-trial investigation, Fortney was confronted with the fact that his only absence without leave in January 1943 was on the 8th, the accused recalled the night he spent with Kissell, Hunt and the girls at the Beauty Rest Cabins, and his return to camp at 11 a.m. on the following morning and, he then and there admitted this occurrence took place on the night of 7/8 January 1943. It was only when his wife had conferred with him two months later after her attendance at the Kissell trial that he decided the date was in error and that the visit must have been on 14/15 January instead. That the accused's presence at the Beauty Rest Cabins on 14 January 1943 in company with Albert Kissell and his wife as shown by the cabin register of that date has not been overlooked and this fact might have been more disturbing had it not been for the fact that Hunt testified that the same group had gone to the cabins on both the 7th and 14th of January and both he and Jean Autry testified that they were there on 7 January 1943.

True, the register maintained by the Beauty Rest Cabins does not show the names of Kissell, Hunt or Fortney during the period 6-8 January 1943, inclusive; but the evidence of record shows that the system whereby the registrations were made was inaccurate and unreliable and the accused himself testified that Hunt and his girl companion occupied a cabin on the same night he and Jean Autry and Albert and Shirley Kissell were there, but Hunt and the girl were not registered. This bears out the testimony of the woman who managed the camp when she said that it was quite possible for persons to occupy cabins without being registered.

It would burden an already lengthy review to comment upon all of the many difficulties which confront those who are obliged to carefully weigh all the evidence in this case in order to discover the truth. Jean Autry was a reluctant witness and both Hunt and the accused repudiated, at the trial, material portions of sworn statements each had theretofore made. After examining the inconsistencies, retractions and palpably false testimony of some of the witnesses it would be a simple matter to reject all of their testimony as unworthy of credibility or belief for these reasons and hold the record too vague, indefinite and uncertain to support conviction. But even-handed justice requires that every method by which the truth may be made to appear shall be applied with infinite patience in order that neither the accused nor the Government shall suffer a violation of any substantial right. This has been done. Every motive, bias, prejudice and interest of the respective witnesses has been taken into account in separating the wheat from the chaff in the mass of evidence adduced.

It is impossible to set forth herein every persuasive factor which led either to the acceptance or rejection of certain portions of the testimony of some of the witnesses but a brief mention of several is appropriate.

Jean Autry fixed the 7th and 8th of January 1943 in her mind by two independent incidents. She recalled the night when she was with the group at the cabins because it was about a week after New Years and a week previous to her quitting her employment at the Victory Tavern on or about 16 January.

Hunt recalled the date of the same occasion because it was about a week after he purchased his automobile on 1 January. Fortney, in his original statement to the investigating officer, recalled the same occasion as 8 January because his memory was refreshed by reference to his absence without leave on that date and, since that was his only absence in January, he knew it must have occurred on the morning following the night he spent at the cabins when he reported to his company commander at 11:00 a.m.

Mrs. Fortney's attention was fixed upon 8 January 1943 by reading a newspaper account of the murder of Alexander after she had returned to Columbus from Shreveport, Louisiana, in April, when her husband, the accused, was brought back to Fort Benning. It is noteworthy that as soon as she had an opportunity to confer with him (in June 1943) he was persuaded, for the first time, that he was in error as to his statement to the investigating officers regarding his activities on 7 and 8 January. Thereafter the accused consistently denied ever being with Hunt and Kissell, at night, while his wife was in Columbus until the day after she left for home, and, although an array of witnesses was produced to establish the alibi which would demonstrate that, in this matter, Fortney spoke the truth, their testimony, carefully considered, failed to raise the required doubt of his presence at the Victory Tavern on the night in question.

Both Fortney and his wife agree that they were never separated at night from 5 to 13 January, but Sergeants Fryholm and Benson, both entirely disinterested, with no apparent bias, prejudice or motive to affect their veracity, and supported by an entry upon the company duty roster, established with reasonable certainty that on 7 January 1943 Fortney, in company with Kissell, came into camp with a drunken and boisterous soldier at 3 o'clock in the morning.

It is also significant that, at the Kissell trial, the accused swore that he had no idea why he was returned, under guard, to Fort Benning, until the investigating officers told him; whereas, in this trial he admitted that was untrue, that he had been informed by one of the guards he was being held for murder and that he had so informed his wife and Ruth Bennett Williams. He also denied prior conviction of crime in the Kissell trial and in this trial admitted the same and the serving of a sentence for forgery in Iowa. Again, during cross-examination, the accused was asked whether, while he was in Shenango Replacement Depot, he had ever had any difficulty with anyone of Mexican or Spanish name, or descent, and he denied knowing such person or ever having any difficulty of any kind with either soldiers or civilians. A record of a summary court-martial trial of the accused on 13 March 1943 at Shenango Replacement Depot for attempting to strike one Jose Ruiz with clenched fists and threatening him with a knife, should then have been introduced as impeachment matter but was instead offered after findings as evidence of prior conviction. Since the offense for which he was tried by summary court-martial occurred after the offense for which he was being presently tried, this action was irregular; but it was no violation of accused's rights and did constitute a grave reflection upon his veracity. All of these matters, when placed in the scales by which the credibility of both Hunt and Fortney is to be weighed, serve to neutralize the effect of the circumstances which tended to impugn Hunt's veracity.

The Board of Review is of the opinion that the record of trial establishes beyond reasonable doubt that the accused did, in fact, participate on the night of 8 January 1943 in the murder of Private Claude A. Alexander, as alleged, and that the facts and circumstances abundantly show that the killing was an atrocious, brutal, willful, deliberate, malicious and premeditated act.

6. Attached to the record of trial are four recommendations of clemency. In a letter submitted by defense counsel they urge that the findings and sentence be suspended and set aside because each of said counsel are convinced that the accused is not guilty of the offense. In separate letters, Captain Charles W. White and Captain Robert K. Clark, both members of the court, state that at the conclusion of the trial each "was convinced of the innocence rather than the guilt of the accused * * * but voted for the death sentence apart from his personal belief as to the guilt of the accused on the evidence". "On due reflection" each "has decided that he did not administer justice according to his conscience in voting for the death sentence for a man whom as a matter of fact he believed to be innocent" and that if each "had it to do over he would not vote for the death sentence". For these reasons they recommend commutation of the sentence and a "reinstatement of the accused as a soldier in the Army of the United States with all the rights and privileges pertaining thereto". Captain Hunter M. Brumfield, a member of the court, had "some question or indecision * * * at the close of the case as to just what part the accused played in the murder and whether or not any act of his was directly responsible for the death of the deceased". For these reasons he recommends commutation of the death sentence to life imprisonment. Careful consideration has also been given to an ancillary brief submitted in behalf of the accused by Hon. Ruvian J. Hendrick, Judge of the City Court of Shreveport, Louisiana, as associate counsel for the defense, on 17 April 1944, and to a transmittal of a copy of the same brief to The Judge Advocate General by Hon. Overton Brooks, Member of Congress from Louisiana, under date of 21 April 1944.

7. The records disclose that the accused is 24 years of age. He enlisted at Missoula, Montana on 17 December 1941 and has had no prior service. In civil life he worked on farms and in a brickyard and cooked in cafes. He is married.

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

William A. Spunde, Judge Advocate.

William A. Hazenberry, Judge Advocate.

Herbert B. Fredman, Judge Advocate.

1st Ind.

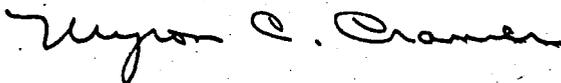
War Department, 'J.A.G.O., 25 MAY 1944 - To the Secretary of War.

