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including

CM 259755 to CM 260737

(1944)

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

(1)

SPJGH
CM 259755

12 AUG 1944

UNITED STATES)

ANTI-AIRCRAFT ARTILLERY TRAINING CENTER
CAMP STEWART, GEORGIA

v.)

First Lieutenant SCOTT W.
KELLY (O-280193), Coast
Artillery Corps.)

Trial by G.C.M., convened at
Camp Stewart, Georgia, 7
July 1944. Dismissal, total
forfeitures and confinement
for one (1) year.

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

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

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

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

Specification: In that First Lieutenant Scott W. Kelly, 545th Antiaircraft Artillery Automatic Weapons Battalion, did without proper leave absent himself from his organization at Camp Stewart, Georgia from about 0001 12 June 1944 to about 0345 13 June 1944.

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

Specification 1: In that First Lieutenant Scott W. Kelly, 545th Antiaircraft Artillery Automatic Weapons Battalion, did, at Savannah Beach, Georgia, on or about 12 June 1944, with intent to deceive one Mr. Dent, room clerk of the Hotel Tybee, wrongfully and unlawfully attempt to register at the Hotel Tybee by signing a fictitious name, to wit, "Lt. Graham".

Specification 2: In that First Lieutenant Scott W. Kelly, 545th Antiaircraft Artillery Automatic Weapons Battalion, did, at Savannah Beach, Georgia, on or about 12 June 1944 wrongfully enter room number 310 in the Hotel Tybee, without the knowledge or consent of the owner or management of said hotel.

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

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Specification: In that First Lieutenant Scott W. Kelly, 545th Antiaircraft Artillery Automatic Weapons Battalion, did, on or about 12 June 1944, at Savannah Beach, Georgia, wrongfully and unlawfully introduce a woman, not his wife, namely, Mrs. C. J. Leon, in room 310, Hotel Tybee, for immoral purposes.

He pleaded not guilty to all Specifications and Charges, and was found guilty of the Specification, Charge I, except "0001 12 June 1944", substituting therefor "0601 12 June 1944", and guilty of all other Specifications and of all Charges. Evidence of one previous conviction by a general court-martial of absence without leave for four days and of the wrongful wearing of campaign ribbons on two occasions was considered by the court. The accused was sentenced to dismissal, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the sentence, but reduced the period of confinement to one year, and forwarded the record of trial for action under the 48th Article of War.

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

a. The Specification, Charge I: An extract copy (Ex. P-1) of the morning report of Headquarters, 545th Antiaircraft Artillery Automatic Weapons Battalion, Camp Stewart, Georgia, the organization of accused, shows him from duty to absent without leave as of 0001 on 12 June 1944. Accused was authorized to be absent the week-end beginning Saturday, 10 June, as it was customary for officers to sign out "VOCO" until midnight on Sundays without a pass. The officers' register (Def. Ex. D-1) shows that accused signed out at 1430 on 10 June. At 0815 on 12 June (Monday) accused telephoned the battalion adjutant and stated that he had missed the morning bus, was still at Savannah Beach, and would try to return on the 1:00 p.m. bus. The adjutant, First Lieutenant Harry B. Jones, did not remember signing a pass for accused on 10 June, but it was possible that he had signed one. A week-end pass would be good until 0600 on Monday. No record of such passes was kept. At about 0115 on 13 June, Sergeant Edward F. Cottrell, a military policeman, learned that accused was in the custody of civilian police. When he went to the police station Sergeant Cottrell saw a pass, good until 0800 on 12 June, which accused had. Accused said it did not mean anything, and tore it up. At 0345 accused was released, and Sergeant Cottrell took him to the Fort Screven guardhouse (R. 7-12, 41-42).

b. The Specifications, Charges II and III: Two enlisted men of the same organization as accused rented room 310 at the Tybee Beach Hotel, Savannah Beach, Georgia, on 10 June; accused spent that night with them; at about 1700 on Sunday, 11 June, they turned in the key; and at that time the room was left unlocked (R. 22).

Mrs. Mae Leon, a waitress, testified that she met accused at the "Brass Rail" at about 8:30 p.m. on 12 June, he invited her to have a few drinks and she accepted. Later, at about 10:00 p.m., she suggested catching a bus back to Savannah and they had an argument. She had been drinking before she met accused, and remembered nothing after the argument until she was awakened

in a hotel room by the manager of the hotel and a policeman. Later, while in jail, she asked accused how she "got to the room" and he told her "to shut up and go to sleep" (R. 35-40).

On the night of 12 June, a little before midnight, James M. Williams, a bell hop at the Hotel Tybee, met accused in the hotel hallway. Accused asked for a pass key to enter room 310 so he could get his cap and tie. Williams obtained the key at the desk, opened room 310 and stood in the hall while accused struck a match, found his cap and tie, and came out. Williams observed a nude "lady" lying on the bed. When they came downstairs, accused went over to the desk to talk to the clerk. Mr. C. A. Dent, assistant manager of the hotel, testified that between 11:30 p.m. and midnight the bell boy reported "what was going on in the room", and just afterward accused came to the desk, wanted to register, and printed "Graham 1st Lt. Camp Stewart CO" on a registration card (Ex. P-2). When accused asked for room 310 Mr. Dent refused him the room, because it had been reported a woman was there. Accused then wanted to register for "the girl he had in the room" and stated that he did not want the room for himself, but Mr. Dent told him he would have to get her out of there. The rate for the room was not mentioned, and Mr. Dent voided the card. Room 310 was not rented on 12 June, accused did not register in his own name, and Mr. Dent did not authorize accused to use any room in the hotel (R. 14-25).

Mr. J. A. Brown, manager of the hotel, testified that he was advised by Mr. Dent on the night of 12 June that someone was in room 310 although it was not rented. Mr. Brown went to that room between 11:00 and 11:15 p.m., knocked several times but received no answer, and opened the door with his pass key. He saw a nude woman on the bed, tried unsuccessfully to awaken her, and went downstairs to call the police. He had noticed a bag, tie and officer's cap in the room. In about ten minutes he returned to the room with Mr. Robert F. Smith, a policeman, and found that the cap, bag and tie were gone. They awakened the woman by using wet towels, she dressed, and they took her downstairs. She and the policeman went out to look for accused. They found him in front of the "Novelty Bar", and the policeman took accused and the woman to the police station. On the way there they stopped at the hotel and accused said "Well, you got me". Mr. Brown had not given accused permission to use the room. On cross-examination Mr. Brown stated that Mr. Dent had not told him there was a woman in the room, but that someone wanted to use the pass key (R. 25-33).

When Sergeant Cottrell saw accused at the police station he advised accused that "the least he said the better" it would be for him. Accused volunteered to him that at about 2100 on 12 June he met a "young lady" at the Brass Rail; they had several drinks and became rather intoxicated; they went to room 310 in the Tybee Hotel; and accused went downstairs for a couple of drinks and returned to the room. Accused stated

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further that having learned from the bell boy that Mr. Brown had been to the room, he went to the desk and tried to rent the room, signed the register, but refused to pay the rate of \$7 that was asked for the room. Accused said that he was trying to protect the girl and was going to leave after renting the room (R. 41-45).

4. Captain Lomer L. Richardson testified for the defense that on Saturday, 10 June, he went to the battalion adjutant and obtained passes for himself, accused and another officer, effective from about 1300 on 10 June until 0600 on 12 June. The passes were signed by Lieutenant Jones. The three officers went to Savannah together, accused left the others at the DeSoto Hotel, and the next day, Sunday, Captain Richardson saw him at Savannah Beach (R. 45-49).

Accused testified that on the evening of 12 June he went with a friend to the Brass Rail, Savannah Beach, for a steak dinner. While waiting he went over to play the slot machines and there met Mrs. Leon. She had a drink with him, and later came to their table. She had about two more drinks there. At about 9:00 or 9:30 p.m. accused stated that he was catching the one o'clock bus, she said she was going on the same bus, and he suggested that they go to the Hotel Tybee and wait. They had two or three drinks at the hotel, and Mrs. Leon became "quite intoxicated". Thinking that she needed to "sleep it off", accused took her to room 310, where he had spent the week-end. Mrs. Leon sat on the bed, "flopped" over and went to sleep. Accused left his cap, tie and bag in the room, locked the door, and went down to the bar. He did not undress Mrs. Leon nor touch her, and did not remain in the room more than a few moments (R. 50-52).

He ordered a bottle of beer, went up to the room and knocked but received no response, went back downstairs, and waited until about eleven o'clock. He returned to the room and knocked several times, found a bell boy in the hall, and asked that he open room 310 so accused could obtain his cap and bag. The bell boy left, then returned and unlocked the door. When accused entered the room he saw Mrs. Leon on the bed, without any clothes. She had been fully dressed when he left her previously. He and the bell boy looked at each other, said nothing, accused obtained his things, and went down to the desk. He registered as Lieutenant Graham, asked for room 310, and stated that he did not want the room for himself. He did not obtain the room, and went to the bus station. He did not have intercourse with Mrs. Leon (R. 52-53).

On cross-examination and examination by the court, accused stated that he went to room 310 because friends had occupied it over the week-end and he knew it was open. Mrs. Leon was able to walk to the hotel. When she became intoxicated he took her upstairs without registering. He left her in the room because he intended waking her later to take her out of the hotel after she had "slept it off". He did not have consent to use the room. He signed the register as Lieutenant Graham because he did not want

to "become involved". When he saw Mrs. Leon's condition, the only thing he thought of was to see that she was not disturbed. The reason he did not take the room when he registered was that the clerk wanted the double rate, \$7, whereas accused insisted that he did not want it for himself. When accused went to the desk to register, he did not know that Mr. Brown had been to the room (R. 53-59).

5. Sergeant Cottrall, recalled by the prosecution, stated that accused told him that when he returned to the hotel room from downstairs he learned from the bell boy that Mr. Brown had visited the room. The policeman, Smith, recalled by the court, added nothing material to his original testimony (R. 59-63).

6. a. The Specification, Charge I: The evidence shows that accused was absent without leave from about 0601 on 12 June 1944 to about 0345 on 13 June, as found by the court. Accused did not return to his station at the expiration of his week-end pass.

b. The Specifications, Charges II and III: On the evening of 12 June accused became acquainted with Mrs. Mae Leon while he was in the Brass Rail at Savannah Beach, Georgia, waiting for his dinner to be served. She had two or three drinks with him. Later in the evening he and Mrs. Leon went to the Hotel Tybee to wait for the one o'clock bus to Savannah, which both were to take. They had two or three drinks there, and accused then took Mrs. Leon up to room 310 in the hotel, where he had spent the night of 10 June, and which he knew was unlocked. Accused had no consent to use the room and had not registered for it. So far as the hotel management was concerned it was an unoccupied room.

Shortly before midnight accused, who had gone downstairs and returned, asked a bell boy to unlock the room for him so he could get his bag, tie and cap. The bell boy went to the desk for the pass key and reported that accused wanted to enter the room for that purpose. The manager of the hotel went to room 310, opened the door with his pass key, and saw Mrs. Leon asleep on the bed and completely nude. He locked the door, went back downstairs and called the police. The bell boy admitted accused to the room, accused obtained his things and went to the desk. He signed a registration card in the name of Lieutenant Graham (a fictitious name) and asked for room 310. When the clerk asked a double rate for the room (according to accused) or refused to rent him the room because there was a woman there (according to the clerk), the card was voided and accused did not take the room. During the conversation accused stated that he did not want the room for himself, but for the woman in the room.

Accused claimed that he did not take Mrs. Leon to the room for immoral purposes, but merely to permit her to sleep off a condition of intoxication. He stated that she became quite intoxicated after taking some drinks at the hotel. All of the surrounding circumstances shown in the evidence satisfy the Board that the explanation given by accused is not correct.

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It appears unnecessary to repeat in detail the circumstances referred to, other than to state that accused surreptitiously took a woman, whom he had not known previously, to a hotel room, after having taken a number of drinks with her.

The evidence sustains the findings of guilty of both Specifications, Charge II, and of the Specification, Charge III. However, it becomes necessary to determine whether the offense involved under Charge III was a violation of the 95th Article of War, or only of the 96th Article of War. In a number of cases instances of illicit relations with women have been held to be violations of the 95th Article of War. Usually, the offense has involved either adultery by a married officer (as in CM 208296, Huskea, 9 BR 1, and CM 228053, Peterson, 16 BR 54 (59)) or publicly introducing as his wife a woman not in fact his wife (as in CM 227791, Fahres, 15 BR 357, 2 Bull. JAG 14). In the present case accused was not shown to be married, did not introduce the woman as his wife, and did not make a flagrant display of his effort to have illicit relations with her. His offense was an isolated instance and not a prolonged course of conduct. In the opinion of the Board, it was a violation of the 96th Article of War, rather than of the 95th Article of War (CM 235295, Anderson, 21 BR 369).

7. The accused is 36 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, 1 May 1931; accepted 5 May 1931; appointment terminated 30 April 1936; temporarily appointed first lieutenant, Army of the United States, 3 October 1942; accepted and active duty 10 October 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification, Charge III, and of Charge III, as involves a violation of the 96th Article of War; legally sufficient to support the findings of guilty of all other Specifications and Charges; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 61st or the 96th Article of War.

Samuel M. Driver, Judge Advocate.

Robert J. Adams, Judge Advocate

J. J. Lott, Judge Advocate

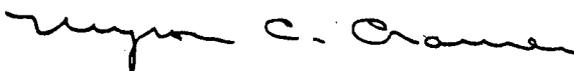
1st Ind.

War Department, J.A.G.O., 21 AUG 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 Scott W. Kelly (O-280193), Coast Artillery 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 the Specification, Charge III, and of Charge III, as involves a violation of the 96th Article of War; legally sufficient to support the findings of guilty of all other Specifications and Charges; and legally sufficient to support the sentence and to warrant confirmation thereof. The accused was absent without leave for part of a day (Spec., Chg. I), while in that status wrongfully introduced a woman not his wife into a hotel room for immoral purposes (Spec., Chg. III), entered the room without the knowledge or consent of the hotel management (Spec. 2, Chg. II), and wrongfully attempted to register for the room in a fictitious name (Spec. 1, Chg. II). Evidence of one previous conviction by general court-martial of absence without leave for four days and of the wrongful wearing of campaign ribbons on two occasions was considered by the court. The Staff Judge Advocate states in his review that the accused has also received punishment under the 104th Article of War for absence without leave, and that it has been learned that a \$15 check which he presented to a bank was returned because of insufficient funds. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for one year be confirmed, that the confinement and 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-Drft. ltr. for sig.

S/n.

Incl. 3-Form of Action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 524, 26 Sep 1944)



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

(9)

SPJGK
CM 259778

28 Aug. 1944

UNITED STATES)

ARMY SERVICE FORCES
THE CAVALRY SCHOOL

v.)

Second Lieutenant DONALD
F. AVERY (O-1031371),
Cavalry.)

Trial by G.C.M., convened at Fort
Riley, Kansas, 12 July 1944. Dis-
missal and confinement at hard labor
for two (2) years.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 1: In that Second Lieutenant Donald F. Avery, Cavalry, Headquarters, Second Training Regiment, Cavalry Replacement Training Center, Fort Riley, Kansas, did, at Modesto, California, on or about 5 May 1944, with intent to defraud, wrongfully and unlawfully make and utter to The Anglo California National Bank of San Francisco, Modesto Branch, Modesto, California, a certain check, in words and figures as follows, to wit:

Fort Ord.
90-206 MODESTO BRANCH 90-206

Monterey County Trust & Savings Bank
~~B-A-N-K-O-F--A-M--E-R-I-G-A~~ No. _____
Trust and
National Savings Association
Fort Ord, Calif.

Fort Ord.
MODESTO, CALIF., 5 May 1944

PAY TO THE ORDER OF Anglo. Calif. Nat. Bank \$ 200
OO.
OO
Two Hundred and 100 ----- DOLLARS

(10)

/s/ Donald F. Avery
2nd Lt. O-1031371

(Reverse side)
BANK STAMP

PAY TO THE ORDER OF
Any Bank, Banker or Trust Co.
All prior endorsements guaranteed
Modesto Office
MAY 5, 1944
THE ANGLO CALIFORNIA NATIONAL BANK
90-293 Successor to 90-293
Modesto Trust & Savings Bank
Modesto, California

and by means thereof, did fraudulently obtain from The Anglo California National Bank of San Francisco, Modesto Branch, Modesto, California, Two Hundred dollars (\$200.00), lawful money of the United States, he the said Second Lieutenant Donald F. Avery, then well knowing that he did not have and not intending that he should have any account with the Monterey County Trust & Savings Bank for the payment of said check.

Specification 2: Similar to Specification 1, but alleging check dated 6 May 1944, drawn on same bank, made and uttered to The Anglo California National Bank of San Francisco, Modesto Branch, Modesto, California, and obtaining thereby \$550.00.

Specification 3: Similar to Specification 1, but alleging check dated 9 May 1944, drawn on same bank, made and uttered to The Anglo California National Bank of San Francisco, Modesto Branch, Modesto, California, and obtaining thereby \$200.00.

Specification 4: In that Second Lieutenant Donald F. Avery, Cavalry, Headquarters, Second Training Regiment, Cavalry Replacement Training Center, Fort Riley, Kansas, did, at Junction City, Kansas, on or about 9 June 1944, with intent to defraud, wrongfully and unlawfully make and utter to Hill's Grill, Junction City, Kansas, a certain check, in words and figures as follows, to wit:

JUNCTION CITY, KANS. 9 June 1944 NO. 23

FIRST NATIONAL BANK 83-130
United States Depository

PAY TO THE
ORDER OF Cash \$ 5 00.
00
Five and 100 - - - - - DOLLARS

FOR _____ /s/ Donald F. Avery
2nd Lt. O-1031371

(Reverse side)

/s/ E. C. Randall

and by means thereof, did fraudulently obtain from Hill's Grill, Junction City, Kansas, Five dollars (\$5.00), lawful money of the United States, he the said Second Lieutenant Donald F. Avery, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank for the payment of said check.

Specification 5: Similar to Specification 4, but alleging check dated 9 June 1944, drawn on First National Bank, Junction City, Kansas, made and uttered to Hill's Grill, Junction City, Kansas, and obtaining thereby \$5.00.

Specification 6: Similar to Specification 4 but alleging check dated 17 June 1944, drawn on First National Bank, Junction City, Kansas, made and uttered to Hill's Grill, Junction City, Kansas, and obtaining thereby \$5.00.

Specification 7: Similar to Specification 4, but alleging check dated 17 June 1944, drawn on the First National Bank, Junction City, Kansas, made and uttered to Hood-Spencer Clothing Company, Junction City, Kansas, and obtaining thereby \$15.00.

Specification 8: Similar to Specification 1, but alleging check dated 15 April 1944, drawn on the National Bank of Washington, Fort Lewis Branch, Fort Lewis, Washington, made and uttered to Monte Schach, 733 10th Street, Modesto, California, and obtaining thereby \$20.00.

Specification 9: Similar to Specification 1, but alleging check dated 19 April 1944, drawn on the

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National Bank of Washington, Fort Lewis Branch, Fort Lewis, Washington, made and uttered to Monte Schach, 733 10th Street, Modesto, California, and obtaining thereby \$15.00.

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

Specification 1: In that Second Lieutenant Donald F. Avery, Cavalry, Headquarters, Second Training Regiment, Cavalry Replacement Training Center, Fort Riley, Kansas, having been restricted to the limits of the Cavalry Replacement Training Center, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 17 June 1944, break said restriction by going to Junction City, Kansas.

Specification 2: In that Second Lieutenant Donald F. Avery, Cavalry, Headquarters, Second Training Regiment, Cavalry Replacement Training Center, Fort Riley, Kansas, having been restricted to the limits of the Cavalry Replacement Training Center, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 18 June 1944, break said restriction by going to Junction City, Kansas.

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 dismissal and confinement at hard labor for two (2) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

The offenses will be set forth in the chronological order of their occurrence, rather than as they appear on the Charge Sheet.

a. Specifications 8 and 9, Charge I. (Making and uttering check for \$20 on 15 April 1944, and for \$15 on 19 April 1944, when he had no account in bank upon which they were drawn).

On 15 April, 1944, accused requested one Monte Schach, owner and operator of Monte's Watch Repair Shop in Modesto, California, to cash a check. He made out a check for \$20, on a "universal check

form^s payable to Schach's order, and drawn on the Fort Lewis Branch of the National Bank of Washington, (Pros. Ex. C) and "represented" at the time that the check would be paid by that bank. Accused received \$20 in cash for the check. Although properly indorsed by Schach and presented through normal banking channels, the check was returned to Schach by the drawee bank with the pencilled notation on it, "no account" (Pros. Ex. A).

On 19 April, 1944, accused requested Schach to cash another check. He made out one for \$15, payable to Schach's order, on the same bank and with a similar representation as to payment. This check was on a blank check form of the Oakdale Branch of the Bank of America, but these words were lined out and the words, "National Bank of Wash. Fort Lewis Branch", inserted (Pros. Ex. D). Accused received \$15 in cash for this check. Although properly indorsed by Schach and presented through normal banking channels, this check was also returned to Schach by the drawee bank with the notation, "no account" (Pros. Ex. A).

An examination of the records of the Fort Lewis Branch of the National Bank of Washington shows that accused maintained an account there from 4 September, 1942, to 2 December, 1943. On the latter date it was closed by the bank, and a check for the balance then in it mailed to accused. Since that time he has had no account there and has not been authorized to draw against any funds belonging to or on deposit in that bank (Pros. Ex. B).

After both these checks had been returned unpaid to Schach, he "contacted" accused, who stated that "there was money in the National Bank of Washington" and that he "would come in and see him (Schach) and get the matter straightened out". Accused did not do so, and Schach never received any money for either check (Pros. Ex. A).

b. Specifications 1, 2 and 3, Charge I. (Making and uttering checks for \$200 on 5 May, 1944, for \$550 on 6 May, 1944, and for \$200 on 9 May, 1944, when he had no account in bank upon which they were drawn).

On 15 April, 1944, accused purchased a 1941 Chevrolet coupe from one Fred A. Seeley, an automobile dealer of Modesto, California, on a conditional sales contract. Mr. Seeley "discounted" the contract at the Modesto Branch of the Anglo-California National Bank of San Francisco. The manager of the Contract Department of the Modesto branch of

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this bank was Mr. Elvyn Carl Evers, who had personal knowledge of the transactions. On 5 May, accused called at Mr. Evers' office, identified himself, and requested that the bank cash a \$200 check for him. Accused made out a check for that amount on a printed check form of the Modesto Branch of the Bank of America, National Trust and Savings Association, and received \$200 in United States currency (Pros. Exs. E, H).

On the same day, this check was indorsed and presented to the Bank of America for payment, which was refused, and the check returned, marked "no account". Accused was immediately "contacted" by the Modesto branch of the Anglo-California Bank. He said that he should have deleted the name of the Bank of America on the check form and should have substituted therefor the name of the Monterey County Trust and Savings Bank. On accused's "instructions", such a change was made in the check "by an official" of the Modesto branch of the Anglo-California Bank. The check in its changed form was submitted probably together with the check next to be discussed by the Anglo-California Bank to the new drawee bank, the Fort Ord branch of the Monterey County Trust and Savings Bank. It was returned unpaid and marked "Unable to locate account" (Pros. Exs. E, H).

On 6 May, 1944 accused again appeared at the Modesto Branch of the Anglo-California Bank and asked that the bank cash a check for him. On a printed check form of the Modesto branch of the Bank of America, on which he had lined out the name of the bank and had inserted the name of the Fort Ord branch of the Monterey County Trust and Savings Bank, accused made out a check for \$550, and received that amount in United States currency. This check was presented to the drawee bank "through normal banking channels", and on 9 May, 1944, returned by it unpaid and marked, "Unable to locate account" (Pros. Exs. E, I).

On 9 May, 1944, accused again called at the Modesto Branch of the Anglo-California Bank. A payment of "about \$75" was due on his automobile contract. He made out a check for \$200 on another printed form of the Modesto branch of the Bank of America, again with that bank's name lined out and that of the Monterey County Trust and Savings Bank's Fort Ord branch inserted. The amount of the car payment was deducted, and accused received the balance of "about \$125" in United States currency. This check was presented to the drawee bank "through normal banking channels", and on 20 May, 1944, returned by it marked, "Unable to locate account" (Pros. Exs. E, J).

The stipulated testimony of Mr. H. J. Tanner, manager of the Army Branch of the Monterey County Trust and Savings Bank of Fort Ord, California, shows that accused has never had an account with that bank or been authorized to draw against any funds belonging to or on deposit with the bank (Pros. Ex. F). The Anglo-California Bank has never been reimbursed by accused for the moneys received by him (Pros. Ex. E).

On 29 June, 1944, an investigation was conducted at Fort Riley, Kansas, by Major Charles L. Schmucker, Inspector General's Department, concerning the above and other financial irregularities on accused's part. After a proper explanation to him of his rights, accused voluntarily made a statement. It was later reduced to writing and signed by him (Pros. Exs. Q, R).

In this statement accused admitted the making of all three checks and the receipt by him of the amounts thereof, in the manner described by Mr. Evers. He further admitted that at the time he gave the checks, he had no funds in the Monterey County Bank with which they could be paid. He used the \$200 received on the first one for his "personal benefit", the \$550 received on the second check as a down-payment for the purchase of the 1941 Chevrolet coupe from Mr. Seeley, and the balance of \$125 received on the third check for his own "benefit" (Pros. Ex. R).

c. Specifications 4, 5 and 6, Charge I. (Making and uttering two checks for \$5 each on 9 June, 1944 and one check for \$5 on 18 June, 1944, without having sufficient funds in the bank upon which they were drawn).

Mr. E. C. Randall was the operator of Hill's Grill, at Junction City, Kansas. Accused was in his establishment on the evening of 9 June, 1944, and asked Randall to cash a check. Randall said that he would cash one for a small amount, so accused took a check from his check book, and wrote a check for \$5, payable to cash. It was drawn on the First National Bank of Junction City, Kansas. Randall gave him \$5 (R. 13-15; Pros. Ex. K).

Later in the evening accused came back to Randall, and said that "he would have to have a little more cash". Randall cashed another check for accused, similar in amount and in other respects to the previous one (R. 15; Pros. Ex. L). Randall deposited both checks in his account in the First National Bank on the next day. They were subsequently returned to him unpaid (R. 16).

Accused was again in Mr. Randall's grill on 18 June, 1944, and asked Randall to cash another check. Randall pointed out the fact that he already held two unpaid checks written by accused. Accused said that he had "put money in the bank to take these all up". Randall reasoned that "it might be a good way to get what I have already got out", and agreed to cash another check. Accused made out a check for \$5 on a check form of the First National Bank of Junction City. He gave it in payment for some meals he had just ordered, and received the balance in change (R. 17, 18; Pros. Ex. M). The name of the payee, which had been left blank, was filled in by Randall with the words, "Hill's Grill". The following Monday Randall presented all three checks to the bank. Payment was again refused. Randall was never paid the amount of the checks (R. 17-19).

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Mr. B. D. Adams, Cashier of the First National Bank of Junction City, testified from the records of the bank. He stated that they showed accused's account to be overdrawn by 14¢ on 9 June, to have a balance of 77¢ on 12 June, a balance of 2¢ on 17 and 18 June, and to be overdrawn 48¢ on 20 June (R. 22, 23). Items returned by the bank incurred a 25¢ service charge. The ledger showed one such charge on 12 June and another on 19 June. It did not show payment of any \$5 check on 12 June. The items were returned because of insufficient funds (R. 22, 23).

Major Schmucker had made an investigation of accused's check issuing proclivities on 17 June, 1944, as well as the one of 29 June. In a stipulation concerning testimony he would have given from the witness stand, it is stated:

"That during this conversation of 17 June, 1944, Lieutenant Avery stated that his bank balance at that time was overdrawn, and that he knew he had no money in the bank on that date" (Pros. Ex. N).

While it is not clear from the wording of the rest of the stipulation what was meant by "at that time" and "on that date", it is certain that the reference must be to the checks mentioned in Specifications 4 and 5, for accused had no account at all in the bank involved in Specifications 1, 2 and 3, and had not yet issued the checks involved in Specifications 6 and 7. It does not, however, appear from the stipulation itself or from the testimony of Major Sylvio O. Bousquin, Adjutant General's Department, who was present at the investigation, that accused was warned of his rights before he made the statement quoted above (R. 24-27; Pros. Ex. N).

d. Specification 7, Charge I. (Making and uttering a check for \$15 on 17 June, 1944, without having sufficient funds in the bank upon which it was drawn).

Mr. Dan Spencer was a partner in the firm of Hood-Spencer Clothing Company, Junction City, Kansas. Accused, who had previously purchased uniforms from that store, went into the store on the evening of 17 June 1944, and asked Mr. Spencer to cash a check for \$15. Mr. Spencer directed one of his clerks to do so. Accused wrote a check for that amount, payable to "Hood and Spencer's Clothiers", on a check form of the First National Bank of Junction City, and received \$15 in cash. Mr. Spencer deposited the check by mail with the drawee bank, which subsequently returned it unpaid. Upon its being presented again during the early part of July, it was paid by the bank (R. 19-21; Pros. Ex. O).

The testimony of Mr. Adams in (c), above, is applicable to this Specification as well as Specifications 4, 5 and 6. He also testified that this check was returned to the payee because of insufficient funds with which to pay it (R. 24).

In the investigation conducted on 29 June by Major Schmucker, prior to which accused was properly advised of his rights, he admitted making and uttering the check, receiving \$15 therefor, and admitted that he knew that he did not have sufficient funds in the bank to pay it and that he used the money for his own benefit (Pros. Ex. R).

e. Specifications 1 and 2, Charge II. (Breach of restrictions on 17 June and 18 June, 1944).

On the morning of 17 June, 1944 accused was called to the office of "Colonel Haldeman", the Executive Officer of the Cavalry Replacement Training Center, Fort Riley, Kansas. Colonel Haldeman notified accused that he was restricted to the limits of the Replacement Training Center until further notice (R. 25). In the afternoon of the same day accused was recalled to the colonel's office. This time he was given a written order of restriction to the same limits (although Major Bousquin testified that it was to his barracks and mess hall). The order was "by command of Brigadier General Strong". Accused acknowledged its receipt (R. 25, 26; Pros. Ex. P).

Accused admitted in his statement to Major Schmucker on 29 June that on the evening of 17 June he went to Junction City, Kansas despite the restriction, and there presented to Mr. Spencer the \$15 check which is the subject of Specification 7, Charge I (Pros. Ex. R).

First Lieutenant James R. Mulligan, Cavalry, testified that he saw accused in Hill's Grill on 18 June. Asked by another officer whether he was not under restriction, accused said that he was, but that it had been "temporarily lifted" (R. 27, 28). Further evidence of accused's presence in Junction City on 18 June may be found in the testimony of Mr. Randall concerning the check which is the subject of Specification 6, Charge I (R. 16-18).

Evidence for defense.

Accused's rights as a witness were properly explained to him by the Law Member. He elected to take the stand and testify (R. 29).

He offered no explanation of the checks concerned in Specifications 8 and 9, Charge I.

At the time he wrote the checks "on the bank at Modesto, California" (Specifications 1, 2 and 3, Charge I), he intended to get some money from his father and to make deposits to cover them (R. 30, 31). He admitted that he did not get in touch with his father before he wrote them, and that his "intentions were just based on the belief that he (his father) would pay them". He did not have an opportunity to arrange with his father to get the money prior to being transferred

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from California to Kansas, but was sent before a Board of Medical Officers after undergoing an operation on his leg, and then ordered to Kansas on limited duty before he had a chance to secure the money from his father or to get in touch with the bank (R. 30-32).

He had an account with the First National Bank in Junction City, and was of the opinion when he wrote "the first" check on it (Specification 4) that he had sufficient funds. [Presumably accused also referred to the check in Specification 5, written the same evening] (R. 30). He admitted that when he wrote "the last two checks" (Specifications 6 and 7) he did not think he had enough money to pay them (R. 32). The Hood-Spencer Company was paid \$15 on 1 July (R. 30).

He had written to his father since the investigation of the charges and had been promised money with which to make restitution on the unpaid checks. He intended to do so. This was the first time such a thing had happened in his 3½ years in the Army. He asked not to be separated from the military service (R. 30, 31).

He admitted breach of restrictions, but could give no reason for having done so (R. 33).

4. The evidence requires no comment, except as to that in support of Specifications 4 and 5 of Charge I, and the Specifications of Charge II. All other Specifications are amply proved by the prosecution's evidence, accused's admissions to Major Schmucker, and his own testimony on the stand, wherein it is shown as to Specifications 1, 2, 3, 8 and 9 that he had no accounts in the drawee banks, and as to Specifications 6 and 7 that he knew he had not sufficient funds in his account. Such conduct was a flagrant violation of the standards expected of an officer and a gentleman, and of Article of War 95.

Accused claimed that he thought he had enough money in his account when he issued the checks which are the subject of Specifications 4 and 5 of Charge I. The Board of Review has disregarded his admission to Major Schmucker on 17 June that he knew his account was overdrawn, for the reason that there is no showing that accused was warned beforehand of his rights. Mr. Adams' testimony does not show the status of accused's account prior to 9 June. But based upon accused's demonstrated banking habits in other banks, and his startling disregard for truth prior to that time, we are not surprised that the court rejected his statement that he thought his account was sufficient. The record as a whole contains facts from which his knowledge of its status may be fairly inferred, without doing violence to reason. We hold violations of Article of War 95 to have been proved with respect to Specifications 4 and 5 of Charge I.

It was not shown clearly that Colonel Haldeman had the authority to order accused into restriction. He told accused, however, that the order was by the commanding officer, and the written order delivered to accused so stated. An arrest or restriction will be presumed legal unless otherwise clearly shown (MCM, 1928, p. 154). We hold the restriction to have been valid, and accused's breaches of it violations of Article of War 96.

5. War Department records show that accused is 24 3/12 years of age. He is a high school graduate, but did not attend college. In civilian life he worked as a gasoline station attendant and truck driver. He enlisted in the Wyoming National Guard on 2 May, 1939, entered federal service on 24 February, 1941. He was a technical sergeant at the time he was selected to attend the Cavalry School, Fort. Riley, Kansas, from which school he was graduated and commissioned a second lieutenant, Cavalry, on 14 January, 1943. The records also disclose correspondence concerning another unpaid check for \$18, given by accused to The Olympia Garage, Olympia, Washington.

6. 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 96 and mandatory upon conviction of violation of Article of War 95.

Lucy C. Jones Judge Advocate.

Norman Mays Judge Advocate.

Samuel Coniford Judge Advocate.

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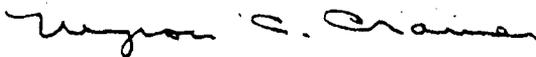
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War Department, J.A.G.O., 1 - SEP 1944 - To the Secretary of War.

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 F. Avery (O-1031371), Cavalry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. All of accused's financial irregularities, however, were charged as violations of Article of War 95, for which the only penalty is dismissal. While the breaches of restrictions in violation of Article of War 96 will support the confinement imposed, such confinement is obviously in excess of the gravity of these offenses and in all probability is predicated upon accused's financial irregularities. Solely for these reasons, I recommend that the sentence be confirmed, but that the period of confinement be reduced to one year, that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

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



Myron C. Gremer,
Major General,

The Judge Advocate General.

3 Incls.

Incl.1-Record of trial.

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

Incl.3-Form of Ex. action.

(Sentence confirmed but confinement reduced to one year.
G.C.M.O. 558, 14 Oct 1944)

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

(21)

SPJGQ
CM 259789

4 AUG 1944

UNITED STATES)

PERSIAN GULF COMMAND

v.)

Trial by G.C.M., convened at
Camp Amirabad, Teheran, Iran,
28 June 1944. To be shot to
death with musketry.

General Prisoner JOSEPH M.
BLAICH.)

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

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

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

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

Specification: In that General Prisoner Joseph M. Blaich, then Private, 1508th Engineer (Water Supply) Company, did at Camp Amirabad, Teheran, Iran, on or about 21 April 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Teheran, Iran, on or about 20 May 1944.

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

Specification: In that General Prisoner Joseph M. Blaich, then Private, 1508th Engineer (Water Supply) Company, having been duly placed in confinement in the Post Guardhouse, Camp Amirabad, Teheran, Iran, on or about 5 February 1944 did at Camp Amirabad, Teheran, Iran, on or about 21 April 1944 escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 84th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

He pleaded not guilty to all Charges and Specifications; he was found not guilty of Charge III and its Specification, but guilty of all other Charges and Specifications. Evidence was introduced of two previous

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convictions by courts-martial: (a) AWOL, in violation of Article of War 61 - trial before Summary Court; (b) failure to obey a lawful command of his superior officer, in violation of Article of War 64, and AWOL, in violation of Article of War 61 - trial by General Court-Martial. In the instant case he was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

Accused, at the time a private in the 1503th Engineer Water Supply Company, Army of the United States (R. 8, 10), was placed in confinement in the Post Guard House, Camp Amirabad, Teheran, Iran, as an "unsentenced" prisoner (R. 37) on 5 February 1944, as shown by a duly authenticated extract copy of the morning report of his organization and by the testimony of First Lieutenant Olin S. Walrath, Police and Prison Officer at Camp Amirabad (R. 8, 11, 29, Ex. 2). A sentence that he be dishonorably discharged the service, forfeit all pay and allowances due or to become due, and be confined at hard labor at such place as the reviewing authority might direct for a period of one year was adjudged against him by general court-martial on 14 March 1944 (R. 26, Ex. 1). This sentence was approved and ordered executed by the reviewing authority on 28 April 1944, but the execution of that portion thereof adjudging dishonorable discharge was suspended until accused's release from confinement (R. 26, Ex. 1). After such sentence was adjudged against him on 14 March 1944, accused was held in the above-mentioned guardhouse as a "sentenced" prisoner (R. 37). Neither the commanding officer of Camp Amirabad, Lieutenant Colonel Gordon D. Cornell (R. 7), nor the Police and Prison Officer, Lieutenant Walrath (R. 7-11), nor the Police and Prison (or Provost) Sergeant, Sergeant John Kozloski (R. 12, 13), nor, so far as the record discloses, any other person of authority, either released, or ordered the release of, accused from confinement at any time after 5 February 1944, the initial date of his confinement. Accused was still in confinement and was observed by Sergeant Kozloski to be present in the above-mentioned guardhouse as late as 6:30 p.m. on 21 April 1944 (R. 7, 15). He failed to answer roll call on the morning of 22 April 1944, whereupon Sergeant Kozloski immediately made a search of the guardhouse premises without finding him (R. 12, 15). Two wires near the cell block were found to be cut, furnishing an avenue of escape (R. 13).

Second Lieutenant George R. James, of the Military Police, Sergeant Kozloski, Private Willard L. Burch, and others commenced a search for accused in the city of Teheran and surrounding territory soon after discovering his escape on 22 April 1944, which search Lieutenant James continued for approximately a month, but they failed to find him (R. 12, 13, 15, 16, 23, 24). Accused remained absent from the guardhouse until 20 May 1944 (R. 13), on which date he was returned to confinement after having been apprehended by Lieutenant Walrath in the home of Michel Akhverdoff, in Teheran, Iran (R. 8, 9, 20, 21).

At the time of his apprehension accused was dressed in civilian clothes, which were produced in court and identified by Lieutenant Walrath (R. 9).

It was stipulated that if Alton L. Stewart, a general prisoner, were present in court as a witness, he would testify to substantially the following (R. 26). During the evening of 21 April 1944, he and accused, of their own accord and without the permission of anyone, escaped through a hole in the guardhouse wall from confinement in the Post Guardhouse, Camp Amirabad, Teheran, Iran, and went to a house on Tabriz Avenue in the city of Teheran, where they found one Stanko Perkovic and another man, with both of whom accused was apparently acquainted. They arrived at this house between 1:40 and 2:00 a.m. of 22 April 1944 and departed at about 2:15 the same morning. While there, accused changed into civilian clothes supplied by Perkovic, gave the latter 1000 Rls. with which to purchase shoes for him, and, when he departed, left his OD pants and shirt with Perkovic.

Accused was seen on the balcony of Perkovic's house on the morning of 23 April 1944 by Mrs. Elizabeta Rukli (R. 18). He represented to her that he was a guest (R. 18) and told her that he was barefoot and had no shoes (R. 19). Mrs. Rukli procured a pair of new shoes from Perkovic's room and gave them to accused (R. 19). Accused was dressed in civilian clothes at the time (R. 18).

Private Burch and Lieutenant James discovered an OD shirt, OD trousers, an OD woolen hat, underwear, socks, and a pair of shoes, all government issue, in Stanko Perkovic's house on the morning of 22 April 1944 (R. 16, 23, 24). This wearing apparel contained no marks from which they could determine ownership. They carried it to the military police station in Teheran (R. 17, 25).

While accused was required to wear fatigue clothes while in confinement and was not ordinarily allowed access to his other clothing, he had had access to his other military clothes on Friday night, 21 April 1944, in preparation for an inspection to be held the following day (R. 14).

On 8 or 9 May 1944 accused appeared at the home of Akhverdoff, where he was subsequently apprehended, and wanted to rent a room, but Akhverdoff had none to rent (R. 20). Accused was dressed in civilian clothes at the time, as well as upon each occasion thereafter when Akhverdoff saw him, and, despite the fact that Akhverdoff had known him as a soldier since September of 1943, accused offered no explanation for being out of uniform (R. 20, 22).

Statements voluntarily made by accused in the Provost Marshal's Office on 20 May 1944, after Article of War 24 had been read and explained to him, were testified to by Captain Harold A. Delaney, Accused stated

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that Stewart had asked him to return to the guardhouse with him (R. 27) but he was not so disposed, and Stewart returned alone (R. 28). Accused also represented either that he was trying, or that he had thought he might try, to get to Baghdad and from there through Basra to Jugoslavia (R. 28). He further stated that he did not think he could desert the service of the United States, because he was already a prisoner. He had already been sentenced, thought he had lost his citizenship, and was under the impression that he was not, and could not be, in the Army (R. 28).

4. Evidence for the defense:

Sergeant Kozloski and Lieutenant Walrath, both of whom had testified for the prosecution, were called as witnesses for the defense. Sergeant Kozloski testified that in so far as he was concerned accused had been a satisfactory prisoner and had been treated by him just like the other prisoners, but that he had seen Lieutenant Walrath treat accused in a harsher manner than he did other prisoners (R. 30), in that the Lieutenant had reprimanded accused, had told him that he was doing things he should not be doing, and that he was the worst prisoner in the stockade (R. 31). This appeared to affect accused very adversely (R. 31) and it was apparent that he did not have "much use" for Lieutenant Walrath (R. 32). On cross-examination, the witness admitted that upon one occasion accused had refused to eat for nine meals (R. 32).

Lieutenant Walrath admitted that he had repeatedly punished and reprimanded accused (R. 34). In explanation of this, he testified that accused had been "anything but a good prisoner"; that he was the worst prisoner with whom he had come in contact in four years of military police work; that accused had been belligerent, had lied, had been disorderly, and had broken every regulation of the stockade (R. 34). Lieutenant Walrath further admitted that upon one occasion he made known to accused that he was conducting an investigation to determine if accused had been connected with the commission of certain thefts (R. 35). On cross-examination the witness testified that while in confinement accused had been guilty of, and had been punished for, sending and receiving uncensored mail to persons outside the guardhouse in direct contravention of orders. Accused had paid one of the guards to carry these letters for him (R. 32).

Having been apprised of his rights as a witness, accused elected to make an unsworn statement, which was substantially as follows: During the month of March 1944 he was tried and convicted by a general court-martial and was sentenced to be dishonorably discharged the service and to be confined at hard labor for one year; and was thereupon returned to the guardhouse (R. 38). He thought that he was no longer a citizen of the United States and was no longer in the Army after this sentence was adjudged against him by the court (R. 38).

Lieutenant Walrath talked to him in a sarcastic manner the first day accused was confined in the guardhouse. Some five days later Lieutenant Walrath told accused that "he had two MP's stationed at the gate" who would swear that they had seen accused "go out with a truck and drive to a place in Darband" and there sell packages of sugar. "It hurt" accused "to be addressed that way" (R. 39). Then, without any explanation, accused was placed in solitary confinement and was not allowed to have visitors of any kind, either civilian or military (R. 39). His requests to see his lawyer and a particular captain brought no results (R. 39). His request to be carried before the prison officer (Lt. Walrath) was granted, but when he got there, the latter told him to "shut up and get out", that he did not want to see him (R. 39). Accused was thereafter detailed under guard to water trees for a period of approximately one month. "In many other ways that are hard to explain with words" Lieutenant Walrath "mistreated" accused (R. 39).