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 Private Raymond W. Fortney, Jr. (19055791), Shenango Zone of Interior Replacement Depot.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification - alleging murder in violation of Article of War 92. The reviewing authority has recommended that the death sentence be commuted to confinement at hard labor for the term of accused's natural life. I concur in the recommendation of the reviewing authority, and recommend that the sentence be confirmed, but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. I further recommend that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Careful consideration has been given to an ancillary brief in behalf of Private Raymond W. Fortney submitted by Hon. Ruvian D. Hendrick, Judge of the City Court of Shreveport, Louisiana, as associate counsel for the defense, under date of 17 April 1944. An identical copy of this same brief was transmitted to The Judge Advocate General by Hon. Overton Brooks, Member of Congress from Louisiana, under date of 21 April 1944.

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.

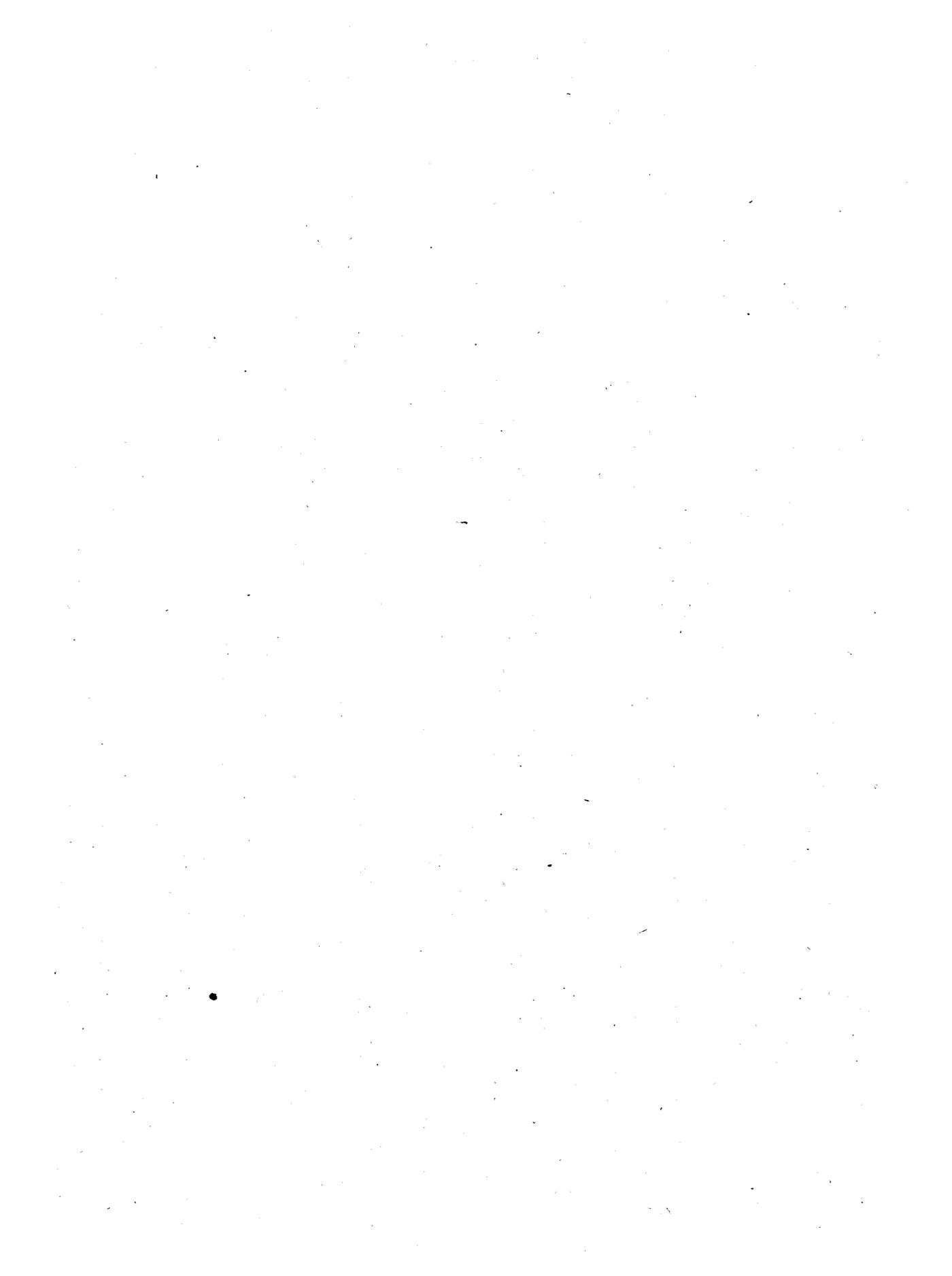


Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.

- Incl. 1 - Record of trial.
- Incl. 2 - Dft. ltr. for sig. S/W.
- Incl. 3 - Form of action.
- Incl. 4 - Brief dated 4/17/44.

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. G.C.M.O. 445, 21 Aug 1944)



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

(383)

SPJGH
CM 252103

23 MAY 1944

UNITED STATES)

v.)

Second Lieutenant ALEXANDER
L. SELEVITZ (O-576232), Air
Corps.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Laredo Army Air Field,
Laredo, Texas, 17 February
1944. Dismissal, total for-
feitures and confinement for
four (4) years.

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: Violation of the 94th Article of War.

Specification 1: In that Second Lieutenant Alexander L. Selevitz, Air Corps, did, at Eagle Pass Army Air Field, Eagle Pass, Texas, on or about 29 November 1943, feloniously take, steal and carry away three (3) cans of Pears, two (2) boxes of raisins, and two (2) cans of Salmon, of a total value of about two dollars and sixty-nine cents (\$2.69), the property of the United States furnished and intended for the military service thereof.

Specification 2: In that Second Lieutenant Alexander L. Selevitz, Air Corps, did, at Eagle Pass Army Air Field, Eagle Pass, Texas, on or about 30 November 1943, feloniously take, steal and carry away five (5) cans of Grapefruit, one (1) two pound jar of Orange Marmalade, one (1) two pound jar of Grape Jam, one (1) jar of Lima Beans, one (1) jar of Sliced Pineapple, one (1) pound of Rice, two (2) jars of Fruit Cocktail, one (1) can of Yellow Corn, one (1) can of Sweet Peas, five (5) cans of Spinach, one (1) one pound, fourteen ounce box of Prunes, two (2) cans of Salmon, two (2) cans of Pears and eight (8) two ounce packages of Shredded Wheat, of a total value of about five dollars and eleven cents (\$5.11), property of the United States furnished and intended for the military service thereof.

Specification 3: In that Second Lieutenant Alexander L. Selevitz, Air Corps, did, at Eagle Pass Army Air Field, Eagle Pass, Texas, on or about 30 December 1943, feloniously take, steal and carry away fifteen (15) cans of Asparagus, one (1) one pound, twelve ounce jar of Cranberry Sauce, three (3) cans of Spinach, and one (1) can of Peas, of a total value of about four dollars and eighty-nine cents (\$4.89), property of the United States furnished and intended for the military service thereof.