Since he "had to get a few things in town" and could not contact anyone outside the guardhouse, accused talked to Stewart and promised him a watch to go to town with him (R. 39). "So when this certain day came" he "and Stewart went out" (R. 39). Stewart returned but accused did not (R. 39). The man "who was supposed to have" accused's "stuff" was not at home so accused had to await his return (R. 39).

He left his uniform where he got the civilian clothes and made no effort to get it back because he knew the Military Police had taken it into their possession (R. 39). It was because of this that he had to remain in civilian clothes (R. 39).

Accused intended to return to camp, but not to the guardhouse, as soon as he had succeeded in getting his "things" and in paying some debts he owed in town (R. 40). He was not going to return to the guardhouse because he knew he could not expect anything there (R. 40). He hoped, instead, to contact some officers whom he knew and whom he hoped would aid him by either procuring his removal from the guardhouse or by effecting some improvement in his relations with Lieutenant Walrath (R. 40). He went to town in order to (a) escape Lieutenant Walrath and (b) to obtain his (accused's) possessions (R. 40).

Accused knew a search was being made for him the first day after his escape but did not realize the seriousness of his offense. He heard after five days that the searchers were going to get him dead or alive, and he was thereafter afraid of being shot if apprehended before he had contacted the officers he wished to contact in camp (R. 40).

When accused was returned to the guardhouse after the escape here involved, Lieutenant Walrath called him a bastard, told him he was going to see him rot, and then knocked him down with his fist (R. 41).

Accused intended to return and did not intend to desert the service. He has been in armies before, knows the consequences of desertion, and would never do such a thing (R. 41).

5. The sentence adjudged against accused by general court-martial on 14 March 1944 had not been acted upon by the reviewing authority on 21 April 1944 and had therefore not become effective (CM 257027-Morris). When the sentence was finally approved and ordered executed by the reviewing authority on 28 April 1944, the execution of that portion thereof adjudging dishonorable discharge was suspended pending accused's release from confinement. Therefore, there is no question but that accused was in the military service on 21 April 1944, the date upon which it is alleged that he deserted. If the accused believed the contrary to be true, he was mistaken as to the law, and it is a fundamental rule that ignorance of the law excuses no one.

The competent and undisputed evidence of record, for both the prosecution and the defense, shows that on 21 April 1944 accused was confined in the Post guardhouse, Camp Amirabad, Teheran, Iran, and that he escaped from such confinement during the evening of that day. The findings of guilty of Charge II (violation of AW 69) and its Specification are therefore conclusively supported by the evidence.

The statement by accused while testifying as a witness, "So when this certain day came me and Stewart went out"; the fact that accused led the way directly to the house of an acquaintance where he was immediately furnished with civilian clothes at two o'clock in the morning; and the further fact that he lost no time in changing into these civilian clothes, all indicate that accused had planned his escape and the day thereof considerably in advance, had made advance arrangements for the civilian clothes, and was anxious to discard the military uniform as quickly as possible. Furthermore, the fact that during the few minutes he was at Perkovic's house he gave Perkovic money with which to purchase civilian shoes for him is strongly persuasive that accused then intended to continue wearing civilian clothes, as he did do continuously thereafter until he was apprehended.

Sentence of dishonorable discharge, total forfeitures, and confinement for a period of one year had been adjudged against accused by a general court-martial, and he was already, even before this sentence had been approved by the reviewing authority, highly dissatisfied with conditions and the treatment accorded him at the guardhouse. He refused to return to the guardhouse with Stewart, managed for a month to elude Military Police who were searching for him, and testified at the trial that he had never intended to return to the guardhouse.

That accused had not effected his intention, expressed in his voluntary pre-trial statement to the Provost Marshal, of escaping from Iran into Baghdad but was still in the city of Teheran a month after his escape from confinement is most likely attributable to the difficulties and dangers attending travel during war time. The fact that he was so near his camp for this protracted period without surrendering himself is an added circumstance tending to show that he did not intend to return.

When considered as a whole, the evidence of record is legally sufficient to establish that accused's escape from confinement and his resulting absence without leave was accompanied by the intention on his part not to return, and to support the findings of guilty of Charge I (violation of AW 58) and its Specification. Par. 130a, M.C.M. 1928.

6. War Department records disclose that this soldier is 28 years of age and was inducted into the service at Fort Lewis, Washington, on 3 December 1941.

7. The court was legally constituted and had jurisdiction over the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. The sentence imposed by the court is authorized upon a conviction of a violation in time of war of Article of War 58.

William H. Sambell, Judge Advocate.

Herbert B. Frederica, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

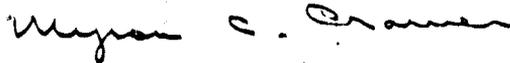
War Department, J.A.G.O., 17 AUG 1944

- 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 General Prisoner Joseph M. Blaich.

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. The reviewing authority recommends 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 life. In his opinion the circumstances of the case generally do not warrant the death penalty, basing this conclusion upon the following specific considerations: The accused is 28-5/12 years of age and has been actively in the military service since 3 December 1941; the desertion involved was not committed in a combat theater nor in the face of the enemy; the accused was in confinement at the time of the commission of the offense and believed he was no longer in the Army and could not therefore be guilty of desertion since a general court-martial had already adjudged a sentence of dishonorable discharge against him. I concur in the recommendation of the reviewing authority that the sentence to death be commuted to a different punishment, but incline to the view that confinement at hard labor for life would be too severe and therefore inappropriate punishment. I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of ten years, and that, as thus commuted, the sentence be carried into execution. I further recommend that the appropriate United States Disciplinary Barracks be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry into effect the above 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 but commuted to dishonorable discharge, total forfeitures and confinement for ten years. G.C.M.O. 541, 4 Oct 1944)

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

SPJGN
CM 259863

1 AUG 1944

UNITED STATES)

ARMY AIR FORCES WESTERN
FLYING TRAINING COMMAND

v.)

Trial by G.C.M., convened at
Stockton Field, California, 7-9
June 1944. Dismissal and con-
finement for six (6) years.
Disciplinary Barracks.

Second Lieutenant JAMES
H. REED (O-741087), Air
Corps.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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 61st Article of War.

Specification: In that 2nd Lieutenant JAMES H. REED, Hq & Hq Sq, 316th TEFT Gp, AAFPS (ATE) Stockton Field, California, did, without proper leave, absent himself from his station at AAFPS (ATE) Stockton Field, California, from about 15 April 1944 to about 18 April 1944.

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

Specification 1: In that 2nd Lieutenant JAMES H REED, Hq & Hq Sq, 316th TEFT Gp, AAFPS (ATE) Stockton Field, California, did at Winter Haven, California, on or about 30 November 1943, with intent

(30)

to defraud, wrongfully and unlawfully make and utter to Lottie Barrison at Winter Haven, California, a certain check, in words and figures as follows, to wit:

11/30/ 1943 No. 6040

BANK OF FORT SAM HOUSTON
Fort Sam Houston, Texas

Pay to the
order of Cash \$ 100.00

One Hundred and no/100 Dollars

Gr II Sqdn 8

JAMES H. REED /signed/
0-741087

and by means thereof, did fraudulently obtain from Lottie Barrison the sum of One Hundred Dollars (\$100.00), he, the said 2nd Lieutenant James H. Reed, then well knowing that he did not have and not intending that he should have any account with the Bank of Fort Sam Houston, Fort Sam Houston, Texas for the payment of said check.

Specification 2: Similar to Specification 1, but alleging check drawn on National Bank of Fort Sam Houston, dated 30 November 1943, at same place, payable to the order of cash, made and uttered to Lottie Barrison, thereby fraudulently obtaining \$100.

Specification 3: Similar to Specification 1, but alleging check drawn on National Bank of Fort Sam Houston, dated 30 November 1943, at same place, payable to the order of cash, made and uttered to Lottie Barrison, thereby fraudulently obtaining \$200.

Specification 4: Similar to Specification 1, but alleging check drawn on National Bank of Fort Sam Houston, dated 30 November 1943, same place, payable to the order of cash, made and uttered to Lottie Barrison, thereby fraudulently obtaining \$100.

Specification 5: Similar to Specification 1, but alleging check drawn on Bank of America, Trust & National Savings Association, dated 13 April 1944, Stockton, California, payable to the order of cash, made and uttered to Matteoni's Night Club, thereby fraudulently obtaining \$50.

Specification 6: Similar to Specification 1, but alleging check drawn on Bank of America, Trust and National Savings Association, dated 13 April 1944, Stockton, California, payable to the order of cash, made and uttered to Mattenoi's Night Club, thereby fraudulently obtaining \$50.

Specification 7: Similar to Specification 1, but alleging check drawn on Bank of America, National Trust and Association Savings, dated 13 April 1944, Stockton, California, payable to the order of cash, made and uttered to Mr. A. E. Kelliher, thereby fraudulently obtaining \$50.

Specification 8: Similar to Specification 1, but alleging check drawn on Bank of America, National Trust and Association Savings, dated 13 April 1944, Stockton, California, payable to the order of cash, made and uttered to Mr. A. E. Kelliher, thereby fraudulently obtaining \$50.

Specification 9: Similar to Specification 1, but alleging check drawn on Bank of America, National Trust and Association Savings, dated 13 April 1944, Stockton, California, payable to the order of cash, made and uttered to Mr. A. E. Kelliher, thereby fraudulently obtaining \$50.

Specification 10: Similar to Specification 1, but alleging check drawn on Bank of America, National Trust and Association Savings, dated 13 April 1944, Stockton, California, payable to the order of cash, made and uttered to Mr. A. E. Kelliher, thereby fraudulently obtaining \$50.

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

at hard labor at such place as the reviewing authority might direct, for eight years. The reviewing authority approved the sentence but remitted two years of the confinement imposed; designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused frequently visited Lottie's Bar, a saloon located in Winter Haven, California, about one mile from the Arizona state line. According to the proprietor, Mrs. Lottie Barrison, "he used to come in my place and eat sandwiches [sic] and drink a bottle of beer lots of times". Adjacent to the establishment was "a separate room" in which gambling tables and devices were operated. Mrs. Barrison had no direct interest in these, but she did receive a certain "percentage" of the gambling receipts as rent (R. 25; Pros. Ex. "E").

Early in the evening of 30 November 1943 the accused ordered a sandwich at the bar. After he had finished eating, he conversed with some of the other customers. Some time thereafter he approached Mrs. Barrison, who was mixing drinks at the bar, and requested her to cash a check for \$100. Upon her expressing a few words of caution and admonition as to his financial responsibility, he replied, "Don't worry I have money in the bank". Having thus been reassured, she furnished him with a blank check form which he filled in and executed. In the space for the name of the drawee bank he wrote "Bank of Fort Sam Houston, Fort Sam Houston, Texas". For this instrument Mrs. Barrison paid him \$100 in currency (Pros. Exs. "A", "E", "F").

During the remainder of the evening he was repeatedly "in and out" of the building. Mrs. Barrison did not see him gambling in the adjoining room and had "no reason to know" that he was. On the occasions on which he returned to the bar he asked her to cash three other checks for him. All were drawn on the "National Bank of Fort Sam Houston, Fort Sam Houston, Texas". The first of the three was for \$100, the second for \$200, and the last was also for \$100. Mrs. Barrison paid full face value for each of them. In each instance she inquired what he proposed to do with the money, and his answer was, "Don't worry the checks are all right. I am sending some of the money to my wife who is sick" (Pros. Ex. "A", "E", "F", "G", "H", "I").

None of the instruments was given in payment of a gambling debt. When they were executed by the accused, he appeared to be sober. He consumed some beer but, so far as Mrs. Barrison knew, no whiskey. All four checks were returned to her dishonored. The reason in each case was that he had no account of any kind either in a bank known as the "Bank of Fort

Sam Houston" or as the "National Bank of Fort Sam Houston" in Fort Sam Houston, Texas. Despite a subsequent promise by him that he "would take care of" the checks, Mrs. Barrison has never been reimbursed for any part of their face value (Pros. Ex. "A", "E").

Several months later, on 13 April 1944, he spent part of the evening at Mattioni's Club, a night club and gambling establishment located in Stockton, California. Both the bar and the gambling paraphernalia were in the same room but were separated from one another by a partition which extended only part of the way to the ceiling. Chips were sold at the dice table and never at the bar. Mr. George Pitzer, one of the proprietors, spent most of his time in the dining room. Between 11:30 p.m. and midnight he was asked by the accused to cash a \$100 check. Apparently as an inducement to the transaction, the accused represented that he had sufficient funds in the bank because he had deposited \$165 which he had won the previous night. In pursuance to his policy of trying "to keep everybody down", Mr. Pitzer suggested that the instrument be for only \$50. This compromise being satisfactory, the accused signed a check in that sum drawn on the Bank of America of Stockton, California. The instrument was prepared by Mr. Pitzer, and the full face value paid to the accused by the cashier of the club at his direction. Within approximately fifteen minutes the accused returned with a request for another \$50. The same procedure was again followed. Mr. Pitzer filled in a blank check for the sum specified, drawn on the Bank of America, Stockton, California, and the accused, upon affixing his signature, received the full face amount from the cashier. When executing this and the previous instrument, the accused was sober. Both checks were ultimately returned by the bank to Mattioni's Club with the notation "Unable to Locate Account". Neither one has since been redeemed by the accused (R. 14-23; Pros. Ex. "A", "C", "D").

On the night of 13 April 1944 he also bestowed his patronage upon Ross' Mecca, an institution catering to devotees of drink and chance. A "partial partition" separated the bar from the dice game. Chips could be purchased at the dice table, but not at the bar. In the course of the evening the accused executed and presented four checks for cashing to Mr. A. E. Kelliher, the proprietor. Each was drawn on the Bank of America, Stockton, California, and each was accepted at its face value of \$50. Their amounts were paid by Mr. Kelliher apparently out of a safe "at the end of the bar". After he had cashed the first check, he was reluctant to pay out on the others. Since his son was an officer in the Air Corps, and since he believed that the accused could not afford the game, he even offered to return all four instruments. In his own words,

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"I don't mean to leave an inference that I just cash checks at random for people who don't care if I get money or not. In this particular case the way I am situated the only close relative I have is one of these boys * * * I made this statement. I said, 'now, I don't want to do this because I don't think you can afford this thing here. I would rather just give these back to you and call it a day. I don't want your money'".

None of the checks was given in satisfaction of a gambling debt. Payment for their face amount was never received by Mr. Kelliher, either in whole or in part. As of 13 April 1944 "and at all times since that date accused did not have an account of any kind" with the Bank of America of Stockton, California. While he may have consumed some liquor at Ross' Mecca, he was not drunk when he signed the four checks (R. 29-40; Pros. Exs. "A", "J", "K", "L", "M").

On 15 April 1944 he absented himself without leave from his organization which was the Headquarters and Headquarters Squadron, 316th TEFT Group. He returned to military control and was placed in arrest in quarters on 18 April 1944 (R. 14; Pros. Ex. "B").

4. The accused, after his rights as a witness were fully explained to him, elected to remain silent. Two witnesses were called on his behalf. Second Lieutenant Joseph Levi testified that, while on military police duty, he had seen the accused at Ross' Mecca, "somewhere around" "9:00 o'clock or 10:00 o'clock" on 13 April 1944. The accused was playing dice. In "a space of 20 or 25 minutes" he took about four or five high-balls. During that period he cashed two checks (R. 41-45).

Captain Louis A. Lane of the Medical Corps was the second witness. As the medical officer in charge of the sick call of all cadets and rated personnel at Stockton Field, he examined the accused on 11 April 1944 and found him to be suffering from "Rhinitis Bi-lateral". On the "patient's record" of the accused the letters "DNIF" were entered. This meant "Duty Not Involving Flying". The accused was orally informed of the temporary change in his status, was given a mimeographed form setting forth the fact to present at the flight line, and was instructed not to report back before 15 April 1944. No definite appointment was, however, made for that date (R. 45-49; Def. Exs. 1, 2, 3).

An affidavit by Mrs. Lottie Barrison was offered in evidence

by the defense and was admitted into evidence with the consent of the prosecution. Its context agreed in all essential particulars with that of her deposition which had been introduced as Prosecution's Exhibit "E" (R. 49; Def. Ex. 4).

5. The Specification of Charge I alleges that the accused "did, without proper leave, absent himself from his station at AAFPS (ATE) Stockton Field, California, from about 15 April 1944 to about 18 April 1944". The evidence, which consists solely of the morning report of the Headquarters and Headquarters Squadron, 316th TEFT Group, shows that the accused was not with his organization from 15 April to 18 April 1944 and is legally sufficient to sustain the finding of guilty of the Specification of Charge I and Charge I.

6. Specification 1 of Charge II alleges that the accused "did at Winter Haven, California, on or about 30 November 1943, with intent to defraud, wrongfully and unlawfully make and utter to Lottie Barrison * * * a certain check in the sum of \$100 drawn on the Bank of Fort Sam Houston, Fort Sam Houston, Texas and by means thereof, did fraudulently obtain from Lottie Barrison the sum of One Hundred Dollars * * *, he, the said accused, then well knowing that he did not have and not intending that he should have any account with the Bank of Fort Sam Houston, Fort Sam Houston, Texas, for the payment of said check". Specifications 2, 3, and 4 allege that the accused committed the same offense, in like manner, on the same day with respect to three other checks in the respective sums of \$100, \$200, and \$100 drawn on the "National Bank of Fort Sam Houston", Fort Sam Houston, Texas, Specifications 5 and 6 allege that the accused committed the same offense, in like manner, on 13 April 1944 by unlawfully making and uttering to Mattioni's Night Club, two checks, each in the sum of \$50, drawn on the Bank of America of Stockton, California, Specifications 7, 8, 9, and 10 allege that the accused committed the same offense, in like manner, on 13 April 1944, by unlawfully making and uttering to Mr. A. E. Kelliher four checks, each in the sum of \$50, drawn on the Bank of America, Stockton, California.

The accused has stipulated that on the respective dates of the ten instruments covered by the Specifications of Charge II, and at all times since those dates, he did not have an account of any kind in the drawee banks. Mrs. Barrison, Mr. Pitzer and Mr. Kelliher accepted the accused's checks in good faith and at full face value. By his fraudulent and deceitful conduct the accused took criminal advantage of their trust. His motive obviously was to obtain funds with which to continue his gambling activities. When the checks were uttered he was not under the influence of liquor but in full possession of his faculties. His

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conduct was deliberate, with intent to defraud, and of a nature to bring discredit upon the military service. The findings of guilty of each Specification, Charge II, and Charge II, are supported by the evidence beyond a reasonable doubt.

7. The accused is about 26 years old. The records of the Office of The Adjutant General show that he had enlisted service from 22 November 1940 to 5 February 1943; that he was commissioned a second lieutenant on 6 February 1943; and that since the last date he has been on active duty as an officer.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 conviction of a violation of Article of War 61 or Article of War 96.

Abner E. Lippincott Judge Advocate.

Charles S. Sykes Judge Advocate.

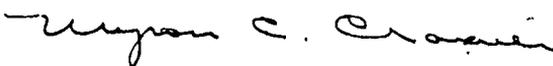
Daniel H. Golden Judge Advocate.

SPJGN
CM 259863

1st Ind.

War Department, J.A.G.O., *14 AUG 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 H. Reed (O-741087), Air Corps.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but that the period of confinement be reduced to three years and that the sentence as thus modified be ordered executed.
3. Consideration has been given to a letter from Mrs. Horace W. Reed, the accused's mother, addressed to The Judge Advocate General and also a letter addressed to the President, requesting clemency for her son.
4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.



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

- 5 Incls.
- Incl 1 - Record of trial.
 - Incl 2 - Dft. of ltr. for sig. Sec. of War.
 - Incl 3 - Form of Action.
 - Incl 4 - Ltr. fr. Mrs. Reed addressed to Judge Advocate General.
 - Incl 5 - Ltr. fr. Mrs. Reed addressed to the President.

(Sentence as approved by reviewing authority confirmed but confinement reduced to three years. G.C.M.O. 496, 12 Sep 1944)



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

(39)

SPJGK
CM 259872

4 AUG 1944

UNITED STATES)

v.)

General Prisoner WOODROW)
J. RAINES)

FIFTH SERVICE COMMAND
ARMY SERVICE FORCES

Headquarters, Fort Knox, Kentucky.
Trial by G.C.M., convened at Fort
Knox, Kentucky, 16 June 1944.
Dishonorable discharge and con-
finement for ten (10) years.
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of General Prisoner Woodrow J. Raines.
2. The accused, a general prisoner under a former sentence of dishonorable discharge suspended, was found guilty of wrongfully impersonating an officer in violation of Article of War 96 (Specification, Charge I), of absence without leave (60 days) in violation of Article of War 61 (Specification, Charge II), larceny of \$10 in cash, clothing and effects, of a total value of about \$122.50, the property of Second Lieutenant James H. Hooker, Jr., in violation of Article of War 93 (Specification, Charge III), and of larceny of property of the United States furnished and intended for the military service, of a total value of \$42.89, in violation of Article of War 94 (Specification, Charge IV). He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. The reviewing authority approved the sentence, but reduced the period of confinement to 10 years, 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 50 $\frac{1}{2}$.
3. The evidence was legally sufficient to support the findings of guilty of Charges I, II and IV and their respective specifications, and legally sufficient to support the sentence. As to the specification of Charge III, apart from the \$10 in cash, there is no evidence of the value of the stolen property therein described other than the testimony of the owner of the property. The Board of Review has said, in regard to proof of the market value of a watch and other articles of stolen personal property before it, that the court could, from its inspection alone, determine that the property had some value, but that to permit the court to find specific market value -

*** would be to attribute to the members of the court
technical and expert trade knowledge which it cannot legally

(40)

be assumed they possessed". (CM 208481, Ragsdale, B.R. 9, p. 13; CM 228742, Blanco, B.R. 16, p. 299; see also JAG Bulletin, Jan. 1943, p. 12.)

In the case now under consideration, the stolen property was not received in evidence and it does not appear that the articles were examined by the court. The owner testified as to the original cost price of the stolen property, but in the absence of proof as to when the property was purchased, its condition, etc., at the time it was stolen, the evidence as to cost does not suffice to prove market value at the time the property was stolen. It may be inferred from the description of the articles that they had some substantial value over and above the \$10 in cash not in excess of \$20.

4. In view of the findings of guilty of the other Charges and Specifications, especially Charge II and its Specification alleging absence without leave, the legality of the confinement imposed is not affected by this holding. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charges I, II, and IV and their specifications, legally sufficient to support only so much of the findings of guilty of the specification of Charge III and of Charge III as involves a finding of guilty of larceny of the specified property by the accused, at the place and time alleged, of the ownership alleged, of some substantial value over and above the \$10 in cash not in excess of \$20, and legally sufficient to support the sentence as approved by the reviewing authority.

W. H. Jones, Judge Advocate.
W. H. Jones, Judge Advocate.
Samuel Cornsford, Judge Advocate.

1st Ind.

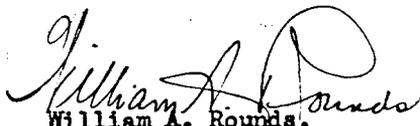
War Department, J.A.G.O., **8 AUG 1944** - To the Commanding Officer,
Fort Knox, Kentucky.

1. In the case of General Prisoner Woodrow J. Raines, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of the Specification of Charge III and of Charge III be approved as involves a finding of guilty of larceny by accused at the place and time alleged and of the property described of some substantial value not in excess of \$20 over and above the \$10 in cash and of the ownership alleged. Upon compliance with the foregoing you will have authority under the provisions of Article of War 50 $\frac{1}{2}$ to order the execution of the sentence.

2. It appears from General Court-Martial Orders No. 45, Headquarters 4th Armored Division, dated 16 August 1943, that the accused was tried and found guilty by a general court-martial at Camp Bowie, Texas, on 10 August 1943, for absence without leave in violation of Article of War 61, and of breach of arrest in violation of Article of War 69. In that case he was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for three years. On 16 August 1943, the reviewing authority approved the sentence, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated a rehabilitation center as the place of confinement. Although the approved sentence in the case now under consideration is legal, in view of the former sentence, it is suggested that consideration be given to approving only so much of the sentence to confinement in the instant case as involves confinement at hard labor for five years. With two separate sentences of confinement against the accused of three and five years respectively, the sentences are executed consecutively in the order of the dates upon which they become effective and not concurrently (AR 600-375, May 17, 1943, sec. 2, par. 17e).

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 259872).


William A. Rounds,
Colonel, J.A.G.D.,

Acting Assistant Judge Advocate General
In Charge of Military Justice Matters



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

(43)

SPJGJ
CM 259880

- 3 AUG 1944

UNITED STATES)

ARMY AIR FORCES CENTRAL
FLYING TRAINING COMMAND

v.)

Second Lieutenant FRANCIS
R. CONNELLY (O-674664), Air
Corps.)

Trial by G.C.M., convened at
Midland Army Air Field, Mid-
land, Texas, 7 July 1944.
Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Francis R. Connelly, Air Corps, did at Odessa, Texas, on or about 20 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to Fitz Drug Store a certain check, in words and figures as follows:

Odessa, Texas April 20 1944 No. 54⁰

THE FIRST NATIONAL BANK

Pay to Fitz Drug Store OR BEARER \$15.00

Fifteen and n/100-----DOLLARS

FOR O-674664

Francis R. Connelly
2nd Lt. A.C.

and by means thereof did fraudulently obtain from Fitz Drug Store, Odessa, Texas, the sum of \$15.00, lawful money of the United States, then well knowing that he did not have, and not intending that he should have, sufficient funds in The First National Bank, Odessa, Texas, for the payment of said check.

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Specification 2: Same form as Specification 1, but alleging check dated 25 May 1944, drawn on same bank, payable to the order of Officer's Mess, in the amount of \$5.00, made and uttered to the Officers' Mess at Midland Army Air Field, Midland, Texas, thereby fraudulently obtaining the sum of \$5.00.

Specification 3: Identical to Specification 2, but alleging check dated 26 May 1944, in the amount of \$10.00, thereby fraudulently obtaining \$7.00 in cash and discharge of a preexisting debt, evidenced by a worthless check in the amount of \$3.00 previously given the Officers' Mess.

Specification 4: Same form as Specification 1, but alleging check dated 31 May 1944, drawn on The First National Bank of Midland, Texas, in the amount of \$5.00, payable to the order of Officer's Mess, made and uttered to the Officers' Mess at Midland Army Air Field, Midland, Texas, thereby fraudulently obtaining the sum of \$4.35 in cash and \$0.65 in merchandise.

The accused pleaded not guilty to, and was found guilty of, the Charge and all Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

On the respective dates of the alleged offenses, and at the time of the trial, the accused was in the military service (R. 11).

Bryan B. Fitz, proprietor of Fitz Pharmacy, Odessa, Texas, testified that on 20 April 1944, he cashed a check for the accused drawn by the latter on the First National Bank, Odessa, Texas, in the amount of \$15, giving the accused \$15 in cash therefor. The witness identified the check, which was introduced in evidence as Prosecution's Exhibit A. The check was twice presented for payment by Fitz Pharmacy but was returned unpaid (R. 7-8).

Sergeant L. P. Wadley, Chief Accountant of the Officers' Mess at the Midland Army Air Field, charged with performing or supervising all accounting of the Officers' Mess, identified three checks, payable to the Officers' Mess and signed by the accused, as having been accepted by the Officers' Mess in the regular course of business. One, dated 25 May 1944, drawn on The First National Bank, Odessa, Texas, in the amount of \$5, was cashed at the bar in the Officers' Mess. Another, dated 26 May 1944, drawn on The First National Bank, Odessa, Texas, in the amount of \$10, was presented by the accused for cash at the office of the Officers' Mess. The witness refused to cash this check, telling

the accused that the Mess was at that time holding a check of the accused for \$3, which had been returned unpaid. The accused thereupon told the witness that he had, on the previous day, deposited \$30 in his checking account and that "this check absolutely was good". The witness thereupon accepted the check and delivered to the accused \$7 in cash and the \$3 returned check. The third check cashed by the Mess was dated 31 May 1944, and was drawn on The First National Bank of Midland, Texas, in the amount of \$5. All three checks cashed by the Officers' Mess were presented for payment and returned unpaid. These checks were introduced in evidence as Prosecution's Exhibits B, C and D (R. 11-14, 18).

John L. Morris, Cashier of The First National Bank, Odessa, Texas, testified that the accused had an account in that bank from 10 February 1944 until 12 June 1944, and that the balances in the account on 20 April 1944, 25 May 1944, and 26 May 1944 were \$00.16, \$2.16 and \$1.91, respectively. The witness also identified the signatures on Prosecution's Exhibits A, B and C as the genuine signatures of the accused (R. 19-21).

M. C. Ulmer, President of The First National Bank, Midland, Texas, testified that the accused's checking account in that bank had been closed out on 12 February 1944, and that the accused had no balance in the bank on 31 May 1944 (R. 24).

None of the checks described above was ever paid by the bank on which it was drawn. The check cashed by Fitz Pharmacy was paid directly by the accused approximately two weeks after it was issued (R. 9), and the three checks cashed by the Officers' Mess were paid directly by the accused to the Mess on 14 June 1944 (R. 15; Def. Ex. 1). A transcript of the accused's account in The First National Bank, Odessa, Texas, from 11 February 1944; until 12 June 1944, was introduced in evidence as Prosecution's Exhibit E (R. 20).

Major Walter A. Brummand, the investigating officer in the case, testified in part as follows:

"I showed the accused a copy of the ledger sheet which we had at that time, which was not a full ledger sheet but a copy covering a portion of the time in which he had an account in the First National Bank, Odessa. It started with the 31st of March, 1944, in the amount of \$27.73 and ending with an entry on the 29th of May in the amount of 91¢ and, as far as he knew, he stated it was correct. As to the checks, he stated he wrote each of the checks and that was his signature on them. He had passed them on the dates they were dated and got the money from the payee shown on the checks, except a \$5.00 check which was cashed at the bar of the Officers' Mess and he got 65¢ in merchandise, which, as he recalled, was a milkshake and cigarettes, and the balance in cash. In regard to the check dated the 31st of May, 1944, for \$5.00, he stated that at the time he wrote

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out the check he had a pen in which the ink flow wasn't functioning properly and he made out several checks and each time the ink would smear his sheet and that he used the blank of a First National Bank of Midland check but was writing the name 'Odessa' over the word 'Midland', intending to write a check on the First National Bank of Odessa. That after doing that several times, the last time he made out the check in the form as it is on Exhibit 'D' and which is the last check he wrote out, he did forget to cross out the word 'Midland' and insert the word 'Odessa' in passing it; that he did intend to write the check on the Odessa bank where he had an account, and did not have an account in the First National Bank of Midland, and that all the persons on whom these checks were given had been reimbursed at the time he gave the statement." (R. 27-28)

4. Evidence for the Defense:

The accused, after having his rights as a witness explained to him, elected to make an unsworn statement through counsel, which was as follows:

"I, Francis R. Connelly, a Second Lieutenant in the United States Army, deposes and says that on May 31, 1944, I wrote a check in the sum of \$5.00 payable to the Officers' Mess of Midland Army Air Field. At the time I wrote this check I was having difficulty with my fountain pen because of the fact that it would run and smear when I touched it to the paper. I wrote the check several times because the ink was smearing. I knew at the time that I was writing the check on a blank check of the First National Bank of Midland, Texas, but had the intention of marking out 'Midland' and substituting therefor 'Odessa,' Texas. As a result of the trouble with the fountain pen, I omitted to strike out 'Midland' Texas and substitute therefor 'Odessa', Texas. I have not had an account at the First National Bank of Midland since February of 1944. I did not intend to write this check on the First National Bank of Midland, Texas. It was merely an oversight. At the time I wrote the checks for which I am being tried, I thought that I had enough money to cover said checks. When I gave the \$10.00 check dated May 26th to Sgt. Wadley, I had previously given a friend of mine \$30.00 and asked that he deposit this for me. That is the reason I told Sgt. Wadley I had deposited the \$30.00. I learned subsequently that my friend failed to deposit the money. I had no intention of defrauding anybody when I wrote the aforementioned checks." (R. 29)

5. The accused admits that none of the four checks in question was, at the time it was issued, backed by sufficient funds in the bank to pay it, but he claims that he was unaware of that fact when he passed the checks and that he had no intention to defraud. His claim of innocent intentions not only is unsupported, but is contradicted, by the

evidence of record. An examination of the transcript of the accused's account (Pros. Ex. E) discloses that more than twenty (20) "insufficient" checks were issued by the accused over the period 11 February 1944 to 31 May 1944. The issuance of so many worthless checks could not have been the result of inadvertance. On the contrary, the evidence is clear that the accused, shutting his eyes to the warning afforded him by the steady stream of returned, unpaid checks, continued to issue checks indiscriminately and in utter disregard of the question as to whether they were backed by sufficient funds in his checking account. The evidence of record not only warranted, but required, a finding of guilty of each of the four Specifications upon which the accused was tried. The fact that the accused subsequently paid the amount of the four checks supplies no defense. That the issuance of checks under the circumstances alleged in the four Specifications is a violation of Article of War 96 is too clear to require discussion.

6. The War Department records show that the accused was born and reared in Boston, Massachusetts. He is 22 years old and is a high school graduate. In civilian life he worked from September 1939, until January 1942, for Armour & Co. as a refrigerator repair man. He was inducted into the Army on 16 March 1942, subsequently attended the Army Air Forces Bombardier School, and upon graduation in March 1943, was commissioned a second lieutenant.

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

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John P. Anderson, Judge Advocate.

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1st Ind.

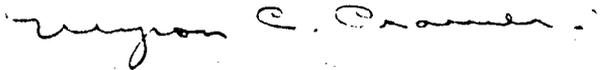
War Department, J.A.G.O.

- To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Francis R. Connelly (O-674664), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. There appear to be no mitigating or extenuating circumstances. On the contrary, it appears from the Staff Judge Advocate's Review that the Commanding Officer of the Midland Army Air Field warned the accused, in writing, as early as 26 April 1943, relative to the latter's obligation as an officer in the matter of issuing personal checks without sufficient funds in the bank to cover them, and that the accused has been involved in a large number of difficulties since he was commissioned 11 March 1943. Such difficulties include the following: (1) arrest by the military police on 2 July 1943 for being in an establishment which he knew to be "off limits" to military personnel, for which he was given a reprimand; (2) punishment under A.W. 104 on 26 July 1943, for being AWOL two days; (3) punishment under A.W. 104 on or about 14 January 1944, for passing an insufficient funds check; and (4) punishment under A.W. 104 on 27 March 1944, for passing an insufficient funds check and failing to pay his account with a local laundry in Midland, Texas. Accordingly, I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

(Filed without further action in view of the execution of the sentence to dismissal against the same officer in a different case, CM 263257, confirmed in G.C.M.O. 614, 10 Nov 1944)

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

SPJGV
 CM 259912

UNITED STATES v. First Lieutenant WILLIS D. PORTER (O-1031530), Cavalry.)))))	31 JUL 1944 THE CAVALRY SCHOOL Trial by G.C.M., convened at Fort Riley, Kansas, 14 July 1944. Dismissal and confine- ment for three (3) years.
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OPINION of the BOARD OF REVIEW
 TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

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

Specification 1: In that First Lieutenant Willis D. Porter, Cavalry, Truck Battalion, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 24 April 1944, willfully and wrongfully write and cause to be deposited with Message Center of The Cavalry School, for delivery, a certain obscene, lewd, and lascivious writing of indecent character, with intent to debauch the morals and conduct of recipients thereof, in words as follows, to wit:

"I am writing this note in an effort to make some one, any one a proposition.

I am willing to pay the price asked if my request is granted. This is merely a tentative letter. If I get the desired results, well and good.

The last time I tried this, it worked fine for all concerned. My self as well as the girls concerned.

I had a girl friend leave a note in the Ladies Toilet in the Main P.X. A girl got it, left the reply where I told her and I met her that same evening. We went for a walk and I explained things to her and she agreed to my proposition. We found a fairly secluded spot and she stood in the door way and went down on my knees. And when she pulled up her dress and pulled down her panties and I saw all that pretty, so white thighs I was almost knocked out. And when I got my mouth into it, it was heaven. She just stood there and I really had my fun. When she started thrilling, she started to shudder and shake and when she 'busted her nuts' it just came all over. She was really enjoying herself.

Enclosed you will find a picture. It is a picture of what I want to do. I think it shows quite clearly. I think that picture is a killer. Just look at her. Those large thighs, spread so far apart. Her 'pussy' showing and he with his head and mouth in it. If you look real close you can see where his tongue is and what it is doing. Well thats my proposition to whomever gets this letter. If you agree tack your reply behind the Officer's Register Desk. I'll get it. If you have no wish to participate, pass this information on to some other girl, Maybe she would. Don't tell anyone. But you can get almost any amount you ask"

Specification 2: In that First Lieutenant Willis D. Porter, * * *, did, at Fort Riley, Kansas, on or about 23 May 1944, willfully and wrongfully write and cause to be deposited with Message Center of The Cavalry School, for delivery, a certain obscene, lewd, and lascivious writing of indecent character, with intent to debauch the morals and conduct of the recipient thereof, in words as follows, to wit:

"P.F.C. Briengham

When I called you this after noon you wondered if you would be agreeably surprised. I replied I hope you would. And I do.

You'll be surprised I know. You see it's like this. I've been watching you for quite some time. So much that I have become quite fascinated. And it has started within me a longing I have not felt for a long time. The desire to posses you. To possess you as I know you have never before been possessed.

As to whether my proposition is desirable to you only you know.

As to what I want of you it is merely this. Your youth and your body. The only way I can have both is by drinking the

youth of your body. I want to 'suck' you honey. So bad that at times I think I am insane. I long so much to kiss you and suck you. Kiss you all over your lovely body. Between your legs. Just lay my mouth in your cunt and tongue in your vagina. Kiss it and suck it until your youth floods my mouth. Then I would let my kisses run down between your legs and kiss your rectum. Let my tongue slide in. I could drive you crazy. And that is exactly what I want to do, drive you crazy. If you let me I would give you anything you wanted. Money or anything. That is how badly I want you. Just the thought of sucking your cunt has my 'thing' throbbing' and hard.

The other night I stopped two girls on the street and told them I would give them \$10 apiece to let me suck them. They said o.k. and we went into the ladies toilet in Post Hq.'s. One of them was fine. She wanted to stand up so I went down on my knees and embraced her thighs and she was hot and her cunt was wet. We both had an enjoyable time. The other girl sat in a chair and held her legs up and when she came she just passed out. So you see how it is with me. All the time I was sucking them I was thinking of you. Please give me a break"

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

Specification 1: In that First Lieutenant Willis D. Porter, * * *, did, at Fort Riley, Kansas, on or about 24 April 1944, willfully and wrongfully write and utter a certain obscene, lewd, and lascivious writing of indecent character, with intent to debauch the morals and conduct of the recipients thereof, which writing is in words as follows, to wit:

"I am writing this note in an effort to make some one, anyone a proposition.

I am willing to pay the price asked if my request is granted.

This is merely a tentative letter. If I get the desired results, well and good.

The last time I tried this, it worked fine for all concerned. My self as well as the girls concerned.

I had a girl friend leave a note in the Ladies Toilet in the Main P.X. A girl got it, left the reply where I told her and I met her that same evening. We went for a walk and I explained things to her and she agreed to my proposition. We found a fairly secluded spot and she stood in the door way and went down on my knees. And when she pulled up her dress and

pulled down her panties and I saw all that pretty, so white thighs I was almost knocked out. And when I got my mouth into it, it was heaven. She just stood there and I really had my fun. When she started thrilling, she started to shudder and shake and when she 'busted her nuts' it just came all over. She was really enjoying herself.

Enclosed you will find a picture. It is a picture of what I want to do. I think it shows quite clearly. I think that picture is a killer. Just look at her. Those large thighs, spread so far apart. Her 'pussy' showing and he with his head and mouth in it. If you look real close you can see where his tongue is and what it is doing. Well thats my proposition to whomever gets this letter. If you agree tack your reply behind the Officer's Register Desk. I'll get it. If you have no wish to participate, pass this information on to some other girl, Maybe she would. Don't tell anyone. But you can get almost any amount you ask"

Specification 2: In that First Lieutenant Willis D. Porter, * * *, did, at Fort Riley, Kansas, on or about 23 May 1944, willfully and wrongfully write and utter a certain obscene, lewd, and lascivious writing of indecent character, with intent to debauch the morals and conduct of the recipients thereof, which writing is in words as follows, to wit:

"P.F.C. Briengham

When I called you this after noon you wondered if you would be agreeably surprised. I replied I hope you would. And I do.

You'll be surprised I know. You see it's like this. I've been watching you for quite some time. So much that I have become quite fascinated. And it has started within me a longing I have not felt for a long time. The desire to posses_ you. To posegg you as I know you have never before been poessed.

As to whether my proposition is desirable to you only you know.

As to what I want of you it is merely this. Your youth and your body. The only way I can have both is by drinking the youth of your body. I want to 'suck' you honey. So bad that at times I think I am insane. I long so much to kiss you and suck you. Kiss you all over your lovely body. Between your legs. Just lay my mouth in your cunt and tongue in your vagina. Kiss

it and suck it until your youth floods my mouth. Then I would let my kisses run down between your legs and kiss your rectum. Let my tongue slide in. I could drive you crazy. And that is exactly what I want to do, drive you crazy. If you let me I would give you anything you wanted. Money or anything. That is how badly I want you. Just the thought of sucking your cunt has my 'thing' throbbing' and hard.

The other night I stopped two girls on the street and told them I would give them \$10 apiece to let me suck them. They said o.k. and we went into the ladies toilet in Post Hq.'s. One of them was fine. She wanted to stand up so I went down on my knees and embraced her thighs and she was hot and her cunt was wet. We both had an enjoyable time. The other girl sat in a chair and held her legs up and when she came she just passed out. So you see how it is with me. All the time I was sucking them I was thinking of you. Please give me a break"

The accused pleaded guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for fifteen years. The reviewing authority approved the sentence but remitted twelve years of the confinement imposed, thus reducing it to three years, and forwarded the record of trial for action under Article of War 48.

3. In support of Specification 1, Charge I, and Specification 1, Charge II, the prosecution introduced evidence demonstrating that from 20 March 1944 until 20 May 1944 accused was a member of the First and Second Special Mechanized Classes at the Cavalry School, Fort Riley, Kansas, and while a member of these classes he was quartered on the post in Building 93. The schedule of classes required accused to visit the Academic Building of the Cavalry School on many occasions (R. 8).

On or about 24 April 1944, Private Abe Cohen, the mail clerk in the Academic Building, delivered a letter to Private First Class Fern Meyers, Women's Army Corps, who was on duty at the information desk and message center in that building. The envelope was addressed to "Girl at the Information Desk, Academic Building" (R. 8, 9; Pros. Ex. F). Private Meyers opened the envelope, read a portion of the unsigned letter contained therein, and then exhibited the letter and an accompanying snapshot to Private First Class Bethia Bringham. The

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contents of the letter were identical with the quoted writing set forth in Specification 1, Charge I and Specification 1, Charge II (R. 9, 11; Pros. Ex. F). The letter was also shown to Technician Fourth Grade Mary Bilik, Women's Army Corps, who read it and then returned it to Private Meyers (R. 12). On the afternoon of the following Sunday Private Meyers exhibited this letter to Private First Class Margaret E. Beam, Women's Army Corps, and queried as to what should be done about it. Private Beam took possession of the letter and the following day delivered it to Colonel Christian Knudsen, Executive Officer of the Cavalry School (R. 14; Pros. Ex. G).

Certain known specimens of the handwriting and printing of accused were admitted in evidence (R. 15, 16; Pros. Exs. D, E, H). These specimens and the anonymous letter addressed to the "Girl at the Information Desk" had been previously submitted to William H. Quakenbush, a duly qualified handwriting expert, for comparison and analysis to determine whether or not the handwritings were similar. After examination of these writings it was his opinion that the anonymous letter had been written by the same person who wrote Prosecution's Exhibits D, E, H (R. 16, 17).

In support of Specification 2, Charge I, and Specification 2, Charge II, the prosecution introduced evidence demonstrating that on 23 May 1944, Private George Bryant, who was the messenger for the Student Officer Detachment and collected all messages sent from Building 93 in which accused was quartered, delivered an envelope, addressed "W.A.C., Information Desk, Academic Building", to Technician Third Grade Alma Booth, Women's Army Corps, who was in charge of the Cavalry School message center (R. 9, 10, 12, 13; Pros. Ex. B). She opened the envelope and both she and Sergeant Mary Bilik read an unsigned letter enclosed therein. The contents of the letter were identical with the quoted writing set forth in Specification 2, Charge I and Specification 2, Charge II (R. 13-15; Pros. Ex. C). Sergeant Booth promptly carried the envelope and letter to Chief Warrant Officer Charles F. Tucker and he, in turn, delivered it to Colonel Knudsen (R. 12-15).

This envelope and letter were also submitted to William H. Quakenbush for comparison with the known specimens of accused's writing, Prosecution's Exhibits D, E, H. After examination and analysis of these writings he was of the opinion that the anonymous letter had been written by the same person who wrote Prosecution's Exhibits D, E, H (R. 16, 17).

4. The defense offered in evidence the accused's Officer's Qualification Card, W.D.,A.G.O. Form No. 66-1, and directed the court's attention particularly to the fact that from 2 March 1943 to 20 June 1944 the accused's manner of performance of his duties ranged from Very Satisfactory to Excellent.

5. The evidence introduced by the prosecution, coupled with the accused's pleas of guilty, conclusively proves that accused wrote and dispatched to certain members of the Women's Army Corps two vile, obscene communications soliciting female participation with him in unnatural sexual practices. Obviously his suggestion, if practiced, would have involved conduct prohibited by Article of War 96.. Writing and publishing his foul invitations similarly violated that Article of War. It is equally apparent that accused's filthy conduct constituted conduct unbecoming an officer and a gentleman under Article of War 95. The accused was properly convicted under Articles of War 95 and 96. Such convictions based upon the same course of conduct are neither inconsistent nor illegal (2 Bull. JAG 96).

6. The accused is 24 years of age. He was inducted into the military service on 3 January 1942 and was commissioned a second lieutenant on 18 January 1943. On 22 September 1943 he was promoted to 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, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96 and mandatory upon conviction of a violation of Article of War 95.

Thomas H. Jolly, Judge Advocate,

Robert B. Harwood, Judge Advocate.

Robert C. Truettman, Judge Advocate.

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SPJGV
CM 259912

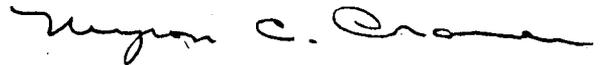
1st Ind.

War Department, J.A.G.O., 21 AUG 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant Willis D. Porter (O-1031530), Cavalry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence, and to warrant confirmation of the sentence. The accused was found guilty of writing and dispatching two vile and obscene letters to members of the Women's Army Corps soliciting female participation with him in unnatural sexual practices, in violation of Article of War 95 and Article of War 96. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



Myron C. Cramer,
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. 539, 30 Sep 1944)

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

SPJGN
CM 259933

18 AUG 1944

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING
	)	• CENTER
v.)	
	)	Trial by G.C.M., convened at
	)	Camp Blanding, Florida, 12
Captain FRANK G. ERNO	)	July 1944. Dismissal.
(O-286863), Infantry.)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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 95th Article of War.

Specification 1: In that Captain Frank G. Erno, Infantry, Company E, 197th Infantry Training Battalion, Camp Blanding, Florida, did, at Kingsley Village, Florida, between on or about 19 December 1943 and on or about 20 April 1944, wrongfully, dishonorably and unlawfully live and cohabit with Mrs. Maude Marie Thomas, a woman not his wife.

Specification 2: In that Captain Frank G. Erno, Infantry, Company E, 197th Infantry Training Battalion, Camp Blanding, Florida, did, at 2351 Riverside, Jacksonville, Florida, between on or about 7 May 1944 and on or about 21 May 1944, wrongfully, dishonorably and

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unlawfully live and cohabit with Mrs. Maude Marie Thomas, a woman not his wife.

Specification 3: In that Captain Frank G. Erno, Infantry, Company E, 197th Infantry Training Battalion, Camp Blanding, Florida, did at New York, New York, on or about 23 May 1944, wrongfully, dishonorably and unlawfully commit adultery with a certain woman not his wife, but the wife of another officer of the Army of the United States, to wit, Mrs. Maude Marie Thomas.

Specification 4: (Finding of not guilty).

Specification 5: In that Captain Frank G. Erno, Infantry, Company E, 197th Infantry Training Battalion, Camp Blanding, Florida, was, at New York, New York, on or about 26 May 1944, in a public place, to wit, Beekman Towers Hotel, disorderly while in uniform.

Specification 6: (Disapproved by reviewing authority).

Specification 7: (Disapproved by reviewing authority).

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Captain Frank G. Erno, Infantry, Company E, 197th Infantry Training Battalion, Camp Blanding, Florida, did, at New York, New York, on or about 26 May 1944, with intent to do her bodily harm, commit an assault upon a certain woman, viz, Mrs. Maude Marie Thomas, by willfully and feloniously striking the said Mrs. Maude Marie Thomas on the chest, arms and head with his fist and grasping her by the throat with his hands.

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 4 of Charge I and the Specification of Charge II and Charge II but guilty of all other Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 6 and 7

of Charge I, 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 met Mrs. Maude Marie Thomas on 28 November 1943. She had been the wife of a Mr. Alvin Ard but was then married to Second Lieutenant Victor C. Thomas. In the course of her conversation with the accused she inquired whether he was married. He replied that he was not. The fact was that he was not only the husband of Mrs. Yelne E. Erno and had been since 4 April 1923 but that he was the father of three children, one of whom was in active service in the Navy (R. 6-8, 14-15, 23; Pros. Ex. A).

The initial acquaintance of the accused and Mrs. Thomas soon ripened into a more intimate relationship. By 19 December 1943 they were living together ostensibly as man and wife. Although the accused revealed that he was already married, Mrs. Thomas continued to "eat and sleep with" him. They occupied a house in Kingsley Village owned by a Mr. A. E. Wall. The accused always paid the monthly rent of \$50 in cash. To Mrs. Wall, who managed the property, Mrs. Thomas stated that she had been married to the accused for five years and that she had "honeymooned" in England (R. 8-9, 16, 18-21).

While the accused was on bivouac, Mrs. Thomas on 20 April 1944, for some undisclosed reason, moved to the home of her niece in Starke, Florida. When he returned, he conveyed her "clothing and belongings" back to Kingsley Village and, according to her, threatened that she "would suffer for it if /she/ didn't go with him". They continued their residence in Kingsley Village only until the following Sunday when they temporarily "took a room" at the Mayflower Hotel in Jacksonville, Florida. Within a short time they found a suitable room for rent in the home of Mr. Joseph Kecher at 2351 Riverside Avenue and moved in on 8 May 1944. As in Kingsley Village, the accused and Mrs. Thomas held themselves out as man and wife (R. 9-10, 21-23).

On 21 May 1944 they departed for New York City. They arrived the next morning at about 10:00 a.m. and immediately went to the Beakman Tower, a hotel. After registering as "Captain and Mrs. Frank G. Erno", they were assigned to room 1601. The ensuing three days were spent by them in an apparently uneventful manner. Mrs. Thomas awoke on the morning of 26 May 1944 feeling too ill to get out of bed. The accused went out alone for his breakfast. When he returned at about 11:00 a.m., he was "in an intoxicated condition". At about 2:00 or 3:00 p.m., he compelled Mrs. Thomas to dress and to accompany him on a trip which he proposed to make to Central Park. On his way he changed his mind and

decided to avail himself of the hospitality of a bar on Sixth Avenue. He imbibed a large quantity of liquor and "toward the last * * * took six very strong drinks". Mrs. Thomas finally induced him to return to the hotel. About 5:00 p.m. she left the room to order some food for him. When she entered their room again, he was gone (R. 10-12, 23; Pros. Exs. B, C).

She immediately instituted a search for him. After combing the hall and particularly the cocktail lounges, she again returned to their room. The accused was sitting in a chair with "a gash over his left eye". Mrs. Thomas has testified as to what then occurred as follows:

"I asked him what was the trouble or what caused the gash and the answer he gave me was, 'I am going to kill you' and came at me with his hands stretched as if to strangle me. he [sic] grabbed me by the throat and put his hand down in my mouth, cutting the roof of my mouth, requiring medical attention, then proceeded to beat me and different assaults of that nature and twisted my ankle very painfully. At that time, I got him in the hallway and the manager or assistant manager of the hotel came up and separated [the accused] and myself."

Mrs. Thomas' screams had attracted several employees of the hotel to the scene of the assault. The accused was then wearing his "full dress uniform minus cap". He was led to his room and put to bed. There he was found shortly thereafter by the military police who had been summoned by telephone. He was directed to dress and was removed to military police headquarters. Since he "was definitely under the influence of liquor", he was detained overnight until "his condition was sufficiently improved to permit him to travel". Mrs. Thomas in the meantime had been treated by a Dr. Kurt S. Nahm. Upon examination he found her to be suffering from "a hematoma behind her left ear, lacerations of her mouth, both forearms and both knees" (R. 12-14, 24-25; Pros. Exs. B, C, D, E).

4. The accused, after he had been apprised of his rights relative to testifying or remaining silent, elected to make an unsworn statement. It consisted mainly of a resume of his long service in the Oregon National Guard and in the Army of the United States. Three days after the infamous attack at Pearl Harbor the unit which he commanded was sent out on security detail with instructions to guard all vital installations, airports, rail-

road bridges, tunnels, and beam stations from Salem, Oregon, south to Medford, Oregon, and west along the Pacific coast to Marshfield, Oregon. The area covered extended over 500 miles and necessitated the operation of "four separate mess locations". The accused was commended for the excellent work done by Colonel L. R. Boyd of the IX Army Corps. Of the accused's three children, two are girls, aged 17 and 18 respectively, and one a son, who is a Signalmen 1st Class in the Navy with a record of service in the South Seas, Alaska, and in France. The accused has received four ratings between 3 March 1942 and 31 May 1944. Two were "excellent", one "very satisfactory", and one "superior" (R. 40-41).

The testimony of several witnesses was offered on behalf of the defense. Their primary purpose was to impugn and discredit the veracity and moral character of Mrs. Thomas. Early in December of 1943 the accused and First Lieutenant John K. Moore had spent a weekend together in St. Augustine, Florida. On their return trip to Camp Blanding they stopped off for "something to eat" in Starke, Florida. After finishing their meal, they walked to a military store. As they were examining the contents of the display window, they were approached by two women who "struck up a conversation". One of them was Mrs. Thomas who had arrived in town that day. After strolling around the block, partaking of some food at the Guidon Grill, and visiting the railroad station "to see about" her dog and baggage, they "just drove around" and talked. To her new acquaintances she represented that she had been a Navy nurse and that she "had been discharged because of wounds". She had come to Starke to stay indefinitely with a relative who was "going to leave her something in their will" (R. 33; Def. Ex. 1).

Prior to her arrival in Starke she had resided in Columbus, Georgia. She had there made the statement that she intended to marry a Lieutenant Rodnicky. Testimony of this fact was offered to refute certain assertions attributed to her to the effect that he was her half-brother (R. 30-31).

Before leaving for New York she had informed Mrs. Thelma Kecher that she had consulted the District Attorney in Jacksonville and that he had advised her to "go right on with the accused just like she was doing, that she was doing the right thing". Mr. Edmund E. Crutchfield, the official referred to, testified, however, that upon being told by her that "she had been having an affair with an officer at Camp Blanding, whose name she never did mention * * *, that her husband was overseas and was returning home, and that she desired to break off her relationship", he delivered the opinion that "she needed a preacher more than a lawyer, particularly a State Attorney". He recommended that she leave and avoid the accused (R. 31-36).

Mr. Alfred Wilkinson, a truck driver by profession and a resident of Starke since 1925, was familiar with Mrs. Thomas' reputation for truth and veracity in the community. It was "bad" and he "wouldn't believe her at all", not even under oath (R. 36-37).

The last witness for the defense was Major Alvin W. Clark, the Commanding Officer of the battalion to which the accused was assigned. Prior to the preferment of charges he had "considered the accused an officer and a gentleman" and had rated him "excellent". The major's recommendation in a letter of transmittal that the accused be eliminated from the service was "based on the evidence presented and if the papers forwarded were true" (R. 37-40).

5. Specification 1 of Charge I alleges that the accused did "on or about 19 December 1943 and on or about 20 April 1943, wrongfully, dishonorably and unlawfully live and cohabit with Mrs. Maude Marie Thomas, a woman not his wife". Specification 2 of Charge I alleges that the accused committed the same offense with the same woman on 7 May and 21 May 1944. Specification 3 of Charge I alleges that the accused did "on or about 23 May 1944 wrongfully, dishonorably and unlawfully commit adultery with a certain woman not his wife, but the wife of another officer of the Army of the United States, to wit, Mrs. Maude Marie Thomas". These acts were all laid under Article of War 95.

The testimony of Mrs. Thomas was unequivocally to the effect that she had lived and cohabited with the accused throughout most of the period between 19 December 1943 and 26 May 1944. Although there is testimony that her reputation for truth and veracity is bad, her story is strongly and convincingly corroborated by Mrs. Wall, by Mr. and Mrs. Kecher, and by Mr. F. M. Keenan and Mr. Lewis Heyden of the Beekman Tower. They were all witnesses to the joint occupancy of various quarters by the accused and Mrs. Thomas. The continued sharing of a room by an officer with a woman not his wife is convincing evidence of impropriety and immoral conduct. Adultery cannot normally be proved by direct proof of the sexual act, but the cohabitation of a man and woman not married to one another, when considered in the light of worldly knowledge, must be construed to be motivated by purposes and motives other than honorable. The rule is stated in II Bull. JAG, Jan. 1943, p. 14, sec. 453 (4a) as follows:

"Accused was found guilty of living in a state of open adultery in violation of A.W. 96. There was evidence that accused, a married officer, rented a sleeping room and occupied it for a month with a

woman not his wife. Held: The record supports the findings. The circumstances warranted an inference of adultery (CM 227791 (1942))#.

6. Specification 5 of Charge I alleges that the accused was "on or about 26 May 1944, in a public place, to wit, Beekman Towers Hotel, disorderly while in uniform". This was also set forth as a violation of Article of War 95. The Specification of Charge III alleges that the accused did "on or about 26 May 1944, with intent to do her bodily harm, commit an assault upon a certain woman, viz., Mrs. Maude Marie Thomas, on the chest, arms and head with his fist and grasping her by the throat with his hands". This was set forth as a violation of Article of War 93.

A hotel corridor provides a common avenue not only for registered guests but for any member of the public who may desire to visit them. Since it is open to the world, it is a public place. Even a porch used as a passage exclusively by military personnel and their wives has been held to be a public place. Thus, Dig. Op. JAG. 1912-1940, sec. 453 (8) states that:

"Where accused was charged with being drunk and disorderly in a public place in violation of A. W. 95, it was held that a porch where the offense was committed, being used as access to apartments in a building within a military reservation and visible from a public road, was a public place although it does not definitely appear it was lighted at the time, and the fact that only Army personnel and their wives were present is immaterial."

Under certain circumstances a hotel room may also lose its normal private character and be deemed a public place. The following summary in I Bull. JAG, November 1942, p. 327, sec. 453 (10) is illustrative:

"Accused was found guilty of being drunk and disorderly in a public place in violation of A.W. 95 and sentenced to be dismissed the service. Accused gave a party in a hotel to celebrate his promotion to major, drank several cocktails while in uniform, and became profane and abusive to several women present. Later, dressed in pajamas, he entered the room of another officer and his wife, where accused's wife had taken refuge from him, and there cursed and beat his wife. Still later, in his own room, accused beat his wife severely, causing her to scream. Upon the approach of

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the hotel manager, a deputy sheriff and a civilian, accused called the hotel manager a vile name and addressed him in grossly obscene language. It was necessary to hit accused on the head with a bludgeon to pacify him and rescue his wife. Held: The record supports the finding and sentence. The conduct of the accused was unbecoming an officer and gentleman. CM 226357 (1942)."

The accused's assault upon a woman was per se disorderly and a disgrace to the uniform. Its commission in a public place in the presence of witnesses was a seriously aggravating factor. Such conspicuously repulsive conduct is clearly unbecoming an officer and a gentleman.

That the accused administered a cruel beating to Mrs. Thomas has been established beyond the peradventure of a doubt. But whether the assault was made with the particular intent to do her bodily harm is highly questionable. Paragraph 162 of the Manual for Courts-Martial, 1928, points out that:

"It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense" (under-scoring supplied.)

All of the evidence submitted indicates that on the evening of 26 May 1944 the accused's wits were completely dulled by drink. Witnesses have referred to him as "very intoxicated" and as "definitely under the influence of liquor". When the military police arrived at the hotel shortly after the assault, they found him asleep in bed. A man in the normal possession of his faculties could hardly have succumbed to slumber so soon after carrying a malevolent intent into execution. At military police headquarters he was found to be so drunk that he had to be retained until his condition had improved sufficiently "to permit him to travel". The cumulative effect of these evidentiary items is to rebut the existence of any specific intent in his mind. The record does not support a finding of guilty of assault with intent to do bodily harm in violation of Article of War 93 but is adequate for a finding of guilty of assault and battery in violation of Article of War 96.

7. The accused is about 41 years of age. The records of the Office of The Adjutant General show that he had enlisted service in the National

Guard of Minnesota from 12 December 1919 to 11 December 1922 and in the National Guard of Oregon from 24 January 1927 to 11 February 1935; that he was appointed a second lieutenant of Infantry in the Organized Reserve Corps on 3 June 1931; that he was commissioned a second lieutenant in the National Guard of the United States, Infantry-Reserve, on 10 June 1935 as of 12 February 1935; that he was called to active duty on 16 September 1940; that he was promoted to first lieutenant on 26 March 1941 and to captain on 6 June 1942; that he has been on active duty as an officer since 16 September 1940.

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 only so much of the findings of guilty of the Specification of Charge III and Charge III as involves a finding of guilty of assault and battery in violation of Article of War 96, and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. 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.

Abner E. Lipscomb, Judge Advocate.

Charles H. Sykes, Judge Advocate.

Gabriel H. Laddis, Judge Advocate.

(66)

SPJGN
CM 259933

1st Ind.

War Department, J.A.G.O., 31 AUG 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 Frank G. Erno (O-286863), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification, Charge III and Charge III, alleging an assault with intent to do bodily harm upon a woman, as involves a finding of guilty of assault and battery, in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. A memorandum from Colonel W. C. DeWare, General Staff Corps, Acting Liaison Officer, requesting information upon which to base a reply to the Honorable Guy Cordon, United States Senate, concerning the facts in the present case has been received and answered. Consideration has been given to a memorandum from Major W. F. Runge, Infantry, Director, Training Division at Camp Blanding, Florida, requesting clemency in behalf of the accused.

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



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

5 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for sig. Sec. of War.
- Incl 3 - Form of Executive action.
- Incl 4 - Memo. fr. Colonel W. C. DeWare.
- Incl 5 - Memo. fr. Major W. F. Runge

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 521, 26 Sep 1944)

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

(67)

SPJGK
CM 259963

17 AUG 1944

UNITED STATES)

FIRST AIR FORCE

v.)

Trial by G.C.M., convened at Army
Air Base, Richmond, Virginia, 7
July 1944. Dismissal, total for-
feitures and confinement for two
(2) years.

First Lieutenant JOHN B.
BROWN (O-576991), Air Corps.)

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

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

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

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

Specification: In that First Lieutenant John B. Brown, Air Corps, Section K-1, 120th Army Air Forces Base Unit (Fighter), did, without proper leave, absent himself from his organization at Army Air Base, Richmond, Virginia, from about 21 April 1944 to about 28 May 1944.

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

Specification 1: In that First Lieutenant John B. Brown, Air Corps, Section K-1, 120th Army Air Forces Base Unit (Fighter), did, at Hopewell, Virginia, on or about 28 May 1944, wrongfully appear at the Ritz Cafe in improper uniform, viz, wearing insignia of grade of Captain.

Specification 2: In that First Lieutenant John B. Brown, * * *, did, at Richmond, Virginia, on or about 13 April 1944, with intent to defraud, wrongfully and unlawfully make and utter as true and genuine a certain check in the words and figures as follows, to wit:

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State Savings Bank - 23 April - 13 19 44

Council Bluffs, Iowa

Pay to the order of Cash

Twenty dollars No cents 20⁰⁰ Dollars

\$20.00 John B. Brown

HOTEL JOHN MARSHALL
Richmond, Virginia.

and by means thereof did fraudulently obtain from Hotel John Marshall, Richmond, Virginia, the sum of \$20.00, he, the said First Lieutenant Brown then well knowing that he did not have and not intending he should have sufficient funds in the State Savings Bank, Council Bluffs, Iowa, for the payment of said check.

Specification 3: Identical in form with Specification 2 but alleging check dated 15 April 1944, payable to John Marshall Hotel, and in the amount of \$15.

Specification 4: In that First Lieutenant John B. Brown, * * *, did, at Petersburg, Virginia, on or about 20 May 1944, with intent to defraud, wrongfully and unlawfully make and utter as true and genuine a certain check in the words and figures as follows, to wit:

City Council Bluffs, Iowa May 20 19 44

NAME OF BANK State Savings Bank

PAY TO THE

ORDER OF Petersburg Hotel \$10²⁰

Ten -----twenty cents DOLLARS

For value received, I represent that the above amount is in said bank in my name, subject to this check, and is hereby assigned to payee hereon or holder.

SIGNATURE John B. Brown 0576991
ADDRESS 2604 - 21 Ave - Rock Island, Ill

and by means thereof did fraudulently obtain from Hotel Petersburg, Petersburg, Virginia, the sum of \$10.20, he, the said accused, then well knowing he did not have and not intending he should have sufficient funds in the State Savings Bank, Council Bluffs, Iowa, for the payment of said check.

He pleaded guilty to Charge I and its Specification and to Specification 1 of Charge II and to Charge II, and not guilty to Specifications 2, 3 and 4 of Charge II, and was found guilty of all charges and specifications. Evidence of one previous conviction for absence without leave in violation of Article of War 61 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 years. The reviewing authority approved only so much of the findings of guilty of Specification 4 of Charge II as found the accused guilty, at the time and place alleged, of the wrongful and unlawful making and uttering of the check in question, with intent to defraud, and without having, or intending that he should have, sufficient funds in the bank for the payment of same, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

a. Charge I and its Specification, - absence without leave.

Accused pleaded guilty to the Charge and its Specification. Captain George C. Philbrick, Commanding Officer of accused's organization, identified the morning report of the organization (R. 9). Certified extract copy of the morning report for 22 April 1944 was offered to show original absence without leave on 21 April 1944 (Pros. Ex. 1). Accused was apprehended on 28 May 1944 at Hopewell, Virginia, by Captain Jesse Wright, Corps of Military Police, of Camp Lee, Virginia. At 0330 of that date, after having been advised of his rights, accused, in answer to a question by Major John E. Scott, Provost Marshal, Camp Lee, stated that he had been absent without leave for approximately eight days (R. 31,32).

b. For the defense.

After a statement by defense counsel that he had explained to accused his rights, accused elected to make a sworn statement (R. 36). Accused stated that he was sentenced by a General Court-Martial in February 1944 to "forfeit \$100 per month for nine months and receive an official reprimand". Thereafter he had no particular duty assignment, although he reported daily. As a result of a belief that the organization resented the fact that he was in uniform after his conviction, accused developed a feeling of depression (R. 39,40,43). He went absent without leave on 21 April 1944 and was arrested on 28 May 1944 (R. 40,41).

c. Charge II, Specification 1, - wearing Captain's insignia.

Accused pleaded guilty to this specification. Mr. James M. Miller saw accused wearing captain's bars at the Ritz Club in Hopewell, Virginia, on 28 May 1944 at about 0200 (R. 28). He was wearing them when he was arrested that morning by Captain Wright (R. 31) and when he was delivered into the custody of Major Scott at 0330 (R. 32,33).

d. For the defense.

Accused stated that he was wearing captain's bars on 28 May 1944 because "they really boosted my morale" (R. 42).

e. Charge II, Specifications 2 and 3, issuing two checks to Hotel John Marshall and Specification 4, issuing check to Petersburg Hotel without sufficient funds.

On 13 April 1944, Hotel John Marshall cashed for accused a check for twenty dollars, drawn by accused to the order of "cash" on State Savings Bank of Council Bluffs, Iowa, and on 15 April 1944 cashed for accused another check drawn by accused to the order of John Marshall Hotel on the same bank for fifteen dollars. Accused was not a guest of the hotel on the first date, but he was on the latter date. Both checks were duly deposited and were subsequently returned unpaid, with a notation from the drawee bank, "Has no account". Witness, Mr. Jelly Leftwich, Assistant Manager of the Hotel, answered in the affirmative the question by defense counsel, "Either of them could or could not have been given in payment of a hotel bill, either check; is that right?" (R. 12-15, 19,20). Neither check was protested nor did the hotel give accused five days' notice that the checks had not been paid, but notice was given to the authorities at Richmond Field, first by telephone and then by letter (R. 19,20). Both checks were paid before 27 June 1944 (R. 20).

On 20 May 1944, accused issued a check, drawn on the same bank, in favor of Petersburg Hotel, for \$10.20, in payment of his hotel bill. Just above the signature appears the following: "For value received, I represent that the above amount is in the said bank in my name, subject to this check * * *". The check was duly deposited and was returned unpaid by the drawee bank two or three weeks later (R. 22,23,26). The check was not protested and the bank did not write to accused.

The bank did not have accused's address and had heard that accused was being detained by the Military Police (R. 24). The check was subsequently paid by accused's mother (R. 24). Mr. Clyde A. Blanchard, Executive Vice-President of State Savings Bank, Council Bluffs, Iowa, testified by deposition that accused did not have an account in that institution on 13 April 1944, 15 April 1944, or 20 May 1944, and that there was no record of his ever having had an account in that bank (Pros. Ex. 5).

f. For the defense.

Accused testified that he had lived at one time in Council Bluffs, and had done business with the State Savings Bank there. His family had likewise done business with the bank for two generations, and his mother had an account there at the time he issued the three checks although he did not and knew that he did not (R. 37,40,41,44). His mother had lived in Council Bluffs but had remarried and was now living in Rock Island, Illinois. He did not notify his mother about the checks nor did the bank (R. 44). As a result of the court-martial sentence accused had only about \$60 a month to live on and gave the checks because he did not have any money, needed funds, and thought that the bank would notify his mother, who would take care of them (R. 40,41). This belief was based on the fact that the bank was "run" principally by a family that had known his family for many years (R. 44,45). Accused did not intend to defraud any one when he issued the checks and had not been notified that they had been dishonored. They were made good upon notice to his family (R. 42).

Mrs. W. F. Chambers, mother of accused, moved from Council Bluffs in 1931, but carries a savings account in the State Savings Bank of that city. She had known the personnel of the bank very well but the depression and the war had changed the personnel so much that she now knew only one girl, who was in the "cashiering or deposit" section. Witness did not think that the bank personnel knew that accused was her son for if they had "they would have wired me and accepted those checks". She would have paid the checks had they been presented and did pay them when she received notice of nonpayment. She had not been notified by any hotel that the checks had been dishonored. Had her son written for money she would have forwarded it (R. 49-51).

g. Defense testimony as to good character.

Accused, as a witness in his own behalf, stated that he had been in the Army since 28 April 1941. After two years as an enlisted man he obtained a commission as a second lieutenant in the Air Corps upon completion of a thirteen-week course at Officer Candidate School. Four months later he was promoted to a first lieutenantcy. Prior to entering the service he had been physical director of the Rock Island Y.M.C.A. He had never had trouble or difficulty of any kind as a civilian and had none in the military service prior to his trial by a general court-martial in 1944 (R. 38).

Captain Emil R. Johnson, Base Classification Office, Richmond Army Air Base, verified accused's statements as to his commissioned service, and furnished the following information as to accused's rating for the manner of performance of his duties, as shown by his "66-2 Form": 27 April 1943 to 6 August 1943, "superior"; 7 August 1943 to December 1943, "very satisfactory"; February 1944 to April 1944, "satisfactory" (R.46, 47).

Accused's good reputation and standing in civilian life was testified to by his mother, Mrs. W. F. Chambers, Probate Judge Forest Dizotell, Rock Island, Illinois, Municipal Judge John P. Tinley, Council Bluffs, Iowa, Mr. W. P. McCaffree, General Secretary, Y.M.C.A., Rock Island, Illinois, and Mr. Gabe Mosenfelder, merchant, Rock Island, Illinois. Letters from the last four were accepted in evidence under a stipulation agreed to by the prosecution (R. 36,51; Def. Exs. A,B,C, and D).

4. The evidence fully sustains the findings of guilty, as approved by the reviewing authority. The absence without leave and the improper wearing of the insignia of a captain were established by competent testimony, supplementing accused's admission of the commission of these offenses and his plea of guilty. As to the three specifications charging issuance of checks with intent to defraud, without having on deposit sufficient funds and not intending to have sufficient funds to meet such checks, the record shows that accused did not have any funds on deposit with the drawee bank, and that he knew that he had none. Any doubt existing as to whether the checks issued to the Hotel John Marshall were for cash received is dispelled by accused's admission that at the time of their issuance he did not have any money because of a court-martial sentence, forfeiting a part of his pay, and needed funds. His sole defense, other than the technical legal one hereinafter discussed, was that his mother, who had not lived for many years in Council Bluffs, had an account in the drawee bank, that his family had done business with the bank for two generations, and that he believed that the bank would notify his mother, who would then pay the checks. He denied any intent to defraud, but admitted that he had not notified his mother that he had drawn the checks and that he had not requested funds from her. The Board of Review is of the opinion that the court was fully warranted in disregarding this protestation of good faith, and of concluding that the checks were issued with intent to defraud.

5. Wearing unauthorized insignia in a public place is a well-recognized offense under Article of War 96 (CM 233900, Baker, 20 B.R. 189, JAG Bull. Aug. 1943, p. 312), and no discussion of this specification is necessary. It is equally well established that the issuance of a check, with intent to defraud or deceive, by a member of the military establishment on a bank in which he has no funds and does not intend to have funds sufficient to meet the check, is an offense under the same article. That the check is subsequently made good does not alter the fact that the military establishment has been subjected to scandal and disgrace by virtue of its previous dishonor. For the same reason it is immaterial whether the check was issued for a preexisting debt or to obtain cash. In the present case there is nothing to indicate that the bank had previously paid checks drawn by accused, nor that on other occasions it had notified his mother of the presentation to it of checks drawn by him. Not only did he admittedly have no funds in the bank, but it was testified by an official of the bank that there was no record of his ever having had any account there.

Accused advanced the defense that the specifications were based on a Virginia statute, under the terms of which, according to the interpretation of defense counsel, it was essential that the check be protested and written notice of nonpayment be given to the drawer. Without attempting to analyze the law in question, it is sufficient to point out that the basis of the charge is not the violation of a state statute, but the commission of an act which brings discredit to the military establishment. The court properly refused to sustain defense's motion for a finding of not guilty, based on the failure of payees to comply with the Virginia statute.

6. War Department records show that accused is 27-9/12 years of age. He graduated from high school in 1935, and was employed as physical director of the Rock Island Y.M.C.A. from that time until his induction into the Army on 28 April 1941. At the time of his admission to the Officer Candidate School he was a corporal in the 11th Antisubmarine Squadron, Army Air Force. He was commissioned a second lieutenant in the Air Corps on 16 April 1943 and was promoted to first lieutenant on 17 August 1943. At the time of his promotion he was serving as Assistant Squadron Adjutant, 443rd Fighter Squadron, and was given a rating of "superior". He twice attended the School for Special Services at Lexington, Virginia, without graduating, first from 4 August 1943 to 20 August 1943, when he pursued the Special Services Officers' course, and then from 12 November 1943 to 23 November 1943, when he pursued the Orientation Officers' course. No reason was assigned for his failure to complete the first course. In connection with the second course he received an academic rating of "unsatisfactory". There also appears in the War Department's records a communication from Berger's Tavern, Orlando, Florida, to the Acting The Adjutant General, advising that officer that the writer on 4 April 1944 had cashed a check for \$20 for accused, which had been returned unpaid. Disposition of this matter is not indicated, as accused was reported by the Adjutant General's Office as being absent without leave at the time of the reply to this communication.

7. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all charges and specifications, as 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 61 or 96.

Tracy H. Zou, Judge Advocate.
Norman Mays, Judge Advocate.
Samuel Conmy, Judge Advocate.

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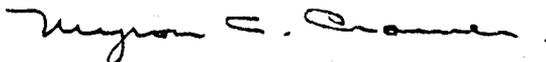
1st Ind.

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

29 AUG 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. Brown (O-576991), 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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Accused was found guilty of absenting himself without leave from his organization (57 days) in violation of Article of War 61, of wearing insignia of a captain without authority and of wrongfully and unlawfully and with intent to defraud issuing three worthless checks in the total amount of \$35.20, in violation of Article of War 96. Evidence of one previous conviction by general court-martial for absence without leave (9 days) in violation of Article of War 61 was introduced. In that case he was sentenced to a reprimand and forfeiture of \$100 of his pay per month for nine months. In this case the approved sentence involved dismissal, total forfeitures and confinement at hard labor for two years. The checks were drawn on a bank in which accused had no account but one in which his mother did have an account. It was accused's contention that he expected his mother to be notified of the presentation of these three checks and that she would pay them. The checks were paid by accused's mother before the trial. I therefore recommend that the sentence be confirmed but that the forfeitures be remitted; that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.
3. Consideration has been given to a letter dated 26 August 1944 from Honorable Scott W. Lucas, United States Senate, inclosing a letter dated 22 August 1944 from Forest Dizotell, Judge Probate Court of Rock Island County, Rock Island, Illinois, requesting clemency in behalf of the accused. The letter of Senator Lucas and a copy of Judge Dizotell's letter accompany 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.

- Incl.1-Record of trial.
- Incl.2-Draft of ltr. sig. Sec. of War.
- Incl.3-Form of Ex. action.
- Incl.4-Ltr. fr. Sen. Lucas, w/incl.

- 8 -

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

(75)

SPJGN
CM 259964

1 Aug 1944

UNITED STATES)

FIRST AIR FORCE

v.)

) Trial by G.C.M., convened at
) Army Air Base, Walterboro Army
) Air Field, Walterboro, South
) Carolina, 3 July 1944. Dis-
) missal.

Second Lieutenant JESSE
WILLIAMS II, (O-562354), Air
Corps.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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 64th Article of War.

Specification: In that Second Lieutenant Jesse Williams, II, Air Corps, Section D, 126th Army Air Forces Base Unit (Fighter), having received a lawful command from Lieutenant Colonel Harry G. Davis, Air Corps, his superior officer, to report to First Lieutenant Arthur L. Haigh, Air Corps, at 0800, 15 June 1944, at ramp near Base operations, for duty, did, at Army Air Base, Walterboro Army Air Field, Walterboro, South Carolina, on or about 15 June 1944, willfully disobey the same.

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

Specification: In that Second Lieutenant Jesse Williams, II, Air Corps, Section D, 126th Army Air Forces Base Unit (Fighter), did, without proper leave absent himself from his command at Army Air Base, Walterboro Army Air Field, Walterboro, South Carolina, from about 0800 15 June 1944 to about 1500, 15 June 1944

(76)

He pleaded not guilty to and was found guilty of all Charges and Specifications except the word "command" in the Specification, Charge II, of which he was found not guilty and for which the words "place of duty" were substituted and of which substituted words he was found guilty. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the morning of 14 June 1944 the accused, pursuant to instructions, reported to Lieutenant Colonel Harry G. Davis, Air Corps, for assignment for primary duty in the Engineering Section at the Walterboro Army Air Base. In the presence of two other officers Lieutenant Colonel Davis ordered the accused to report for duty at a designated place at 0800 o'clock on 15 June 1944 when he was to relieve one of the other officers then present. The accused's previous efficiency ratings were discussed and he was assured that he would be rated by his future instead of his past performance. The accused stated that he understood the order and that he was cognizant of the Articles of War. These facts were established by the testimony of Lieutenant Colonel Davis and the other two officers who had been present at the conversation (R. 14-19, 19-21, 21-23).

The next morning, according to the testimony of Lieutenant Colonel Davis and the officer who was to be relieved, the accused did not report as ordered and was not at his appointed place of duty between 0800 and 1500 o'clock. A search at his quarters and home in a nearby town was conducted and the accused was not located (R. 16, 22, 23, 25-29).

4. The evidence for the defense shows that the accused had requested Lieutenant Thomas H. Porter, Jr., Air Corps, to awaken him at 0700 o'clock on the morning of 15 June 1944 but that Lieutenant Porter failed to do so and later requested a sergeant to awaken the accused. According to the stipulated testimony of the sergeant the accused was notified between 0830 and 0900 o'clock on 15 June 1944 that Lieutenant Porter had requested the sergeant to awaken the accused. Lieutenant Porter also testified that he had seen the accused in the Officers' Mess at 1000 o'clock on 15 June 1944 and that the accused at such time appeared unperturbed. Another officer testified that he had received a telephone call about 0900 o'clock on 15 June 1944 requesting information concerning the accused's whereabouts (R. 31-34, 34-36).

The defense introduced into evidence a certified copy of an order dated 22 May 1944 of the accused's organization whereby he had been assigned to perform the duty of "Technical Inspector". A copy of the organization's order dated 15 June 1944 was also admitted. This latter order appointed the accused "Asst Production Line Maint O" for his primary duty (R. 36; Def. Exs. "A", "B").

The accused, a negro officer, conducted his own defense with the assistance of the regularly appointed defense counsel. After explanation of his rights as a witness, he elected to make an unsworn statement. Upon the issues involved he asserted that his failure to obey the order had been occasioned by his oversleeping and the failure of his brother officer to awaken him as agreed. He contended that he did not report as ordered even after 0830 or 0900 o'clock because he had received information that the military police were looking for him and that he repeatedly called their office during the morning. He insisted that the order was not a legal order because he had not been assigned to a position subject to the order of Lieutenant Colonel Davis until 15 June 1944. He also sought to show that the order was given for the sole purpose of increasing the penalty for an offense which he alleged Colonel Davis expected him to commit. The remainder of his statement consists of an assertion of discrimination against negro officers in general and himself in particular. He styled himself as the "best engineering officer in the First Air Force" and charged that his accuser and the prosecution's witnesses had colluded to defame his character and professional reputation because they were jealous of him (R. 37-42).

5. In rebuttal the prosecution adduced the testimony of another officer that the accused had not reported for duty as ordered and a recalled witness reiterated his testimony to the same effect. The base personnel officer testified that on 13 June 1944 he had notified the accused to report to Lieutenant Colonel Davis for primary duty assignment, and that such assignment had been made on 14 June 1944 and confirmed by written order on 15 June 1944 (R. 43, 44-46, 46-48).

6. The Specification, Charge I, alleges that the accused having received a lawful command from his named superior officer to report to a designated officer at a specified time and place for duty willfully disobeyed such order. Willful disobedience is the refusal or deliberate omission manifesting an intentional defiance of authority to comply with an order relating to a military duty given by an authorized superior officer (M.C.M., 1928, par. 134b). Such disobedience is violative of Article of War 64.

The evidence for the prosecution conclusively establishes every essential element of the offense charged. The testimony of three officers shows that the order was given as alleged. It related to a military duty. Those officers likewise testified that the accused failed to obey the order and the accused himself admits his failure to comply therewith. His own testimony while seeking to ameliorate his conduct by showing that he overslept on the morning of his alleged disobedience, at the same time shows that he wilfully persisted in a prolonged refusal to obey the order even after he had awakened at approximately 0830 o'clock. The issuance of the written order on 15 June 1944 assigning the accused to a position under the command of Lieutenant Colonel Davis was merely confirmatory of the oral

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orders of the preceding day and consequently the order was given by an authorized superior officer. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt as alleged and amply supports the findings of guilty of Charge I and its Specification.

7. The Specification, Charge II, alleges that the accused without proper leave absented himself from his command at a named place "from about 0800 15 June 1944 to about 1500, 15 June 1944". The court by appropriate exceptions and substitutions excepted the word "command" and substituted therefor the words "place of duty". The offense alleged and as found by the court is violative of Article of War 61 (M.C.M., 1928, par. 132).

The evidence conclusively shows that the accused's failure to report as ordered was unauthorized. Consequently, his absence from his assigned place of duty was without leave. By failing to report as ordered he committed two separate and distinct offenses (CM 221591 (1942), Bull. JAG, Vol. I, p. 159). The court, therefore, properly overruled the accused's plea in abatement to Charge II and its Specification and rejected the accused's argument based thereon. The evidence beyond a reasonable doubt establishes the accused's guilt as found by the court and fully warrants the findings of guilty of Charge II and its Specification as found by the court.

8. The accused is about 30 years old. The War Department records show that he has had enlisted service from 9 February 1942 until 5 August 1942 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as found by the court of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or 64.

Abner E. Liferant, Judge Advocate.

Charles S. Styles, Judge Advocate.

Gabriel H. Tolden, Judge Advocate.

SPJGN
CM 259964

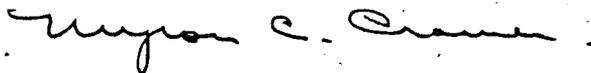
1st Ind.

War Department, J.A.G.O., 11 AUG 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 Jesse Williams, II (O-562354), 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.

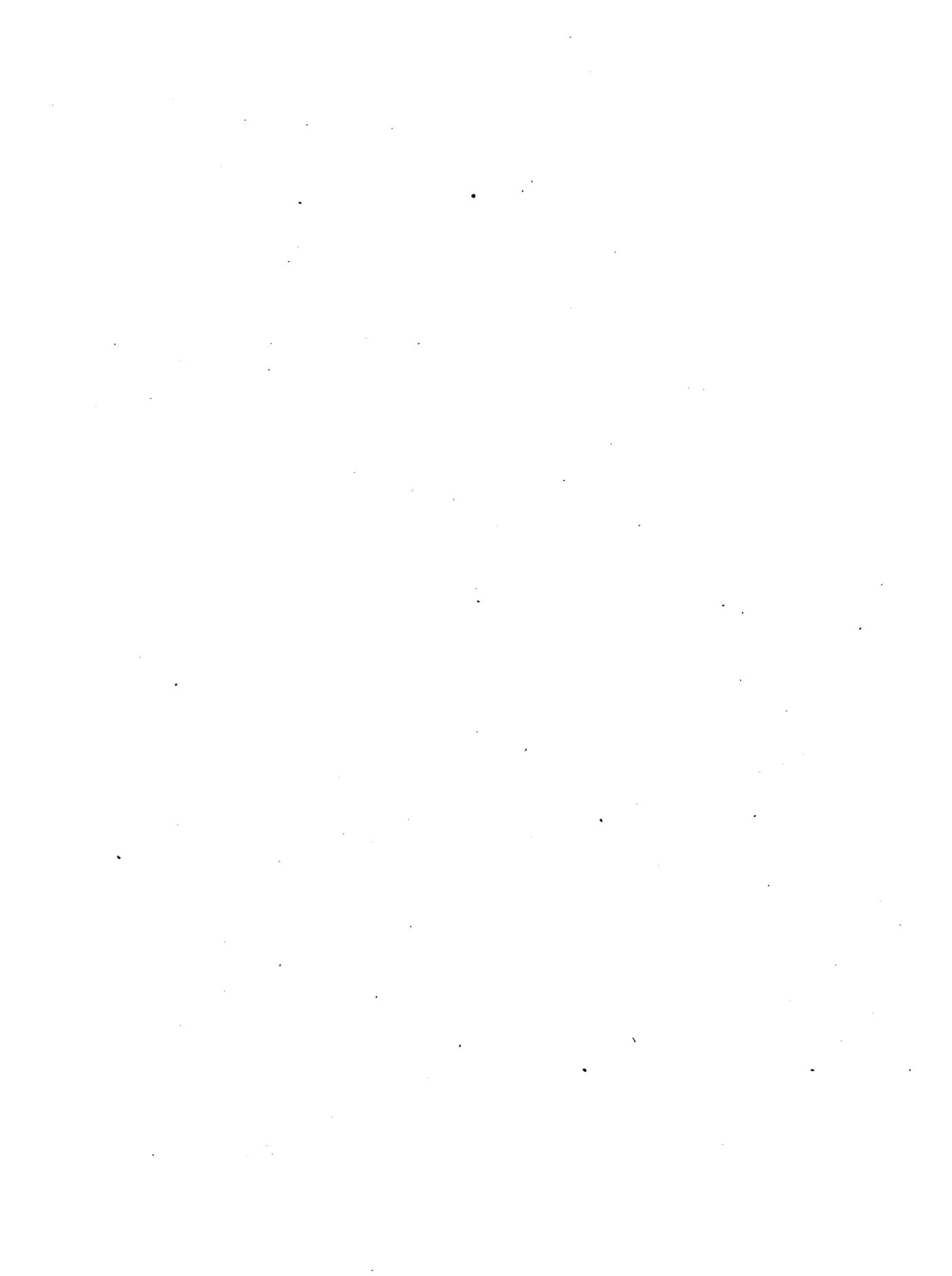


Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.