Specification 4: In that Second Lieutenant Alexander L. Selevitz, Air Corps, did, at Eagle Pass Army Air Field, Eagle Pass, Texas, on or about 13 January 1944, feloniously take, steal and carry away one (1) box of Rolled Oats, two (2) cans of Peas, five (5) jars of Orange Marmalade, one (1) jar of Peanut Butter, six (6) boxes of Corn Flakes, three (3) one pound jars of Apple Jelly, one (1) box of Prunes, two (2) cans of Peaches, six (6) bottles of Hot Sauce, six (6) cans of tomatoes, six (6) cans of Green Beans, five (5) cans of Asparagus, five (5) cans of Peas, five (5) bottles of Catsup, twelve (12) cans of Milk, one (1) thirty-five pound sack of Irish Potatoes, and ten (10) pounds of Beef Meat, of a total value of about fourteen dollars and five cents (\$14.05), property of the United States furnished and intended for the military service thereof.

Specification 5: In that Second Lieutenant Alexander L. Selevitz, Air Corps, did, at Eagle Pass Army Air Field, Eagle Pass, Texas, on or about 13 January 1944, knowingly and wilfully apply to his own use and benefit one (1) four by four Ford Lorry, government registration number 3123712, of the value of about two thousand dollars (\$2,000.00), property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Second Lieutenant Alexander L. Selevitz, Air Corps, did, at Eagle Pass Army Air Field, Eagle Pass, Texas, on or about 10 January 1944, knowingly and wilfully misappropriate the sum of about \$20.00 in lawful money of the United States, property of the United States intended for the military service thereof.

Specification 2: In that Second Lieutenant Alexander L. Selevitz, Air Corps, did, at Eagle Pass Army Air Field, Eagle Pass, Texas, on or about 12 January 1944, knowingly and wilfully

misappropriate the sum of about \$47.00 in lawful money of the United States, property of the United States intended for the military service thereof.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four (4) years. 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: Accused, a mess officer at Laredo Army Air Field, Laredo, Texas, was sent on 18 October 1943, to Eagle Pass Army Air Field, about 130 miles distant, to serve as mess officer of the detachment there. The detachment, which expanded in size until it included some 650 or 700 men, was originally commanded by "Major Huber" who was succeeded in November 1943, by "Lieutenant Collins". First Lieutenant James C. Barrett was sales officer at Eagle Pass from October 1943 to 1 January 1944, when he became purchasing officer. Among the enlisted men under accused was Sergeant Charles L. Streeter, subsistence sergeant (R. 13-15, 65-67, 146-7).

a. Specifications 1 to 5, the Charge: Shortly after Thanksgiving 1943, accused instructed the storeroom clerk in the mess hall that the "top shelf on the right hand side of the store room" belonged to him (accused), that whatever was placed on it was his and what it is, "is nobody's business". Accused came in "practically every day", picked up cans of tomatoes, spinach and similar items brought from the post commissary, and instructed the clerk to place them on the shelf. Accused left Eagle Pass "nearly every week" on Thursday and went to his home at Laredo not returning until Monday morning. On these occasions he would take with him canned goods and other groceries placed on his shelf and have them unloaded at his house in Laredo. Accused used Government trucks as a means of transportation and under his instructions enlisted men under accused, including Sergeant Streeter, drove him to his home in Laredo on Thursday and returned for him and drove him back to Eagle Pass on Monday. Two trucks were allotted to the mess hall, one for the hauling of subsistence and the other for the hauling of trash and similar purposes (R. 67-71, 112-114, 115-125).

Sergeant Streeter testified that on Thursday afternoon, 13 January 1944, accused said to get ready and they would go to Laredo. Sergeant Streeter backed the "Ford lorry", "four by four", No. 3123712 (the stipulated value of which was \$2,000) up "to the platform" where another soldier loaded four boxes with canned goods and other groceries and a partially filled bag of potatoes (Ex. 3). They also carried some personal belongings of accused and the personal luggage of another officer. Upon arrival at the home of accused in Laredo, Sergeant Streeter, at the direction of accused,

unloaded the groceries in the kitchen. The groceries unloaded included about ten pounds of butter, five pounds of cheese, and also seven to ten pounds of meat which Sergeant Streeter had previously obtained from the Eagle Pass mess hall at the request of accused. Sergeant Streeter then drove to Laredo Army Air Field and delivered to the provost marshal a letter which had been given him at Eagle Pass by Lieutenant Collins. The provost marshal, Captain Wilbur H. Greenstreet and Captain Jerry C. O'Rourke, the general mess officer at Laredo, accompanied by Sergeant Streeter, then drove to the home of accused (Ex. 17; R. 15-16, 72-76, 91, 122-128, 148-149).

On cross-examination Sergeant Streeter testified that about 10 January 1944 he and "Sergeant Woods" were talking "about the Lieutenant and the thing had been going on" and "we figured we would be in a pretty bad spot in case of investigation". After some conversation they decided to make an accusation against accused and went to Lieutenant Collins about it. Sergeant Streeter denied that Lieutenant Collins had instructed him to offer to drive accused to his home. He (Sergeant Streeter) did not remember making a statement to the investigating officer to that effect. He did ask accused on 11 January if he could drive him to Laredo. After leaving the home of accused he reported to Captain Greenstreet with the letter given him by Lieutenant Collins. He told Captain Greenstreet that he had just delivered some groceries to the home of accused. On redirect examination Sergeant Streeter testified that he had never signed a written statement concerning the case; he had given his information only verbally to the investigating officer. Under examination by the court Sergeant Streeter testified that the trucks allotted to the mess hall were parked at the Eagle Pass motor pool. The "truck responsible officer" was Lieutenant Collins and the trip tickets were always made out to him. No one signed for the trucks and nothing was ever said about the mileage accumulated. The trip tickets were turned in to their own orderly room. On 13 January Sergeant Streeter received "direct orders" from accused to drive a truck to Laredo (R. 88-112).

Captain Greenstreet and Captain O'Rourke testified that upon arriving at the home of accused they knocked and accused opened the door. After exchanging greetings accused invited them in. Captain Greenstreet said, "Lieutenant Selevitz, we understand that you brought some groceries from Eagle Pass to your home. May we see them?" Accused replied, "Yes, come this way", led them into a breakfast nook in a corner of which were stacked several cardboard cases with the "crescent shaped Quartermaster mark" on them and said, "Those are the groceries". Captain O'Rourke asked accused what he was doing with the groceries and accused replied that he was holding them until the detachment mess at Eagle Pass was closed when he would turn them in for credit. Accused recalled to Captain O'Rourke that he had previously reported to him a conversation which he (accused)

had with Lieutenant Barrett in which, according to accused, Lieutenant Barrett had said he was going to try to "stick" accused before he left Eagle Pass. Captain O'Rourke also inquired what accused was doing in Laredo on Thursday and he replied that Lieutenant Collins had asked him to bring over some personal luggage belonging to "Captain Dalwood" and that he also came over to get some trisodium to use in cleaning. In response to further inquiry accused stated that he kept no inventory of the groceries he had brought home. He identified the various cartons according to the dates that he had brought them to his home. Captain Greenstreet wrote on the end of each carton the date it was brought to Laredo. When the cases had been marked Captain Greenstreet asked accused if there were any Government groceries in the house besides those in the cartons and walked to a pantry off the kitchen. Accused then asked, "Gentlemen, what is this all about? Gentlemen, am I being charged with something, and what are the charges?" Captain Greenstreet said, "You are being charged with stealing government groceries" and then advised accused "that he could either say nothing or that he could say whatever he wanted, but whatever was said might be used against him in future investigation". He further told accused that "if he did not want to say anything further, that his investigation would be stopped at that point". Accused replied that he had been telling the truth, he had nothing to "cover up", and that it was all "honest and above board". Captain Greenstreet then asked accused if he could identify any groceries in the pantry as the property of the Government and several items which accused identified were removed and placed in a box. An empty No. 10 can, labeled "peach halves" (Ex. 1) and an empty No. 2½ can, labeled "early June peas" (Ex. 2) identified by Captain O'Rourke as "items of government issue" were removed from the garbage can. Captain Greenstreet opened the ice box and took out "some six pounds" of butter and three or four pounds of cheese. Accused said he did not know whether these items were Government property and they were returned to the ice box. Underneath the stove was a sack of potatoes (Ex. 3) and accused said he did not know whether it was Government property. Sergeant Streeter was summoned to carry out the groceries to the car and he identified the bag of potatoes as the one he had brought over that day from Eagle Pass. Accused made no objection to the removal of the groceries from his house and only asked that he be given a list of them. He stated that "he was trying to help and in any way, to show his innocence in any wrong doing in bringing the food to his house, and that he had intended to turn it back at the close of operations at Eagle Pass, and everything that he was telling was the truth and that he was not trying to cover up anything". Ten cartons of groceries (Exs. 7 to 16) were removed and accused was told to report to the provost marshal the following morning (R. 15-41, 77-78, 128-136).