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

(Sentence confirmed. G.C.M.O. 537, 27 Sep 1944)



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

(81)

SPJGQ
CM 259965

9 AUG 1944

UNITED STATES)

FIRST AIR FORCE

v.)

) Trial by G.C.M., convened at
) Godman Field, Kentucky, 6 July
) 1944. Dismissal and confine-
) ment for five (5) years.

) Second Lieutenant LOWELL F.
) COLBERT (O-571307), Head-
) quarters, 477th Bombardment
) Group (M).)

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

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

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

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

Specification 1: In that Second Lieutenant Lowell F. Colbert, Air Corps, Headquarters, 477th Bombardment Group (M), Godman Field, Kentucky, did, at Selfridge Field, Michigan, on or about 3 November 1943, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Crown Savings Bank
of Newport News, Va.

Newport News, Va. 11-3-1943

No. 17

CROWN SAVINGS BANK

Pay to the order of Paul F. Bradford \$250.00

Two hundred and fifty -----dollars.

Wilson A. Copeland
O-571337

(82)

and indorsed on the back thereof; Paul F. Bradford, which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that Second Lieutenant Lowell F. Colbert, Air Corps, Headquarters, 477th Bombardment Group (M), Godman Field, Kentucky, did, at Detroit, Michigan, on or about 5 January 1944, with intent to defraud, falsely forge an indorsement on a certain check in the following words and figures, to wit:

(Face of check)
WAR
Finance
Selfridge Field, Mich., 31 December 1943
124,549

TREASURER OF THE UNITED STATES

PAY Two Hundred Twenty-One & 80/100*** Dollars \$221.80
(SEAL)
To the
order of ****Thomas H. Porter, Jr. ****
553rd Fighter Sq
Post

Vo No. 16678

K. H. Jackson
Finance Officer, U.S.A. 211,667

KNOW YOUR ENDORSER - REQUIRE IDENTIFICATION

(Back of check)

IDENTIFICATION PROCEDURE

When cashing this check for the individual payee, you should require full identification and endorsement in your presence, as claims against endorsers may otherwise result.

Unless this check is presented for payment within one year beginning July 1, next, after date of issue (U.S. Code Title 31, Section 725t), it should be sent by the owner direct to the Secretary of the Treasury with request for payment after settlement of account.

The payee should endorse below in ink or indelible pencil.

If the endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

Thomas H. Porter, Jr.

by indorsing on the back thereof the name of Thomas H. Porter, Jr., which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification 1: In that Second Lieutenant Lowell F. Colbert, Air Corps, Headquarters, 477th Bombardment Group (M), Godman Field, Kentucky, did at Mt. Clemens, Michigan, on or about 4 November 1943, with intent to defraud wilfully, unlawfully, and feloniously pass and utter as true and genuine a certain check in words and figures as follows:

Crown Savings Bank Newport News, Va. 11-3 1943 No. 17
of Newport News, Va.

CROWN SAVINGS BANK

Pay to the order of Paul F. Bradford \$250.00

Two hundred and fifty ----- dollars.

Wilson A. Copeland

O-571337

and indorsed on the back thereof: Paul F. Bradford, a writing of a private nature, which might operate to the prejudice of another, which said check, was, as he, the said Second Lieutenant Lowell F. Colbert then well knew, falsely made and forged.

Specification 2: In that Second Lieutenant Lowell F. Colbert, Air Corps, Headquarters, 477th Bombardment Group (M), Godman Field, Kentucky, did, at Detroit, Michigan, on or about 5 January 1944, with intent to defraud wilfully, unlawfully, and feloniously, pass and utter as true and genuine a certain check in words and figures as follows:

(Face of Check)

WAR
Finance

Selfridge Field, Mich., 3 December 1943
124,549

TREASURER OF THE UNITED STATES

PAY Two Hundred Twenty-One & 80/100*** Dollars \$221.80

(SEAL)

To the order of *****Thomas H. Porter, Jr. *****
553rd Fighter Sq
Post

Vo No. 16678

K.H. Jackson

Finance Officer, U.S.A. 211,667

(Back of Check)
IDENTIFICATION PROCEDURE

When cashing this check for the individual payee, you should require full identification and endorsement in your presence, as claims against endorsers may otherwise result.

Unless this check is presented for payment within one year beginning July 1, next, after date of issue (U.S. Code Title 31, Section 725t), it should be sent by the owner direct to the Secretary of the Treasury with request for payment after settlement of account.

The payee should endorse below in ink or indelible pencil.

If the endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

Thomas H. Porter, Jr.

a writing of a private nature, which might operate to the prejudice of another, which indorsement on the said check was, as he, the said Second Lieutenant Lowell F. Colbert, then well knew, falsely made and forged.

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

Specification: In that Second Lieutenant Lowell F. Colbert, Headquarters, 477th Bombardment Group (M), Godman Field, Kentucky, did, at Louisville, Kentucky, on or about 15 June 1944, wrongfully take and use without the consent of the owner, a certain 1942 Oldsmobile, 98 Sedanette, Illinois License No. 45-571, of the value of about \$1825.00, property of Second Lieutenant Frank R. Roberts, Air Corps, 617th Bombardment Squadron (M), Godman Field, Kentucky.

ADDITIONAL CHARGE II: Violation of the 61st Article of War.
(Finding of Not Guilty).

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

He pleaded guilty to the Specifications of Charge I and to Charge I, to the Specifications of Charge II and to Charge II, and not guilty to all other Charges and Specifications. He was found not guilty of the Specifications of Additional Charge II and of Additional Charge II, and guilty of all other Charges and Specifications. No evidence of previous convictions

was introduced at the trial. He was sentenced "to be dismissed from 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 thirteen (13) years". The reviewing authority approved the sentence but reduced the confinement imposed to five (5) years and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

Specification I, Charge I and Specification 1, Charge II:

During November 1943, Second Lieutenant Wilson A. Copeland, 619th Bombardment Squadron, Godman Field, Kentucky, had a personal checking account with the Crown Savings Bank, Newport News, Virginia. On 3 November 1943 he noticed that someone had written, upon a stub in his check book, the following words and figures:

"No. 17 \$250.00
 11-3- 1943.
 To. Cash
 For. Cash "

He had not made the entry himself and could not account for it, but he had, at one time left his check book in his office over night instead of taking it with him to his quarters (R. 10; Pros. Ex. 1).

During December 1943 Lieutenant Copeland received cancelled checks from the bank and among them was one in the sum of \$250.00, numbered "17", dated "11-3-1943", payable to "Paul F. Bradford" and purporting to be signed by "Wilson A. Copeland". It had been endorsed "Paul F. Bradford" and was paid by the bank, the amount being charged against Lieutenant Copeland's account. Lieutenant Copeland had not drawn such a check nor had he authorized the accused or anyone else to do so (R. 11).

On 4 November 1943 the accused presented said check (Pros. Ex. 2) to a teller of the First National Bank, Mt. Clemens, Michigan for cashing and received \$250.00 in cash therefor (Pros. Ex. 7). By stipulated testimony of an Examiner of Questioned Documents of the United States Treasury Department it was shown that, in his opinion, the accused wrote the check and the indorsement thereon (Pros. Ex. 6).

Specification 2, Charge I and Specification 2, Charge II:

On 31 December 1943, Second Lieutenant Thomas H. Porter, Jr., Ordnance Department, received a check of the United States Treasury Department dated 31 December 1943 and payable to himself in the amount of \$221.80. He placed the check in his wallet, the wallet in his clothes and then undressed, hung the clothes up in his locker and went to bed. The next morning his wallet was missing and although he searched for it he was unable to find it. He did not endorse or cash the check and he did not authorize the accused or anyone else to do so (Pros. Ex. 3).

On 5 January 1944 the accused presented said check endorsed "Thomas H. Porter, Jr." to the Commonwealth Bank, Gratiot-Chene Branch, Detroit, Michigan, and received \$221.80 in cash therefor (Pros. Ex. 9). By stipulated testimony of an expert in handwriting it was shown that, in his opinion, the endorsement on the check was in the handwriting of the accused (Pros. Ex. 6).

Additional Charge I and the Specification:

On Wednesday, 14 June 1944, a 1943 model Oldsmobile automobile, the property of Second Lieutenant Frank R. Roberts, Air Corps, was delivered to the Standard Auto Company, Louisville, Kentucky, for repairs. Work was done upon the car but a leaking radiator required that it remain in the shop until the following Saturday before completion of the repairs. The accused went to the Standard Auto Company on Thursday, 15 June 1944 at about 4 o'clock p.m. and asked whether Lieutenant Roberts' car was ready. Upon being told about the condition of the radiator and that the automobile could only be used if water was added from time to time, because of the leak, the accused took the car, saying he was anxious to get gas from a friend in Indiana and would return it that evening. When the proprietor of the shop arrived there the next morning he found Lieutenant Roberts' automobile in the garage with the accused asleep in the back seat (R. 17). Meanwhile Second Lieutenant Carl B. Taylor, Adjutant General's Department, had seen the accused driving Lieutenant Roberts' car on the streets of Louisville accompanied by two women at about 1:15 or 1:30 a.m. on the morning of 16 June 1944 (R. 18, 19). Since he knew that Lieutenant Roberts had placed his car in the shop for repairs and that he was "on the post" at the time he reported the incident to Lieutenant Roberts as soon as he returned to camp on the same morning (R. 14, 19). Lieutenant Roberts thereupon telephoned to the Standard Auto Company, inquired whether his car had been taken out during the previous night and when told that it had been and that the accused, who had taken the car out was there, he requested to talk with him and did so. Lieutenant Roberts then asked the accused "What in the hell are you doing taking my car on the streets?" to which the accused replied that "he thought he was doing (Lieutenant Roberts) a favor". Lieutenant Roberts thereupon reported the matter to Captain Parker who advised him to report the circumstances to "the Base". Lieutenant Roberts had not, on this or any previous occasion, given the accused permission to take, or use, his car. When the automobile left the garage in the accused's possession the speedometer reading was 2846 and when it was returned the reading was 2907 (R. 14, 15, 17).

4. For the accused, both First Lieutenant Edward Nichols, Air Corps (R. 13) and Captain James W. Redden, Air Corps, who was Assistant Defense Counsel (R. 24) testified that the accused had discussed pending Court-Martial Charges with each of them, with a view to obtaining the services of individual defense counsel.

Second Lieutenant Joseph G. Echol, 477th Bombardment Squadron, testified that he has known the accused for more than two years and as far as he knows, the accused "has conducted himself as a gentleman". He had "never known him to get into any trouble at any time" (R. 28).

Second Lieutenant Lester Norris, 617th Bombardment Squadron, has known and has served with the accused since October 1942. He has "no reason to doubt his reputation" and having "lived with the accused for a period of approximately 6 to 8 months and during that time we lived together and slept together * * * I found no reason to doubt his integrity" (R. 28).

The accused having been advised of his rights, elected to be sworn as a witness and testified substantially as follows:

With regard to the forgeries he stated that in November 1943 he "was having quite a bit of family trouble". Although he has a son, 14 months old, he and his wife "hadn't been getting along any too well". She was costing him "quite a bit of money" and he "thought it was his duty to give her anything she asked for" because he "didn't know exactly what her reason was for asking at all". Accordingly, although he believed he had sent her \$200 he also sent her the proceeds of the \$250 check to which he had forged Lieutenant Copeland's name on 3 November 1943. His wife had claimed that she had to have an operation because of the birth of the baby. He knew that he "was doing wrong at the time". Since then he had the money to reimburse Lieutenant Copeland "but didn't know whether to walk up to him and say 'Here is the money I had taken'" (R. 31).

Prior to the time he forged the endorsement of Lieutenant Porter on the Treasury check for \$221.80 the accused's wife had called him from Los Angeles and said she wanted to come back home. He then sent her "most of the money for that month which was close to \$200". Thereafter he received word from Tampa, Florida that his brother had been seriously injured in an automobile accident and might die at any moment. He, thereupon, took the proceeds of the forged Treasury check and used this for an airplane trip to Florida and return (R. 32). On cross-examination he admitted taking Lieutenant Porter's wallet from the locker in his room but denied that it was on 31 December 1943 as Lieutenant Porter had stated but said that he took it on 4 January 1944 (R. 34). He also admitted indorsing the check and using his own identification card at the time he cashed it (R. 35).

With regard to the taking of Lieutenant Robert's automobile he stated that on 15 June 1944 he was with a group of 6 or 8 officers who were in Lieutenant Robert's quarters "talking about going different places". Someone mentioned going to Cincinnati and the accused said he would like to go because he had friends there whereupon Lieutenant Roberts said: "I will take you down there". The accused said he would get the gas. Later he went to the garage where Lieutenant Roberts had placed his car and took it out. When he returned to the garage the proprietor had gone. After waiting for about half an hour he left and again returned expecting to find the night watchman. Failing in this he left again and at 1:30 a.m. accompanied then by two women he saw Lieutenant Taylor and spoke to him. After taking the women home he once more returned to the garage and slept there in the car from 2 a.m. to 6 a.m. When he woke up he ran

the car into the garage and again went to sleep until about 8 a.m. when he was awakened by a telephone call from Lieutenant Roberts (R. 29, 33). During the night he had driven the car into Indiana in order to get gas and he estimated that he had driven the car about 35 miles (R. 30).

5. Notwithstanding the accused's pleas of guilty to Charges I and II and the Specifications thereto, the prosecution adduced full and complete evidence as to his guilt of the offenses alleged therein and the accused testified under oath at the trial regarding the circumstances surrounding each of them. The record of trial is therefore amply sufficient to support the findings of the court thereon.

With respect to the Charge of wrongfully taking and using the automobile of his brother officer without consent the accused endeavored to show a tacit acquiescence of the owner in his admitted use of the car. The testimony of the accused on this score is, however, so vague and indefinite as to lack persuasion and the court was justified in disbelieving it. Lieutenant Roberts, the owner of the automobile, and the accused were not sufficiently intimate in their acquaintance to justify the assumption of the accused that his unauthorized use of the car at a time when it was in a garage undergoing repairs which had not been completed would be condoned by the owner. As a matter of fact, the evidence of the prosecution and the defense shows that the accused arbitrarily took the automobile from the garage without the knowledge or consent of Lieutenant Roberts at a time when he knew, or should have known, that the car was not fit for use. He was warned by the proprietor of the repair shop about the leaking radiator yet he nevertheless took and drove the car a distance of sixty-one (61) miles according to the speedometer readings. Clearly, the actions of the accused show a wilful, wrongful and unlawful use of the car without the owner's consent and the evidence is deemed legally sufficient to support the findings of guilty of Additional Charge 1 and its Specification.

It is difficult to comprehend the import of the testimony of Lieutenant Edward Nichols and Captain James W. Redden, both of whom were witnesses for the defense. Lieutenant Nichols was unable to give character evidence because he had not known the accused long enough and Captain Redden was not asked to do so. Each did, however, testify about conferences the accused had with them with regard to obtaining individual defense counsel for the accused, but nothing appears to have been done about it. Whatever may have been in the accused's mind at that time the record shows that, at the outset of the trial he "stated that he desired to be defended by the regularly appointed defense counsel, Captain George M. McCleod, Air Corps, and the regularly appointed assistant defense counsel, Captain James W. Redden, Air Corps."

6. The records of the War Department disclose that the accused was born in Washington, Indiana, and is 25½ years of age. After graduating

from high school in Indianapolis, Indiana, he attended Indiana Central College from 1939 to 1941. He was inducted on 31 July 1941 at Fort Benjamin Harrison, Indiana. Upon completion of the prescribed course of the Air Forces Officer Candidate School, Miami, Florida, he was commissioned a second lieutenant, Army of the United States, on 20 January 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of either Article of War 93 or Article of War 96.

William H. Lambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

(90)

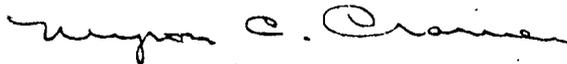
1st Ind.

War Department, J.A.G.O., ²¹ AUG 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 Lowell F. Colbert (O-571307), Headquarters, 477th Bombardment Group (M).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings 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 and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



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

3 Incls.

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

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 517, 26 Sep 1944)

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

(91)

SPJGW
CM 259970

24 AUG 1944

UNITED STATES)

THIRD AIR FORCE

v.)

Trial by G.C.M., convened at
Barksdale Field, Louisiana,
30 June 1944. Dismissal.

Second Lieutenant STANLEY
D. HYMAN (O-814907), Air
Corps.)

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Stanley D. Hyman, Air Corps, Section L, 328th AAF Base Unit (RTU-HB), Gulfport Army Air Field, Gulfport, Mississippi, did, at or near Fort Oglethorpe, Georgia, on or about 2 June 1944, wrongfully violate Paragraph 16 a (1) (d), Section II, Army Air Forces Regulation No. 60-16, dated 6 March 1944, by flying a military airplane at an altitude less than five hundred feet above the ground.

Specification 2: In that 2nd Lieutenant Stanley D. Hyman, * * *, did, at or near Fort Oglethorpe, Georgia, on or about 3 June 1944, wrongfully violate Paragraph 16 a (1) (d), Section II, Army Air Forces Regulation No. 60-16, dated 6 March 1944, by flying a military airplane at an altitude less than five hundred feet above the ground.

He pleaded not guilty to and was found guilty of the Charge and both 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:

On 2 June 1944 the accused flew as pilot an AT-23A Army airplane bearing serial number 42-43374, buzz number TM-5, from Atlanta, Georgia, to Greenville, South Carolina, accompanied by a crew consisting of Second Lieutenant Henry E. Chouteau, Technical Sergeant Charles E. Ellis and Corporal Doyle L. Hawkins. En route and at about 1600 or 1630 hours on 2 June the accused flew over Fort Oglethorpe, Georgia, passing over the military installation about three times, at an altitude between 75 and 100 feet, varying according to the testimony of Captain Lucien R. Rawls and Major Harry L. Hickey, two witnesses in the vicinity who observed the plane from the ground (Exs. F, G). The plane created quite a disturbance among the personnel located there and at one point passed between two large trees below tree top level. The accused's three crew members each testified that the airplane piloted by accused was flying at an altitude of between 500 and 800 feet and that it was never flown under 500 feet while over this area (R. 11, 12, 14). On one of these passes over the military reservation and pursuant to prearrangement with accused, Corporal Hawkins dropped a note from the tail of the ship. The note was in an envelope inclosed in a bag of marbles weighing about a half pound with red and white ribbons attached as streamers, and intended for accused's girl friend stationed with the WAC unit at Fort Oglethorpe.

On 3 June 1944 accused flew the same airplane and crew from Greenville, South Carolina, to Maxwell Field, Alabama, and en route flew over Fort Oglethorpe, Georgia, and dropped another note to his girl friend. Captain Rawls, Major Hickey, Private Otis C. Cornwell, Private Coyel V. Ricketts and Sergeant Earl A. Lucas each testified by way of deposition that on 3 June 1944 at about 1630 hours, a two motored Army bomber made two sweeps over Fort Oglethorpe, Georgia, at an altitude of between 60 and 150 feet, flying at one point just over the treetops. Captain Rawls and Private Cornwell recognized the buzz number on the airplane as TM-5. Accused's three crew members each testified that the airplane was flying at an altitude of between 500 and 800 feet, and was never flown under 500 feet while over Fort Oglethorpe. Upon returning to his station at Maxwell Field, accused made a verbal report concerning the flight to his commanding officer, Captain Clarence R. McCourt, saying that he had experienced trouble with the airplane. After describing the trip and the trouble he had

with the plane he stated he had flown over Fort Oglethorpe, Georgia, to drop a note to his girl friend stationed there and destined for shipment overseas. Accused told Captain McCourt that he made three passes over Fort Oglethorpe. The first was for the purpose of locating the area, the second was a trial run and the third was for the purpose of dropping a note.

Accused voluntarily made a sworn statement to the officer investigating the charges (Ex. K), in which he stated that he was piloting an airplane in the vicinity of Fort Oglethorpe on 2 June and 3 June 1944; that on 2 June he left Atlanta, Georgia, en route to Greenville, South Carolina, in order to obtain some repair material at the sub-depot located there; that he flew to Greenville by way of Chattanooga, Tennessee, in order to test his right engine which had been repaired in Atlanta, by giving it a little flying time; that en route he passed over Fort Oglethorpe, Georgia, at an altitude which he estimated to be not less than 500 feet at any time; that a note was dropped to his girl friend at Fort Oglethorpe, using the same method as that used in dropping a tow target sleeve; that he was familiar with the various flying regulations and had signed a certificate evidencing his familiarity therewith; that on 3 June following the completion of repairs to his plane he left Greenville, South Carolina, for Maxwell Field, Alabama; that he flew by way of Chattanooga, Tennessee, in order to avoid thunderstorms, and again dropped a note to his girl friend at Fort Oglethorpe, Georgia, that he did not use his altimeter as a reference while over Fort Oglethorpe, and did not remember what the lowest altitude was while flying from Greenville to Maxwell Field, but estimated that his altitude was never less than 500 feet at any time; that he possessed approximately 590 flying hours, military and civilian inclusive; that about 300 of the 590 hours had been flown in B-26's (2 motored bombers).

4. No evidence was introduced by defense and after his rights as a witness were explained, accused elected to remain silent.

5. The evidence is clear and uncontradicted that accused piloted an AT-23A military airplane over Fort Oglethorpe, Georgia, without authority on 2 June and 3 June 1944. Although accused contended that he flew from Atlanta, Georgia, to Greenville, South Carolina, by way of Chattanooga, Tennessee (in the vicinity of Fort Oglethorpe) on 2 June in order to test his right engine and from Greenville, South Carolina to Maxwell Field, Alabama, by way of Chattanooga, Tennessee on 3 June in order to avoid thunderstorms, neither of which course was the most direct route to his destination, it is quite apparent from the evidence that his prime reason was for the purpose of dropping a note to his girl friend, who was a member of the Women's Army Corps stationed at

Fort Oglethorpe, Georgia, and who was destined to depart for overseas duty. This obvious conclusion is supported by the testimony of accused's crew members as well as his own sworn statement to the effect that the note was written and prepared for launching in each instance before the take-off. Furthermore, accused had by prearrangement with Corporal Hawkins agreed upon dropping the note at a time when accused gave the proper signal. The fact that the note was in a large, sealed envelope, inclosed in a bag with glass marbles for a weight and attached to which were red and white ribbons for streamers is further proof that the idea of dropping the note was not spontaneous nor an afterthought following accused's departure from Atlanta on 2 June and from Greenville on 3 June, but was conceived, and perfected before his departure on both dates. The court was therefore fully warranted in disbelieving his statement that the flight by way of Fort Oglethorpe was made for the reasons he advanced.

The only controverted issue of fact in this case is whether accused flew his plane at an altitude of less than 500 feet while over Fort Oglethorpe, Georgia, on 2 June and 3 June in violation of Army Air Forces Flying Regulations described in the Specifications. The testimony on this point is in conflict. Accused in his sworn statement and each of his three crew members maintained in their testimony that the plane was never flown at an altitude less than 500 feet from the ground, while five witnesses for the prosecution testified by deposition upon written interrogatories that the plane was flown at an altitude of between 60 and 150 feet from the ground while over the Fort Oglethorpe area. Two of these witnesses were able to discern the buzz number on the plane. One of them said the plane flew between two trees and all five of them were positive that it flew as low as the top of the trees in the vicinity. The witness Private Coyel V. Ricketts testified that on the second pass over Fort Oglethorpe on 3 June 1944, the plane flew over a tree 50 to 75 feet high and that the backwash from the plane propellers caused a noticeable waving of the treetops.

In finding accused guilty as charged it is evident that the court disbelieved accused and his crew members, and saw fit to believe the five witnesses for the prosecution. Even though it be contended that the testimony of the crew members should be accorded more probative value due to their training, experience and judgment, than that of the prosecution witnesses who possessed no such qualifications in judging the altitude of an airplane from the ground, yet the court is allowed great latitude in drawing its own conclusions as to the credibility of the witnesses and may attach such weight to their testimony as their credibility may warrant (MCM, 1928, par. 124a). There is nothing in the record of trial to indicate that this discretion was abused by the court in arriving at its findings of guilty. There was ample evidence presented to justify the findings.

6. Accused is 21 years of age. He graduated from high school and attended Miami University for two years. In civil life he was an automobile mechanic. He entered the military service 29 June 1942 and served as an enlisted man until 3 November 1943, when upon completion of Army Air Forces Pilot School, Turner Field, Albany, Georgia, he was appointed and commissioned second lieutenant, Army of the United States.

7. The court was legally constituted and had jurisdiction of the person and 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 authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffy, Judge Advocate.

Robert B. Hawwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

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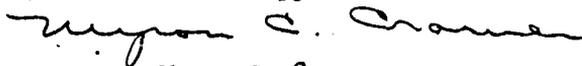
War Department, J.A.G.O., **11 OCT 1944** - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Stanley D. Hyman (O-814907), 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.

3. Consideration has been given to the inclosed letter from Mr. Isaac Hyman, father of the accused, dated 17 August 1944, to the inclosed letter from Congressman Ralph A. Gamble dated 1 August 1944 with inclosure from the accused's father, and to the inclosed memorandum from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, dated 7 October 1944, in which he recommends that the sentence be commuted to a forfeiture of pay in the amount of \$75 per month for twelve months. I concur in that recommendation.

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-Ltr fr Isaac Hyman, dated 17 Aug 44.
- Incl.3-Ltr fr Cong Ralph A Gamble, dated 1 Aug 44 w/incl.
- Incl.4-Memo of Gen Giles, 7 Oct 44.
- Incl.5-Dft ltr for sig S/W.
- Incl.6-Form of action.

(Sentence confirmed but commuted to forfeiture of \$75 pay per month for twelve months. G.C.M.O. 583, 25 Oct 1944)

and by means thereof, did fraudulently obtain from the Hotel Mark Hopkins, San Francisco, California, twenty dollars (\$20.00) United States currency, he the said 2nd Lt. Thomas A. Mealey, Jr., then well knowing that he did not have and not intending that he should have, sufficient funds in the Waccamaw Bank and Trust Company, Holly Ridge, North Carolina, for the payment of said check.

Specification 2: Similar to Specification 1 except that it alleges a check for \$17.75 made and uttered on 14 February 1944, and the fraudulent obtaining of accommodations.

Specification 3: Similar to Specification 1 except that it alleges a check for \$30 made and uttered on 17 February 1944.

Specification 4: (Nolle prosequi entered).

Specification 5: In that 2nd Lt. Thomas A. Mealey, Jr., Transportation Corps, Officers Replacement Pool, Fort Mason, California, being indebted to Rogers Peet Company, New York City, New York, in the sum of \$129.50 for uniforms purchased, which amount became due and payable on or about 1 August 1943, did, at New York City, New York, from 1 August 1943 to 8 March, 1944, dishonorably fail and neglect to pay said debt.

Specification 6: In that 2nd Lt. Thomas A. Mealey, Jr., Transportation Corps, Officers Replacement Pool, Fort Mason, California, being indebted to the Beverly Hills Hotel, Beverly Hills, California, in the sum of \$64.10, for accommodations, which amount became due and payable on or about 6 December 1943, did, at Beverly Hills, California, from 6 December 1943 to 24 February 1944, dishonorably fail and neglect to pay said debt.

Specification 7: In that 2nd Lt. Thomas A. Mealey, Jr., Transportation Corps, Officers Replacement Pool, Fort Mason, California, being indebted to the Mocambo Club, Hollywood, California, in the sum of \$170.00, lawful money of the United States, for food and drink, which amount became due on or about 26 January, 1944, did, at Hollywood, California, from 28 January 1944 to 31 March 1944, dishonorably fail and neglect to pay said debt.

Specification 8: In that 2nd Lt. Thomas A. Mealey, Jr., Transportation Corps, Officers Replacement Pool, Fort Mason, California, did, at Fort Mason, California, on or about 22 February, 1944, with intent to deceive Colonel Melvin A. Craig, GSC, his section chief, officially report to the said Colonel Melvin L. Craig, that on 19 February 1944, he had forwarded a check for \$100.00 to

the Mocambo Club, Hollywood, California, which report was known by the said 2nd Lt. Thomas A. Mealey, Jr., to be untrue, in that he had not sent said check to said Mocambo Club.

Specification 9: In that 2nd Lt. Thomas A. Mealey, Jr., Transportation Corps, Officers Replacement Pool; Fort Mason, California, did, at Fort Mason, California, on or about 24 February 1944, with intent to deceive Colonel Melvin L. Craig, GSC, his section chief, officially report to the said Colonel Melvin L. Craig, that on 23 February, 1944, he had forwarded a check for \$64.10 to the Beverly Hills Hotel, Beverly Hills, California, which report was known by the said 2nd Lt. Thomas A. Mealey, Jr., to be untrue, in that he had not sent said check to said Beverly Hills Hotel.

Specification 10: In that 2nd Lt. Thomas A. Mealey, Jr., Transportation Corps, Officers Replacement Pool, Fort Mason, California, did, at Fort Mason, California, on or about 26 February 1944, with intent to deceive Colonel Melvin L. Craig, GSC, his section chief, officially state to Colonel Melvin L. Craig that he had paid the Beverly Hills Hotel the sum of \$64.10, and the Mocambo Club the sum of \$100.00, which statement was known by the said 2nd Lt. Thomas A. Mealey, Jr., to be untrue, in that he had not paid said sum to the Beverly Hills Hotel Company or to the Mocambo Club.

He pleaded guilty to Specifications 1, 2 and 3, except the words "with intent to defraud" and "not intending that he should have"; guilty to Specifications 5, 6 and 7, except the word "dishonorably"; guilty to Specifications 8 and 10, except the words "with intent to deceive Colonel Melvin L. Craig, GSC, his section chief"; guilty to Specification 9, except the words "with intent to deceive"; and not guilty to the Charge, but guilty of a violation of the 96th Article of War. He was found guilty of all Specifications and of the Charge, and was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

At a former trial on 25 April 1944, the accused was found guilty of the same Specifications and Charge and was sentenced to dismissal, but the reviewing authority disapproved the sentence and ordered a rehearing.

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

a. Specification 5: About 13 February 1943 accused ordered a blouse, two pair of trousers, two caps and a raincoat, at a total price of \$129.50, from Rogers Peet Company of New York, and signed an agreement to pay in full upon receiving his uniform allowance. The items ordered were

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delivered to him about 19 March 1943. Letters demanding payment were written to accused in April, May, June, July and August 1943. Payment had not been made on 17 April 1944 (R. 15-16; Ex. B). When accused was interviewed by Major Charles D. Smith, investigating officer, on 24 March 1944, he stated, after being warned of his rights, that he had not "taken care of" the bill and that he had received his uniform allowance of \$250 (R. 25, 27).

b. Specification 6: Accused was a guest in the Beverly Hills Hotel, Beverly Hills, California, from 4 December to 6 December 1943. There were other officers in a bungalow with accused, but he assumed liability for the rent. While a guest there he gave the hotel a check for \$25, either for cash or on account, which was returned "for insufficient funds". The total bill was \$66.10, including charges for damages. The assistant manager of the hotel sent accused a telegram about the bill on 16 December 1943, but received no reply. On 2 January 1944 he received a letter from accused stating that he would call at the hotel "at his first opportunity" to settle the account. On 17 January he received another letter from accused stating that he would pay the bill on 1 February. Later accused sent a letter dated 14 February, explaining that he had been unable to pay on 1 February because of his transfer and unforeseen expenses, but indicating that he would be able to forward the amount due as soon as he was reimbursed for his travel and living expenses (R. 16). The account was not paid until 3 May 1944 (R. 51; Def. Ex. C).

c. Specification 7: Accused became indebted to Mocambo Night Club, Los Angeles, California, in the amount of \$170 on account of seven of his checks to the club which were returned by the bank because of insufficient funds. The checks (Exs. 5, 6, 7, 8, 9, 10 and 11) are dated from 15 January to 28 January 1944, and were not paid until 13 June 1944. Demand for payment was made on accused about 10 February and again at a later date (R. 22-24, 31-32; Exs. E, F).

d. Specifications 1, 2 and 3: Accused registered at the Hotel Mark Hopkins in San Francisco about 2 February 1944 and remained there until about 14 March. About 17 February a check which the hotel had cashed for accused was returned by the bank. About 20 February an official of the hotel talked to accused about the check, as the hotel had cashed his checks amounting to \$132.75 and it was expected that others would be returned. The next day accused took up the check that had been returned and also gave the hotel \$50 to cover other checks that might come back (R. 12-14). Among the checks cashed for accused by the bank were the following: check dated 8 February 1944 for \$20 (Ex. 1), check dated 14 February 1944 for \$17.75 (Ex. 2), and check dated 17 February 1944 for \$30 (Ex. 3). The checks were drawn on Waccamaw Bank & Trust Company, Holly Ridge, North Carolina. Accused maintained an account in that bank from a time prior to 25 October 1943 until

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NAVY DEPARTMENT

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27 March 1944, but from 12 November 1943 until 6 March 1944 the balance in the account was never in excess of \$4. The three checks referred to were returned by the bank because of insufficient funds. The bank sent regular monthly statements to accused, and no deposits were made in the account in January and February 1944 (R. 10-12, 26; Exs. A and 4).

e. Specifications 8, 9 and 10: In February 1944 Colonel Melvin L. Craig, General Staff, San Francisco Port of Embarkation, received through official channels a letter from the Mocambo Club with reference to outstanding checks of accused amounting to \$100, and indorsed it to accused for a statement of contemplated action. By fourth indorsement (Ex. C) of 22 February accused stated to Colonel Craig that on 15 January a check for \$200 was deposited in his account at the Waccamaw Bank & Trust Company; that on the strength of this deposit he cashed several checks during the last half of January; that on 10 February he received a statement showing that the \$200 check had been returned for insufficient funds and his account was overdrawn; that he had "contacted" all persons who had cashed checks for him during this period, including the Mocambo Club; and that he had forwarded a check for \$100 to that club on 19 February, which was satisfactory to the management (R. 17-18).

There was introduced in evidence a letter dated 14 February from Beverly Hills Hotel with reference to \$64.10 owed by accused, along with several indorsements (Ex. D). Colonel Craig identified his signature to a fifth indorsement inviting attention to a fourth indorsement to him by accused dated 24 February, in which accused stated that a check for \$64.10 was forwarded to the Beverly Hills Hotel on 23 February 1944. These papers were subsequently returned to Colonel Craig and he held them until 10 March thinking that accused might pay "these accounts". He then returned them to the director of personnel with a recommendation that the matter be referred to the Inspector General (R. 19-21).

About 26 February, Colonel Craig interviewed accused officially about the \$64.10 owed to the Beverly Hills Hotel and the sum owed to the Mocambo Club. Accused assured him that the accounts had been paid, and that checks for \$64.10 and \$100, respectively, had been sent them (R. 18-19).

When interviewed by the investigating officer, Major Smith, on 24 March, accused stated that his indorsements of 22 and 24 February, which he identified, were "untrue in their entirety", as well as his verbal report to Colonel Craig that he had taken care of the obligations to the Mocambo Club and the "Hotel Mark Hopkins". It was not true that a check for \$200 had been deposited and returned, nor that he had sent a check for \$100 to the Mocambo Club, nor that he had sent a check for \$64.10 to the Beverly Hills Hotel. Accused stated that he had written both parties and made suitable explanations to them and thought he would be able to "take care of that" on the same day that he talked to Colonel Craig. For that reason he made the response to Colonel Craig, as there was a "dead line" for it (R. 25-29).

4. The accused testified that he had been in the military service since 1942, was commissioned 1 April 1943, was stationed at Camp Davis, North Carolina, and then at Camp Haan, California, and was assigned to San Francisco Port of Embarkation 1 February 1944 (R. 32-33). From the time he entered the Army he contributed to the support of his parents, and after he was commissioned he sent them at least \$100 per month. The remaining part of his pay was not sufficient for his expenses and he became indebted to several persons. While at Camp Haan he conferred with the finance officer to find out whether as a single officer he was entitled to dependency allowances, and found that he was. He had been paid a rent allowance one month at Camp Davis, but was not paid at Camp Haan. The finance officer at Fort Mason paid his current salary with family allowances, amounting to about \$250, but did not pay the amount due for December and January. He assured accused that since the account for the back amount had been filed accused would receive it in a few days (R. 35-36). Subsequently, on 10 June, accused received the balance of the allowance for the period from 1 April 1943 (R. 48-49).

As to the Rogers Peet Company account accused testified that he made the contract before he was commissioned and it came due when he was commissioned. He did not pay it on receipt of his clothing allowance because in the preceding six months he had incurred other and more pressing debts, and because he had maintained an account with that company as a civilian and felt that it was desirable to pay the other bills first (R. 33). Accused received two letters from Rogers Peet Company about the bill, stated that he would pay as soon as possible, and thought he had explained the situation. He tried to borrow money to pay this and other bills (R. 35-36).

He stated that he registered at the Beverly Hills Hotel for four officers, including himself, as he knew the manager. He remained there one night but was the guest of friends the next night. When he returned to the hotel to accompany the other officers to Camp Haan, he found the bill unpaid, but he did not have enough money to pay the entire amount. He told the manager he would speak to the other officers and see that the hotel was paid, which he did. He wrote the manager about the bill and made a trip to the hotel to see him personally, but did not pay the bill at that time (R. 34-35).

Accused testified that the Mocambo Club indebtedness came about when he cashed checks there on several occasions. When he cashed the checks he had in his possession a post-dated check for \$200 which he intended to deposit, but subsequently he was forced to return the check to the maker as the latter could not cover it. When he thought he was going to receive his dependency allowance he called the club and stated that he was forwarding a check for the amount of the debt (R. 34-35).

When accused arrived at San Francisco he checked in at the Hotel Mark Hopkins, where he was billed for room rent and also cashed some checks

for living expenses. He fully intended to have money in the bank, although he had returned the \$200 check to the maker, because he was expecting to be reimbursed by the finance officer for his travel expenses from Camp Haan. But he was not paid because he was pressing for payment of his dependency allowances (R. 35).

Accused stated that Colonel Craig spoke to him about the Mocambo Club and Beverly Hills Hotel debts and told him to do something about them. Since he did not have the money to pay them, all that accused could do was get in touch with the managers at both places and explain about expecting a check from the finance officer. When he did not receive this money accused could not send checks to these creditors (R. 36-37). When he wrote "the indorsement" to Colonel Craig, there was a deadline for reply, and he had to comply. He had held it as long as possible, made several trips to see the finance officer, who on the date of the indorsement had assured accused the amount would be paid. Accused thought he was getting the matter cleared by sending checks (R. 47-48).

On cross-examination accused testified that he opened his account at the Waccamaw Bank when he was commissioned, and his first check as an officer, 1 May 1943, was sent there. His check went there each month while he was at Camp Davis. When he came to Camp Haan in October 1943 he collected his pay personally. The only amount deposited in the bank after he came to Camp Haan was \$175, either from pay or travel allowance (R. 37, 48). He did not receive a statement from the bank after September, and could not recall his balance for any month. He drew checks in January 1944 (R. 37-38, 49). The post-dated check for \$200 was given to him by another officer when it became apparent that accused was to be transferred to the San Francisco Port of Embarkation, about the middle of January. Accused had intended to deposit the check when it became due, about the end of January. He had it in his possession when he made the checks to the Mocambo Club. The check was returned to the maker on the day accused came to the San Francisco Port of Embarkation, and he did not have it when he drew checks to the Hotel Mark Hopkins (R. 38-40). He made no deposits in January and February. The last deposit made was \$175, and he thought it was after 16 November 1943, when he moved to Camp Haan (R. 40).

When the first check came back to the Hotel Mark Hopkins, accused redeemed it and put up \$50 in case others were returned. Checks amounting to \$100 which had been cashed were expected to be returned (R. 41). When Colonel Craig spoke to accused about the debt to the Mocambo Club, accused told him he would take care of it immediately, called the club, and stated that he was collecting from the finance officer and was sending a check to the club (R. 41). Accused told Colonel Craig he had paid \$64.10 to the Beverly Hills Hotel, but he had not done so. He identified his signature

on the indorsements of 22 and 24 February. He had not paid the Mocambo debt on 22 February, and he had not deposited the \$200 check referred to in the indorsement (R. 41-43). He did not pay Rogers Peet Company when he received his uniform allowance, but wrote them about it when he received a statement (R. 44). Accused gave the \$17.75 check to the Hotel Mark Hopkins on his bill, and cashed the other two checks for expenses or to send money home (R. 44-45). After arriving in California accused made some deposits but did not have enough money in the bank to pay the checks to the Mocambo Club (R. 45). He first began investigating his right to demand dependency allowances in January 1944 (R. 47).

5. After the findings of guilty had been made, and before the court closed to adjudge the sentence, the defense was permitted to introduce receipts (Def. Exs. A, B, C, D) showing payments made to the creditors of accused, as follows: 3 May 1944, Beverly Hills Hotel, \$64.10; 10 June, Hotel Mark Hopkins, \$125.74; and 13 June, Rogers Peet Company, \$129.50, and Mocambo Club, \$170 (R. 51).

6. a. Specification 5. About 13 February 1943, prior to receiving his commission on 1 April 1943, accused ordered uniforms amounting to \$129.50 from Rogers Peet Company of New York, and received the items ordered about 19 March 1943. Accused signed an agreement to pay in full upon receiving his uniform allowance, but did not comply with it. The company demanded payment by letters written in April, May, June, July and August 1943, but accused did not pay the account until 13 June 1944. Accused testified that he did not pay the account when he received his uniform allowance because in the preceding six months he had incurred other and more pressing debts which he desired to pay first, and because he had maintained an account with the company as a civilian.

In the opinion of the Board of Review the evidence sustains the finding of guilty, in violation of the 95th Article of War. Although the mere failure to pay a debt is not an offense, yet where such nonpayment amounts to dishonorable conduct because accompanied by such circumstances as fraud, deceit or specific promises of payment, it may properly be deemed to constitute an offense (CM 221833, Turner, 13 BR 239, 1 Bull. JAG 106; CM 246686, Beasley). Accused did not pay the debt until almost 15 months after the uniforms were delivered to him, although he had promised in writing, as a part of the purchase, that he would pay as soon as he received his uniform allowance. Demand for payment was made many times. When payment was finally made, accused had already been tried and found guilty at a first trial of dishonorable failure to pay the debt, and was awaiting a second trial on rehearing. Under the circumstances the failure of accused to pay the debt was clearly dishonorable.

b. Specification 6: Accused and three other officers occupied a bungalow at the Beverly Hills Hotel, Beverly Hills, California, from

4 December to 6 December 1943. Accused registered for the room and assumed liability for the rent. While a guest accused gave the hotel a check for \$25, either for cash or as a payment on account. The check was later returned "for insufficient funds". The total bill, \$66.10, which included charges for damages, was not paid by accused at his departure although, according to accused, he promised the manager that he would see that the hotel was paid. On 16 December the hotel sent accused a telegram requesting payment but received no reply until 2 January 1944, when accused wrote that he would pay "at his first opportunity". Accused wrote again about 17 January promising that he would pay the bill on 1 February which he failed to do. In another letter dated 14 February accused said that he had been unable to pay because of a transfer and unexpected expenses but indicating he would pay when he was reimbursed for travel and living expenses. The bill was not paid until 3 May.

An obligation to a hotel is not an ordinary debt. As the Board of Review said in CM 232882, Koford, 19 BR 229 (242):

"When a person registers as a transient guest at a hotel, credit is not extended to him in an ordinary sense. The hotel management merely grants him the courtesy of deferring payment for his accommodations until the time of his departure. In accordance with what is known to be an almost universal custom, such a guest tacitly represents that he is financially able to pay for his lodging and will do so at the proper time."

Although there is no showing here that accused left the hotel surreptitiously, as the officer did in the Koford case, accused did fail to pay the bill on departure, thereby showing the falsity of his implied representation that he was able to pay and would pay the charges for the bungalow rental (but not necessarily including the unexpected item for damages) when the bill was presented. Subsequently he made several promises to pay which he failed to keep. Furthermore his discreditable performance is heightened by the fact that he gave the hotel a worthless check, apparently in part payment of the account. The Board is of the opinion that accused was guilty of dishonorable conduct in his dealings with the hotel in this matter.

c. Specification 7: Accused cashed seven checks, amounting to \$170, at the Mocambo Club, Los Angeles, California, in the latter part of January 1944. All of them were returned unpaid to the club by the bank. Although demand for payment was made on accused about 10 February, he paid no part of the debt until 13 June 1944. In the opinion of the Board the evidence sustains the finding of guilty of this Specification. This was no ordinary debt. Accused was under the duty to take up the checks immediately, if humanly possible to do so, or at least to make such payment as he was able.

d. Specifications 1, 2 and 3: In February 1944 accused made and uttered three checks to the Hotel Mark Hopkins, San Francisco, California, where he was a guest. The checks, drawn on the Waccamaw Bank & Trust Company, Holly Ridge, North Carolina, were as follows: 8 February, \$20 (Spec. 1);

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14 February, \$17.75 (Spec. 2); and 17 February, \$30 (Spec. 3). All of the checks were returned unpaid by the bank because of insufficient funds. The account of accused did not exceed \$4 from 12 November 1943 to 6 March 1944.

Accused claimed that he drew the checks in reliance on an expected refund of travel expenses by the finance officer. He also drew other checks to the hotel which came back unpaid, but put up money to pay them when the hotel brought them to his attention. Nevertheless, his conduct in making and uttering the three checks described in these Specifications was a violation of the 95th Article of War. It is dishonorable to draw checks without sufficient funds to pay them where the drawee knows, as he did here, that his bank account is insufficient.

e. Specifications 8, 9 and 10: Having been called on for a statement of his contemplated action with respect to \$100 of the checks held by the Mocambo Club, accused replied to Colonel Melvin L. Craig, General Staff, by an indorsement dated 22 February 1944, that he had cashed the checks on the strength of a \$200 check deposited to his account on 15 January, that on 10 February he had learned that the \$200 check was not good and his account was overdrawn, and that he had forwarded a check for \$100 to the club on 19 February. The indorsement was false in that a \$200 check had not been deposited to his account, and he had not sent a check to the Mocambo Club on 19 February.

Similarly, on 24 February, accused stated to Colonel Craig in an official indorsement that a check for \$64.10 had been forwarded to the Beverly Hills Hotel on 23 February. This statement was false.

On 26 February Colonel Craig interviewed accused officially about these same matters, and accused assured him that checks for \$64.10 and \$100, respectively, had been sent to the Beverly Hills Hotel and the Mocambo Club. In fact such checks had not been sent.

The making of false official statements is a violation of the 95th Article of War, and accused was properly found guilty.

7. War Department records disclose that this officer is 24 years of age, is unmarried, but has two dependents. He is a high school graduate and attended Rhode Island State College, Kingston, Rhode Island for two years. He majored in engineering and mathematics, and subsequently was employed as a mechanical engineer by a company manufacturing naval airplanes, until he was inducted into the service in October 1942. He attended the Antiaircraft Artillery School, Camp Davis, North Carolina, where he attained an academic rating of very satisfactory, and was commissioned a temporary second lieutenant, Army of the United States, 1 April 1943, and entered on active duty as an officer the same day.

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 of all Specifications and of the Charge and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Driver, Judge Advocate.

Robert Plannor, Judge Advocate.

F. J. Lott, Judge Advocate.

1st Ind.

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

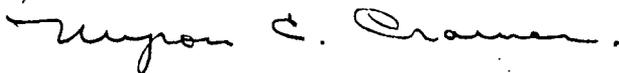
29 AUG 1944

- 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 A. Mealey, Jr. (O-1054058), Transportation Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. The accused dishonorably failed to pay three separate debts; fraudulently made and uttered three checks without having a bank account sufficient to pay them, and made three separate false official statements. 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 above recommendation, should it meet with approval.



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

3 Incls.

Incl.1-Rec. of trial.

Incl.2-Draft of ltr. for sig.

S/W.

Incl.3-Form of Action.

(Sentence confirmed. G.C.M.O. 545, 5 Oct 1944)

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

(109)

SPJGK
CM 259987

22 AUG 1944

UNITED STATES)

v.)

Captain Harry M. Loudon)
(O-308107), Air Corps.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Selman Field, Monroe,
Louisiana, 28 June 1944.
Dismissal

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates

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

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

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

Specification 1: In that Captain Harry M. Loudon, Air Corps, did, at Monroe, Louisiana, from about 10 September 1943 to about 15 November 1943, unlawfully, fraudulently, and feloniously convert to his own use approximately ten (10) gallons of gasoline of the value of about two dollars (\$2.00), property of the United States furnished and intended for the military service thereof.

Specification 2: In that Captain Harry M. Loudon, Air Corps, did, at Selman Field, Monroe, Louisiana, from about 10 September 1943 to about 15 November 1943, unlawfully, fraudulently, and feloniously convert to his own use approximately sixty (60) gallons of gasoline of the value of about twelve dollars (\$12.00), property of the United States furnished and intended for the military service thereof.

CHARGE II: Violation of the 98th Article of War.

Specification 1: In that Captain Harry M. Loudon, Air Corps, did, at Selman Field, Monroe, Louisiana, on or about 28 January 1944, wrongfully borrow from Corporal Rohmer B. Beard, Section C, 2530th Army Air Forces Base Unit, an enlisted man under his immediate command, the sum of ten dollars (\$10.00).

Specification 2: In that Captain Harry M. Loudon, Air Corps, did, at Selman Field, Monroe, Louisiana, on or about 3 March 1944, wrongfully borrow from Corporal Rohmer B. Beard, Section C, 2530th Army Air Forces Base Unit, an enlisted man under his immediate command, the sum of five dollars (\$5.00).

Specification 3: In that Captain Harry M. Loudon, Air Corps, did at Selman Field, Monroe, Louisiana, on or about 12 January 1944, wrongfully borrow from Staff Sergeant J. D. Weems, Section B, 2530th Army Air Forces Base Unit, an enlisted man under his immediate command, the sum of fifty dollars (\$50.00).

Specification 4: In that Captain Harry M. Loudon, Air Corps, did, at Selman Field, Monroe, Louisiana, on or about 15 January 1944, wrongfully borrow from Staff Sergeant Virgil J. Garner, Section B, 2530th Army Air Forces Base Unit, an enlisted man under his immediate command, the sum of twenty dollars (\$20.00).

Specification 5: In that Captain Harry M. Loudon, Air Corps, did, at Selman Field, Monroe, Louisiana, on or about 5 April 1944, wrongfully borrow from Staff Sergeant E. B. Thorp, Jr., Section B, 2530th Army Air Forces Base Unit, an enlisted man under his immediate command, the sum of thirty dollars (\$30.00).

The accused pleaded not guilty to Charge I and its Specifications and guilty to Charge II and its Specifications. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service of the United States. The reviewing authority approved only so much of the finding of guilty of Specification 1, Charge I, as involves a finding of guilty except the words "of the value of about two dollars (\$2.00)" substituting therefor the words "of some value", and except the words "furnished and intended for the military service thereof", and only so much of the findings of guilty of Specification 2, Charge I, as involves a finding of guilty, except the words "of the value of about twelve dollars (\$12.00)", substituting therefor the words "of some value" and except the words "furnished and intended for the military service thereof", and only so much of the finding of guilty of Specifications 1 and 2, Charge I as involves a violation of the 96th Article of War; approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence:

- a. Charge I, Specifications 1 and 2, wrongful conversion of gasoline, property of the United States at Monroe, Louisiana, and Selman Field, Monroe, Louisiana, respectively.

Accused was Mess Officer of the Advanced Navigation School Mess at Selman Field, Monroe, Louisiana from 1 September 1943 to June 1944 (R. 46). This mess operated a truck for hauling its colored civilian help to and from

Monroe (R. 18). Gasoline for the operation of this truck was purchased at the Saul Adler Service Station, Monroe, Louisiana, and was charged to and paid for out of funds belonging to Army Air Forces Navigation School Wing Fund, which is comparable to a company or similar fund, and is made up in part of Post Exchange dividends (R. 18, 22). Private First Class John E. Cholly, who received extra pay while working for the mess, operated this truck from about 1 September 1943 to the early part of January 1944 (R. 18, 29). Cholly testified that between the fourth and sixth of September accused called him aside and told him to take five gallons of gasoline from the truck and place it in accused's car, which was located in the rear of the Mess Hall. Accused suggested that he would find a five gallon can in the storeroom. To assist him in making the transfer, Cholly borrowed a siphon from Sergeant Mason (R. 19, 20, 23, 27). About a week later accused repeated the request (R. 20, 23). Cholly stated that this practice was continued about "three times a week straight for a month", about five gallons being transferred each time (R. 20, 21, 23), and that the last time he transferred any gas from the truck to accused's car was when the truck was laid up for repair (R. 20). He could not recall whether these transfers took place between September and November, but was certain that they continued through September into October for a period of about a month (R. 21, 23, 24, 28). In addition, on two occasions he siphoned five gallons of gas from the truck into accused's car in front of his (accused's) home in Monroe (R. 21). All gas transferred from the truck was gas that had been purchased for and charged to the Mess Fund. In November, 1943, a lock was placed on the gas-tank cap by the filling station, under instructions from accused, according to Cholly's belief. Thereafter Cholly had no access to the gas, the keys being kept by the owner of the station. According to Cholly, "Saul Adler just told me that he was told to put a lock gas cap on and they were to keep the keys and I would not have it. It made me feel bad". (R. 26, 28). Cholly admitted that he had not been paid anything by accused for transferring the gas and that he had received no favors from him for doing so (R. 27). In January, 1944, he was called in by accused and relieved of his job, with a promise that he would be reinstated in two or three weeks. He had not been placed back on the job (R. 19, 27). He admitted that he had told "deliberate lies" to accused on occasions, but did not feel that he should have been relieved of his duties in January by accused "for just a little lie, after what I done for Captain Loudon" (R. 24, 25, 29). He likewise admitted that on occasions he had purchased gas for accused in Monroe and had taken this gas to accused's car at Selman Field (R. 24). On one morning Sergeant Thomas P. Cowen, Mess Sergeant of Advanced Cadet Mess, saw Cholly put gasoline from a square-shaped five gallon can, similar to those owned by the mess in which fly spray comes, into accused's car back of Group 5 Mess Hall at Selman Field. He did not know the source of the gasoline (R. 30-32). In the course of the cross-examination of Mr. Saul Adler, witness for the defense, the prosecution had witness identify the list of purchases of gas made for the mess from 4 September 1943 to 31 January 1944 (R. 43), and offered this list in evidence as Prosecution Exhibit B. No purchases took place between 14 September and 16 October. After the entry of purchase for 14 September there appears the notation, "truck in for repairs from 9/14 to 10/16". The next entry of purchase is dated "10-16".

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b. For the defense:

Accused recalled Staff Sergeant Thomas P. Cowen, witness for the prosecution in connection with Charge I and Staff Sergeants J. D. Weems, Virgil J. Garner and E. B. Thorp, Jr., witnesses for the prosecution in connection with Charge II, to testify to Private First Class Cholly's bad reputation for veracity. Their testimony as to his being unworthy of belief was based largely on a specific instance in which Cholly had made false statements concerning his reasons for being late for work but all had known him for several months (R. 32, 33, 34, 35, 37, 38, 39). Mr. Saul Adler testified that accused had made one or two purchases of gasoline personally from him, and recalled that on one occasion in the month of November Cholly purchased some gasoline in a can which was charged by his front man to the mess fund. About thirty minutes later accused telephoned witness that this gasoline was his personal purchase and should not have been charged to the Mess Fund. Accused stated on that occasion that he had run out of gas and had requested Cholly to bring him five gallons in a can. The item was duly charged to accused (R. 40, 41). Witness Adler recalled that a lock had been placed on the gas-tank cap, but did not recall who had ordered it done (R. 41, 42). Mr. Doc West, operator of another filling station in Monroe, testified that he had known accused for about three years; that he sold him gas once or twice a week, usually five gallons at a time, and that during the months of September, October and November, 1943, he had sent gas to him three or four times through some one who called for it (R. 44-45).

Testifying in his own behalf after an explanation of his rights, accused denied that he had ever procured gasoline from the mess truck. During the reorganization of the mess, accused was working from 4:30 in the morning until 8:00 at night, and on several occasions did have gas sent out to him because of his inability to find time to procure it himself. He considered Cholly an "habitual liar" and kept him as long as he did merely because he had been sent to accused by a superior officer who thought highly of him. Accused had a fifteen day leave from 20 September to 5 October 1943, and wired for a three day extension. He used his car to drive his wife and twin children to his wife's home in Connecticut, utilizing the gas coupons that he had saved for this purpose. He received some financial assistance from his relatives in making the trip (R. 45-49).

c. Charge II, Specifications 1 to 5, borrowing from enlisted men under his command.

Accused pleaded guilty to this Charge and its Specification. Two loans of ten dollars and five dollars, respectively, from Corporal Rohmer B. Beard, and loans of fifty dollars, twenty dollars and thirty dollars, respectively, from Staff Sergeants J. D. Weems, Virgil J. Garner and E. B. Thorp, all enlisted men under his immediate command, were duly established. All sums so borrowed were repaid. No favors were extended by accused to anyone of the four by reason of the loans so made (R. 7-17).

Testifying in his own behalf, accused admitted borrowing from the four non-commissioned officers as charged, but explained that his action was due to thoughtlessness, and was occasioned by extraordinary demands on his limited resources. Up to 1941 accused had supported his mother and a brother, who had lost an arm in an accident. Feeling that he had adjusted his family problems by that time, accused married that year. In October, 1941, he applied for active duty in the Army, but action on this application was delayed. A few months thereafter twins were born to accused and his wife. Heavy bills were incurred in connection with their birth and subsequent care and treatment. Accused consequently took no further steps to return to active duty and accepted civilian employment. While so employed, he was called back into service. During January, 1944, the house which he was occupying in Monroe was "sold out from under" him and in furnishing new quarters a number of necessary items had to be procured. To meet "some minor household and personal expenses" accused had to borrow money and "thoughtlessly" borrowed it from the four enlisted men (R. 45-46).

4. Findings of a court-martial on a question of fact are entitled to great consideration and weight and will not be disturbed by a Board of Review except for compelling reasons. In a case in which the President is the confirming or reviewing authority, however, where a Board concludes from a searching examination of the record that there is not sufficient competent evidence to justify the determination of guilt arrived at by the court, it is empowered and is under an obligation to hold the record legally insufficient (CM 153479, Dig. Ops. JAG, 1912-40, p. 258).

In the present case the testimony fully establishes the commission of the offenses described in the Specifications of Charge II, to which accused pleaded guilty, but, in the opinion of the Board, is legally insufficient to support the findings of guilty beyond a reasonable doubt of the two Specifications of Charge I and of Charge I. The only testimony to establish accused's guilt of unlawful conversion of gasoline, both at Selman Field and in Monroe, was that of Private First Class Cholly, who, if his testimony were believed, was the direct offender, or, at least an accomplice. Sergeant Cowen's testimony is negative, since on the one occasion on which he saw Cholly pouring gas into accused's car from a five gallon can he had no knowledge whatsoever of its source and there is ample proof that on several occasions gas was sent to the field for accused's car. Summarizing Private First Class Cholly's unsupported testimony, therefore, accused about 4 September 1943 told him to transfer five gallons of gas from the truck, belonging to the Mess Fund, to accused's car, requested him within a week to repeat this action, and continued this practice through September into October about three times a week for a month, the last transfer being made prior to the truck's being laid up for repair. These transfers took place at Selman Field. On two occasions gas was similarly transferred into accused's car in front of his home in Monroe. Directly destructive of both the substance and effect of witness' testimony is the notation on Exhibit "B", offered by the prosecution, which purports to be a record of all sales of gas for the truck

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by the Saul Adler Service Station from 4 September 1943 to 31 January 1944, that the truck was "in for repair from 9/14 to 10/16". This declaration was apparently inserted to explain the absence of charges between those dates. Further summarizing Cholly's testimony, it is clear that he had deliberately made false statements to accused, that he had been relieved by accused of his job with the mess, for which he had been receiving extra compensation, and that a lock had been placed on the gas-tank cap under accused's instructions, according to his belief, after which time witness had no access to the gas, the key being kept by the service station operator. There is also an admission in his testimony that on occasions he had procured gas for accused in town and had taken it to his car at the field. Accused unequivocally denied any unlawful conversion of gasoline and branded witness as an "habitual liar", supporting this designation by recounting specific instances in which he had made false statements to the accused. His views as to witness' unworthiness of belief were substantiated by four non-commissioned officers, previously offered as witnesses for the prosecution. The testimony of Mr. Saul Adler and Mr. Doc West, filling station operators in Monroe, corroborated accused's statements as to gasoline's being sent out to him and as to personal purchases by him, for all of which he personally paid.

5. The Board of Review is of the opinion that Private First Class Cholly is unworthy of belief. In addition to the testimony as to the false statements made by him, Cholly's admission that he had deliberately made such false statements, and the evidence of his poor reputation for veracity, the record affirmatively shows that for almost the entire period in which Cholly claimed that he was transferring gas from the truck into accused's car about three times a week, this truck was not in use and that no gasoline was being purchased for it. Furthermore, during the greater part of this time accused was absent on leave. The lapse of time between the alleged commission of the offenses and the filing of charges indicated that Cholly made no effort to bring accused's alleged misconduct to the attention of the proper authorities and that when he finally did so he was actuated by personal motives, ill will and prejudice because accused had relieved him of his job as driver. Cholly's personal standards may well be judged by his reaction to his relief from duty by accused, previously quoted "I do not think I should be relieved for just a little lie, after what I done for Capt. Loudon".

The Manual for Courts-Martial, 1928, (par. 124a) emphasizes that the credibility of a witness is to be determined, in part, by his character, his prejudices and his reputation for truth and veracity. The weakness of witness' testimony is emphasized and its effectiveness destroyed when these principles, thoroughly based on human experience, are applied. It should additionally be noted that the witness held himself out in effect as an accomplice or as the principal offender, and for this reason his testimony should be accepted with considerable care. The final sentence of Paragraph 124a (supra) provides, "A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and should be considered with great caution." To the same effect are the views of Colonel Winthrop:

"While the testimony of an accomplice, if believed, may be sufficient, though uncorroborated, to warrant a conviction, it is agreed by the authorities that, as a general rule, such testimony cannot safely be accepted as adequate to such purpose unless corroborated by reliable evidence" (Military Law and Precedents, 2d Edition, p. 357).

There is nothing in the record to justify the court or this Board in deviating from the general rule, but, on the contrary, there is much which obliges this Board to consider witness' uncorroborated testimony unworthy of belief and lacking in that degree of probative force which is required to establish the guilt of an accused beyond a reasonable doubt.

The conclusion reached renders unnecessary the consideration of the plea in abatement filed by accused in connection with Charge I and its Specifications.

6. War Department records show that accused is 53 years of age. He graduated from Burlington High School (Vermont) in 1929 and University of Vermont in 1933. He was a member of the R.O.T.C. at the latter institution for four years and successfully completed the required six weeks training course at Fort Devens, Massachusetts, in the summer of 1932. He was commissioned a second lieutenant of Infantry (Reserve) on 19 June 1933, and was promoted to first lieutenant on 2 November 1937. On 15 October 1937, with his consent, he was ordered to active duty with the Civilian Conservation Corps, and was continued on such duty for an additional six months period. During this second tour of duty accused suffered a three-day spell of amnesia, was hospitalized and upon a finding of physical unfitness was placed on the inactive list, effective 26 August 1938. After a medical examination on 23 September 1942, accused took cognizance of certain physical defects which he was found to have, and requested extended active duty. On 5 October 1942 he was ordered into service effective 19 October and has served continuously since that date. On 17 July 1943 the Commanding Officer of Selman Field recommended him for promotion to captain because of outstanding performance of duty, giving him a rating of "excellent". His promotion to that grade was announced 16 August 1943.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as above noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specifications and legally sufficient to support the findings of guilty of Charge II and its Specifications and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Wm. H. Zou. Judge Advocate.

Herbert Mays. Judge Advocate.

Samuel Connors. Judge Advocate.

1st Ind.

War Department, J.A.G.O., **29 AUG 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 Harry M. Loudon (O-308107), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specifications, and legally sufficient to support the findings of guilty of Charge II and its Specifications and the sentence and to warrant confirmation of the sentence. While it is subversive of proper military discipline for an officer to borrow from enlisted men under his command, accused's conduct appears not to have been dishonorable but largely the result of thoughtlessness on his part. He used no coercion in procuring the loans, rendered no favors in return therefor and promptly repaid the amounts borrowed. His record indicates that he has been a valuable officer. The investigating officer recommended that he not be tried on Charge I and its Specifications and expressed the opinion that accused should not be eliminated from the service because of his years of very satisfactory and excellent service. Consideration has been given to a letter to The Judge Advocate General from Honorable Warren R. Austin, United States Senator from Vermont, transmitting a letter to him from accused. Under all the circumstances I recommend that the sentence be confirmed and commuted to a reprimand.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the 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. Senator
Warren R. Austin.

(Findings of guilty of Charge I and its Specifications disapproved.
Sentence confirmed but commuted to reprimand. G.C.M.O. 555,
13 Oct 1944)

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

SPJGN
 CM 260047

4 AUG 1944

UNITED STATES)

ARMORED CENTER)

v.)

) Trial by G.C.M., convened at
 Fort Knox, Kentucky, 12 June
 1944. Dismissal and confine-
) ment for two (2) years.

) First Lieutenant DAIL B.
 BOOKER (O-450407),
) Infantry.

OPINION of the BOARD OF REVIEW
 LIPSCOMB, SYKES and GOLIEN, Judge Advocates

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

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

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

Specification: In that First Lieutenant Dail B. Booker, Armored Command Officers Replacement Pool, Armored Replacement Training Center, Fort Knox, Kentucky, did, without proper leave, absent himself from his command at Fort Knox, Kentucky, from about 7 March 1944, to about 17 April 1944.

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

Specification 1: In that First Lieutenant Dail B. Booker, Armored Command Officers Replacement Pool, Armored

Replacement Training Center, Fort Knox, Kentucky did at Louisville, Kentucky, on or about 16 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Brown Hotel, a certain check, in words and figures as follows, to wit: "April 16, 1944. First National Bank of Birmingham, Birmingham, Alabama. Pay to Brown Hotel, \$58.58. Dail B. Booker," and by means thereof, did fraudulently obtain from the Brown Hotel \$10.00 in cash and \$48.58 in hotel services and accomodations, he, the said First Lieutenant Dail B. Booker then well knowing that he did not have and not intending that he should have sufficient funds on deposit with the First National Bank of Birmingham, Birmingham, Alabama, for the payment of said check.

Specifications 2-20 inclusive: (Finding of guilty of Specification 17 disapproved by reviewing authority).

Each Specification is the same as Specification 1 except as to date, amount, and payee, as follows:

Specification	Date	Amount	Payee
Specification 2	10 April 1944	\$15	Brown Hotel, Louisville, Ky.
Specification 3	11 March 1944	\$15	Brown Hotel, Louisville, Ky.
Specification 4	16 March 1944	\$28.50	Friedman Company, Clarksville, Tenn.
Specification 5	22 March 1944	\$35	Friedman Company, Louisville, Ky.
Specification 6	25 March 1944	\$25	Friedman Company, Louisville, Ky.
Specification 7	10 March 1944	\$25	Levy Brothers Inc. Louisville, Ky.
Specification 8	11 March 1944	\$25	Levy Brothers Inc. Louisville, Ky.
Specification 9	13 March 1944	\$25	Levy Brothers Inc. Louisville, Ky.
Specification 10	15 March 1944	\$50	Levy Brothers Inc. Louisville, Ky.
Specification 11	23 March 1944	\$25	Louis Appel Co., Inc. Louisville, Ky.

Specification	Date	Amount	Payee
Specification 12	17 March 1944	\$20	The Read House, Chattanooga, Tenn.
Specification 13	18 March 1944	\$20	The Read House, Chattanooga, Tenn.
Specification 14	20 March 1944	\$20	The Read House, Chattanooga, Tenn.
Specification 15	20 March 1944	\$25.74	The Read House, Chattanooga, Tenn.
Specification 16	21 March 1944	\$10	The Read House, Chattanooga, Tenn.
Specification 17	(Finding of guilty disapproved by reviewing authority).		
Specification 18	11 February 1944	\$15	National Military Stores, Temple, Texas.
Specification 19	14 February 1944	\$15	National Military Stores, Temple, Texas.
Specification 20	15 February 1944	\$15	National Military Stores, Temple, Texas.

Specification 21: (Finding of guilty disapproved by reviewing authority).

Specification 22: (Finding of guilty disapproved by reviewing authority).

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

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

He pleaded guilty to Charge I and its Specification, guilty with exceptions to the Specifications of Charge II, which pleas the court changed to not guilty, not guilty to Charge II, and not guilty to Charge III and its Specification. He was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for twenty-five years. The reviewing authority disapproved the findings of guilty of Specifications 17, 21 and 22 of Charge II and of the Specification of Charge III and Charge III, approved only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard

labor for two years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution consisting primarily of stipulations shows the issuance by the accused of three worthless checks aggregating \$45 within a period of one month prior to the beginning of his unauthorized absence on 7 March 1944 and the issuance of sixteen worthless checks aggregating \$422.82 during the period from 7 March 1944 to 17 April 1944 while he was absent without leave. The checks which aggregate the amount of \$467.82 are those described in the Specifications of Charge II excepting Specification 17. The accused received "either merchandise or cash for those checks" which were drawn on The First National Bank of Birmingham, Birmingham, Alabama, and which were "returned" by that bank "to the respective payees unpaid" (R. 12, 13).

During this period of time the accused and his wife had a joint checking account with the aforesaid bank in which the maximum amount on deposit between 8 and 25 February 1944 was \$3.56 and between 8 March and 21 April 1944 was \$22.57. At no time was there a sufficient sum in the account to pay any of these checks when presented (R. 13; Pros. Exs. 1, 2, 3).

4. The accused, whose "rights * * * as a witness" had been explained to him, testified that he had paid the checks described in Specifications 18, 19 and 20 of Charge II after they "had been returned" from the bank. He had opened a checking account with The First National Bank of Birmingham, Birmingham, Alabama, on 1 January 1944 and had authorized a monthly allotment to the bank of \$200 from his pay. While absent without leave he did not know that the allotment had been stopped, and believed that the checks did not exceed the amount on deposit (R. 22-24; Def. Ex. A).

On cross-examination the accused testified that he understood that no pay accrues to officers while they are absent without leave. Furthermore, he admitted that he had received no statements from the bank and had made no inquiries in regard to the account (R. 24-26).

5. The Specification, Charge I, alleges that the accused was absent without leave "from his command at Fort Knox, Kentucky, from about 7 March 1944, to about 17 April 1944". The accused's plea of guilty to the Specification and to the Charge under which it appears is sufficient to justify the court's finding of guilty of Charge I and its Specification.

6. Specifications 1 through 20, excepting Specification 17, of Charge II allege that the accused, at named times and places, "with intent

to defraud, wrongfully and unlawfully" made and uttered to different designated parties nineteen described checks aggregating \$467.82 upon a specified bank and "by means thereof did fraudulently obtain" from the parties cash and merchandise in the amount of the checks "when he knew he did not have and not intending that he should have sufficient funds on deposit with" the drawee bank for the payment thereof. "Giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending there there should be" is definitive of an offense in violation of Article of War 95 (M.C.M., 1928, par. 151).

The evidence for the prosecution conclusively shows that the described checks were made and uttered by the accused who received cash and merchandise therefor and that the checks were returned by the drawee bank "to the respective payees unpaid". Although the accused had an account with the bank, at no time was there on deposit in the account an amount sufficient to pay the checks upon presentation. The accused admitted that he had not made any attempt to ascertain the amount of money on deposit and further that he knew that no allowances accrue to officers while absent without leave. Obtaining cash and merchandise by the utterance of checks against an account which is insufficient to pay them, coupled with an utter disregard of the status of the account, provided an adequate basis for inference by the court of the accused's fraudulent intent. The evidence, therefore, establishes beyond a reasonable doubt his guilt as alleged and fully supports the court's findings of guilty of Charge II and Specifications 1 through 20, excepting Specification 17, thereof.

7. The accused is about 30 years of age. The records of the Office of The Adjutant General show that he had prior enlisted service from 6 February 1933 to 30 September 1941 when he was commissioned as a second lieutenant, that he has had active duty as an officer since the latter date, and that he was promoted to first lieutenant on 20 June 1942.

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 Charges and Specifications as approved by the reviewing authority, and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb Judge Advocate.

Charles S. Ayler Judge Advocate.

Gabriel H. Walden Judge Advocate.

(122)

SPJGN
CM 260047

1st Ind.

War Department, J.A.G.O., 15 AUG 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 Dail B. Booker (O-450407), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



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

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

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 504, 22 Sep 1944)

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

SPJGN
CM 260050

11 AUG 1944

UNITED STATES)

66TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Camp Rucker, Alabama, 8 July
1944. Dismissal, total for-
feitures and confinement for
five and one-half (5½) years.

Second Lieutenant WALTER J.
PETERSON (O-1306141),
Infantry.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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 64th Article of War.

Specification 1: In that Second Lieutenant Walter J.

Peterson, Headquarters Company, Second Battalion, 263rd Infantry, having received a lawful command from Major Roger G. Frail, 288th Engineer Combat Battalion, his superior officer, to leave the hospital ward room, Station Hospital, Camp Rucker, Alabama, of Second Lieutenant Edna Faye Stepp, Army Nurses Corps, Fourth Service Command, Basic Training Center for Nurses, did at Camp Rucker, Alabama, on or about 22 June 1944, willfully disobey the same.

Specification 2: In that Second Lieutenant Walter J. Peterson, Headquarters Company, Second Battalion, 263rd Infantry,

did at the Station Hospital, Camp Rucker, Alabama, on or about 22 June 1944, wrongfully offer violence against Major Roger G. Frail, 288th Engineer Combat Battalion, his superior officer, who was then in the execution of his office, in that he, the said Lieutenant Walter J. Peterson, did grasp the front of the shirt being worn by the said Major Roger G. Frail, raise his fist and threaten to strike him.

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

Specification 1: In that Second Lieutenant Walter J. Peterson, Headquarters Company, Second Battalion, 263rd Infantry, did, at the Station Hospital, Camp Rucker, Alabama, on or about 22 June 1944 behave in a disrespectful and ungentlemanly manner toward Second Lieutenant Edna Faye Stepp, Fourth Service Command, Basic Training Center for Nurses, by saying to her "I'm going to get out of this damned Army pretty soon and as far as I'm concerned you can take the whole God-damned Army and shove it up your fat fanny," or words to that effect.

Specification 2: In that Second Lieutenant Walter J. Peterson, Headquarters Company, Second Battalion, 263rd Infantry, did, at the Station Hospital, Camp Rucker, Alabama, on or about 22 June 1944 wrongfully and unlawfully fail to leave the hospital wardroom of Second Lieutenant Edna Faye Stepp, Army Nurses Corps, Fourth Service Command, Basic Training Center for Nurses, upon her requests for him so to do.

Specification 3: In that Second Lieutenant Walter J. Peterson, Headquarters Company, Second Battalion, 263rd Infantry, was, at the Station Hospital, Camp Rucker, Alabama, on or about 22 June 1944, drunk and disorderly while in uniform.

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

Specification: In that Second Lieutenant Walter J. Peterson, Headquarters Company, Second Battalion, 263d Infantry, did at Camp Rucker, Alabama, on or about 22 June 1944 wrongfully and unlawfully make and utter the following

disloyal statements against the United States of America: "I'm going to get out of this damned Army pretty soon and as far as I'm concerned you can take the whole God-damned Army and shove it up your fat fanny," or words to that effect.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years and six months. The reviewing authority approved the sentence, but recommended that it be commuted to forfeiture of \$75 per month for six months, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused on 22 June 1944 was a patient at the Station Hospital, Camp Rucker, Alabama. Since he was not confined to bed, he was free to visit friends within the building and could, with permission from competent authority, even leave the premises. A pass for the hours between 1300 and 2100 o'clock had been issued to him on that day, but he returned before the expiration time and was observed on the back porch of the hospital at 1930 o'clock (R. 23, 27, 30-31).

About a half an hour later he went to the room of Second Lieutenant Edna Faye Stepp of the Army Nurses Corps, "a personal friend", who was also then a patient. His "eyes were red" and "the lids were heavy". In her opinion he was drunk. After only a "slight" conversation, she "requested him back to his ward" and, upon his acquiescing, she accompanied him there (R. 20-23).

Immediately after her return to her own room she was visited by Major Roger G. Frail of the 288th Engineer Combat Battalion and by a Second Lieutenant Andrews of the Army Nurses Corps. The major was dressed in his khaki, Class A, uniform and was wearing the insignia of his rank on his collar. In about three minutes the accused appeared outside the door. He was with a friend, another lieutenant, who was urging him to leave, saying: "Come on, let's go, I have had enough". The accused would not, however, be persuaded and entered the room. His friend followed. The two nurses were disussing the Army and, particularly, basic training to whose rigors Lieutenant Stepp had been subject prior to her admission to the hospital. The accused remarked that he had been in the service since 1942 and that "there were much fewer officers and men then than there are now". Turning to Major Frail, he said, "I don't

suppose you were in the Army at that time, were you?" The major replied that he had been, that "in fact he had been in the Caribbean at that time" (R. 9-10, 20, 23, 26).

The accused temporarily terminated the conversation and left the room. He was soon back with some cold meat which he proceeded to "stuff" into his mouth. Lieutenant Stepp pleaded: "Pete, you are drunk, please leave". The accused ignored her request. Addressing himself to the major, he inquired, "Have you ever been in French Morocco". Upon the major's replying in the negative, the accused pointed out that he had been "over there in glider troops". The lieutenant who had followed the accused into the room again said, "Come on, Pete, let's leave" but, upon receiving no favorable response, departed alone. Lieutenant Stepp also reiterated her request that the accused go. He finally prepared to leave. At this point Lieutenant Stepp stated that she liked the Army. The accused who was almost at the door took a step toward her and remarked "I am getting out of this damned Army pretty soon and as far as I am concerned you can take the whole God-damned Army and shove it up your fat fanny" (R. 10, 24).

Major Frail ordered the accused to "get out". The accused was not impressed and said, "Who do you think you are? You can't order me around". He was reminded that he had been given a distinct order. When he continued in his defiance, he was asked for his name and serial number by the major. The accused supplied the information required but refused to leave the room despite three other orders to that effect. He began unbuttoning his shirt and boasted: "Come on outside, I will show you the better man, I will show you who can boss who around". Lieutenants Stepp and Andrews went in search of the ward man, a "colored boy" named George. They found him and sent him to the room. He asked the accused to leave and to button his shirt. The accused complied with the latter half of the request but continued his bellicose conduct toward the major, saying "Come on outside, I will pound you to a pulp". Upon the major observing that "it wasn't customary for officers to go around fighting", the accused referred to him as "yellow", breathed hard in his face, and pushed him in the chest. The major replied that from the accused's "insulting words to these nurses, from his drunk and disorderly conduct in public he was right then in my opinion nothing but scum" (R. 10-11, 18, 24, 26).

The accused rejoined with "Just a minute, you can't call me scum". Seizing the major's shirt front with his left hand, he drew back his right and held it "cocked back in a threatening gesture". At this stage Captain Richard G. Parette of the Medical Corps, who was the ward officer, entered the room. He removed the accused's hand from the major's

shirt and said "Turn around and go to bed". The accused, who had at first "completely disregarded" the captain and continued to express his resentment at being called "scum", finally took his departure. As he left he threatened the major, saying, "I will get you for this just as soon as I get out" (R. 11-12, 25, 27-28, 32).

All of the witnesses who observed the accused that evening believed him to be drunk. Major Frail's opinion was based "on the fact [the accused's] voice was bud and boisterous, his eyes were dilated and red, he was unsteady on his feet, * * * his clothes were disheveled", and his breath smelled of liquor. Although drunk, the accused had sufficient control of his faculties to know "what he was doing" (R. 13-14, 18, 23, 29, 31-32).

4. After having been apprised of his rights relative to testifying or remaining silent, the accused took the stand in his own defense. He had enlisted in the Army and had served for a "little over four years". In 1943 as the result of a glider "crack up" he fell two hundred feet and suffered a broken back. He had been a patient ever since and had been treated in four hospitals. In consideration of his severe injuries he was offered a choice between limited and general duty. He chose the latter but, after a twelve mile hike, he was again hospitalized (R. 37-38, 43).

Medical authorities had advised him to seek relief in drink when in pain. He suffered continuously from his injury. The possibility existed that his left leg would in time be paralyzed. Prior to his accident he had weighed 194 pounds. At the trial he weighed only 145 pounds (R. 38-39, 42-43).

He was not present at the pre-trial investigation of the other witnesses and was not asked to be. Major Curry the Investigating Officer, stated that "he would go around and see the other witnesses". Their statements when obtained were not shown to the accused. Major Curry had, however, called on him and told him "about the case". The accused could not remember whether he had been advised of his right to cross-examine other witnesses (R. 38, 40-42).

5. Major Tom V. Curry, called as a witness by the prosecution on rebuttal, testified that he had shown the statements of all the other witnesses to the accused. The right of cross-examination had been fully explained. The accused read all of the documents, expressed disagreement with "one or two points" and had concluded, "That is their statement so there isn't much use to call them in" (R. 45-46).

6. Specification 1 of Charge I alleges that the accused "having received a lawful command from * * * his superior officer * * * did * * * on or about 22 June 1944, willfully disobey the same". Specification 2 of Charge I alleges that the accused did on the same day "wrongfully offer violence against * * * his superior officer, who was then in the execution of his office, in that he, the [accused], did grasp the front of the shirt being worn by the said [superior officer], raise his fist and threaten to strike him". Both acts were set forth as violations of Article of War 64.

Major Frail ordered the accused to leave Lieutenant Stepp's room four different times. On each occasion the accused deliberately and willfully refused. The major was in full uniform and was wearing the insignia of his authority. He was under a duty to quell disorder among persons subject to military law. The accused not only disobeyed but made himself increasingly obnoxious. The culmination of his impertinence and defiance was attained when he seized Major Frail by the shirt and threatened to strike him. Major Frail was then in the execution of his office. As is stated in paragraph 134a of the Manual for Courts-Martial, 1928,

"It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office".

Both the findings of guilty of the alleged disobedience and the alleged offer of violence are sustained beyond a reasonable doubt by the evidence.

7. Specification 1 of Charge II alleges that the accused did

"on or about 22 June 1944 behave in a disrespectful and ungentlemanly manner toward Second Lieutenant Edna Faye Stepp * * * by saying to her 'I'm going to get out of this damned Army pretty soon and as far as I'm concerned you can take the whole God-damned Army and shove it up your fat fanny', or words to that effect".

Specification 2 of Charge II alleges that the accused did on the same day "wrongfully and unlawfully fail to leave the hospital ward room of * * * Lieutenant * * * Stepp * * * upon her requests for him to do". Specification 3 of Charge II alleges that the accused was on the same

day "drunk and disorderly while in uniform".

The words employed by the accused were insulting both to the Army and to the lady before whom they were uttered. They were wholly unbecoming an officer and a gentleman and were more befitting a bar-room habitue. When Lieutenant Edna Stepp signified that the accused was no longer a welcome guest and requested him to leave her room his continued presence there was conduct unbecoming an officer and a gentleman. That the accused was drunk as alleged is established by the testimony of all the eye witnesses and was not denied by him when on the stand. His use of the coarse language quoted in Specification 1 of Charge II above in itself constituted a disorder: CM 257015. The rough and contumacious manner in which he conducted himself toward Major Frail was a disorder of even a more aggravated nature in that it involved a measure of physical violence. The findings of guilty of the three Specifications as violations of Article of War 95 are sustained by the evidence beyond a reasonable doubt.

8. The Specification of Charge III alleges that the accused did

"on or about 22 June 1944 wrongfully and unlawfully make and utter the following disloyal statements against the United States of America: 'I'm going to get out of this damned Army pretty soon and as far as I'm concerned you can take the whole God-damned Army and shove it up your fat fanny', or words to that effect".

This was represented to be a contravention of Article of War 96.

That the sentence quoted was distasteful, disorderly, and grossly vulgar is self-evident, but it should not be branded as disloyal. Neither the context nor the surrounding circumstances were such as to justify a treasonable or subversive connotation. The accused had voluntarily enlisted in the Army, had served for more than four years, and had in the course of his hazardous work on a glider sustained a severe and disabling injury. When offered a choice between limited and general duty, he chose the latter and made a courageous, though unsuccessful, attempt to prove himself physically qualified. This is not the story of a man who hates his country or its institutions. If anything, it shows the contrary.

Nor was there anything innately disloyal in the words employed. Many a soldier has made disparaging remarks about the Army while remaining unswervingly true to it and while even performing heroically. Indeed the soldier who has not grumbled about the Army, its officers, its food, its tactics, is a rare specimen.

When the pain endured by the accused and his intoxicated condition are considered, the sinister inference drawn from his words seems rather strained. They were the utterances of a man who was somewhat the worse for liquor. They were not intended to be disloyal and should not have been so interpreted. The evidence is, therefore, legally insufficient to sustain the findings of guilty of the Specification.

9. The accused is about 23 years of age. The records of the War Department show that he had enlisted service from 10 September 1940 to 29 December 1942; that he was commissioned a second lieutenant on 30 December 1942; that since the last date he has been on active duty as an officer.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of the Specification of Charge III and Charge III, and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 64 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb Judge Advocate.

Charles S. Sykes Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 260050

1st Ind.

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

- To the Secretary of War.

17 AUG 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 Walter J. Peterson (O-1306141), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the Specification of Charge III and Charge III alleging the utterance of a disloyal statement, legally sufficient to support all the other findings and the sentence and to warrant confirmation thereof. The reviewing authority recommends that the sentence be commuted to forfeiture of \$75 per month for six months. I recommend that the sentence be confirmed but commuted to a reprimand and a forfeiture of \$75 of his pay per month for six 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.

(Findings of guilty of Specification of Charge III and Charge III disapproved. Sentence confirmed but commuted to reprimand and forfeiture of \$75 pay per month for six months. G.C.M.O. 501, 13 Sep 1944)



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

(133)

SPJGV
CM 260073

16 AUG 1944

U N I T E D S T A T E S)
v.)
First Lieutenant DONALD M.)
GROSS (O-1010960), Head-)
quarters 4th Armored Group.)

HAWAIIAN DEPARTMENT

Trial by G.C.M., convened
at APO 958, 5 June 1944.
Dismissal.

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

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

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

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

Specification 1: In that 1st Lieutenant Donald M. Gross, Headquarters, 4th Armored Group, did, at APO 958, on or about 8 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to Fort Shafter Officers' Mess, a certain check, in words and figures as follows, to wit:

Honolulu, Hawaii, April 8, 1944 No. 10

59-101 BISHOP NATIONAL BANK OF HAWAII 59-101
at Honolulu
Schofield Br

Pay to the
Order of Fort Shafter Officers' Mess \$10 00/100

Ten and 00/100 Dollars

/s/ DONALD M. GROSS
1st Lt., O-1010960

and by means thereof, did fraudulently obtain from Fort Shafter Officers' Mess, Ten Dollars (\$10.00), he the said

1st Lieutenant Donald M. Gross then well knowing that he did not have and not intending that he should have sufficient funds in the Bishop National Bank of Hawaii at Honolulu, Schofield Barracks Branch, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 1 May 1944, payable to the order of Fort Shafter Officers' Mess, made and uttered to Fort Shafter Officers' Mess, and fraudulently obtaining thereby \$10.