On cross-examination Captain O'Rourke and Captain Greenstreet testified they did not have a warrant when they entered the home of accused.

They had received information earlier in the day by radio from Lieutenant Collins at Eagle Pass that accused was on his way to Laredo with groceries. Previously, on 10 January 1944, Lieutenant Collins had reported that accused was said to be taking groceries from Eagle Pass to his home and on 11 January Lieutenant Collins discussed with Captain Greenstreet a plan to "catch him". Captain O'Rourke denied having previously testified that Exhibits 1 and 2 were "government property". He admitted that accused, "about the middle of November, 1943", had reported to him a "purported threat" made against accused by Lieutenant Barrett. Captain O'Rourke told accused to "check everything very carefully" and "to protect yourself". (R. 50-61, 136-142).

The groceries which had been removed from the house of accused were taken to the provost marshal's office. The following morning an inventory (Ex. 4) was made of the contents of each box according to the dates placed on the boxes by Captain Greenstreet. The inventory disclosed that box dated "Nov. 29" contained three (3) cans of pears, two (2) boxes of raisins, and two (2) cans salmon; the boxes marked "Nov. 30th" contained five (5) cans grapefruit, one (1) two pound jar of orange marmalade, one (1) two pound jar of grape jam, one (1) can of lima beans, one (1) can of sliced pineapple, one (1) pound of rice, two (2) jars of fruit cocktail, one (1) can of yellow corn, one (1) can of sweet peas, five (5) cans of spinach, one (1) one pound fourteen ounce box of prunes, two (2) cans of salmon, two (2) cans of pears and eight (8) two ounce packages of shredded wheat; the box dated "Dec. 30th" contained fifteen (15) cans of asparagus, one (1) one pound twelve (12) ounce jar of cranberry sauce, three (3) cans of spinach and one (1) can of pears; and the boxes dated "Jan. 13th" contained one (1) box of rolled oats, two (2) cans of pears, five (5) jars of orange marmalade, one (1) jar of peanut butter, six (6) boxes of corn flakes, three (3) one pound jars of apple jelly, one (1) box of prunes, two (2) cans of peaches, six (6) bottles of hot sauce, six (6) cans of tomatoes, six (6) cans of green beans, five (5) cans of asparagus, five (5) cans of peas, five (5) bottles of catsup, and twelve (12) cans of milk. A stipulation (Ex. 17) concerning the value of each of the items contained in the inventory shows that the value of all goods in the box marked "Nov. 29" was \$2.69; the boxes marked "Nov. 30", \$5.11; the box marked "Dec. 30th", \$4.89; and the boxes marked "Jan. 13th", together with the sack of potatoes and ten pounds of meat, \$14.05 (R. 41-46, 134, 148-149).

Lieutenant Barrett testified that he never made any statement to the accused that he "intended to stick him or hold him responsible when he checked out of Eagle Pass Army Air Field". He denied ever having any quarrel or unpleasantness with accused. On one occasion at Piedras Negras when he, accused and others were together in the Moderna Cafe, he "kidded" accused about his long hair asking if he had a dog license. The only other conversation he had with accused, other than two telephone conversations, was at the time accused reported (R. 146-147).

b. Specifications 1 and 2, Additional Charge: Under the arrangement at Eagle Pass Army Air Field meals were served to enlisted men who were on separate rations at 25 cents per meal. The men signed for the meals and were billed at the end of the month. Officers who were served signed a "boarder slip" and were likewise billed at the rate of 25 cents per meal at the end of the month. The money collected was sent by accused to "Lieutenant Beck" in the office of the general mess officer at Laredo and eventually was turned over to the finance officer. Such money was Government money. An audit (Ex. 19) made of the accounts of accused in connection with the handling of this money for the period from October 1943 to 16 January 1944 disclosed a shortage of \$111.50, consisting of deficits of \$6.25 in October, \$11 in November and \$124.25 in December. This was the difference between the amounts collected and the actual cash turned in (R. 47-49, 149-164).

Sergeant Streeter testified that among his duties was to take care of the money collected, make up the vouchers and the lists of officers' names and the number of meals, and transmit them to Laredo. He kept the cash in an envelope in "1026 Orderly Room, Eagle Pass, Texas". Sometime in December accused made the remark that he wondered what the quartermaster at Laredo did with the money collected, and then said "Well, they are making money out of it, I might as well make a little bit of money". Accused at that time took six five dollar bills from the mess money. About 10 January 1944 accused asked for the envelope, which then contained \$90, retained it for a few minutes and returned it with only \$70 in it, a \$20 bill being missing. On the morning of 12 January accused remarked that he needed some money for his family and removed \$47 from the envelope saying he would "reimburse the envelope" for the amount taken. In order to "cover up" the shortages accused instructed Sergeant Streeter, in making out the papers in connection with the remittance of the December collections, to take the report of the number of meals eaten by the various officers in December and to alter it so that it showed fewer meals. Sergeant Streeter identified various erasures and changes in the December report (Ex. 5) as changes made by him with respect to the figures showing the number of meals eaten and the amounts collected. The report for November 1943 (Ex. 6) containing similar alterations was also received in evidence (R. 79-88).

4. Evidence for the defense: Major Elmer E. Huber, investigating officer in the case, testified that Sergeant Charles L. Streeter made a statement to him concerning the case which was reduced to writing (Ex. 1). The following language was a part of the statement, "About Wednesday, January 12, 1944, I was instructed by Lieutenant Collins to request of Lieutenant Selevitz that he allow me to drive him on his weekly trip to Laredo. I did this and Lieutenant Selevitz consented". On cross-examination Major Huber testified that he did not take a signed written statement from Sergeant Streeter but simply took notes of what he said and later in

the afternoon wrote them up in the form of a statement. Sergeant Streeter did not see the completed statement. On redirect examination Major Huber said he was "sure" there was no mistake in the statement (R. 166-171).