Specification 3: Same form as Specification 1, but alleging check dated 1 May 1944, payable to the order of Fort Shafter Officers' Mess, made and uttered to Fort Shafter Officers' Mess, and fraudulently obtaining thereby \$10.

Specification 4: Same form as Specification 1, but alleging check dated 1 May 1944, payable to the order of Cash, made and uttered to First Lieutenant M. G. Cameron, and fraudulently obtaining thereby \$20.

Specification 5: Same form as Specification 1, but alleging check dated 1 May 1944, payable to the order of Cash, made and uttered to First Lieutenant M. G. Cameron, and fraudulently obtaining thereby \$10.

Specification 6: Same form as Specification 1, but alleging check dated 1 May 1944, payable to the order of Cash, made and uttered to First Lieutenant M. G. Cameron, and fraudulently obtaining thereby \$10.

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

Specification 1: In that 1st Lieutenant Donald M. Gross, Headquarters, 4th Armored Group, did, at APO 957, on or about the month of September 1943, borrow the sum of thirteen dollars (\$13.00), from Technician Fifth Grade Harold E. Israel, Headquarters Company, 766th Tank Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 2: In that 1st Lieutenant Donald M. Gross, Headquarters, 4th Armored Group, did, at APO 957, on or about the month of January 1944, borrow the sum of fifteen dollars (\$15.00), from Staff Sergeant Christy Ortenzio, Company A, 766th Tank Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 3: In that 1st Lieutenant Donald M. Gross, Headquarters, 4th Armored Group, did, at APO 957, on or about the month of January 1944, borrow the sum of fifteen dollars (\$15.00), from Technician Fifth Grade Clarence H. Shults, Company A, 766th Tank Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 4: In that 1st Lieutenant Donald M. Gross, Headquarters, 4th Armored Group, did, at APO 957, on or about the month of January 1944, borrow the sum of ten dollars (\$10.00), from Staff Sergeant Jimmy B. Baker, Company A, 766th Tank Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 5: In that 1st Lieutenant Donald M. Gross, Headquarters, 4th Armored Group, did, at APO 957, on or about the month of January 1944, borrow the sum of forty dollars (\$40.00), from Sergeant Charles W. Robe, Company A, 766th Tank Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 6: In that 1st Lieutenant Donald M. Gross, Headquarters, 4th Armored Group, did, at APO 957, on or about the month of February 1944, borrow the sum of ten dollars (\$10.00), from Corporal Patrick O'Hearn, Company A, 766th Tank Battalion, an enlisted man, this to the prejudice of good order and military discipline.

He pleaded guilty to all Specifications under Charge I, excepting the words in each Specification "with intent to defraud, wrongfully and unlawfully", "fraudulently", and "well knowing that he did not have and not intending that he should have, sufficient funds", substituting therefor, respectively, the words "wrongfully and negligently" for the first exception, nothing for the second exception, and "not having sufficient funds" for the third exception, not guilty of violation of the 95th Article of War but guilty of a violation of the 96th Article of War, and guilty of all Specifications under Charge II and Charge II. He 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 but recommended that the execution thereof be suspended during the pleasure of the President, and forwarded the record of trial for action under Article of War 48.

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

a. Specification 1, Charge I.

Accused issued to the Fort Shafter Officers' mess a check in the amount of \$10 dated 8 April 1944, drawn on the Bishop National Bank of Hawaii, Schofield Branch. After being deposited in the drawee bank on 9 April the check was returned to the payee on 13 April with a slip marked "Refer to Maker" (R. 9-12; Exs. 1, 2). Accused had a balance of only 86 cents on deposit with the drawee bank on 8 April 1944, the date this check was made and uttered, which balance remained unchanged through 13 April 1944, the date the check was returned unpaid (R. 34; Ex. 11).

b. Specifications 2, 3, 4, 5 and 6, Charge I.

On 1 May 1944, the accused made, uttered and received cash of \$60 in exchange for five checks drawn on the Bishop National Bank of Hawaii, Schofield Branch. Two of these checks (Exs. 3, 4) were payable to the order of Fort Shafter Officers' mess in the amount of \$10 each and the other three checks (Exs. 7, 8, 9) were payable to cash in the amounts of \$20, \$10 and \$10 respectively (R. 11, 12, 28-31). The two checks payable to Fort Shafter Officers' Mess and one of the \$10 checks payable to cash were presented on 4 May 1944 by the holders thereof to the drawee bank for payment, and the other two checks payable to cash were similarly presented on 5 May 1944. Payment of all five checks was refused by the drawee bank because of insufficient funds on deposit to the credit of accused (R. 34). However, on 1 May 1944, the date these five checks totaling \$60 were made and uttered accused had a balance of \$83.50 in his account in the drawee bank. The balance was reduced to \$53.50 on 2 May, to \$28.50 on 3 May, to \$2.50 on 4 May and further reduced to 90 cents on 5 May 1944 (R. 32-35; Ex. 11).

c. Specifications 1, 2, 3, 4, 5 and 6, Charge II.

In September 1943 accused borrowed \$10 from Technician Fifth Grade Harold E. Israel and later that month borrowed \$3 more. The money was to be repaid on accused's next payday. Accused promised about six times to repay the money, but did not do so (R. 37, 38).

In January 1944 Staff Sergeant Christy Ortenzio made two loans to accused in amounts of \$5 and \$10 respectively. This money was to be repaid on accused's next payday, but was not so repaid (R. 39, 40).

In January 1944 at accused's request Technician Fifth Grade Clarence H. Shults made two loans to accused in amounts of \$5 and \$10 respectively, with no date fixed for its repayment (R. 42, 43).

In January 1944 Sergeant Charles W. Robe made three loans to accused in amounts of \$5, \$15 and \$20 respectively. No date was

set for repayment of the loans, but in February 1944 Robe requested repayment and accused paid \$20 of the loan. The second time Robe asked for repayment accused stated he did not have it but was going to cable home for money (R. 46-48).

In February 1944 Corporal Patrick M. O'Hearn loaned accused \$10, to be repaid on accused's next payday which accused failed to do (R. 48, 49).

All of these loans to accused from these enlisted men were repaid by accused on 18 May 1944 after charges had been preferred against him (R. 38, 40, 43, 44, 47, 49).

5. For the defense.

Mr. Wootton, the assistant bank manager being called as a witness for the defense, testified that during a period of a year and a half the accused had borrowed money from the Bishop National Bank of Hawaii on five notes in amounts from \$50 to \$200, and that payment of these notes had been made in a very satisfactory manner. Accused had also discussed with him the matter of obtaining another loan on 1 May 1943, to liquidate his debts. The loan would have been made if accused could have obtained the endorsements of his company and battalion commanders on the note (R. 51-53).

The accused after having his rights as a witness explained elected to testify under oath. He testified that his financial affairs became quite involved in April 1944 and he consulted Mr. Wootton of the Schofield Branch of the Bishop National Bank relative to a loan of \$800 to liquidate his debts and was informed by the bank that it would require the endorsement on the note of his company and battalion commanders (R. 58). On Sunday, 30 April 1944, he cashed three checks dated 1 May 1944 at the Fort Shafter Mess Office, each for \$10, and played the slot machines in the Round House. Later in the day he went downtown to the Officers' Club at Halekai, played the slot machines there, and cashed two more checks dated 1 May 1944, one for \$10 and one for \$20 (R. 59, 63). On the following day, Monday, 1 May, he gave a check for \$26 drawn on the Bishop National Bank, Schofield Branch, to the Bank of Hawaii in payment of a note and on the same day he cashed a check for \$15 at the Bishop National Bank, Main Branch. The first check was presented and paid on 4 May 1944 and the second one was presented and paid on 3 May 1944, reducing his account by corresponding amounts (R. 60; Ex. 11). He had no intention of defrauding anyone when he uttered the first five checks, but admitted he kept no account of them in a check book (R. 61), and at the time had outstanding obligations ranging from \$500 to \$600 (R. 64). Accused's company and battalion commanders, after due consideration, declined to endorse a proposed \$800 note for him as

sureties because of the amount (R. 62). In response to a wire, he received money from home on 17 May and the following day used the money to pay all of his bills (R. 63). Accused admitted that of the \$70 obtained from cashing the six worthless checks he spent about \$60 of it playing the slot machines (R. 64).

6. The evidence shows that accused on 8 April 1944 gave to the Fort Shafter Officers' Mess a check in the amount of \$10, drawn on the Bishop National Bank of Hawaii, Schofield Branch. His balance in the bank on that date and on 13 April, the date the check was presented to the bank for payment, was 86 cents. This evidence sustains the findings of guilty of Specification 1 of Charge I.

On 30 April 1944, accused issued two checks dated 1 May 1944 to the Fort Shafter Officers' Mess in the amount of \$10 each, and three checks dated 1 May 1944 payable to cash. On 1 May accused's balance in the bank was \$83.50, being reduced by withdrawals to \$53.50 on 2 May, \$28.50 on 3 May, \$2.50 on 4 May, and 90 cents on 5 May. Three of the above-mentioned checks were presented to the bank on 4 May, two were presented on 5 May and payment was refused because of insufficient deposits to cover their payment. It is apparent that, on the day these five checks were issued in the aggregate amount of \$60, accused had \$83.50 on deposit in the drawee bank. Although he had not more than \$2.50 on deposit when these checks were presented for payment, there is no evidence in the record that the withdrawals which so reduced accused's balance resulted from instruments made and uttered prior to the five checks in question. Indeed the record does show that two checks which aided in so reducing accused's balance, one for \$26 and one for \$15, were issued after the five checks in question although they preceded the latter in arriving at the drawee bank for payment. Therefore, the evidence fails to prove that the accused made and uttered the checks dated 1 May "then well knowing that he did not have" sufficient funds on deposit for their payment. The Board of Review is accordingly of the opinion that the evidence pertaining to Specifications 2, 3, 4, 5 and 6 of Charge I is sufficient to support a conviction on these Specifications only of the lesser included offense of wrongfully failing to maintain a sufficient bank balance to meet issued checks, in violation of Article of War 96.

The evidence further shows that in the months of September 1943 and January and February 1944 accused borrowed money in amounts from \$3 to \$20, and totaling \$113, from six enlisted men, a practice condemned by Article of War 96 (1 Bull. JAG 106, 2 Bull. JAG 144). All of these loans were repaid 18 May 1944.

7. War Department records show that accused is 25 years of age and a high school graduate. He attended Pennsylvania State College for one and one half years. He was inducted into the Army 5 June 1941 and after completing the Armored Forces Officer Candidate School, Fort Knox, Kentucky, was appointed second lieutenant, Army of the United States, on 13 June 1942. On 29 December 1942 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 of Specification 1 of Charge I and Charge I, Specifications 1-6 of Charge II and Charge II, legally sufficient to support only so much of the findings of guilty of Specifications 2-6 of Charge I as involves the lesser included offense of wrongfully failing to maintain a sufficient bank balance to meet issued checks, 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 and mandatory upon conviction of a violation of Article of War 95.

Thomas M. Jaffey, Judge Advocate.

Robert M. Harwood, Judge Advocate.

Robert C. Swettenham, Judge Advocate.

(140)

SPJGV
CM 260073

1st Ind.

War Department, J.A.G.O., 31 AUG 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 Donald M. Cross (O-1010960), Headquarters 4th Armored Group.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 1 of Charge I and Charge I, Specifications 1-6 of Charge II and Charge II, legally sufficient to support only so much of the findings of guilty of Specifications 2-6 inclusive of Charge I as involves the lesser included offense of wrongfully failing to maintain a sufficient bank balance to meet the payment of the issued checks, in violation of Article of War 96; legally sufficient to support the sentence and to warrant confirmation of the sentence. In view of the recommendation by the reviewing authority and of all the circumstances of the case I recommend that the sentence be confirmed but that the execution thereof be suspended during accused's 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 S/W.
Incl.3-Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 554, 13 Oct 1944)

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

(141)

SPJGK
CM 260114

29 JUL 1944

UNITED STATES)

ELEVENTH ARMORED DIVISION

v.)

Private GEORGE E. WHITE)
(34726193), Battery C,)
778th Antiaircraft Artillery)
Automatic Weapons Battalion)
(Self-Propelled).)

Trial by G.C.M., convened at Camp
Cooke, California, 19 June 1944.
Dishonorable discharge and con-
finement for ten (10) years.
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

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

2. There is no need to set forth the Specifications in full, except Specification 2, Charge II. In summary, they are as follows:

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

Specification 1: Absence without leave from 5 April 1944 to 7 April 1944.

Specification 2: Absence without leave from 10 April 1944 to 18 April 1944.

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

Specification 1: Appearing in civilian clothing without authority in Los Angeles, California, on 7 April 1944.

Specification 2: In that Pvt. George E. White, Battery C, 778th AAA Auto Wps Bn (SP), Camp Cooke, California, did, at Los Angeles, California, on or about 7 April 1944, have in his possession two (2) false and unauthorized military permits to be absent from his organization and duties.

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

Specification: Escape from confinement at Los Angeles, California, on 10 April 1944.

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

(Finding of guilty disapproved by the reviewing authority.)

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

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

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of two previous convictions, one by summary court-martial for absence without leave for two days and drunkenness in a public place, and one by special court-martial for absence without leave for six days and breach of restriction, was introduced. Accused was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty (20) years. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2 of Charge IV and of Charge IV, approved the sentence but remitted ten (10) years of the confinement, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence supports the findings of guilty of Charges I and III and their Specifications, and of Specification 1 of Charge II, and there is no question as to those findings. With respect to Specification 2 of Charge II there is evidence only that accused was apprehended in Venice, California, on 7 April 1944 by two enlisted military policeman, that he had at that time been absent without leave since 5 April 1944, and that he had in his possession two passes. One was dated from 1700 on 4 April 1944 to 0600 on 6 April 1944, and was signed by an officer shown by other evidence to have been accused's commanding officer. It appears from the extremely meager evidence in the record that this pass properly designated accused's organization. The other pass was dated from 1500 on 6 April 1944 to 1500 on 9 April 1944. It was signed by a "Cptn J.I. Williams, CAC", and designated an organization which is not otherwise mentioned in the evidence pertaining to this or any other Charge or Specification (Pros. Ex. 5). The passes themselves were not offered in evidence, nor was there any testimony whatsoever concerning their legitimacy or the identity of the persons or organizations mentioned in them.

4. In the face of this meager evidence the Board holds that the record does not support the finding of guilty of this Specification. While he was absent without leave during a part of the period covered by each pass, there is no showing that the passes were false, and this essential element should not be presumed from that fact alone. Other inferences are equally consistent with innocence. The evidence in the record does not even show that the passes were made out in accused's name. It is well within the realm of possibility that they were properly issued to someone else in the first instance and then cancelled. The record is devoid of any evidence to show, or from which one may infer, the falsity alleged in the Specification.

5. The sufficiency of the evidence to support the finding as to Charge II and the legality of the sentence are not affected by this holding.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 2 of Charge II, but legally sufficient to support the findings of guilty of Specification 1 of the Charge and the Charge and of all other Charges and Specifications and of the sentence.

(On Leave) . Judge Advocate.

Herbert M. [unclear] . Judge Advocate.

Samuel [unclear] . Judge Advocate.

(144)

1st Ind.
1 AUG 1944

War Department, J.A.G.O.,
Eleventh Armored Division, Camp Cooke, California.

- To the Commanding General,

1. In the case of Private George E. White (34726193), Battery C, 778th Antiaircraft Artillery Automatic Weapons Battalion (Self-Propelled), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge II, and legally sufficient to support the sentence, which holding is hereby approved. Upon disapproval of the finding of guilty of Specification 2 of Charge II you will have authority to order the execution of the sentence.

2. In view of the youth of accused and of the brief periods of absence without leave, it is recommended that consideration be given to a reduction of the period of confinement to seven (7) 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 260114).



William A. Rounds,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General,
In Charge of Military Justice Matters.

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

SPJGN
CM 260157

31 AUG 1944

UNITED STATES)

THIRD AIR FORCE

v.)

) Trial by G.C.M., convened at
) Morris Field, Charlotte, North
) Carolina, 30 June 1944. Dis-
) missal.

)
)
) Second Lieutenant ALBERT H.
) CULVER JR. (O-680413), Air
) Corps.
)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Albert H. Culver, Jr., Section R, 329th AAF Base Unit, did, on or about 28 May 1944, near or over the Sesqui-Centennial Park, near Dentsville, South Carolina, wrongfully violate paragraph 16 a, 1 (d), Section II Army Air Forces Regulation No. 60-16, dated 6 March 1944, by flying a military airplane at an altitude less than 500 feet above the ground.

Specification 2: (Finding of not guilty).

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CHARGE II: Violation of the 69th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

3. The evidence for the prosecution shows that about 1430 o'clock on 28 May 1944 the accused took off from the Columbia Army Air Base in an L-2M aircraft with Lieutenant Walter E. Weber as the "running qualified dual" pilot for the purpose of transition flying and "shooting landings". After about an hour the accused piloted the plane back to the field for more gasoline and again took off in the direction of nearby Fort Jackson near which is located Sesqui-Centennial Park, a recreational park with a lake which was being used by numerous persons for swimming. The accused was piloting the plane and according to Lieutenant Weber twice flew over the lake in the park at a height of about 200 feet although the "indicated altitude" which he had difficulty in observing was about 500 feet. The plane was over the lake about 1600 o'clock. Two sergeants who were swimming in the lake testified that they recognized the plane as an L-2M because of its distinctive characteristics and that it twice flew over the lake within 50 feet of the surface of the water. Although their testimony varied as to the exact time of the occurrence they both placed it between 1500 and 1600 o'clock and were agreed that the L-2M type plane was the only one that flew low over the lake that afternoon (R. 5-8, 9-13, 13-19; Pros. Ex. 1).

The court's attention was directed to Paragraph 16a, 1 (d), Section II, Army Air Forces Regulation 60-16 of which the court was asked to take judicial notice and the following was read therefrom to the court:

"Minimum altitude of flight. Except during take-off and landing, aircraft will not be operated below the following altitudes: 500 feet above the ground elsewhere than as specified above" (R. 19).

4. The accused, after explanation of his rights as a witness, testified that he had noticed his altimeter shortly before flying over the lake,

that it indicated an altitude of about 800 or 900 feet and could not have been seen very well by Lieutenant Weber who was seated in the rear, that he did not believe he lost more than 50 or 100 feet while flying over the lake, that he consequently was never within 500 feet of the lake's surface, that he knew of one other L-type plane flying in the vicinity of the Columbia Air Base that afternoon and that he did not know the two sergeants who testified and had known Lieutenant Weber only a short while. Upon cross-examination he admitted knowledge of the regulations against low flying and upon examination by the court he admitted that he had been advised that the altitude at the lake was 300 feet. The flight record was admitted into evidence and it is silent about the entire episode (R. 26-35; Court Ex. 1).

5. The Specification, Charge I, alleges that the accused on or about 28 May 1944 near or over the Sesqui-Centennial Park, near Dentsville, South Carolina, wrongfully violated paragraph 16a, 1 (d), Section II Army Air Forces Regulation No. 60-16, dated 6 March 1944 by flying a military airplane at an altitude of less than 500 feet above the ground. "Disobedience of standing orders" is conduct prejudicial to good order and military discipline and consequently is violative of Article of War 96 (M.C.M., 1928, par. 152a).

The evidence for the prosecution conclusively shows that the accused piloted the plane on the occasion in question, that the regulation was in effect and that it within the judicial knowledge of the court prohibited the act alleged in the Specification. The regulation is one of general application governing the operation of military aircraft within the continental limits of the United States and the accused, even if he had not admitted his knowledge thereof, must be presumed to have had constructive knowledge thereof. The evidence for the prosecution through the testimony of three disinterested eye witnesses who identified the plane, the time, the place and its "buzzing" the lake, established the accused's guilt as alleged beyond a reasonable doubt. The accused's denial of the offense is rendered unworthy of belief when it is considered that he admitted flying over the lake twice about the time in question and that his own testimony contains the explanation of why his altimeter could read about 500 feet as testified to by his "dual" pilot and the plane could still be within 200 feet of the lake. The elevation of the location of the lake was 300 feet. Although neither damage to property nor injury to person resulted, such attendant good fortune does not obliterate the offense. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt as alleged and amply supports the findings of guilty of Charge I and the first Specification thereunder.

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6. The accused is about 23 years old. The records of the Office of The Adjutant General show that he has had enlisted service from 2 March 1942 until 24 May 1943 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date.

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

Abner E. Lescow, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 260157

1st Ind.

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

- To the Secretary of War.

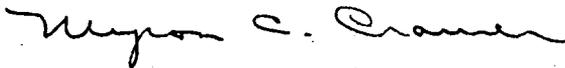
12 SEP 1944

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 Albert H. Culver Jr. (O-680413), 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. Subsequent to the commission of the present offense, the accused has been officially charged with wrongfully seizing and choking a military policeman who was then in the execution of his office, of being disorderly in uniform in a public place, of wrongfully appearing in a public place without his blouse and with his sleeves rolled up, and of using insulting and defamatory language in referring to the Provost Marshal of the Tampa area, all in violation of Article of War 96. In view of the accused's alleged subsequent misconduct he appears to be unworthy of clemency. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Consideration has been given to a letter from the Deputy Commander, Army Air Forces, dated 26 August 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 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 - Dft. of ltr. for sig. Sec. of War.
- Incl 3 - Form of Executive action.
- Incl 4 - Ltr. from Deputy Commander, Army Air Forces.

(Sentence confirmed. G.C.M.O. 572, 21 Oct 1944)



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

SPJGN
CM 260165

22 AUG 1944

UNITED STATES)

OGDEN AIR SERVICE COMMAND)

v.)

) Trial by G.C.M., convened at
) Army Air Field, Alliance,
) Nebraska, 27, 28, and 29 June
) 1944. Dismissal and confinement
) for three (3) years. Disciplinary
) Barracks.

) First Lieutenant JOSEPH H.
) THOMPSON, JR. (O-1576859),
) Air Corps.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant Joseph H. Thompson, Jr., Section A, 805th Army Air Forces Base Unit, did, at Army Air Field, Alliance, Nebraska, on or about 25 May 1944 cause to be presented for payment a certain United States Government Pay Voucher, D. O. Vou. No. 23226, to Captain William H. Hutchinson, finance officer at Army Air Field, Alliance, Nebraska, an officer of the United States, duly authorized to pay such pay vouchers, in the amount of \$575.40, for pay alleged to have been due to one Major Raymond A. Harris, a fictitious person, which pay voucher was false and fraudulent in that there was

no such person as Major Raymond A. Harris, and which was then known by the said First Lieutenant Joseph H. Thompson, Jr., to be false and fraudulent.

Specification 2: In that First Lieutenant Joseph H. Thompson, Jr., Section A, 805th Army Air Forces Base Unit, for the purpose of obtaining payment of a certain United States Government Pay Voucher, D. O. Vou. No. 23226, by causing it to be presented to Captain William H. Hutchinson, finance officer at Army Air Field, Alliance, Nebraska, an officer of the United States, duly authorized to pay such pay vouchers, did, at Army Air Field, Alliance, Nebraska, on or about 25 May 1944 make and use a certain paper, to wit, a War Department Form No. 336-Revised, D. O. Vou. No. 23226, which paper was false and fraudulent in that it related to a fictitious person, who the said First Lieutenant Joseph H. Thompson, Jr., well knew was fictitious, and which paper was then known by the said First Lieutenant Joseph H. Thompson, Jr., to be false and fraudulent.

Specification 3: In that First Lieutenant Joseph H. Thompson, Jr., Section A, 805th Army Air Forces Base Unit, for the purpose of obtaining the payment of a certain United States Government Pay Voucher, D. O. Vou. No. 23226, by causing it to be presented to Captain William H. Hutchinson, finance officer at Army Air Field, Alliance, Nebraska, an officer of the United States, duly authorized to pay such pay vouchers, did, at Army Air Field, Alliance, Nebraska, on or about 25 May 1944, forge the signature of Major Raymond A. Harris, a fictitious person, upon the aforesaid pay voucher in words and figures as follows:

"I certify that the foregoing statement and account are true and correct; that payment therefor has not been received; and that payment to me as stated on the within pay voucher is not prohibited by any provisions of law limiting the availability of the appropriation(s) involved.
Place to my credit with Guardian State Bank,
Alliance, Neb. (Name signed) RAYMOND A. HARRIS
Raymond A. Harris
Rank Major, AC."

Specification 4: In that First Lieutenant Joseph H. Thompson,

Jr., Section A, 805th Army Air Forces Base Unit, for the purpose of obtaining payment of a certain fictitious United States Government Pay Voucher by causing it to be presented to Captain William H. Hutchinson, finance officer at Army Air Field, Alliance, Nebraska, an officer of the United States, duly authorized to pay such pay vouchers, did, at Army Air Field, Alliance, Nebraska, on or about 25 May 1944, make and use a certain writing, to wit, an extract of a fictitious paragraph 12 of Special Orders No. 140, Headquarters I Troop Carrier Command, Stout Field, Indianapolis, Indiana, dated 20 May 1944, which writing was false and fraudulent in that it related to a fictitious person and a fictitious assignment, which the said First Lieutenant Joseph H. Thompson, Jr., well knew were fictitious, and which writing was then known by the said First Lieutenant Joseph H. Thompson, Jr., to be false and fraudulent.

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

Specification: In that First Lieutenant Joseph H. Thompson, Jr., Section A, 805th Army Air Forces Base Unit, with intent to defraud the Guardian State Bank, Alliance, Nebraska, did, at Alliance, Nebraska, on or about 31 May 1944, unlawfully pretend to Howard Lichty, a cashier in the said bank, that he, the said First Lieutenant Joseph H. Thompson, Jr., was Major Raymond A. Harris, a fictitious person, well knowing that the said pretenses were false, and by means thereof did fraudulently obtain from the said Guardian State Bank the sum of \$575.40.

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

Specification: In that First Lieutenant Joseph H. Thompson, Jr., Section A, 805th Army Air Forces Base Unit, having taken an oath in an official hearing before a board of officers appointed by letter order dated 2 June 1944, Headquarters Army Air Field, Alliance, Nebraska, a competent tribunal, that he would testify truly, did, at Army Air Field, Alliance, Nebraska, on or about 3 June 1944, wilfully, corruptly, and contrary to such oath, testify in substance that he had cashed a check for one Major Raymond A. Harris, which testimony was a material matter, and which he did not then believe to be true.

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

Specification: In that First Lieutenant Joseph H. Thompson, Jr., Section A, 805th Army Air Forces Base Unit, with intent to defraud, did, at Alliance, Nebraska, on or about the 31st of May, 1944, unlawfully pretend to Howard Lichty, a cashier of The Guardian State Bank, Alliance, Nebraska, that he, the said First Lieutenant Joseph H. Thompson, Jr., was Major Raymond A. Harris, a fictitious person, well knowing that the said pretenses were false, and by means thereof did fraudulently obtain from the said The Guardian State Bank, Alliance, Nebraska, the sum of \$75.40.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications and was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on or about 24 May 1944, the accused sold his car for \$1000 which was paid to him in the form of ten \$100 travellers' checks. During that night, the accused participated in a poker game at the Officers' Club, Army Air Field, Alliance, Nebraska, in which there was at one time "a pot of approximately \$2800" and "a bet of \$800 on one card". The accused lost and paid to Flight Officer Varner upon the latter's leaving the game "six or seven \$100.00 travellers' checks". The game continued and the accused continued playing and losing. At the end of the game, the accused "paid off" with a \$100 traveller check. Prior to the game, he had given a \$100 travellers' check to pay a previous debt (R.60, 67, 71, 76-78, 81, 85, 87).

About five or six nights later the accused was again a participant and loser in a poker game. To Lieutenant William G. Greer, who was one of the winners, the accused gave at the game's end two checks in the amount of \$475 and \$675 which was the total sum that the accused had lost in the game. In turn, Lieutenant Greer paid the other winners by giving them his personal checks. On the following morning, the accused gave Lieutenant Greer some cash, a "check for \$500, and a personal check for \$213" in exchange for the two checks which he had given Lieutenant Greer on the preceding night. The "\$500 check" which was introduced in evidence was signed by "Raymond A. Harris, Maj. A.C." as maker but the date and payee were omitted. The accused at the time of delivery of the check

to Lieutenant Greer inserted his (the accused's) name as payee and indorsed it in blank. The check was deposited and "was turned down at the branch bank here on the post as No Account under the name of the signer of the check". Lieutenant Greer "took the check over to Lt. Thompson [the accused] and informed him of the fact that there was no account under that name and he said that probably the check would be good in a short time" (R. 61-64; Pros. Ex. I).

Mr. Howard Lichty, cashier of the Guardian State Bank, Alliance, Nebraska, testified that on this same date (1 June 1944), "a person who presented himself by the name of Major Raymond A. Harris" discussed with him "his [Harris'] account which was supposed to have been opened on May 31st. He wanted to close out the balance of his account. He stated he had issued a \$500 check and wanted to withdraw the balance of \$75.40". When "Major Harris" was asked to identify himself, he presented an "AGO Card" which Mr. Lichty "examined and thought to be sufficient to prove that he was a Raymond A. Harris". The picture on the card "compared favorably" with the person who stated that he was "Harris". The "left hand side of the card was torn off and the part beneath the picture was cut away". "Major Harris" was allowed to withdraw \$75.40, "the balance of the account". During this interview, "Harris" was wearing "major insignia" and "wore dark colored glasses, green". The record then sets forth the following questions and answers:

"Q. Mr. Lichty, please look around the court room and point out the man who you think is Major Raymond A. Harris, if he is here.

A. (Looks over entire room, spectators, and all, then points to accused) Right here in the center.

Q. Is it your testimony that the man you just pointed out, the accused in this case, is the man who appeared before you and stated to you that he was Major Raymond A. Harris?

A. He is.

Q. Are you positive of that?

A. Absolutely." (R. 30-33).

A short time after his interview with Mr. Lichty, the accused

went to the office of Major, then Captain, William H. Hutchinson, Finance Department, Section A, 805th AAFBU, and told him that he was concerned about a check which he had cashed for "Major Harris" and given to Lieutenant Greer who presented it to the Guardian State Bank. They went to the branch of the bank on the post and were informed by the manager that as a result of a visit by "Major Harris" to the bank's office in town earlier that day the matter had been straightened out and that the check would be cleared the next day (R. 18, 19).

Major Hutchinson's curiosity was aroused over the accused's concern. He secured the pay voucher of "Major Raymond A. Harris" and accompanying orders (Special Orders 140, par. 12, Hq. I, Troop Carrier Command) directing a change in station from Stout Field, Indiana, to the base at Alliance, Nebraska. The voucher disclosed that "Harris" had reported for duty at the latter station on 25 May 1944. An examination of the "register" revealed that no Major Harris had signed in on that date or within three or four days prior or subsequent thereto. He then obtained an original copy of Special Orders 140, Hq. I Troop Carrier Command and found that there was no paragraph 12. A photostatic copy of the voucher, of par. 12, Special Orders 140, of certificate of service and of statement on reverse side of voucher, and a certificate as to quarters at Stout Field were introduced in evidence. After ascertaining these facts, Major Hutchinson ordered that payment be stopped on the Government check which had been issued to pay the voucher. As a result of this, when the \$500 check of Harris reached the Guardian State Bank, it was dishonored and charged to Lieutenant Greer's account (R. 19, 23, 31; Pros. Exs. A-F).

By order of Headquarters, Alliance Army Air Field, dated 2 June 1944, a board of officers was appointed "to investigate and report upon the circumstances and facts surrounding and leading up to the preparation and, presentation" of the "Harris" voucher and the "government check" issued to pay the voucher. The board, so appointed, convened on 3 June 1944. The accused was a sworn witness before the board and was recalled several times, each time being reminded that he was still under oath. The accused testified that he had cashed for Major Harris a check for \$500 from money received from the sale of his car. Later he said that his father had sent him the money with which he had cashed the check, and finally he testified "All I have told has been a falsehood except about selling my car" (R. 94-96, 105, 110-112; Pros. Ex. J).

Staff Sergeant Jack Silverston, Section A, 805th Army Air Forces Base Unit testified that he was with the "officer's pay section of Officer Personnel", that his duty was to make up vouchers for officers, that the accused was military personnel officer and that his desk was

four or five desks from the accused's desk. Toward the end of May 1944, he noticed on his desk "a pay voucher made out for a Major Harris" from which "certain things were missing". He prepared a "buck slip" to have Major Harris come in which "buck slip" was sent to "section C" composed primarily of flying officers. The voucher was left on his desk "waiting for the officer to come in. Nothing happened. One day Captain Hawkins asked [him] about this voucher and [he] looked through the file on [his] desk and there was no such voucher there". He never received an answer to his "buck slip" (R. 9-11, 13).

Second Lieutenant J. Dorothy Scott, WAC, Adjutant of Section A, 805th Army Air Forces Base Unit, had the duty, among other things, of witnessing officers' signature pay cards. On occasions she signed her name to some cards of this kind evidencing the authenticity of the signatures thereon when such signatures had been previously affixed. On one occasion, she placed her signature on some pay cards in the Finance Office which bore only the typed name of the officers. She did not remember whether "Major Raymond A. Harris" appeared before her for a signature card (R. 15-17).

Lieutenant Maurice B. Glassman, Section B, 805th AAFBU, testified that on 2 June 1944, he saw the accused trying to put together his AGO Card which was in several pieces. There was nothing secretive about accused's actions and he made no effort to hide the card. Witness "placed no significance at all to the torn pass and had no conversation about it". He could not see the signature under the picture but recognized the picture as being that of the accused (R. 50-56).

4. The accused, after explanation of his rights as a witness, elected to remain silent. The evidence for the defense consists of the testimony and stipulated testimony of eight officers, who had known the accused for various periods of time up to one and one-half years, to the effect that the reputation of the accused for honesty and truthfulness was good (R. 122-125, 128-138).

A copy of WD, AGO Form No. 66-2 relating to the accused was introduced in evidence. With the exception of the first rating of "VS" which covered the period from 19 July 1942 to 5 November 1942, all of the performance ratings given to the accused were excellent (R. 126-127; Def. Ex. 1).

5. Specification 1 of Charge I alleges that the accused did "at Army Air Field, Alliance, Nebraska, on or about 25 May 1944 cause to be presented for payment" a certain described pay voucher "to Captain William H. Hutchinson, finance officer * * * authorized to pay such" voucher "in the amount of \$575.40, for pay alleged to have been due to one Major

Raymond A. Harris, a fictitious person, which pay voucher was false and fraudulent in that there was no such person as Major Raymond A. Harris" as the accused well knew. Specification 2 of Charge I alleges the accused did at the same time and place for the purpose of obtaining payment "make and use" the aforesaid pay voucher which was "false and fraudulent in that it related to a fictitious person, who" the accused "well knew was fictitious, and which" voucher was known by the accused "to be false and fraudulent". Specification 3 of Charge I alleges that the accused did at the same time and place for the purpose of obtaining payment "forge the signature of Major Raymond A. Harris, a fictitious person, upon the aforesaid pay voucher".

"Presenting to a paymaster a false final statement, knowing it to be false" is an example of an offense condemned by Article of War 94 (M.C.M., 1928, par. 150b). "Making a claim is a distinct act from presenting it" and to be in violation of Article of War 94, the "claim must be made or caused to be made with knowledge of its fictitious or dishonest character" (M.C.M., 1928, par. 150a). Forging a "signature upon any writing or other paper", with full knowledge, for the purpose of obtaining the payment of a claim against the United States is also violative of Article of War 94 (M.C.M., 1928, pp. 183, 224).

These Specifications allege separate offenses arising out of one transaction which is ordinarily not the most desirable practice (M.C.M., 1928, par. 27). In this case, however, the sentence clearly indicates that accused was not prejudiced by the apparent "multiplication of charges" against him.

The evidence for the prosecution clearly shows that during the latter part of May 1944, Major, then Captain, Hutchinson, the finance officer, received a pay voucher in the amount of \$575.40 for the month of May 1944, bearing the signature of "Raymond A. Harris" whose rank was "Major, AC", as claimant, and issued in payment of said voucher a check to the Guardian State Bank, Alliance, Nebraska, in accordance with instructions contained in the voucher.

Although there is no direct proof that the accused "made" the voucher or caused it "to be presented" to the Finance Officer or forged the signature thereon of the alleged fictitious claimant there is ample proof to justify the inference that he did so. The accused's position as Military Personnel Officer afforded him ample opportunity to prepare and forward the voucher to the Finance Officer. The attempt to have the voucher submitted through routine channels was frustrated when the noncommissioned officer on whose desk the voucher had been left by

an unknown person found that it was incomplete and sent out a "buck slip" requesting "Major Harris" to see him. After that, the voucher disappeared from his desk and next appeared as having been paid, although it reached the Finance Officer through other than established channels. No witness testified that the accused signed the voucher in the name of "Raymond A. Harris". However, there is included in the evidence a check signed by "Raymond A. Harris" which the accused asserted in a conversation with the cashier of the bank on which it was drawn had been made and issued by him, which signature was thus available for comparison with the signature appearing on the voucher, also in evidence. "Any admitted or proved handwriting of [a] person shall be competent evidence as a basis for comparison * * * by the court to prove or disprove" the genuineness of handwriting of such person which is in dispute (M.C.M., 1928, par. 116a; see also 28 USCA, sec. 638). The court, therefore, had sufficient evidence before it on which to base a finding that the accused actually signed the name "Raymond A. Harris" to the voucher.

The presence of the accused at the bank holding himself out as "Major Harris", his having in his possession a few days prior to this a check signed by "Major Harris", his certification of copies of orders pertaining to "Major Harris", and the apparent nonexistence of this "Major Harris", are facts indicating that the accused himself prepared the voucher in question and caused it to be presented to the Finance Officer in order that he might obtain from the Government the amount claimed in the voucher to assist in defraying the gambling obligations which he had incurred. The indications are that the accused was solely responsible for the entire transaction which is impelled to some extent by his attempting to exercise full control over the use of the funds paid by check in satisfaction of the claim expressed in the voucher. The evidence beyond a reasonable doubt excludes any fair and reasonable hypothesis save that of guilt (Dig. Op. JAG, 1912-40, sec. 395 (9)), and is sufficient to support the court's findings of guilty of Specifications 1, 2 and 3 of Charge I and of Charge I.

6. Specification 4 of Charge I alleges that the accused did "make and use * * * an extract of a fictitious paragraph 12 of Special Orders No. 140, Headquarters I Troop Carrier Command", which "was false and fraudulent in that it related to a fictitious person and a fictitious assignment" which the accused knew was false and fraudulent, and used to obtain payment by the Government of the aforesaid voucher.

The making and using of a false writing or other paper in connection with a claim against the Government constitutes a violation of Article of War 94 (M.C.M., 1928, par. 150d).

The prosecution's evidence shows that an extract copy of the

aforesaid paragraph 12 of Special Orders No. 140, certified by the accused as authentic, was attached to the fictitious pay voucher, and that Special Orders No. 140 contained in fact no paragraph 12. The attendant circumstances are deemed sufficient beyond a reasonable doubt to justify the court's findings of guilty of Specification 4 of Charge I and of Charge I.

7. The Specification of Charge II alleges that the accused "with intent to defraud the Guardian State Bank, Alliance, Nebraska" unlawfully pretended to the bank's cashier that he was "Major Raymond A. Harris, a fictitious person, well knowing the said pretenses were false, and by means thereof did fraudulently obtain from the said Guardian State Bank the sum of \$575.40".

For an officer, with fraudulent intent, to represent himself as a fictitious person and by means thereof to obtain money is conduct unbecoming an officer and gentleman and a violation of Article of War 95 (See Dig. Op. JAG. 1912-40, sec. 453 (25); M.C.M., 1928, par. 151).

The evidence for the prosecution clearly shows that the accused presented himself to the bank's cashier as "Major Harris" and by his representations and by use of his torn AGO card convinced the cashier of his identity as the fictitious "Major Harris" sufficiently to have the cashier give him the sum of \$75.40, the amount remaining in "Harris'" account after deducting the outstanding \$500 check which he had drawn and given to a third party. It appears, however, that the \$500 check was not paid by the bank because the Government stopped payment on the \$575.40 check which had been forwarded to the bank for the "Harris" account. Thus, the evidence is sufficient beyond a reasonable doubt to support only so much of the Specification as involves a finding of fraudulently obtaining the lesser included amount of "\$75.40", and legally sufficient to support Charge II.

8. The Specification of Charge III alleges that the accused in violation of his oath testified falsely before a certain board of officers that "he had cashed a check for one Major Raymond A. Harris".

This alleges perjury which, as an offense condemned by Article of War 93, "is the willful and corrupt giving, upon a lawful oath * * * in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry" (M.C.M., 1928, par. 149i).

The prosecution's evidence shows that the accused testified under oath before the stated board of officers that "he had cashed a

check [for \$500] for one Major Raymond A. Harris". It also shows that not only was "Major Harris" a fictitious person but that the accused himself pretended to be "Major Harris" and asserted that he had drawn and issued the check in question. In his subsequent testimony before the board, the accused stated that all that he had "told has been a false-hood except about selling [his] car". The fact was unquestionably material to the inquiry.

That the accused's admission before the board that this statement was untrue did not purge him of his false testimony is now clearly established. "The crime of perjury is complete when a deliberate material false statement is made and nothing thereafter done can alter the situation" (CM NATO 154; Vol. III, Bull. JAG, p. 13).

It is pertinent to consider whether the accused's testimony was given "in a judicial proceeding or course of justice". The status of the board of officers is determinative of this question. The board was duly appointed "to investigate and report upon" the facts relating to the voucher of "Major Harris" and check issued in payment therefor which involved in effect an investigation of a "fraud on, or attempt to defraud, the Government, [and] an irregularity or misconduct of * * * [an] officer of the Army". The investigation constituted a case "in which a law of the United States [Sec. 183, Rev. Stats., as amended] authorized an oath to be administered and a false statement of a material matter made by a witness under oath in the course of such investigation amounted to perjury within the purview of section 125, Federal Penal Code of 1910 * * * embraced in those crimes * * * denounced by the 96th Article of War" (CM 201765, Dig. Op. JAG, 1912-40 sec. 451 (52)).

The evidence, therefore, establishes a so-called "statutory perjury" in violation of Article of War 96 (CM 198262, Dig. Op. JAG, 1912-40 sec. 451 (52) rather than "common law perjury" which is violative of Article of War 93, and is sufficient to support only so much of the findings of guilty of Charge III and its Specification as involves findings of guilty of perjury as alleged, in violation of Article of War 96.

9. The Specification of Charge IV alleges that the accused "with intent to defraud" unlawfully pretended to a named cashier of the Guardian State Bank, Alliance, Nebraska, that he "was Major Raymond A. Harris, a fictitious person, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said * * * Bank * * * the sum of \$75.40".

"Obtaining property [or money] under false pretenses" is properly charged as a violation of Article of War 96 (Dig. Op. JAG, 1912-40, sec. 454 (51)).

SPJGN
CM 260165

1st Ind.

War Department, J.A.G.O., 31 AUG 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 H. Thompson, Jr. (O-1576859), 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 court's finding of guilty of the Specification of Charge II as involves a finding of guilty of the Specification substituting the lesser sum of \$75.40 for the larger sum of \$575.40, legally sufficient to support only so much of the Specification of Charge III and Charge III (A.W. 93) as involves a finding of guilty of the Specification as a violation of Article of War 96, legally sufficient to support the findings of guilty of all the other Charges and Specifications, and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed.

3. Consideration has been given to the attached letter from the Honorable Samuel D. Jackson, United States Senate, dated 23 August 1944, requesting clemency for the accused.

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



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

4 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for sig. Sec. of War.
- Incl 3 - Form of Executive action.
- Incl 4 - Ltr. from Honorable Samuel D. Jackson.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 533, 26 Sep 1944)

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

SPJGK
CM 260183

3 AUG 1944

UNITED STATES	)	92ND INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Huachuca, Arizona, 12
Second Lieutenant CLIFFORD E.	)	July 1944. Dismissal, total
GODLEY (O-1293939), Infantry.	)	forfeitures, confinement for
	)	five (5) years.

 OPINION of the BOARD OF REVIEW
 LYON, MOYSE and SONENFIELD, 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 61st Article of War.

Specification 1: In that Second Lieutenant Clifford Godley, 371st Infantry, did, at Fort Huachuca, Arizona, on or about 0730, 8 May 1944, fail to repair at the fixed time to the appointed place of assembly.

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

Specification 3: In that Second Lieutenant Clifford Godley, 371st Infantry, did, without proper leave, absent himself from his company at Fort Huachuca, Arizona from about 0600, 10 May 1944 to about 0930, 13 May 1944.

Specification 4: (Finding of not guilty).

Specification 5: In that Second Lieutenant Clifford Godley, 371st Infantry, did, without proper leave, absent himself from his company at Fort Huachuca, Arizona, from about 0600, 1 June 1944 to about 0600, 5 June 1944.

(166)

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

He pleaded not guilty to the Charge and all its Specifications, and was found not guilty of Specification 4 and guilty of the Charge and all other Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for five years. The reviewing authority disapproved the findings of guilty of Specifications 2 and 6, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence

a. Specification 1. (Failure to repair to the appointed place of assembly at 0730 on 8 May 1944.)

The only witness for the prosecution was First Lieutenant Bayard C. Fisher, 371st Infantry, who was Executive Officer of accused's company until 28 May 1944, and thereafter its Commanding Officer (R. 7, 13). He testified that standard operational procedure in the battalion of which the company was a member was for officers to report in person to their company orderly rooms every morning. Witness acquainted accused with this procedure when accused first reported to the company for duty. Accused had followed the procedure on occasions thereafter (R. 12, 13). On the morning of 8 May witness remained in the orderly room all morning, after the company had moved out. Accused did not report at 0730, nor at any time thereafter (R. 9, 10).

b. Evidence for defense, Specification 1.

Second Lieutenant Asa G. Murray, 371st Infantry, testified that he occupied the same room in the officers' barracks as did accused, and that on 8 May they had breakfast together. At approximately 0720 they left mess and walked together as far as accused's orderly room, which accused entered (R. 26, 27, 36).

c. Specification 3. (Absence without leave from his company from 0600, 10 May 1944, to 0930 on 13 May 1944.)

Lieutenant Fisher testified that accused did not report to the company at 0600 on 10 May 1944, and that he (witness) did not see accused during the period of 10 May to 13 May, although witness was on duty in the company orderly room during that time (R. 10, 14).

The company morning report for 11 May showed accused from duty to absent without leave as of 0600 on 10 May and that for 13 May showed him from absent without leave to duty as of 0930 on 13 May (R. 7; Pros. Ex. A).

d. Evidence for defense, Specification 3.

Lieutenant Murray testified that he and accused had breakfast together on the mornings of 10, 11, 12, and 13 May, and that after breakfast they had set out together for their respective organizations. Witness stated that he saw accused enter the latter's orderly room, which was directly across the street from that of the witness, and in plain view from the front window (R. 36, 39).

e. Specification 5. (Absence without leave from his company from 0600, 1 June 1944 to 0600, 5 June 1944).

Lieutenant Fisher testified that accused did not report to the company orderly room for duty between 0600 on 1 June and 0600 on 6 June (R. 10). The company morning report for 1 June showed accused from duty to absence without leave as of 0600 on that date, while that for 7 June showed accused from absent without leave to duty as of 0600 on 5 June (R. 8, 9; Pros. Ex. C).

Lieutenant Fisher admitted that he had seen accused in the company area during this period. Accused several times came into the orderly room after retreat was over, to see if he had any mail. Apparently nothing was said between them; accused just came in, looked around, and departed without comment (R. 16-18). Witness also admitted having been encountered by accused, in the company of Second Lieutenant Herbert C. McWilson, in a corridor of the officers' barracks between 1200 and 1300 of 2 June, at which time accused asked witness why he had been carried absent without leave. Accused was not present with the company for duty prior to or subsequent to that hour (R. 16, 17).

f. Evidence for defense, Specification 5.

Major Percy R. Turnley, 597th Field Artillery Battalion, testified that a reclassification board met "infrequently and at quite short notices" during this period, and that accused was several times called before it. The evidence does not disclose Major Turnley's exact relationship to the board. He was, however, directed by the president of the board to have accused summoned before it for questioning "at least three times". This he did by telephoning accused's regiment. He was informed by the regiment that the notice would be passed down to accused through channels, which would include his company. Witness would not state of his own knowledge that the summonses reached accused's company, but accused was present at the times the board desired him. The board meetings did not occupy all of the time covered by the allegation of this specification, and the board did not meet before 0830 (R. 23, 24).

Lieutenant McWilson testified that he was with accused in the officers' barracks on 2 June, 1944, when they met Lieutenant Fisher. Accused and Lieutenant Fisher engaged in angry words, during the course of which accused asked, "Why did you carry me AWOL?", to which Lieutenant

Fisher replied, "Well, you are". Upon accused's mention of the reclassification board's proceedings, Lieutenant Fisher said that he did not care what accused was doing, that he was "not going to stick my neck out for nobody", and that he was going to have accused court-martialled at the first opportunity (R. 28). Accused and witness then left. Witness further testified that he and accused were together every day from 3 June to 5 June, but did not make clear where they were, except to say that they were in different companies (R. 28-30).

Major Turnley testified that accused once mentioned to him that he had been carried as absent without leave by Lieutenant Fisher, and this despite his having told Lieutenant Fisher of his whereabouts. Witness saw Lieutenant Fisher "the next day" and told him that accused had been before the reclassification board. Lieutenant Fisher told witness that he knew that (R. 23).

Lieutenant Fisher, called as a witness for the defense, testified he had met accused and Lieutenant McWilson in the officers' barracks. He admitted the conversation between himself and accused and that he had said that he would not stick his neck out for anybody. He stated that he told accused that he would continue to be reported absent without leave until he reported for duty. Witness admitted the angry words between them, but denied that he had threatened to court-martial accused the first chance he got (R. 34). He denied having received any instructions from the regiment to excuse accused from formations during any day covered by the period from 1 June to 5 June for the purpose of attendance at reclassification board hearings, and stated that he did not know specifically of these hearings or of accused's whereabouts until 6 June, at which time he talked to Major Turnley (R. 32-34). Accused had no permission from him to be absent (R. 34). After the conversation with Major Turnley witness corrected the morning report as of 7 June (R. 35). Presumably Prosecution's Exhibit C is a copy of the report as corrected, for the defense was given an opportunity during a recess to examine the originals, and did not further allude thereto in the course of the trial (R. 35, 36).

Accused stated that he fully understood his rights as a witness and that he elected to remain silent (R. 39).

4. The Board of Review is of the opinion that there is competent evidence in support of the findings of guilty of the Charge and each Specification as finally approved by the reviewing authority.

While a witness for the defense testified that he saw accused enter his orderly room on the morning of 8 May, accused's own company commander testified that accused did not report at the assigned hour and that he did not see accused thereafter on that day. The court was at liberty to believe the one witness and to disbelieve the other, and we are unable to say that the court erred.

The same observation may be made concerning the sufficiency of the record as to Specification 3. It should also be noted that the offense charged is absence from his company. Accused's mere presence in camp, or even in the area, which is the ultimate fact suggested by Lieutenant Murray's testimony, would not, even if established, suffice to absolve him of the offense charged and established by Lieutenant Fisher's testimony.

One thing stands out in the conflicting welter of testimony which surrounds the offense charged in Specification 5. That is that, wherever accused was on those days, and whatever may have been his reasons therefor, he was not present with his company for duty, which is the offense alleged. His witnesses attempt to establish that his presence was required before a reclassification board. It is clear, however, that its proceedings did not occupy all of the days covered, nor all of any one day. The defense itself does not suggest that he was present at times when he was not before the board. If we may speculate, it appears that accused was using his occasional absence for this purpose in an effort to provide a general excuse for his absence throughout the period. On the basis of the record, he does not make out a defense adequate to meet prosecution's prima facie case.

5. War Department records show that accused is 22 years of age. He is a high school graduate, and was employed as a garage mechanic prior to his voluntary enlistment in the Army on 21 January 1942. He attended The Infantry School, and upon graduation therefrom on 17 September 1942, he was commissioned a second lieutenant, Infantry, on 18 September 1942. At the time he was recommended for attendance at Officers' Candidate School, his commanding officer stated that accused's character was "excellent" and said of his qualities of leadership that he was of "well above average intelligence".

6. 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Ray A. Zor, Judge Advocate.

Norman Mays, Judge Advocate.

Samuel Bonafant, Judge Advocate.

(170)

1st Ind.

War Department, J.A.G.O. 1 2 AUG 1944 - To the Secretary of War.

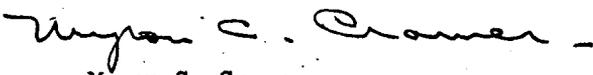
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Clifford E. Godley (O-1293939), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as approved by the reviewing authority, and the sentence and to warrant confirmation thereof. The Staff Judge Advocate states,

"This officer is now the subject of reclassification proceedings which, although approved by this headquarters, have not as yet been approved by higher headquarters. There are at least four known disciplinary actions against this accused, having been taken intermittently from September, 1943, to April, 1944. * * *"

In view of this and in view of the failure to repair to the appointed place of assembly and the two absences without leave of which he was convicted in the instant case, I recommend that the sentence be confirmed, that the forfeitures and confinement be remitted, and that the sentence as thus modified be carried into execution.

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


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

3 Incls.

Incl.1-Record of trial.

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

Incl.3-Form of Ex. action.

(Sentence confirmed but confinement and forfeitures remitted.
G.C.M.O. 509, 22 Sep 1944)

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

SPJGV
CM 260198

4 SEP 1944

UNITED STATES)

v.)

Major EDWARD I. POLSLEY
(O-202178), Infantry.)

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES
Trial by G.C.M., convened at
Dallas, Texas, 7 July 1944.
Dismissal,

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that Major Edward I. Polsley, 1882nd Service Unit, Eighth Service Command, did, at Camp Maxey, Texas, on or about 25 April 1944, with the intent to deceive First Lieutenant W. A. McKenzie, Finance Department, Post Disbursing Officer, Camp Maxey, Texas, officially state to the said First Lieutenant W. A. McKenzie that one Imogene V. Polsley, El Paso, Texas, was his lawful wife by signing a pay and allowance account voucher (War Department Form No. 336a - Revised) to that effect, which statement was known by the said Major Edward I. Polsley to be untrue in that the said Major Edward I. Polsley was then and there legally married to one Louise Taylor Polsley.

Specification 3: In that Major Edward I. Polsley, * * *, did at Camp Maxey, Texas, on or about 12 May 1944, with the

intent to deceive First Lieutenant W. A. McKenzie, Finance Department, Post Disbursing Officer, Camp Maxey, Texas, officially state to the said First Lieutenant W. A. McKenzie that one Imogene V. Polsley, El Paso, Texas, was his lawful wife by signing a pay and allowance account voucher (War Department Form No. 336a - Revised) to that effect, which statement was known by the said Major Edward I. Polsley to be untrue in that the said Major Edward I. Polsley was then and there legally married to one Louise Taylor Polsley.

Specification 4: In that Major Edward I. Polsley, * * *, being then and there lawfully married to Louise Taylor Polsley, who was then living and from whom he, the said Major Edward I. Polsley, was not divorced, did, at Prisoner of War Camp, Camp Maxey, Texas, on divers occasions from about 23 April 1944 to about 14 May 1944, wrongfully, falsely and with the intent to deceive, introduce a woman, one Imogene Zuler, as his wife to the officers then and there on duty at the Prisoner of War Camp, Camp Maxey, Texas, and their wives, when in fact the said Imogene Zuler was not the wife of the said Major Edward I. Polsley, as he, the said Major Edward I. Polsley, then well knew.

Specification 5: In that Major Edward I. Polsley, * * *, being then and there lawfully married to Louise Taylor Polsley, who was then living and from whom he, the said Major Edward I. Polsley, was not divorced, did, at Officers' Mess No. 1, Camp Maxey, Texas, on or about 5 May 1944, wrongfully, falsely and with the intent to deceive, introduce a woman, one Imogene Zuler, as his wife to the officers of the 1882nd Service Unit, Eighth Service Command, Camp Maxey, Texas, and their wives, when in fact the said Imogene Zuler was not the wife of the said Major Edward I. Polsley, as he, the said Major Edward I. Polsley, then well knew.

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

Specification: In that Major Edward I. Polsley, * * *, being then and there lawfully married to Louise Taylor Polsley, who was then living and from whom he, the said Major Edward I. Polsley, had not obtained a divorce,

did, at Paris, Texas, from about 23 April 1944 to about 14 May 1944, wrongfully and unlawfully live and cohabit with Imogene Zuler, a female person.

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 1 of Charge I and guilty of all other Specifications and of all Charges. 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. To support generally all Specifications and Charges, the prosecution introduced evidence to prove that Louise Taylor Polsley, whose two previous marriages had been terminated by divorce, met accused in September 1943 while he was commanding officer of Tonkawa Prisoner of War Camp, Oklahoma. Accused courted her for some two or three months thereafter and they married at El Campo, Texas, on 21 December 1943, after accused had been transferred to Camp Hulen, Texas. They lived together in the vicinity of Camp Hulen until 14 January 1944 when accused was sent to Camp Gruber, Oklahoma, on temporary duty (R. 1g-3, 24). Mrs. Polsley then went to Tulsa, Oklahoma, where accused visited her the week end following his transfer to Camp Gruber (R. 5). Apparently accused returned to Camp Hulen, Texas, shortly thereafter, failed to correspond regularly with Mrs. Polsley and finally during a telephone conversation with her in early February 1944 he admitted in response to her direct question that he did not care to live with her any longer (R. 8, 9). Although in subsequent telephone conversations and in correspondence Mrs. Polsley suggested she be permitted to join accused, he was not receptive to this proposal and eventually in March 1944 he wrote her that their marriage was unfortunate from his point of view and suggested that a divorce be obtained (R. 11, 12, 13; Pros. Ex. 3). On or about 17 June 1944, service of papers in a divorce action commenced by accused in El Paso County, Texas, was made upon Mrs. Polsley (R. 14; Pros. Ex. 4). The divorce had not been granted, however, up to the date of trial (R. 16, 18). Mrs. Polsley had not seen accused since their separation, occurring the latter part of January 1944, until the day of the trial of accused on these charges, 7 July 1944 (R. 7).

In support of Specifications 2 and 3 of Charge I the prosecution introduced evidence to show that on his pay vouchers submitted to the finance department for the months of April and May 1944, accused listed Imogene V. Polsley, El Paso, Texas, as his lawful wife. Accused received no more pay and allowances than he would have received if his lawful wife,

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Louise Palsley, had been named on these vouchers (R. 26-29, 32; Pros. Ex. 5). Accused submitted his June pay voucher after an investigation of the present charges had been commenced and on that voucher a different name (not disclosed) appeared as the name of accused's wife (R. 33). After having been properly warned of his rights accused freely and voluntarily admitted to the investigating officer that the statements on these vouchers showing his wife's name as Imogene V. Palsley were untrue (R. 78-81; Pros. Ex. 9).

In support of Specification 4 of Charge I the prosecution introduced evidence to show that on or about 23 April 1944, accused arrived at the Prisoner of War Camp, Camp Maxey, Texas, where he had been assigned to duty as commanding officer. He was accompanied by a woman whom he introduced as his wife to First Lieutenant and Mrs. Andrew Tomasi (R. 34-36). On or shortly after 23 April 1944, accused also introduced this same woman as his wife or as Mrs. Palsley to Captain Jimmie Dooley (R. 43-45), First Lieutenant Tilman N. Gibson (R. 50, 51, 56), Captain John A. Moore (R. 58), and Captain Herman W. Graupner (R. 66), all on duty at the prisoner of war camp. Until sometime during the middle of May 1944 this woman was frequently observed about the prisoner of war camp, at the officers' mess where she dined two or three evenings a week with the accused and also in accused's quarters at the camp. During this period she was introduced by accused as his wife to various officers at the prisoner camp and was treated by the personnel of the prisoner camp, an aggregate of some 17 or 18 officers and some 225 enlisted men, as the wife of their commanding officer (R. 36-38, 42, 45-47, 51, 52, 59, 61, 64).

On 14 May 1944, a birthday party for accused was held at the prisoner of war camp at which this woman was present with accused. He introduced her as his wife to the various officers and their wives present at the gathering and, at the conclusion of the party accused arose and stated that, on behalf of his wife and himself, he wished to thank them for the celebration (R. 40, 41, 46, 65).

After accused had been properly warned of his rights he voluntarily admitted to the investigating officer that he was married to Louise Taylor and that, when he reported for duty to the prisoner of war camp on 23 April 1944, he was accompanied by a woman named Imogene Zuler whom he introduced to various officers and their wives, by whom she was accepted as his wife, both about the prisoner camp and at the birthday party held on 14 May 1944 (R. 78-81; Pros. Ex. 9).

In support of Specification 5 of Charge I the prosecution introduced evidence to show that on 5 May 1944 a party was held at Officers' Mess No. 1, Camp Maxey, which was attended by Colonel Annin, the commanding officer of Camp Maxey, his executive officer, Lieutenant Colonel Morley, and numerous other officers and their wives (R. 38, 39). Accused and this same woman attended the party being seated opposite each other at a table occupied by several other officers and their wives (R. 38, 39, 54, 55, 60, 71, 72). She was introduced to the group as his wife or as Mrs. Polesley (R. 59, 60). Captain Theodore S. Maffett and his wife who were also present at this gathering had met accused's wife, Louise Taylor Polesley, while she and accused were keeping company prior to their marriage (R. 68, 70). He had heard that she and accused had married, had thereafter seen accused at Camp Gruber and congratulated him thereupon, and had in turn been thanked by accused who then directed the conversation into other channels (R. 69, 70). They saw accused at this party with a woman who was not Louise Taylor Polesley and, although they chatted with them, they were not formally introduced to accused's companion (R. 71, 72). Later accused requested Captain Maffett not to inform anybody at Tonkawa Prisoner of War Camp that he had attended this party with a female companion (R. 72, 73).

Accused freely and voluntarily admitted to the investigating officer that Imogene Zuler was not his wife, that she had attended this party with him and that he there introduced her to various officers and their wives, by whom she was accepted as his wife (Pros. Ex. 9).

In support of the Specification of Charge II the prosecution introduced evidence, in addition to the evidence hereinabove summarized, to show that sometime between 23 April 1944 and the middle of May 1944 accused informed Lieutenant Gibson, his adjutant, that he was living at Camp Paris Tourist Courts about seven miles from Camp Maxey (R. 53). Accused in fact was registered at the tourist camp from 23 April 1944 to 14 May 1944 where he and a woman in her early thirties occupied cabin No. 26, which was furnished with a double bed for sleeping accommodations. During their stay several calls came to the office of the tourist camp for Mrs. Polesley and when informed of the calls accused's cabin companion would answer the telephone (Pros. Ex. 6). Other occupants of cabins at the tourist camp saw a middle-aged major and a dark, slender woman about 30 years of age coming from and going to cabin 26 during the period of time from the latter part of April until the middle of May 1944 (Pros. Exs. 7, 8).

Accused freely and voluntarily admitted to the investigating officer that he lived with Imogene Zuler, although they had never been married, from 23 April 1944 to 14 May 1944 (Pros. Ex. 9).

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4. The accused elected to remain silent and no evidence was presented by the defense.

5. An essential element of the offenses alleged in Specifications 2, 3, 4 and 5 of Charge I and the Specification of Charge II is that the woman who was represented by accused to be his wife was not in fact his lawful wife. Evidence establishing that Louise Taylor Polsley was accused's lawful wife when he committed these acts and that she had not lived with him or even seen him since January 1944 is found in the testimony of Mrs. Louise Polsley and in accused's confession. Although it is generally established both in our federal courts and court-martial procedure that a wife is incompetent to testify against her husband (Cyc. of Fed. Pros., 2nd ed., Vol. 9, p. 444; MCM, 1928, par. 120d), an exception to this rule is that:

"A wife may testify against her husband without his consent whenever she is the individual or one of the individuals injured by an offense charged against her husband. Thus in such cases as bodily injuries inflicted by him upon her, bigamy, polygamy, or unlawful cohabitation, abandonment of wife and children, or failure to support them, or using or transporting her for 'white slave' or immoral purposes, the wife may testify against her husband; but she can not be compelled to do so" (MCM, 1928, par. 120d).

From the foregoing it is apparent that Mrs. Polsley was competent to testify in support of the Specification of Charge II alleging accused's unlawful cohabitation with Imogene Zuler. Her testimony, coupled with accused's confession that he lived with Imogene Zuler as alleged plus the prosecution's evidence concerning their occupancy of a cabin at a tourist camp, conclusively sustains the findings of guilty of the Specification of Charge II and Charge II.

Likewise, the testimony of Louise Polsley that she was the wife of accused and was not with him at the time he committed the acts alleged as offenses in Specifications 2, 3, 4 and 5 of Charge I, plus the other evidence introduced by the prosecution, would establish the commission of these offenses particularly when considered in conjunction with accused's confession. However, it is not absolutely clear that any of these offenses so "injured" Louise Polsley as to render her a competent witness with respect to any one of them under the exception to the general rule (MCM, 1928, par. 120d). In any event the findings

may be sustained on other grounds. There is sufficient other evidence in the record to establish the corpus delicti and render the accused's confession competent and admissible. It is established by competent evidence that Captain Theodore S. Maffett knew Louise Taylor when accused was courting her; that, having heard accused had married her, he congratulated accused sometime before the events in question occurred and accused acknowledged the felicitation; that he saw accused at the party at Officers' Mess No. 1 with a woman who was not Louise Taylor and whom accused had introduced as his wife to others both at this party and about the prisoner of war camp; that thereafter accused asked Captain Maffett not to write anyone at his old station that he had attended this party with a female companion. Although Captain Maffett's knowledge of accused's marriage to Louise Taylor was based on hearsay, nevertheless, accused's acknowledgement of the captain's congratulations was sufficient to justify an inference by the court that the marriage had taken place. Accused's request to Captain Maffett indicated accused did not wish it known in Oklahoma that he was being seen in public at Camp Maxey, Texas, with a woman other than Louise Polesley and is some evidence indicating that his marriage to her had not been terminated. Thus, the corpus delicti of the offenses alleged in these Specifications 2, 3, 4 and 5 was sufficiently established and accused's confession was competent and admissible in evidence as to the offenses alleged in each one of these Specifications (MCM, 1928, par. 114a; Dig. Op. JAG, 1912-40, sec. 395 (11)).

Specifications 4 and 5 do not constitute an unreasonable multiplication of offenses (MCM, 1928, par. 27). Although the time element of Specification 5 falls within the continuous time element covered by Specification 4, the latter offense was committed at the Prisoner of War Camp, Camp Maxey, Texas, while the former offense occurred at Camp Maxey proper during a gathering of the officers of all installations under the jurisdiction of the commanding officer of Camp Maxey. Another and a larger officer personnel were then imposed upon than the smaller contingent associated with the prisoner of war camp. The wrongful introductions made at these two places to a differing officer personnel do not constitute "one transaction, or what is substantially one transaction" within the prohibition against unreasonable multiplication of charges (MCM, 1928, par. 27). The offenses alleged in Specifications 4 and 5 were also properly charged as violations of Article of War 95 (2 Bull. JAG 312).

The offenses alleged in Specifications 2 and 3, the making of false official statements, are not dependent upon whether or not the insertion of a name other than that of accused's wife resulted in

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monetary loss to the United States. The gravamen of the offense is not injury or damage produced by the false statement; it is the failure of the individual officially to speak truthfully which is objectionable.

From all of the foregoing, it is the opinion of the Board of Review that the evidence also sustains the findings of guilty of Specifications 2, 3, 4 and 5 of Charge I and Charge I.

6. Mr. A. Leslie Jackson of Dallas, Texas, individual counsel for accused, requested that he be permitted to personally appear before the Board of Review in behalf of his client. This request was granted and Mr. Jackson was accorded a full hearing on 29 August 1944.

7. The accused is about 48 years of age. He enlisted in the Nebraska National Guard on 23 November 1914 and was honorably discharged on 31 December 1916. He reenlisted in the Nebraska National Guard on 27 June 1917, was drafted into World War service on 3 August 1917, served overseas from 5 June 1918 to February 1919 and was honorably discharged on 12 February 1919. He accepted a five year appointment as second lieutenant in the Officers Reserve Corps on 28 July 1924, was federally recognized as a first lieutenant, Texas National Guard, on 24 May 1926 and was promoted to captain on 11 November 1940. He was inducted into active federal service on 25 November 1940, was relieved on 11 November 1941 and transferred to Texas Inactive National Guard as captain on 12 November 1941. He was recalled to active duty on limited service 27 March 1942 and was promoted to major 19 October 1942. In civilian life accused owned and operated a wholesale automotive supply store.

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, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96 and mandatory upon conviction of a violation of Article of War 95.

Thomas M. Taffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Truett, Judge Advocate.

SPJGV
CM 260198

1st Ind.

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

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of Major Edward I. Polesley (O-202178), Infantry.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. The accused was found guilty of making two false official statements, guilty of two offenses of introducing as his wife a woman not his wife to brother officers and their wives, all in violation of Article of War 95, and guilty of living and cohabiting with a woman not his wife, in violation of Article of War 96. He was sentenced to be dismissed the service. I recommend that the sentence be confirmed and carried into execution.
3. Consideration has been given to the inclosed letter from the Honorable W. R. Poage, House of Representatives, requesting clemency on behalf of accused.
4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

- 4 Incls.
Incl.1-Record of trial.
Incl.2-Ltr fr WR Poage, 22 Aug 44.
Incl.3-Dft ltr for sig S/W.
Incl.4-Form of action.

(Sentence confirmed. G.C.M.O. 564, 14 Oct 1944)



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

SPJGN
CM 260202

7 AUG 1944

UNITED STATES	)	SPOKANE AIR SERVICE COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	Gore Field, Great Falls, Montana,
Second Lieutenant LEROY J.	)	27 June 1944. Dismissal and
MILLER (O-733694), Air Corps.	)	total forfeitures.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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 93rd Article of War.
(Finding of not guilty).
Specification: (Finding of not guilty).

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

Specification: In that 2nd Lieutenant LeRoy J. Miller, Air Corps, 7th Ferrying Squadron, 557th AAF Base Unit, (Seventh Ferrying Group), Ferrying Division, Air Transport Command, Gore Field, Great Falls, Montana, did, at Gore Field, Great Falls, Montana, for the purpose of obtaining payment of Claims against the United States by presenting to the Finance Officer at Gore Field, Great Falls, Montana, an officer of the United States duly authorized to approve and pay such claims, on or about the 30th

day of April, the 31st day of May, the 30th day of June, the 31st day of July, the 31st day of August, the 30th day of September, the 31st day of October, the 30th day of November, and the 31st day of December, all in the year of 1943, submit vouchers for pay and allowances which were false and fraudulent in that he failed to set forth and deduct on each of the nine vouchers a Class "E" Allotment debit of \$208.00, which amount was being paid directly to the allottee each month by the Office of Dependency Benefits, Newark, New Jersey, the said 2nd Lieutenant LeRoy J. Miller well knowing at the time that the vouchers were false and fraudulent.

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

Specification: In that 2nd Lieutenant LeRoy J. Miller, Air Corps, 7th Ferrying Squadron, 557th AAF Base Unit, (Seventh Ferrying Group), Ferrying Division, Air Transport Command, Gore Field, Great Falls, Montana, did, at Gore Field, Great Falls, Montana, during the period of 30 April 1943 to 31 December 1943, inclusive, knowingly, feloniously, and unlawfully submit to the Finance Officer at Gore Field, Great Falls, Montana, an officer of the United States duly authorized to approve and pay claims, false pay and allowance vouchers and obtain thereon the sum of \$208 per month for a period of nine months, a total of \$1872 in excess of the pay and allowances due him for that period, and did knowingly, feloniously and unlawfully appropriate and convert the same to his own personal use and benefit.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification, guilty of Charges II and III and the Specifications thereunder, and 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 50 $\frac{1}{2}$. The record of trial has been treated as if forwarded under Article of War 48.

3. The evidence for the prosecution shows that on 1 February 1943 the accused authorized for an indefinite period of time commencing 1 April

1943 a Class E allotment of his pay in the amount of \$208 per month, to the First National Bank, Baltimore, Maryland, to the credit of his wife, Virginia Hynson Miller. Payment of the first installment of the allotment was received by the bank on 12 May 1943 and succeeding payments were received each month thereafter until 3 April 1944. All of the payments of the allotment were credited to the joint checking account of accused and his wife (Pros. Exs. 2, 7).

Despite having made the allotment, and without corresponding with the bank to which the allotment had been made to ascertain whether it was being paid, the accused executed monthly pay vouchers to the Finance Officer, Gore Field, Great Falls, Montana, for April 1943 through December 1943, which indicated that no Class E allotment had been made. The amount of each voucher was paid in full to the accused. Furthermore, the accused failed to notify the Finance Office at Gore Field, as required by Army Regulations, that he, the accused, had made a Class E allotment. In fact the Finance Officer's attention was first called to the existence of the accused's allotment by a letter from the office of Dependency Benefit during the middle of January 1944. Thereafter in an interview with the Finance Officer the accused stated that he did not have the money necessary to repay the amount of the allotment. The Finance Officer then informed the accused that the allotment would have to be discontinued and that the accused could not receive his January pay (R. 8-10, 11-14; Pros. Exs. 3, 7).

Lieutenant Colonel James W. Luker, Deputy Commanding Officer of the 7th Ferrying Group, Gore Field, Montana, testified that in October or November 1943, he was told by the accused that the latter had made an allotment to a Baltimore bank for his wife's support. He suggested to the accused that he wire the bank and ascertain whether the allotment was being paid because he (the accused) might be drawing "double pay". A short time later, the accused reported to Lieutenant Colonel Luker that the matter of accused's allotment had been taken care of and "it was all settled", leading Colonel Luker "definitely to understand he [the accused] had sent the wire and the matter was taken care of" (R. 25-30).

Staff Sergeant Albert P. Abdun-nur of the Finance Department at Gore Field, testified that "in the spring of 1943" the accused reported to him that he, the accused, had made a Class E allotment which was not being deducted from his pay and that he, Sergeant Abdun-nur, advised the accused to see "Captain Jones of the allotment department" and to "hang onto the money and pay it back". On cross-examination, he testified that it normally takes about two months for an allotment to become effective or for an allotment to be discontinued (R. 30, 31).

During the investigation of the Charges against him, the accused submitted a voluntary sworn statement to the investigating officer which the prosecution introduced in evidence without objection. In this statement the accused said that he had made the allotment to his wife, from whom he had separated, because of the illness of his son, that he had received letters from his wife in April and May, 1943, to the effect that the allotment was not being paid, that he assumed that "the allotment had gone astray" as had a previous allotment for War Bonds, and he "sent her money from his pay"; that in May 1943, he had consulted Sergeant Abdun-nur at the Base Finance Office as to a previous allotment for another purpose who referred him to Captain Jones and advised him "to hold on to the money", that he reported the matter to Captain Jones who said that he would "check into the matter", and that he heard nothing further until January 1944 at which time he applied for discontinuance of the allotment. The accused also stated that in September 1943, his wife informed him that she had been receiving the allotment money since June 1943, that shortly after this, he talked with Lieutenant Colonel Luker who advised him to wire the Baltimore bank and ask the number of payments of the allotment which had been made to it, that he sent the wire "but received no answer to it" and that he also

"went to the Finance Office and asked Sergeant Abdun-nur what he, the accused should do in regard to this allotment and Sergeant Abdun-nur again stated there was nothing the Finance Office could do; that they could not deduct it from his pay because they had no official notification from the Office of Dependency Benefits; * * * and he advised the accused to keep the money until such time as the matter could be straightened out and then reimburse the Government".

In April 1944, the accused "submitted a letter, through Capt. McGuire, to the Secretary of War in which he stated that he would pay back \$100.00 a month" for a designated time and the balance in one lump sum but that he had not had a reply to his letter. He further stated that he had not the "slightest intention of perpetrating fraud upon the Government" and that during this time until 1 October 1943 he had "little opportunity to properly look into the matter of these allotments" because he spent so much time on duty away from his station (R. 38-41; Pros. Ex. 8).

4. The accused, after an explanation had been made as to his right to testify or to remain silent, testified that he was "told to hang onto the money" and that he had "the money" with him (R. 42, 43). On cross-

examination, he testified that he kept "the money", which amounted to \$340, in a sock placed in the drawer of a chiffonier of a young lady's apartment "down town", that he maintained accounts with the Great Falls National Bank and the First National Bank of Great Falls, Montana, into which he deposited his pay and "per diem" and from which he withdrew each month a sufficient sum for his "little sock pool" to pay the monthly "overpayment" of a previous allotment involved in the Specification of Charge I (an offense of which he was found not guilty), that in this manner he saved enough to pay this previous allotment and "part of the other", and that no arrangements to return the money to the Government had been made in the absence of approval of the Secretary of War to whom the accused had written two months earlier.

Also on behalf of the defense, the stipulated testimony of Virginia H. Miller, the accused's wife, was introduced. Her testimony was that she had been notified by the accused in March 1943, that he had made her a monthly allotment of \$208 for which she would receive her first check on about 1 April 1943, that after she wrote her husband of her son's ill health and of failure of payment of the allotment's installment in April the accused sent her money each month from May through October, 1943, and that the "allotment checks started coming to her in May 1943 and as accused kept sending her money varying each month from \$175.00 to \$225.00 per month she was under the impression that he was sending her extra money to help cover her heavy expenditures during the said months". In September she wrote her husband "thanking him for the extra help and he immediately wrote her and said he did not understand because he was only sending money to cover the allotment she had not been receiving". She then informed him that her "allotment had commenced in May 1943".

5. The Specification under Charge II alleges that the accused "for the purpose of obtaining payment of claims against the United States" on designated dates in each of the months from April to December 1943, did "submit vouchers for pay and allowances which were false and fraudulent in that he failed to set forth and deduct on each of the nine vouchers a Class "E" Allotment debit of \$208.00, which amount was being paid directly to the allottee each month by the Office of Dependency Benefits, Newark, New Jersey", the accused "well knowing at the time that the vouchers were false and fraudulent."

"Presenting to a paymaster a false final statement, knowing it to be false" is definitive of an offense under Article of War 94 (M.C.M., 1928, par. 150b).

The evidence for the prosecution conclusively shows that the accused submitted vouchers for pay and allowances to the Finance Officer at Gore Field, Montana, for the designated months and that he "failed to set forth and deduct a [monthly] Class E Allotment debit of \$208.00" which he had authorized to be paid to a Baltimore bank for his wife. The evidence further shows that the allotment was authorized to be made from his pay for the month "commencing April 1, 1943, and expiring indefinite" and that the first installment was paid on 12 May 1943 and succeeding installments each month thereafter during the alleged period of time. Although the evidence indicates that the accused during the spring and fall of 1943 discussed, respectively, with a sergeant in the Finance Department and with the Deputy Commanding Officer of the 7th Ferrying Group the allotment which he had made, it discloses that he took no action whatever to rectify the record but, to the contrary, continued thereafter to submit vouchers without deducting the allotment from them. Furthermore, the accused informed the Deputy Commanding Officer a short time after the aforesaid interview that he had wired the bank and that the matter had been adjusted when, as a matter of fact, the accused never did get in touch with the bank about the allotment. According to the evidence for the defense, the accused was specifically informed by his wife in September that payments of installments of the allotment had been made in May and in each month thereafter. Nevertheless, the accused continued the submission of his monthly pay vouchers with complete disregard of the allotment. The evidence, therefore, shows beyond a reasonable doubt that the accused committed the alleged offense and amply supports the court's finding of guilty of Charge II and its Specification.

6. The Specification under Charge III alleges that the accused "during the period of 30 April 1943 to 31 December 1943" through "false pay and allowance vouchers" which were "knowingly, feloniously and unlawfully" submitted did obtain thereon a total sum of \$1872 in excess of the amount due him for that period which total sum of \$1872 he "did knowingly, feloniously and unlawfully appropriate and convert the same to his own personal use and benefit".

Article of War 95 under which this Specification is laid "includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman; thus an officer who embezzles military property violates both this and the preceding Article" (M.C.M., 1928, par. 151).

The evidence for the prosecution set forth in paragraph 5 of this opinion applies to the allegations of this Specification. In addition,

the evidence shows that the accused was paid during the alleged period the full amount of each voucher. This establishes an overpayment of \$1872 which the accused used for his own benefit. The possibility of his having endeavored to establish a reserve to return to the Government the amount of the overpayment is not so impelling, in the light of the other evidence which the court acting within its province believed, as to negative the existence of his unlawful appropriation of this money with full knowledge of the existence of the allotment which is manifested by the evidence adduced by the prosecution. The evidence, therefore, is sufficient to support beyond a reasonable doubt the court's finding of guilty of Charge III and its Specification.

7. The accused is about 29 years of age. The records of the Office of The Adjutant General show enlisted service from 17 March 1942 until 3 December 1942 when he was commissioned a second lieutenant.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charges II and III and the Specifications thereunder, and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 94 and is mandatory upon a conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

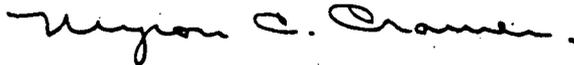
(188)

SPJGN
CM 260202

1st Ind.

War Department, J.A.G.O., **23 AUG 1944** - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant LeRoy J. Miller (O-733694), Air Corps.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed.
3. 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. 575, 21 Oct 1944)

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

(189)

SPJGV
CM 260211

9 AUG 1944

UNITED STATES)

71ST INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
Fort Benning, Georgia, 6 July
1944. To be hanged by the neck
until dead.

Private RALPH C. WHEELIS
(7007224), Company B, 66th
Infantry.)

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

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

Specification: In that Private Ralph C. Wheelis, Company "B", 66th Infantry, did, at Post Exchange Number 26 Beer Garden, Fort Benning, Georgia, on or about 3 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class John H. Mussetter, a human being, by stabbing him with a knife.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence demonstrating that about 7 p.m. on 3 June 1944, accused and Technician Fifth Grade James V. Martin, Private Willard J. Muncy and Private Wilson Jones were drinking beer at

the 14th Infantry Post Exchange, Fort Benning, Georgia (R. 43, 44, 56, 81). After an hour or two they moved on to the 66th Infantry Post Exchange where they drank beer in the adjoining beer garden from about 9:10 p.m. until about 10 p.m. (R. 44, 48, 56, 81). Muncy consumed some 12 or 15 bottles of beer, Jones had about 15 of them and, although there is no evidence as to exactly how many accused consumed, it was not more than 15 bottles (R. 49, 61, 87). By 10 p.m. Corporal Martin and Muncy were under the influence of alcohol but were not drunk (R. 48, 50, 66, 71, 85). Accused was in a similar condition but likewise was not drunk. Although he began cutting capers such as "jumping up on a tree, acting like a monkey" he behaved normally otherwise, having no difficulty with his speech or balance (R. 48, 49, 50, 60, 61, 85). However, the consumption of alcohol generally put accused "in more of a quarrelsome mood" (R. 51). Accused's party was talking loudly and then began singing until accused instructed the others to be silent while he sang alone.

At a nearby table were seated Technician Fifth Grade Catesby T. Jones, Private Louis V. Lafayette and the victim, Private John H. Mussetter (R. 44, 56, 64, 67). Apparently a remark was made by someone in Mussetter's party concerning accused's voice and he proceeded to their table, walking across the intervening table tops, and squatted upon the top of it. At the same time Corporal Martin, Jones and Muncy walked to Mussetter's table to borrow some cigarettes. As one of accused's group was passing Corporal Jones' cigarettes around some of them were spilled upon the ground and Corporal Jones protested stating that he had no more and would not be able to obtain any until the next day (R. 45, 57, 64, 67, 68, 82). It was now shortly after 10 p.m. and the only illumination in the beer garden was that afforded by the light above the doorway of the Post Exchange (R. 54, 61, 78, 89).

Apparently accused's party took offense at Corporal Jones' protestations. Accused, in a squatting position on the table, commenced to argue and Corporal Jones told him to be quiet (R. 45, 68, 97, 98). Muncy joined the argument, challenged Corporal Jones to fight and told him to remove his eyeglasses. The latter reluctantly removed his glasses, Corporal Martin took them and, as Corporal Jones turned to see what had happened to them, Muncy struck him without warning and knocked him unconscious (R. 45, 57, 64, 68, 82). Mussetter who had tried earlier to prevent any argument rose from his seat to come to Corporal Jones' assistance (R. 64, 69). Accused jumped from the table, approached Mussetter and they grappled together for a few seconds locked in each other's arms until Mussetter, crying that he had been stabbed and bleeding freely, slumped upon one of the benches and toppled to the ground (R. 46, 58, 60, 69, 74, 75, 78, 83, 90, 96). Accused walked to the gateway of the beer garden and then broke into

a run fleeing from the scene followed by Corporal Martin who saw blood on Mussetter's left arm as he passed (R. 62, 70, 72, 84, 89, 90). Accused had a reputation for dexterity in using a knife having been known to draw it from his pocket and open it in a single motion (R. 39, 49, 85).

Between 10:30 and 11 p.m. a sentinel of the guard on Post 4 called the guardhouse and promptly thereafter Staff Sergeant Leonard H. Wagner, sergeant of the guard, hastened to the Post Exchange and found Mussetter lying on the ground between two tables, bleeding, mumbling and gasping for breath. He was placed in a military vehicle and taken to the station hospital (R. 10, 12, 14, 15). All those in the beer garden, including Muncy and Jones, were taken to the guardhouse (R. 45, 59). Mussetter was examined at the hospital about 10:50 p.m. by a medical officer, Captain Henry C. Holliday, and was pronounced dead on arrival. He was found to have been stabbed by a sharp instrument in the chest at the origin of the aorta and also in the left arm (R. 16). The chest wound which was about 1.5 cm long and about 10 cm deep caused a laceration of the left lung and of the aorta which in turn produced a massive hemothorax and hemopericardium, causing accused's death (R. 20, 21). Even if a doctor had been present at the time of the stabbing Mussetter's life could not have been saved (R. 18). Although a blood analysis revealed the presence of alcohol in his system, it was insufficient in quantity to have made Mussetter intoxicated (R. 21).

About 10:30 p.m. this same evening Private Orville L. Rouse saw accused sitting on the steps of the doorway to the latrine of his barracks. Accused was apparently in pain suffering from an injury to his ankle or foot. Accused gave Rouse a knife and asked him to keep it for accused (R. 33, 34). Apparently Sergeant Elwyn F. Samuelson was aroused by their conversation and he accompanied accused who was out of breath and distraught to the station hospital (R. 34, 91). Captain Holliday examined accused at the hospital and found he had a fractured ankle. He also noticed bloodstains on accused's right trouser leg. Although accused had been drinking Captain Holliday was of the opinion he was not drunk (R. 16, 17, 24).

Meanwhile, Rouse examined the knife accused had given him, noticed that it was stained with blood and placed it under the barracks porch (R. 35). The following morning he notified an officer of his company, First Lieutenant James E. Bangs, and showed him where he had concealed it. Lieutenant Bangs thereupon notified regimental headquarters and subsequently the knife was removed by military police.

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Lieutenant Bangs also observed that there was blood on the knife (R. 35-37). A chemical analysis of this blood revealed it to be of human origin and of blood type "O" (R. 28). Mussetter's blood was also of type "O" while accused's was of type "B" (R. 38).

At a later unstated time Muncy saw accused at the station hospital and accused asked Muncy what he had revealed about the events of this evening. When told that Muncy had said nothing accused replied he also had said nothing and was not going to say anything. He further stated that he could not be given a sentence of over 15 years inasmuch as a life sentence amounted to that in the Army (R. 47, 48, 54).

Major Walter F. Schmidt, 66th Infantry, a member and the recorder of an investigating board, interviewed accused at the hospital on or about 4 June. After accused had been fully warned of his rights he stated that he was at the Post Exchange drinking beer on the previous evening, knew he had a knife in his possession at one time during that day, and remembered vaguely returning to his barracks and sitting on the steps of the latrine. The following day he remembered that he had given the knife to someone in the latrine (R. 54, 55).

Major Edward R. Janjigian, division neuropsychiatrist of the 71st Infantry Division, visited accused at the post stockade and gave him a typical psychiatric examination to determine if he suffered from mental aberration. As a result of the examination Major Janjigian was of the opinion that accused possessed a psychopathic personality but had no mental aberration and was sane on 3 June 1944 (R. 94, 95). It was also his opinion that an individual possessing accused's attributes tends to become arrogant and overbearing after the consumption of liquor (R. 95).