Accused testified that he was responsible for the mess hall at Eagle Pass and his duties were to watch the cooking, take care of the supplies, see that the place was clean, orderly and that the men behaved themselves, make inspections, note and correct defects. He worked at night at times until twelve or one o'clock. He had a "Staff Sergeant Woods" working for him and he had removed him as "shift leader" on 10 January 1944. He had met Lieutenant Barrett in June 1943, before going to Eagle Pass having taken a course with him at Randolph Field. Sometime in the middle of November 1943, at the Victory Club in Piedras Negras Lieutenant Barrett said, "Selevitz, before you get off this field I am going to stick you. Long after you are through here you will be paying and paying and paying". Accused told Captain O'Rourke about this remark and he told accused "Protect yourself". Accused also told Sergeant Streeter that he was the man drawing subsistence and to keep checking carefully. As a means of protection accused commenced to accumulate groceries. He did it openly taking the groceries out in the day time, bringing them to his house by truck. The groceries listed in "Specification 1" were brought down in that way. Accused identified the boxes which he had previously identified on 13 January 1944 as containing merchandise brought from Eagle Pass on 29 and 30 November, 30 December and 13 January. He testified that his family consisted of himself and wife and neither used any of the groceries. During this period his wife was managing a millinery shop, ate out all of the time, and did no cooking for him. The greater part of the time he was at Eagle Pass. The groceries were not intended for their own use. On 13 January, Sergeant Streeter had asked permission to drive him (accused) to Laredo. The reason accused came was because he received a call from "Sergeant Cohen" in the orderly room asking if there was a truck going to Laredo and he "took it for granted that it was an order from Lieutenant Collins". It was also a personal favor to "Captain Dahlberg", who was "shipping out", and needed his baggage moved. When Captain O'Rourke and Captain Greenstreet came to his house on that date, he spoke to Captain O'Rourke, and then Captain Greenstreet said, "I would like to see the groceries you brought in this evening". Accused replied, "All right. Right this way", showed the groceries to him and identified them. Accused did not have any butter, cheese or meat in his refrigerator that day. Three families lived in the same house and all used the same kitchenette and refrigerator. All money which accused collected was sent with the prepared forms to "Lieutenant Beck" by mail. Lieutenant Beck sent him a "clearance" or statement showing that the money for October and November had been checked, found correct and that there were no shortages. Accused specifically denied taking six five dollars from an envelope in December, a twenty dollar bill on 10 January 1944, or \$47 on 12 January (R. 172-181).

On cross-examination and recross-examination accused testified that Lieutenant Barrett could have "stuck" him by charging him "differently

on the tally-in and tally-out sheet", so that when it came time to check back in he would be short. He admitted that each time they obtained subsistence it was checked and all he had to do to keep from getting "stuck" was not to sign for something he did not get. Instead of doing this he brought groceries home. The reason he did not store the groceries in the storeroom was that the cooks might possibly have taken them out. He did have a shelf where he put subsistence and concerning which he issued instructions that groceries on it were not to be touched. He set aside this shelf after Lieutenant Barrett had threatened him. This was a very short time after he was married, on 11 November. Prior to that he had eaten in town or on the field. His wife rarely cooked and they usually ate out. She had a ration book but he did not. He had been a mess officer since 8 March 1943 but had never heard that the quartermaster would not accept goods in broken lots. It would have been easier to have taken whole cases of canned goods but he "did not want to take anything that was in boxes". Accused was told a few days before 13 January that Lieutenant Barrett was no longer sales officer at Eagle Pass. However, he was still protecting himself against Lieutenant Barrett on 13 January. He usually came home every weekend. His primary purpose in coming to Laredo was to see Captain O'Rourke and to get needed supplies. He had trucks come and take him back to Eagle Pass on Monday morning. If any enlisted men were going to Eagle Pass from Laredo they were furnished transportation at the same time. Accused did not know how the sack of potatoes got in his house, or how the butter got in the refrigerator. Concerning his collection of money accused admitted that the "boarder slips" were the "real basis" by which a check could be made to see whether he was accounting properly. These slips were the signatures of those men who ate on a particular day. He had ordered Sergeant Streeter to send these slips in. He did not know that they were not sent in (R. 181-203, 212-213).

Under examination by the court accused testified that the receipt he received from Lieutenant Beck was for the money actually remitted. He had never heard anybody of his household complain about the loss of a sack of potatoes after the groceries had been removed from his house. Accused did not know how some of the Government items of merchandise got on his pantry shelves and mixed up with non-government merchandise inasmuch as he had ordered that the "stuff" in the house was to be left in the corner. When Sergeant Streeter went to the quartermaster and drew out groceries they were given to him on "tally out". His only accountability was to feed it to the men or turn it back if not fed. There was no way to check to see whether it was all fed to the men. Accused did not know how Lieutenant Barrett could charge him "with something if he did not know". He felt he had authority to order the trucks to take him various places "because they were entrusted to him". When he came down in a truck to Laredo he did not know whether it had a load going back or not. He knew there were busses that hauled students from Eagle Pass to Laredo on Saturday and returned on Sunday (R. 203-212).

5. a. Specifications 1 to 5, the Charge: The evidence shows that about 18 October 1943, accused was sent from Laredo Army Air Field, Laredo, Texas, where he had been serving as a mess officer, to Eagle Pass Army Air Field, about 130 miles distant, to serve as mess officer of the detachment there. He served in that capacity until about 13 January 1944. Accused usually left Eagle Pass on Thursday and went to his home in Laredo not returning to Eagle Pass until Monday morning. For transportation in both directions he used one of the two Government trucks which were allotted to the mess hall for use in hauling subsistence and for allied purposes. The trucks were driven by enlisted men under accused. Accused usually carried home with him canned goods and other groceries taken from the mess hall storeroom. About 13 January 1944 under orders from accused, Sergeant Charles L. Streeter, subsistence sergeant, drove accused to his home in Laredo, in a "four by four", Ford lorry, No. 3123712, valued at \$2,000. Accused took with him four boxes of canned goods, ten pounds of butter, five pounds of cheese, a sack of potatoes, and ten pounds of meat. Shortly after his arrival at home Captain Jerry C. O'Rourke, the general mess officer, and Captain Wilbur H. Greenstreet, the provost marshal of Laredo Army Air Field, went to the home of accused and requested that they be shown the groceries brought there from Eagle Pass. Accused took them to the breakfast nook and identified several cartons as containing such groceries. Accused gave the specific dates the various cartons were brought there. The several cartons were marked with the dates stated by accused, and an inventory of their contents disclosed the items described in the first four Specifications, except for potatoes and beef. It was accordingly shown that the groceries described in Specifications 1, 2, 3 and 4, the Charge, the values alleged being stipulated, were taken from the Eagle Pass mess hall storeroom on the respective dates alleged.

Accused told Captain O'Rourke and Captain Greenstreet, at the time they were in his home, and he testified at the trial, that he was only storing the groceries in his house until the detachment mess at Eagle Pass was closed when he intended to turn the goods in for credit. He asserted that Lieutenant James C. Barrett, the sales officer at Eagle Pass had threatened to "stick" him, and that he was accumulating a stock of groceries to "protect" himself. It was shown that about the middle of November, 1943, accused had reported this alleged threat to Captain O'Rourke.

Accused was unable to give any clear explanation concerning the manner in which Lieutenant Barrett could "stick" him. He admitted that all subsistence drawn from the quartermaster was checked and signed for and that he could avoid any difficulty by signing only for what he actually received. He further admitted that his only accountability was to feed the subsistence drawn to the men or to turn it back if not fed, and that Lieutenant Barrett had no way of ascertaining whether the subsistence was fed or not. Lieutenant Barrett testified and denied ever making any threat

against accused. Aside from its manifest implausibility, his explanation is further disproved by the fact that accused took perishables, which he obviously did not intend to return, as well as canned and packaged goods; that empty cans of Government issue were found in the garbage of accused; that canned and bottled goods of Government issue were intermingled with other goods in his pantry and ice box in such manner that the Government property could not be distinguished from the others; and finally because after accused knew Lieutenant Barrett was no longer sales officer at Eagle Pass, accused still "protected" himself by hauling home groceries. The larceny by accused of the Government property described is established beyond any reasonable doubt.

The action of accused on Thursday, 13 January 1944, in having an enlisted man drive him from Eagle Pass to his home in Laredo in a Government truck allotted to the mess hall for hauling purposes was clearly a wrongful application of Government property to his own use. Although accused testified vaguely that the purpose of the trip was to see Captain O'Rourke and to get supplies, it is not shown that his reason for seeing Captain O'Rourke on that date was Government business or that any specific supplies were to be hauled. He also testified that a sergeant in the orderly room asked him to haul the personal luggage of another officer to Laredo and he interpreted the request as an order from his commanding officer. There is nothing in the record which shows any justification for such interpretation. It is clear that the principal purpose of the trip was the personal business or pleasure of accused and that any other purpose of the trip was purely incidental. Under all the circumstances the conclusion is inescapable that accused applied the truck to his own use and benefit.

b. Specifications 1 and 2, Additional Charge: Meals were served at Eagle Pass to enlisted men on separate rations and to officers at the rate of twenty-five cents per meal. The men and officers signed a "boarder slip" and were billed at the end of the month. The money collected from officers was kept in an envelope by Sergeant Streeter who made up the necessary reports and vouchers for the signature of accused and then transmitted them to the mess office at Laredo from which they were turned in to the finance office. The money collected was Government money. According to Sergeant Streeter, sometime in December accused made the remark that he wondered what the Laredo quartermaster did with the money collected and then said "Well, they are making money out of it, I might as well make a little bit of money". Accused at that time took six five dollar bills from the mess money. On 10 January he took twenty dollars from the envelope and on 12 January he took forty-seven dollars saying he would "reimburse the envelope" later. To hide the shortage accused had Sergeant Streeter make changes in the report of the number of meals eaten. An audit made of the accounts for the months of October, November and December showed a shortage of \$141.50, the difference between the amounts collected and the actual cash turned in. Although accused in his testimony denied taking any amount from the mess funds, in

(394)

the opinion of the Board of Review his guilt is established beyond any reasonable doubt.

6. a. A motion was made by accused to quash Specifications 1, 2, 3 and 4 of the Charge on grounds that the offense charged was embezzlement rather than larceny because the property described therein was held by him in trust. It was held in CM 220398, Yeager, that the carrying away by a mess officer of foodstuffs from his mess was larceny rather than embezzlement. The Board of Review there said:

"Although accused was mess officer and as such had charge of the property issued to the mess, his removal of the cans of tuna fish was a trespass within the law of larceny. His powers as mess officer with respect to the property were limited to care thereof for the single purpose of operating the mess as an agency of the Government and for the benefit of the military personnel of the hospital. His control over the property was subject to the control of his superior officers. Such being the case, he had 'custody' only of the property as distinguished from 'possession'. Possession, the 'present right and power absolutely to control' (par. 149g, M.C.M.) the property, remained in the United States."

b. During the trial accused also made a "MOTION TO SUPPRESS EVIDENCE AND FOR RETURN OF PROPERTY SEIZED" on the grounds that the property removed from the home of accused by Captain O'Rourke and Captain Greenstreet and introduced in evidence was obtained by unlawful search and seizure. Although the property was obtained without a search warrant it is undisputed that accused invited the officers into his home, led them to the room where the property was stored and raised no objection whatever to its removal. Accused asserted at the time that he had nothing to hide and that everything he did was "honest and above board". No force was used or threats made. The search was carried out in an amicable manner and with the full cooperation of accused. The evidence shows that accused consented to the search and under the circumstances no warrant was required (United States v. Bianco (C.C.A.) 96 F. 2d 97; Schutte v. United States (C.C.A.) 21 F. 2d 830; cases cited, 57 FD 707).

c. A further motion was made by accused to dismiss the Specifications of the Charge on grounds of entrapment. The evidence shows that about 10 January 1944, enlisted men at Eagle Pass reported to Lieutenant Collins that accused had been taking groceries from the mess hall storeroom to his home every Thursday in a Government truck. Lieutenant Collins thereupon discussed with Captain Greenstreet a plan by which accused could be caught. The following day Sergeant Streeter asked accused if he could drive him to Laredo that week. The evidence is conflicting whether or not Sergeant Streeter in making this request acted under instructions from Lieutenant Collins. On Thursday,

13 January, accused directed Sergeant Streeter to drive him to Laredo, had a quantity of groceries from the storeroom placed in the truck, and was driven to his home. Lieutenant Collins advised Captain Greenstreet by radio as soon as the truck left Eagle Pass. After unloading the groceries for accused at his home in Laredo, Sergeant Streeter went to Captain Greenstreet who proceeded to the home of accused and found the stolen groceries there.

The evidence fails to support the defense of entrapment. The Board of Review said in the case of Wohl (CM 239845):

"* * * Such defense is available in cases where an agent of the Government or his assistant incites or lures an accused into doing a criminal act (Dig. Op. JAG, 1912-40, sec. 395 (35); CM 187319, Line; CM 207652, Fay and Morris). But where a person has formed the intent to commit an offense, and agents of the Government merely lay a trap to catch him or even cooperate with him in order to obtain proof of his guilt, the defense cannot be sustained. * * *"

The evidence here shows that the intent to commit the offenses was formed by accused without any suggestion or inducement by agents of the Government and that the actions of the latter did not transcend the limits of legitimate cooperation to obtain proof of his guilt. As to misapplication of the truck, the evidence sustains the action of the court in resolving against accused the contention that Lieutenant Collins in effect invited him to use the truck, through the agency of Streeter.

7. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 14 April 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 3 March 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th Article of War.

Samuel M. Driver, Judge Advocate

Robert Cannon, Judge Advocate

J. L. Lott, Judge Advocate

1st Ind.

War Department, J.A.G.O., 2 JUN 1944

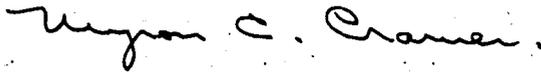
- To the Secretary of War.

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 Alexander L. Selevitz (O-576232), 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 mess officer, stole groceries of the total value of \$26.74 from the mess on four different occasions, and carried them to his home (Specs. 1 to 4, the Chg.); used a Government truck as a means of transporting the groceries and himself to his home, 130 miles from camp (Spec. 5, the Chg.); and misappropriated, on two different dates, \$20 and \$47 of mess funds under his control (Specs. 1 and 2, Add. Chg.). I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for four years be confirmed, but in view of all the circumstances that the period of confinement be reduced to two years, and that the sentence as thus modified be carried into execution.

3. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

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



Myron C. Cramer,
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.

(Sentence confirmed but confinement in excess of two years remitted.
G.C.M.O. 400, 18 Jul 1944)

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

(397)

SPJGK
CM 252107

17 APR 1944

UNITED STATES

ARMORED CENTER

v.

Trial by G.C.M., convened
at Fort Knox, Kentucky, 1
March 1944. Dismissal.

Second Lieutenant CLIFFORD
E. MOEN (O-430669), Infantry.

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

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

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

Specification: In that Clifford E. Moen, Second Lieutenant, Infantry, Rifle Company, Armored Demonstration Regiment, The Armored School, did at Fort Knox, Kentucky, on or about 5 February 1944, with intent to deceive George A. Cleaver, Major, Infantry, Headquarters Special Battalion, Demonstration Regiment, The Armored School, officially state to the said Major Cleaver that he had phoned the Regimental Guard House and rendered the Battalion Reveille Report, which statement was known by the said Lieutenant Moen to be untrue in that he had not in fact rendered the Battalion Reveille Report.

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

Specification: In that Clifford E. Moen, Second Lieutenant, Infantry, Rifle Company, Armored Demonstration Regiment, The Armored School, being the Duty Officer for Special Battalion, Demonstration Regiment, The Armored School on the 4th and 5th February 1944, did at Fort Knox, Kentucky, on or about 5 February 1944, fail to repair at the fixed time to the properly appointed place for receiving the Special Battalion Reveille Reports.

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. 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. Specification, Charge II.

Accused was attached to the Rifle Company, Special Battalion, Armored Demonstration Regiment, Fort Knox, Kentucky. Second Lieutenant Sidney P. Jackson, Adjutant of that battalion, prepared the battalion duty rosters, and assigned accused as battalion duty officer for 2 February 1944. This assignment was one of several made on a memorandum to all company commanders dated 29 January 1944 (Ex. 1). It required the duty officer to familiarize himself with certain duties outlined in a previous administrative memorandum (Ex. 2), and, particularly, to make the battalion reveille report to the regimental officer of the day, who would be stationed at a designated street intersection in the regimental area (R. 6-8). The accused had read and was familiar with the contents of Exhibits 1 and 2 (R. 8).

Sometime between the posting of the mentioned memorandum on 29 January and 2 February, accused came to Lieutenant Jackson and asked permission to exchange his date as duty officer with "Lieutenant O'Brien", who had been assigned to this task on 4 February. Accused told Lieutenant Jackson that this was agreeable to Lieutenant O'Brien, so Jackson granted the permission (R. 6-8). Major George A. Cleaver, commanding officer of the Special Battalion of the Armored Demonstration Regiment, testified that while he did not personally authorize this change in the dates between duty officers, the adjutant had the authority to do so (R. 26).

First Lieutenant Joseph W. Schaedler, Cavalry, Demonstration Regiment, Fort Knox, Kentucky, was regimental officer of the day on 4-5 February 1944. About 2000 or 2100 on 4 February accused asked permission to be absent from the place at which reveille reports were to be rendered the following morning at 0630, and to render the report by telephone. Lieutenant Schaedler told accused that he had no authority to grant such permission, and that as duty officer of the Special Battalion accused would have to be present to give the report to witness. On cross-examination witness denied telling accused that "as far as I am concerned it doesn't make any difference" (whether you are absent) (R. 10,12,13,15).

Accused failed to appear at the designated place to receive the reveille reports of the companies in his battalion. First Sergeant Joseph Letourneau of the Rifle Company, First Sergeant Paul G. Little of the Battalion Headquarters Company, and Corporal James F. Smith of the 781st Tank Destroyer Company, all of which companies belonged to the Special Battalion, took the reveille reports of their companies, repaired to the proper place at

the appointed time, found no officer there to receive their reports, and after waiting for periods of from 5 to 15 minutes, returned to their own organizations (R. 18-20, 20-22,23,24). Defense counsel admitted that accused was not present (R. 21).

Lieutenant Schaedler took the reveille reports of the component battalions of the Demonstration Regiment at the designated location therefor on the morning of 5 February. He received reports from the Armored Battalion and the Provisional Battalion, but none from the Special Battalion, although he remained at his post for 15 minutes (R. 11-13,15,16). Returning therefrom he instructed the regimental sergeant of the guard to pay particular attention to any telephone calls and to report to witness by telephone if any report from the Special Battalion came in (R. 11,14,15).

The reveille report for the Regiment was required to be in the hands of the regimental adjutant by 0800 (R. 16). Lieutenant Schaedler stated that at about 0745 he telephoned the Special Battalion headquarters and asked for the battalion's reveille report. "Sergeant Tobius" took this call and apparently inquired of the companies of the battalion and reported back to Lieutenant Schaedler, who took the sergeant's report and submitted it to the regimental adjutant (R. 14,16).

It appears, however, that an earlier reveille report had been secured and submitted for the Special Battalion. Corporal Robert J. Mangan of the Rifle Company (accused's organization at that time) testified that he was on duty in the company orderly room as charge of quarters about 0615 on 5 February, when accused telephoned him to ask whether it was the practice for the companies to telephone in their morning reports, and whether they had yet done so. Witness informed him that this had not yet been done, and accused asked Mangan if he "would * * * make the reports". Mangan said that he would, obtained the reports of two of the battalion's five companies by personal inquiry and three by telephone, and made the report about 0630 to "the Corporal of the Guard" (R. 36,37). Corporal Anthony N. Kokoletsos, Headquarters Company, 17th Armored Group, testified that he was corporal of the first guard relief of the regimental guard on the morning of 5 February, and that he was on duty at the guard-house telephone from 0500 to 0700. He received one telephone call, about 0615 or 0630, from a caller who did not identify himself, that the Special Battalion was present or accounted for. Witness did not recognize the caller's voice, but it seems clear from the time fixed by Mangan and Kokoletsos for the making and receipt, respectively, of their calls that Kokoletsos received Mangan's call. First Sergeant Charles G. Matthews, Casual Detachment, the regimental sergeant of the guard, Corporal Patrick Wiley, Rifle Company, corporal of the second relief and Sergeant H. E. Brown, Second Casual Group, acting corporal of the third relief, all testified that they did not receive any telephone calls from any person representing himself to be the duty officer of the Special Battalion, making a reveille report. Kokoletsos did not notify anyone of the call which he had received until the sergeant of the guard asked him during the afternoon whether he had received a report (R. 31-32, 33-34, 35, 36).

(400)

Lieutenant Schaedler talked to Major Cleaver about 0830, and reported that accused had not rendered his reveille report. Major Cleaver called the Rifle Company to speak to accused, but was unable to do so because accused was absent on duty with a "troop requirement" (R. 14,29).

b. Specification, Charge I.

Major Cleaver left word for accused to report to him as soon as accused came in. Accused arrived at Major Cleaver's office about 1500 on 5 February. Also present were Lieutenant Jackson and Sergeant Tobias. Major Cleaver asked accused if he had rendered his report as duty officer that morning at reveille. Accused replied that he had taken the report, telephoned the sergeant of the guard, and had given it to him (R. 27-30). Accused did not admit that he had not stood reveille (R. 28).

Evidence for defense.

a. Specification, Charge II.

Accused's rights as a witness were explained to him, and he elected to be sworn and to testify in his own behalf (R. 39). He stated that he had assumed the duties of battalion duty officer on 4 February, and while in charge of a detail of prisoners had gone in to see Lieutenant Schaedler, the regimental officer of the day. Accused had a "troop requirement" the following morning, and therefore asked Lieutenant Schaedler if the latter had any objection to his rendering the reveille report by telephone (R. 39, 42,43). Accused stated that Lieutenant Schaedler said, "Well, it is all right with me", and that after some further discussion between them concerning the procedure to be followed if Lieutenant Schaedler or the sergeant of the guard were not at the guardhouse to receive it, it was understood that the report could be made to "whoever is there ^{to} get the report". Accused claimed that Lieutenant Schaedler had approved this method (R. 39). He then finished his prison details about 2130, went to the regimental area, and returned to his quarters, where he remained until the next morning. He did not report at the designated place as battalion duty officer the next morning, but got up around 0600 or 0615, called Corporal Mangan, the Charge of Quarters, and asked him to call the companies of the battalion and "to turn in the report to the Guard House, as was planned the night before" (R. 39,40,44). Accused did not make the calls himself because there was no telephone directory available at his quarters, because he did not know the numbers of the companies, and, of course, did not know then whether all companies were present and accounted for. He gave as further reasons for his actions the fact that he had to meet his troop requirement "somewhere around 7:40 or 7:50", that the walk from his quarters to the place of duty and return would have taken him twenty or twenty-five minutes, whereas by telephoning he could obtain the report "with the snap of your finger", and because "the Regimental O.D. * * * gave me permission the night before"

to carry out those plans and I didn't want to disrupt them * * * I didn't think it would be wrong for me to do that" (R. 41-45).

b. Specification, Charge I.

Accused returned from his "troop requirement" and found a note in his box to see Major Cleaver. He stated that "I figured that it was about being Duty Officer, so immediately I questioned the Charge of Quarters to make sure just what his statement would be". He reported to Major Cleaver between 1000 and 1100, not at 1500. Major Cleaver asked him what time his troop requirement had been. Accused replied that it had been at 0630; asked whether he had stood reveille, accused said, "No, sir", testifying that -

"* * * Then I added by saying the reveille report was turned in to the Guard House; then he asked, 'To whom?' I replied by saying, 'To the Sergeant of the ---' then I corrected myself and said, 'To the Corporal of the Guard'. I didn't state I made the report to the Guard House." (R. 40)

Accused further stated that Major Cleaver did not give him any opportunity to explain that the regimental officer of the day had given him permission to report by telephone (R. 41,42).

Evidence in rebuttal.

a. Specification, Charge II.

Lieutenant Schaedler, recalled as a witness for the court, stated that on the evening of 4 February, when accused first asked for permission to absent himself from reveille and to report by telephone,

"* * * he was trying to * * * put the words in my mouth. He tried to frame me into saying it was all right, but I just would not do it * * *. * * * finally I told him definitely that that was a Battalion proposition and I had nothing to do with it, that it was up to me to take the reveille reports and that was all there was to it" (R. 49).

Witness "assumed from his accused's conversation and manner that he had no intention of being there the next morning" (R. 50).

b. Specification, Charge I.

Major Cleaver was recalled as a witness for the court. Major Cleaver testified that he recalled that he had asked accused why he had failed to render the reveille report, and that accused had stated that he had rendered a report to the sergeant of the guard; that accused did not offer and witness did not request any further explanation. He did not question accused

(402)

further (R. 46-48).

Lieutenant Schaedler testified that Sergeant Tobius had called him and given him the reveille report for the Special Battalion sometime between 0745 and 0900 (R. 48).

4. The evidence shows that accused was detailed as duty officer of the Special Battalion of the Armored Demonstration Regiment, Fort Knox, Kentucky, for 4-5 February 1944. On the evening of 4 February, while engaged in some of the duties of that office, he requested permission of the regimental officer of the day to be absent from the regularly designated spot at which he was expected as battalion duty officer to receive the reveille reports of the companies composing the Special Battalion, and permission to make the report through the regimental sergeant of the guard over the telephone. This permission was refused by the officer of the day as being beyond his authority.

The evidence further shows that accused was not present to receive the reports of the companies in his battalion, and that he was not present in order to render his battalion's report to the regimental officer of the day. He did, however, telephone to a corporal who was on duty as charge of quarters at accused's own company, and asked him to obtain the reports of the other component companies of the battalion and to make the report to the guardhouse. This the charge of quarters did, making the report to a corporal of the guard on duty at the guardhouse, who, in turn, failed to notify the regimental officer of the day or the sergeant of the guard until that afternoon.

The regimental officer of the day had meanwhile procured a report of the Special Battalion through the Headquarters Company of the battalion. When called into the office of the commanding officer of the battalion to explain why he had not been present and had not rendered the reveille report, accused stated that he had rendered the report to the sergeant of the guard over the telephone. He did not state that he had not been present for reveille, to receive the reports, or that his report was made by his charge of quarters.

Accused claimed that he had obtained permission to be absent from the appointed place, and to make the report by telephone, that he had admitted to his commanding officer that he was not present, and that he had immediately corrected his statement concerning the person to whom he telephoned the report.

5. The findings of the court are, in the opinion of the Board of Review, clearly substantiated upon both Charges and their Specifications by the evidence in the record. There is no doubt that accused asked permission of the regimental officer of the day to be absent from the place where he was supposed to receive and render the reveille reports, and to

make his report by telephone. Accused claimed that he obtained such permission, but it sufficiently appears from the evidence that he did not. His own testimony that upon his return from the troop requirement to find a note in his box ordering him to see Major Cleaver he "questioned the Charge of Quarters to make sure just what his statement would be" clearly indicates that he was at that time laying the foundations of a story with which to exculpate himself. This, together with Lieutenant Schaedler's testimony, points to a calculated scheme on the part of accused to be absent from his duties in spite of the regulations, and to be prepared to explain his actions by a claim of misunderstanding between himself and the officer of the day.

His statement to Major Cleaver was false, in what it said, and still more in what it did not say. Obviously he was trying to conceal from Major Cleaver the fact that he had delegated to the charge of quarters the performance of a duty which he as duty officer was required to perform. In all the circumstances, there is no reasonable doubt of accused's guilt of making a false official statement as alleged within the meaning of Article of War 95.

Minor errors occurred in the testimony of Lieutenant Schaedler when he was recalled as a witness for the court. Without objection by defense counsel, witness was permitted to testify concerning efforts on accused's part; that accused "was trying to * * * put the words in my mouth. He tried to frame me into saying it was all right" (R. 49) and to give his opinion that from accused's "conversation and manner that he accused had no intention of being there the next morning" (R. 50).

This testimony was clearly incompetent. The witness could testify to what accused actually said or did, from which testimony the court could draw such inferences as to it seemed proper, but the conclusions of the witness were not under the circumstances the proper subject of testimony. However, in view of the convincing competent evidence of guilt, the error can not be considered prejudicial or as affecting any substantial right of accused within the meaning of Article of War 37.

6. War Department records show that accused is 24 years of age and single. He was graduated from high school and attended junior college for 1-1/2 years, but did not graduate. He served as a private in the Illinois National Guard from 1935 to 1936 and from 1937 to 1938. He was commissioned a second lieutenant, Infantry, Army of the United States, on 8 November 1941, and entered upon active duty on 27 March 1942. He satisfactorily completed the Rifle and Heavy Weapons Company Officers' Course at The Infantry School, Fort Benning, Georgia, on 26 June 1942. He attended the Army Air Forces Preflight School, San Antonio Aviation Cadet Center, San Antonio, Texas, and the Army Air Forces Flying Training Detachment, Sikeston, Missouri, from 21 March 1943 until 23 June 1943,

when he was relieved for "failure to make satisfactory progress in flying training", and was reassigned to the Infantry.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96 and mandatory upon conviction of violation of Article of War 95.

Wm. G. Egan Judge Advocate.
John Hummel Judge Advocate.
(On Leave) Judge Advocate.

1st Ind.

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

- To the Secretary of War.

26 APR 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 Clifford E. Moen (O-430669), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. In his review, the Staff Judge Advocate states that accused has been an unsatisfactory officer, has shown a lack of sense of responsibility, and has more than once been reprimanded for improper and negligent performance of military duties. In view of the foregoing facts, and because of the deliberate nature in which the present offenses were committed, 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. 305, 17 Jun 1944)