4. No evidence was presented by the defense and accused having been advised of his rights elected to remain silent.

5. Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse. If one kills in self-defense the killing is legally excusable. However, the doctrine of self-defense is only applicable if the person killing (a) was not the aggressor (b) has reasonable grounds to believe he must kill to save his own life and (c) has retreated as far as he can (MCM, 1928, par. 148a). It is quite apparent from the evidence that this doctrine is inapplicable here inasmuch as the accused was

the aggressor, he was in no danger of losing his life at any time during his short tussle with Mussetter and, moreover, he provoked the encounter rather than retreated from it.

Malice aforethought does not mean hatred or personal ill will or even an actual intent to take life. An intent to inflict grievous bodily harm upon any person or knowledge that the act which causes death will probably cause grievous bodily harm establishes malice aforethought (MCM, 1928, par. 148g). It is clear from this record that accused intentionally stabbed Mussetter with a knife during their encounter and then fled hurriedly from the scene. The intent to inflict grievous bodily harm is established by accused's act of stabbing Mussetter.

Although accused had consumed a substantial amount of beer there is not a scintilla of evidence that he was drunk or so intoxicated that he was unable to entertain the intent to stab accused (MCM, 1928, par. 126g). Indeed, if anything, his intoxication made him more willing to entertain such an intent.

Finally, the evidence does not establish that accused's crime was committed in the heat of sudden passion caused by provocation in which event the offense would be that of voluntary manslaughter (MCM, 1928, par. 149g). The provocation "must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing" (MCM, 1928, par. 149g). The evidence shows no provocation adequate to excite uncontrollable passion even in accused's mind. Indeed, there is no evidence that he was in the throes of an uncontrollable passion. Further, the encounter with Mussetter was intentionally provoked by accused and his friends and thus, even if the requisite provocation existed, it would have resulted only from their efforts to induce it.

In the opinion of the Board of Review the evidence conclusively sustains the findings of guilty of the Charge and its Specification.

6. The accused is 22 years of age. He enlisted in the military service on 22 January 1940.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting

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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. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

Thomas M. Jaffy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Truesdale, Judge Advocate.

SPJGV
CM 260211

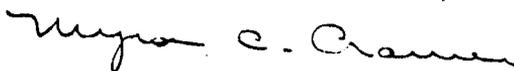
1st Ind.

War Department, J.A.G.O., 21 AUG 1944 - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of Private Ralph C. Wheelis (7007224), Company B, 66th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. Accused and three friends, after several hours spent drinking beer, provoked a quarrel with Corporal Catesby T. Jones and Private John H. Mussetter. One of accused's companions knocked Corporal Jones unconscious while his attention was diverted and, as Mussetter went to his assistance, accused engaged him in a scuffle during which he drew a knife and killed Mussetter by stabbing him in the chest. The entire succession of events was occasioned by the belligerent conduct of accused and his friends who were bent upon provoking an altercation with Corporal Jones and Mussetter. I find no mitigating or extenuating circumstances to warrant clemency and accordingly recommend that the sentence be confirmed and carried into execution.

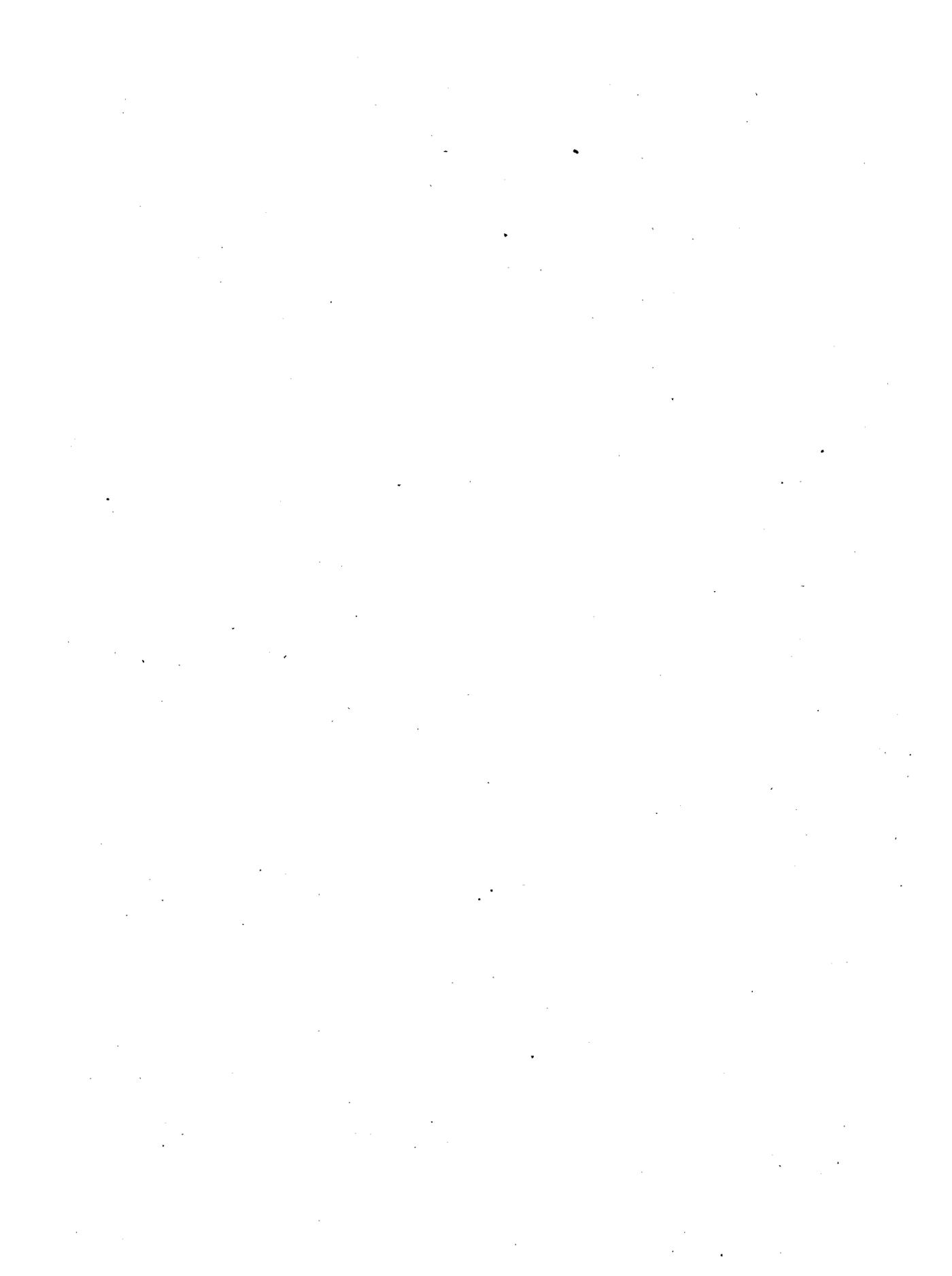
3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should it meet with approval.



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. 643, 7 Dec 1944)



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

SPJGV
CM 260253

17 AUG 1944

UNITED STATES)
) v.)
Second Lieutenant JOSEPH)
C. WHITE (O-813626), Air)
Corps.)

ARMY AIR FORCES
SOUTHEAST TRAINING CENTER
Trial by G.C.M., convened at
Newport, Arkansas, 26 and 27
June 1944. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

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

Specification 2: In that Second Lieutenant Joseph C. White, Air Corps, Section B, 2134th AAF Base Unit, AAF Pilot School (Basic), Newport Army Air Field, Newport, Arkansas, did, at AAF Pilot School (Basic), Newport Army Air Field, Newport, Arkansas, on or about 24 May 1944, with intent to deceive 1st Lt. Cloyd B. Sayler, Engineering Officer, Section C, 2134th AAF Base Unit, AAF Pilot School (Basic), Newport Army Air Field, Newport, Arkansas, and other officers of the Army of the United States, officially report on War Department AAF Form No. 1A, that a government-owned airplane described as a BT-13A, serial number 42-22474, was in a satisfactory condition, which report was known by the said Second Lieutenant Joseph C. White to be untrue in that the said airplane was not in a satisfactory condition at the time.

He filed a plea in abatement to Specification 2 of the Charge on the grounds that the Specification does not define an offense triable by general court-martial, in that it does not specify any Article of War, Army regulation or order violated. The Specification was in proper form and the court properly denied the plea (MCM, 1928, App. 4, Form 119). He then pleaded not guilty to the Charge and both Specifications, and was found guilty of the Charge and both Specifications. Evidence of one previous conviction 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 disapproved the finding of guilty of Specification 1, approved the sentence but remitted the forfeitures imposed, and forwarded the record of trial for action under Article of War 48.

3. The accused challenged separately and successively seven of the members of the court on the ground that they, as members of the court to which this case was referred, had sat at a previous trial of the accused on a different charge on which accused was found guilty, and were therefore prejudiced. Each member so challenged was respectively sworn and examined and stated he did not know of the facts in this case, and had not formed any opinion. In each instance the challenged member withdrew, the court was closed and voted by secret written ballot, and upon reopening the president announced the particular challenge was not sustained. There was no attempt on the part of the defense in the examination of each challenged member to show that any of them actually had formed any opinion as to the guilt or innocence of the accused, or knew any material facts of the case, but the challenges were made on the theory that the challenged members having sat on a previous court-martial of the accused based on different facts entirely were per se incompetent to sit as members of a court to try accused on subsequent and unrelated charges.

Winthrop states that in criminal law the fact that a juror has served as such on a previous trial of the same party for a separate instance of the same offense, or for a similar offense, is held not necessarily to disqualify a juror, but in such cases disqualification must result from actual bias as to the guilt or innocence of the defendant, and that in military law a similar test is employed (Winthrop's Military Law and Precedents, 1920 Reprint, p. 227). It seems well established that the fact that a juror has

tried and convicted or acquitted a person of a crime does not render such juror incompetent to sit in the subsequent trial of the same defendant for a second and different offense (31 Am. Jur. "Juries", sec. 163). In this case there was not even an insinuation by the defense that any challenged member was prejudiced as a result of having heard the previous unrelated case against this accused. Each member specifically denied the presence of bias. It is the function of the court to determine the existence or nonexistence of the alleged grounds for challenge (Dig. Op. JAG, 1912-40, sec. 375 (1) (2)), and the burden of maintaining a challenge rests on the challenging party (MCM, 1928, par. 58f). The Board of Review is of the opinion that the action of the court in not sustaining the challenges was proper.

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

About 1045 on 24 May 1944, the accused and Second Lieutenant William K. Hook took off for a weather flight from Newport Army Air Field, Arkansas, in a BT-13A military airplane No. 366, the nose of which was blue in color. This plane had been given the regular preflight inspection and service by Sergeant Harold F. Joy shortly before its take-off and was in good condition (R. 23, 61). On the morning of 24 May 1944, O. E. Johnson, a farmer living about five miles from Beedeville, Arkansas, saw a silver colored plane with a blue nose fly very low, at a height of four or five feet, above the ground, over his cotton and corn fields, and strike two electric wires strung 25 or 30 feet above the ground. After striking the wires the plane continued on its way. This happened "about something like 11:30, near as I could say" (R. 55-57). Lindsay Williams, an employee of Johnson, testified substantially the same as did Johnson (R. 58, 59). Sergeant Joy checked the plane flown by accused and Lieutenant Hook when it returned to the field. He observed mud on the wing that had not been present when the plane went out; there was a dent on the wing; the pitot ring appeared to have been struck by some object, and there was another damaged spot on the lower half of the wing. Sergeant Joy immediately examined Form 1A and saw that the condition of the plane after the flight had been reported as "OK" by Lieutenant White, the accused. He then reported the matter to First Lieutenant Cloyd B. Saylor, the Engineering Officer (R. 24). Lieutenant Saylor inspected the plane and found that both wing panels had dents about one quarter inch deep and one foot long in them, and

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the propellor, ring cowling and pitot tube were damaged. To return this plane to satisfactory condition it was necessary to change the ring cowling, propellor and left wing panel, and repair the right wing panel (R. 35, 36). Properly identified photographs of the damaged portions of the plane were received in evidence (R. 22; Exs. A, B, C).

The court was asked to take judicial notice of Army Air Forces Regulations No. 15-1 and an extract copy of paragraph III e (2) was received in evidence (R. 66; Ex. 6). This paragraph provides:

"After landing, in the space for 'Remarks' on Forms 1A and 1A-G, the pilot will indicate O.K.; or if any defect or malfunctioning occurred, explain the trouble and sign his name and rank following the remarks."

Form 1A executed by accused after this flight with the handwritten notation "OK, J C White, 2nd LT" under "Remarks" was received in evidence (R. 25; Ex. 2) and also an authentic sample of accused's writing in the form of an affidavit to a Report of Survey signed "Joseph C White" by the accused in the presence of Major Samuel W. Neff (R. 66; Ex. 4).

War Department, A.A.F. Form No. 1, Flight Report, was received in evidence without objection (R. 26; Ex. 3). This report shows that accused and Second Lieutenant William K. Hook flew a BT-13A model airplane, serial number 42-22474 on a local weather mission from 1045 to 1135 on 24 May 1944, and that each officer piloted the plane for 25 minutes. Lieutenant Hook after declining to answer certain questions on direct examination on the grounds of self incrimination, testified on cross-examination and examination by the court that he signed the clearance form for the plane indicating that he was the pilot, but that he was not at the controls when the plane took off, nor when it landed (R. 67, 68).

At the close of the case for the prosecution the defense moved for a "directed verdict of not guilty" as to Specification 2 of the Charge on the grounds that the clearance for the plane was obtained by Lieutenant Hook as pilot, and he was senior in rank to accused, and that Form 1A is to be executed by the pilot (R. 71). The court denied the motion (R. 72). Treating the motion made by the defense as tantamount to a motion for a finding of not guilty the Board of Review is of the opinion that the court acted properly in denying the motion. The evidence shows that accused did pilot the plane for half the time it was in the air, took it off and landed it, and did execute on Form 1A under

"Remarks" a notation that the condition of the plane after the flight was "OK". The fact that Lieutenant Hook may have been listed on the clearance form as the pilot in no wise weakens the proven facts that accused did falsely certify that the plane's condition was OK after the flight, which report accused knew, or should have known, was untrue.

5. For the defense.

The defense presented no evidence and the accused after having his rights as a witness explained elected to remain silent.

6. The evidence shows that on 24 May 1944, accused and Second Lieutenant William K. Hook took off from Newport Army Air Field, Arkansas, in a blue nosed military airplane for a weather flight. Lieutenant Hook had signed the clearance form as pilot. The accused piloted the plane as it left the field and also landed it. The flight report shows that each officer piloted the plane for 25 minutes each during the 50 minute flight. Two farmers observed a silver plane with a blue nose flying four or five feet above the ground near Beedeville, Arkansas, at about 11:30 on 24 May 1944. This plane eventually flew into some electric wires strung 25 to 30 feet above the ground, but was able to continue its flight afterward. Immediately after the plane flown by accused and Lieutenant Hook landed it was examined and found to have mud on the wings, both wings had dents about one quarter inch deep and one foot long in them, and the ring cowling, propellor and pitot tube were damaged. Accused after landing noted on Form 1A above his signature that the condition of the plane was "OK".

7. War Department records show that accused is 24 years of age and a high school graduate. He enlisted in the Tennessee National Guard 12 November 1938 and entered military service of the United States 16 September 1940 when the Tennessee National Guard was federalized. He was appointed aviation cadet in January 1943 and after completing the prescribed Flying Training Command Course of instruction was appointed second lieutenant, Army of the United States, on 1 October 1943.

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 96.

Thomas M. Jaffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

(202)

SPJGV
CM 260253

1st Ind
2 - SEP 1944

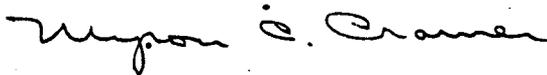
War Department, J.A.G.O.,

- 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 Joseph C. White (O-813626), 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 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-Dft ltr for sig S/W.
Incl.3-Form of action.

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 536, 26 Sep 1944)

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

(203)

28 AUG 1944

SPJGH
CM 260331

UNITED STATES)

v.)

Second Lieutenant LESLIE W.
STONE (O-379802), Infantry.)

INFANTRY REPLACEMENT TRAINING CENTER
CAMP JOSEPH T. ROBINSON, ARKANSAS

Trial by G.C.M., convened at
Camp Joseph T. Robinson,
Arkansas, 5, 10 and 12 July
1944. Dismissal, total for-
feitures and confinement for
five (5) 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 I: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Leslie W. Stone, Company A, 129th Infantry Training Battalion, 81st Infantry Training Regiment, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, did at Benton, Arkansas, on or about 3 May 1944, unlawfully, wrongfully and feloniously marry one Jessie Christine Faulkner O'Connell, he, the said Second Lieutenant Leslie W. Stone, having at that time a living wife, Evelyn Margarite Stone, from whom he had not then and there been divorced.

Specification 2: In that Second Lieutenant Leslie W. Stone, Company A, 129th Infantry Training Battalion, 81st Infantry Training Regiment, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, did at Little Rock, Arkansas, on and before 3 May 1944, wrongfully, knowingly and with the intent to deceive Jessie Christine Faulkner O'Connell a single woman of legal age, induce said Jessie Christine Faulkner to marry him on 3 May 1944, by dishonorably representing to her that he was an unmarried man, whereas in truth and in fact was at said times legally married to Evelyn Margarite Stone.

Specification 3: In that Second Lieutenant Leslie W. Stone, Company A, 129th Infantry Training Battalion, 81st Infantry Training Regiment, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, did at Little Rock, Arkansas, on or about 8 June 1944 wrongfully strike Jessie Christine Faulkner on her face about the eyes with his fists.

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

Specification 1: (Same as Specification 1, Charge I).

Specification 2: (Same as Specification 3, Charge I).

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 five (5) years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution may be summarized as follows: An authenticated "Copy of Return of Marriage" (Ex. A) taken from the records of the County Clerk of Will County, Illinois, shows the marriage of Leslie W. Stone to Evelyn M. Currie at Joliet, Illinois on 1 February 1934 (R. 9). A photostat (Ex. B) of a marriage license and certificate of marriage recorded in the office of the County Clerk of Saline County, Arkansas, shows the marriage of Leslie W. Stone to Mrs. Christine O'Connell on 3 May 1944 (R. 44).

Jessie Christine O'Connell testified that she resided in Little Rock, Arkansas, and was employed at the "camp laundry". She was first married in 1939 when she was about sixteen years of age, had one child and was divorced in 1942. She married Sergeant Kenneth L. O'Connell in 1942 and had another child by this marriage. She had applied for a divorce from Sergeant O'Connell in 1943 because he infected her with gonorrhea but did not complete the proceedings at the time as he was providing an allotment for the support of her two children (R. 10-12, 28-31, 42). She first met accused on 31 March 1944 as she was "walking down the street" with two girl friends "fixing" to go into the Officers' Club in the "Hotel Marion". She went to the "Hilltop" with him that evening and during their conversation, as on several subsequent occasions, she asked accused if he was married. Accused told her that he had never married and she informed him that she had a husband but was separated from him (R. 13-14, 32). Mrs. O'Connell stated that she continued to see accused every night after their first meeting and on 7 April 1944 he proposed marriage, telling her that he would take care of her children if she obtained her divorce from Sergeant O'Connell (R. 14-15). Her divorce was granted on 17 April 1944 and on 3 May she and accused drove to Benton, Arkansas, where they obtained

a marriage license and were married at 8:30 that evening. They were sober and had nothing to drink (R. 16-18, 42). They returned to the house in Little Rock that accused had asked her to rent and lived together as man and wife for about three weeks. Accused took her out socially during this time and introduced her to his friends as his wife (R. 18-19).

On 17 May 1944 the accused and Mrs. O'Connell moved into a rooming house (R. 62-63). On Friday, 19 May, accused telephoned her that his stepfather was dying and that he was going away on emergency leave but would return on Monday. When Mrs. O'Connell did not hear from accused on 22 May she telephoned Camp Robinson and discovered that there was no record of accused being absent on emergency leave. The following day she went to the camp and found accused in the company orderly room. He "acted mad" and accused her of giving him a venereal disease. She informed him that she was not infected and immediately went to a doctor for a medical examination to prove it. Accused came home that night and "still acted like there was something wrong with him". The next time she saw him was on 29 May when she told him of the doctor's findings. Accused admitted that she did not give him a venereal disease and told her that when he married her he already had a wife and three children, and that his wife had returned to Little Rock. He stated to Mrs. O'Connell that he did not tell her of his marriage because he loved her. He gave her \$10 to employ a lawyer to start divorce proceedings against his wife. On 7 June accused informed the lawyer that he wanted a divorce from his wife and an annulment of his marriage to Christine O'Connell (R. 20-25, 38).

On 8 June 1944 accused telephoned Mrs. O'Connell and she insisted that he come to see her to "straighten things out one way or the other". It was after midnight when accused arrived and when she asked where he had been accused replied that he was with his "other wife". He stated that he had been informed that a divorce from his wife would not be granted. She became angry and, standing with her back against the door, asked accused for the addresses of his mother and brother. Accused "got mad", "grabbed" her by the neck and choked her. She "screamed" and he hit her in the face with both fists and "ran out of the door" (R. 26-27, 36-38). Helen Littlejohn, who occupied the apartment next to Mrs. O'Connell, found her sitting on the stairs "crying and moaning". She assisted her down the steps and into the room of the landlady who placed ice packs on her face. Mrs. O'Connell's face was red and swollen around her eyes and nose. The next day her face was turning black and blue and was so swollen that she was unable to put on a pair of large rim glasses (R. 57-61, 64-68).

On 9 June 1944 Mrs. O'Connell, accompanied by three ladies, called on Captain George F. Partridge, executive officer of the 130th Battalion, of which accused was a member at the time. She complained of accused

marrying her while having a wife and of accused assaulting her. Captain Partridge told accused of the battered condition of Mrs. O'Connell's face and accused stated that he hit her once "in a fit of temper" because she would not let him out of the room. He also stated that his wife had returned to Little Rock and he was living with her "now" (R. 69-74).

On 12 June 1944, the accused, after being advised of his rights, stated to "Major Ludington", Staff Judge Advocate, and Lieutenant Colonel Harvey Shelton, 81st Infantry Training Regiment, that he arrived at Camp Robinson with his wife on 5 April 1944, his wife left in two or three days for their home in Illinois, and about a week after her departure he met Christine O'Connell. He received word from his wife that she had started divorce proceedings against him and on 3 May, believing that she had obtained the divorce, he married Mrs. O'Connell. His wife returned to Camp Robinson the first week in June and he learned that she did not obtain a divorce. He later went to discuss the "matter" with Mrs. O'Connell and she tried to keep him in the room by force. When he attempted to leave she locked the door and losing his temper he "struck her eyes" (R. 75-79).

4. For the defense: By stipulation the following documents were received in evidence: A letter (Def. Ex. 1) from The Adjutant General dated 23 June 1944 showing the prior service of accused; an extract copy (Def. Ex. 2) of Special Orders No. 78, Infantry Replacement Training Center, Fort McClellan, Alabama, dated 31 March 1944, showing accused ordered to Camp Robinson, Arkansas for assignment to the Infantry Replacement Training Center on 5 April 1944; and a copy (Def. Ex. 3) of the form "66-1" of accused. An authenticated copy (Def. Ex. 4) of a divorce decree taken from the records of the City Court of Sterling, Illinois, shows that on 10 October 1937 a divorce decree was granted in favor of Evelyn M. Stone, dissolving the marriage entered into between Evelyn Stone and Leslie W. Stone on 1 February 1934 (R. 79-80).

5. In "rebuttal" the prosecution introduced an authenticated copy (Ex. C) of a "Return of Marriage" from the records of the Clerk of the District Court of Clinton County, Iowa, showing the marriage of Leslie W. Stone to Evelyn M. Stone on 11 March 1939 at Clinton, Iowa. Photostats of pay vouchers signed by accused for the months of April (Ex. D), May (Ex. E) and June 1944 (Ex. F) show the name of Evelyn M. Stone as his lawful wife (R. 85-86).

6. After the "rebuttal" evidence was introduced accused elected to make an unsworn statement in which he identified a letter dated 19 April 1944 that he received from Evelyn Stone wherein she stated that she had filed suit for divorce. She asked him to notify her if he would agree to the divorce as her attorney had advised that the decree would not be granted if he contested the suit (R. 90-92).

7. a. The evidence shows that on various occasions during the month of April 1944 the accused falsely represented to Christine O'Connell, and led her to believe, that he was an unmarried man, and by means of his false representations induced her to marry him, as alleged in Specification 2, Charge I. The evidence further shows that accused and Evelyn M. Currie were legally married on 1 February 1934, divorced on 10 October 1937, and remarried on 11 March 1939; and that, while the marriage status existed, he contracted a bigamous marriage with Christine O'Connell on 3 May 1944 as alleged in Specification 1, Charge I and Specification 1, Charge II. Statements were made by accused to the effect that he believed his wife had obtained a divorce and that he was free to marry. Such a belief on the part of accused was hardly justified by the receipt of a letter from his wife stating that she had filed suit for divorce and asking if he would consent to it. It appears extremely doubtful that accused ever entertained any such belief as is demonstrated by the fact that subsequent to his bigamous marriage to Mrs. O'Connell he continued to list Evelyn M. Stone as his lawful wife on his monthly pay vouchers. Whatever the situation in this regard, there is nothing in the record to show that accused exercised reasonable diligence to ascertain his true marital status and, accordingly, he cannot rely on his alleged belief as a defense (CM 123267, Dig. Op. JAG, 1912-40, sec. 454 (18); CM 245806, Hancock).

b. It is shown by the evidence that at about midnight, 8-9 May 1944, the accused, at the request of Christine O'Connell went to her room to discuss the problem of their bigamous marriage. She became angry when accused informed her that he had been with "his other wife" and that he could not obtain a divorce from her. The accused "got mad", either because she asked for the addresses of his mother and brother, or because she prevented him from leaving the room, and assaulted her by striking her in the face with his fists as alleged in Specification 3, Charge I and Specification 2, Charge II.

8. a. Accused was convicted under both Article of War 95 and Article of War 96 of the same bigamous marriage and the same assault. There was no error in charging accused with the same offenses under both Articles. The evidence is legally sufficient to support conviction under each Article. It has been held that conviction of an officer under both Articles on the same facts is not illegal as placing him twice in jeopardy for the same offense (McRae v. Henkes, 273 Fed. 108). The offense should, however, be considered as a single offense in fixing the appropriate punishment under the two Charges (CM 230222, Daly, 17 B.R. 331). The conviction of accused under Article of War 95 sustains only that part of the sentence providing for dismissal but his conviction under Article of War 96 sustains the entire sentence providing for dismissal, total forfeitures and confinement at hard labor for five years. In upholding the sentence imposed by the court there can be no question of punishing the accused twice for the same offense (cf. CM 248104, Porter).

b. The testimony of Captain George F. Partridge relative to his conversation with Christine O'Connell should have been excluded as hearsay. Neither should he have been permitted to testify as to the admissions made to him by accused, as it does not affirmatively appear that accused had been warned of his rights under the 24th Article of War. The Board of Review is of the opinion, however, that accused was not prejudiced by the admission of this testimony because his guilt of assault and bigamy was established by compellingly convincing evidence properly in the record.

9. The records of the War Department show that this officer is 33 years and 10 months of age. His application for appointment as a national guard officer, made in 1938, states that he has attended no schools other than grade schools and that his employment for the preceding four years has been that of timekeeper for the Works Progress Administration. He has been a member of the national guard since 21 October 1929. He was appointed a second lieutenant, National Guard of the United States, 28 April 1939, accepted 10 May 1939, and was ordered to active duty, effective 10 October 1942, but was found physically disqualified by reason of positive serological tests for syphilis and reverted to inactive status 19 October 1942. He was reexamined 21 December 1943, found physically qualified except for history of positive serology for which a waiver was granted, and entered upon active duty 28 January 1944.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally 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 and authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Drews, Judge Advocate.

Foster Plummer, Judge Advocate.

J. J. Lettich, Judge Advocate.

1st Ind.

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

- To the Secretary of War.

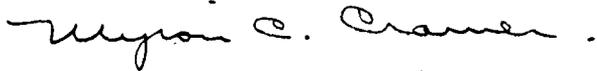
2 SEP 1944

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 Leslie W. Stone (O-379802), Infantry,

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was found guilty of inducing Jessie Christine Faulkner O'Connell to marry him by falsely representing to her that he was unmarried, of contracting a bigamous marriage with Mrs. O'Connell, and of assault and battery upon her, all in violation of the 95th Article of War, and also of the same offenses of bigamy and of assault and battery, in violation of the 96th Article of War. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for five years be confirmed, but, in view of all the circumstances, that the confinement be reduced to two (2) years, the forfeitures remitted and that as thus modified the sentence be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Consideration has been given to two letters from the wife of accused requesting that clemency be extended to him and stating that by threatening to divorce accused, she believes she caused him to commence drinking and to become involved with Mrs. O'Connell. Mrs. Stone submitted a copy of a report made by an investigator for the local district attorney's office in which it is alleged that Mrs. O'Connell is a person of ill-repute.

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 above recommendation, should it meet with approval.



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

5 Incls.

Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig.

S/W.

Incl.3-Form of Action.
Incl.4-Ltr. fr. Mrs. Stone,
July 28/44.
Incl.5-Ltr. fr. Mrs. Ston,
July 17/44.

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 548, 7 Oct 1944)



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

(211)

SPJGK
CM 260367

15 AUG 1944

UNITED STATES)

FOURTH AIR FORCE

v.)

Trial by G.C.M., at Salinas Army
Air Base, Salinas, California, 8
July 1944. Dismissal.

Second Lieutenant HUGH W.
MEFFORD (O-773749), Air
Corps.)

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 Hugh W. Mefford, Squadron T-2, 461st Army Air Forces Unit, Army Air Base, Salinas, California, did, at Army Air Base, Salinas, California, on or about 21 June, 1944, feloniously take, steal, and carry away one hundred and twenty-three dollars (\$123.00) in currency, lawful money of the United States, one (1) billfold, value of about one dollar (\$1.00), the property of Second Lieutenant Howard L. Goss; eighty-four dollars (\$84.00) in currency, lawful money of the United States, one (1) billfold, value of about one dollar (\$1.00), the property of Second Lieutenant Herbert S. Finney; of a total value of about two hundred and nine dollars (\$209.00).

He pleaded guilty to and was found guilty of the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for three years. The reviewing authority approved the sentence, remitted the confinement and forfeitures, and forwarded the record of trial for action under Article of War 48, recommending that the execution of the sentence be suspended.

3. Summary of the evidence.

Accused pleaded guilty, and stated that he understood the implications and possible consequences of his plea (R. 6). Upon two separate occasions

he made signed, written statements, one to the base provost marshal and the other to the investigating officer, in which he admitted all elements of the offense (Pros. Exs. C and D). It appears from the statements themselves and from the testimony of the officers to whom he made them that accused was informed of his rights to remain silent, and that the statements were entirely voluntary (R. 21,22,23,24). There is no doubt that at the time and place alleged accused entered an officers' barracks, and took from the pockets of trousers on the beds of two lieutenants wallets belonging to those lieutenants. He then returned to his room in a hotel in Salinas, California, extracted from one \$123 in currency and from the other \$84 in currency, and threw the wallets out a window. His plea of guilty admits the value of the wallets. He has repaid the entire amounts taken (R. 7-19; Pros. Exs. C,D).

Evidence for the defense.

Accused testified under oath after a proper explanation to him of his rights (R. 29,30). He admitted the offense (R. 32,33). He explained that he had been married 8-1/2 months, and that his wife was pregnant at the time he committed the theft. Though he thought when he first met her that she was "a different kind of a girl from all of the girl friends he had had at home", he found her extravagant and demanding. He had spent on her his and his father's savings of \$3500. The day before the offense she had again demanded more new clothes, which he told her he could not provide. On the evening of the theft they had dinner together; afterwards, his wife became quite intoxicated. She threatened that she would "get it money some other way if I couldn't get it for her". Accused "knew right away what she did mean", and feared the disgrace it would bring upon him and his family. He left her asleep in their hotel room, went to the air base, and there stole the wallets and money. He repaid it within two or three days (R. 30-37).

Accused's wife took the stand as a witness in his behalf. She admitted to an unsavory past, of which accused was ignorant when he married her. She had been promiscuous since the age of 11 years, and had left home, pregnant, at the age of 15. Although they had known each other but a few weeks, she married accused, whom she found naive and "different". She was used to having what she wanted in the way of cars, clothes, and a good time, and demanded and got them from accused, once on the threat of leaving him. She had twice scandalized him before his family, and knew he feared she would do so again. Finally she told him that "if he couldn't give me the things I wanted I could get them some place". She drove him "to the breaking point", but did not realize that he would steal the money for her (R. 38-41).

4. The evidence requires no comment. The court's findings were correct on the basis of the record.

5. War Department records show that accused is 23-5/12 years of age.

He is a high school graduate, but did not attend college. He enlisted in the Air Corps in June 1942, and was a staff sergeant and a glider pilot at the time he was selected for training as an aviation student. He was commissioned a second lieutenant, Air Corps, Army of the United States, on 15 April 1944.

6. Attached to the record of trial are four letters from residents of accused's home community, attesting to his good character, honesty, industry and integrity. Also attached is a plea for clemency addressed to The Commanding General, Fourth Air Force, by Major George A. Rush, Air Corps, stating that accused has been an excellent officer and that he can be of value to the Army; a telegram from Captain C. W. Wallace, formerly accused's commanding officer, stating that accused had been soldierly and trustworthy; and a recommendation signed by all ten members who sat on the court-martial that because of accused's three years of conscientious and efficient military service, his ability as a flier, his good character, and the circumstances under which the offense was committed, he be given an opportunity to redeem himself by suspension of the sentence and assignment to combat.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Lucy A. Egan, Judge Advocate.
William A. M. Mays, Judge Advocate.
Samuel C. Conner, Judge Advocate.

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1st Ind.

19 AUG 1944

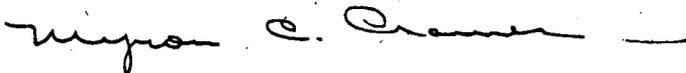
War Department, J.A.G.O.,

- 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 Hugh W. Mefford (O-773749), Air Corps.

2. The accused pleaded guilty to and was found guilty of the theft of two billfolds of the total value of \$209, the property of brother officers, in violation of the 93d Article of War. The court sentenced him to dismissal, total forfeitures, and confinement at hard labor for three years. The reviewing authority approved the sentence but remitted the forfeitures and confinement and recommended that the execution of the sentence be suspended. There is also appended to the record the unanimous recommendation for clemency of the court-martial which tried the accused. While the accused's offense is a serious one, there are some mitigating circumstances. If it were not for the recommendations of the court-martial and of the reviewing authority I would have recommended that the sentence as approved by the reviewing authority be confirmed. However, in view of these recommendations, the youth of the accused, his previous good record and the circumstances connected with the theft, 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. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



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

3 Incls:

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

(Sentence confirmed but execution suspended. G.C.M.O. 512, 25 Sep 1944)

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

(215)

SPJGN
CM 260395

1 SEP 1944

UNITED STATES	)	100TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened
	)	at Fort Bragg, North Carol-
Privates ANTONIO J. DE-	)	ina, 5 July 1944. DeMasse:
MASSE (31238192), Company	)	Dishonorable discharge and
F, 398th Infantry and	)	confinement for thirty (30)
BARNEY C. MONETT (38118404),	)	years. Monett: Dishonorable
Company L, 399th Infantry.	)	discharge and confinement for
	)	twenty (20) years. Both:
	)	Penitentiary.

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, Judge Advocates

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

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

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

Specification 1: In that Private Antonio J. DeMasse, Company F, 398th Infantry, did, at Fort Bragg, North Carolina, on or about 13 June 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Bragg, North Carolina, on or about 13 June 1944.

Specification 2: In that Private Barney C. Monett, Company L, 399th Infantry, did, at Fort Bragg, North Carolina, on or about 13 June 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Bragg, North Carolina, on or about 13 June 1944.

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

Specification: Private Antonio J. DeMasse, Company F, 398th Infantry, and Private Barney C. Monett, Company L, 399th Infantry, having been placed in confinement at Fort Bragg, North Carolina, prior to 13 June 1944, and being

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in confinement on said date, did at Fort Bragg, North Carolina, join in a mutiny in camp, in that at said time and place, acting jointly and concertedly in pursuance of a common intent they did overpower, disarm, beat and escape from Private Everett E. Parker, Company F, 399th Infantry, who having been duly detailed by superior military authority to guard the said DeMasse and Monett, was guarding them at said time and place.

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

Specification 1: In that Private Antonio J. DeMasse, Company F, 398th Infantry, and Private Barney C. Monett, Company L, 399th Infantry, having received a lawful command from Second Lieutenant M. Z. Wishon, a superior officer, to come to him, did while acting jointly and in pursuance of a common intent, at Fort Bragg, North Carolina, on or about 13 June 1944, willfully disobey the same.

Specification 2: In that Private Antonio J. DeMasse, Company F, 398th Infantry, having received a lawful command from First Lieutenant John J. O'Brien, a superior officer, to remove his, DeMasse's shoes, did, at Fort Bragg, North Carolina, on or about 13 June 1944, willfully disobey the same.

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

Specification 1: In that Private Antonio J. DeMasse, Company F, 398th Infantry, did, at Fort Bragg, North Carolina, on or about 13 June 1944, behave himself with disrespect towards Major John F. Cherry, his superior officer, by calling him, or referring to him as; "a four-eyed cocksucker".

Specification 2: In that Private Antonio J. DeMasse, Company F, 398th Infantry, did, at Fort Bragg, North Carolina, on or about 13 June 1944, behave himself with disrespect towards First Lieutenant John J. O'Brien, his superior officer, by calling him, or referring to him as, "a dirty bastard, mother-fucker, Irish cocksucker".

Specification 3: In that Private Antonio J. DeMasse, Company F, 398th Infantry, did, at Fort Bragg, North Carolina, on or about 13 June 1944, behave himself with disrespect towards Second Lieutenant Donald J. Whiting, his superior officer, by calling him, or referring to him as "a mother fucking son-of-a-bitch, cocksucker bastard".

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

Specification 1: In that Private Antonio J. DeMasse, Company F, 398th Infantry, and Private Barney C. Monett, Company L, 399th Infantry, acting jointly and in pursuance of a common intent, did, at Fort Bragg, North Carolina, on or about 13 June 1944, with intent to commit a felony, to wit: sodomy, commit an assault upon Private Everett E. Parker, Company F, 399th Infantry, by willfully and feloniously striking the said Private Everett E. Parker in the head with hands or fists, and by pointing a dangerous weapon, to wit: a carbine, at the said Private Everett E. Parker's head or body.

Specification 2: In that Private Antonio J. DeMasse, Company F, 398th Infantry, did, at Fort Bragg, North Carolina, on or about 13 June 1944, with intent to do him bodily harm, commit an assault upon Master Sergeant Solomon Sheer, by willfully and feloniously striking the said Master Sergeant in the face and body with his fists.

Specification 3: In that Private Antonio J. DeMasse, Company F, 398th Infantry, did, at Fort Bragg, North Carolina, on or about 13 June 1944, with intent to do him bodily harm, commit an assault upon Private first class George Morris, by willfully and feloniously striking the said Private first class Morris in the face with his fists.

Each accused pleaded not guilty to all Charges and Specifications. The accused, DeMasse, was found guilty of Specification 1 of Charge I except the words "desert" and "in desertion" substituting therefor the words "absent himself without leave from" and "without leave", not guilty of Charge I but guilty of a violation of Article of War 61, guilty of Charge II and its Specification, of Charge III and its Specifications, of Charge IV and its Specifications, and of Specification 1 of Charge V and Charge V, and guilty of Specifications 2 and 3 of Charge V except the word "fists" substituting therefor the word "fist". The accused, Monett, was found guilty of Specification 2 of Charge I except the words "desert" and "in desertion" substituting therefor the words "absent himself without leave from" and "without leave", not guilty of Charge I but guilty of a violation of Article of War 61, guilty of Charge II and its Specification, of Charge III and Specification 1 thereunder, and of Charge V and Specification 1 thereunder. The accused, DeMasse and Monett, were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for the respective periods of 45 and 30 years. The reviewing authority approved the sentences, remitted as to DeMasse all confinement in excess of 30 years and as to Monett all confinement in excess of 20 years, designated the U. S. Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record pursuant to Article of War 50½.

3. The evidence for the prosecution shows that Privates Antonio J. DeMasse and Barney C. Monett, the accused, and Private Joseph P. Giordano, were prisoners in the 100th Division Stockade, Fort Bragg, North Carolina, and on 13 June 1944 were assigned as a "work detail" under the supervision and custody of Private Everett E. Parker, Company F, 399th Infantry. According to the "stockade rules" communicated to them, prisoners are required to obey orders of their guards "as if they were non-commissioned officers". On the morning of the aforesaid date, this "work detail" went to the "Special Troops Officers' Club" to perform "clean up work". While there, the two accused, disregarding the instructions of their guard, Parker, drank about six beers each (R. 16, 17, 18, 19, 25, 32).

After the noon hour which was spent at the stockade, the "detail", still under the supervision of Private Parker who was armed with a loaded carbine, returned to the Officers' Club where work was resumed. At about 3 p.m., Parker gave the "detail" a "ten minute break" which was taken in the boiler room adjacent to the building where they had been working. Each of the accused there drank "four beers" against Parker's orders. After the "break" was over, Parker instructed them "to police" the boiler room. Parker's testimony as to the ensuing events is in part as follows:

"Q. Will you again tell what happened when you gave them the order to police up. You just stated that Giordano started picking up papers. What did Monett and DeMasse do?

"A. They humped over and when Monett straightened out he grabbed the rifle and hit me and told me to take my hand off it.

"Q. Monett grabbed the rifle from you?

"A. Yes, sir.

"Q. What did he do with the rifle when he grabbed it from you if anything?

"A. He backed me in the corner, sir.

"Q. Who was holding the rifle at the time he was backing you into the corner?

"A. He was holding it right against my chest at that time.

"Q. Was it pointed to you?

"A. Yes, sir.

"Q. What, if anything, was Private DeMasse doing at this time?

"A. Sir, DeMasse took -- I don't think he had done anything, sir, but he took the rifle after that, sir, after I had been backed over in the corner he took the rifle and ejected two rounds from it.

"Q. Private DeMasse took the rifle from Private Monett and ejected two rounds from it?

"A. Yes, sir.

"Q. What happened then?

"A. Well, sir, he held the rifle on me, sir.

- "Q. Who held the rifle on you?
- "A. DeMasse. Then a belt was taken off me.
- "Q. Who took the belt off of you?
- "A. Monett. When the belt was taken off they told me to give them the watch I had borrowed from the enlisted man here. I gave that to them, sir, and then DeMasse hit me and knocked me down with his left hand while holding the carbine with his right hand.
- "Q. What happened then after he hit you and knocked you down?
- "A. Then, sir he--
- "Q. Who is he?
- "A. DeMasse, sir. He gave the carbine to Monett, sir, and Monett stuck it against the side of my head, sir.
- "Q. Pointed it at the side of your head?
- "A. Yes, sir.
- "Q. After DeMasse had given it to him?
- "A. Yes, sir.
- "Q. All right, what, after DeMasse gave the rifle to Monnet, if anything did DeMasse do?
- "A. DeMasse said, do you see what a mess we have you in. We can take your helmet and rifle to the Provost Marshal and have you court-martialed from now on.
- "Q. Had they done anything to your helmet?
- "A. The helmet was knocked off.
- "Q. What happened, if anything, after DeMasse said to you what a fix you are in and that he could take you to the Provost Marshal?
- "A. He said, that is what we are going to do.
- "Q. Will you repeat that statement?
- "A. He said, that is what we are going to do if you don't suck me off.
- "Q. All right, after that statement was made what if anything did DeMasse do?
- "A. He went so far as to take his penis out, sir, and put it up next to my mouth. And I said, boys I won't do it I haven't been a prick.
- "Q. He took his penis out?
- "A. Yes, sir.
- "Q. And how close did--first I'll ask you where were you at this time, what was your position?
- "A. Sir, I was on the floor except my back was up against the stove, sir, sort of sitting position, sir.
- "Q. How had you gotten in that position?
- "A. Sir, I had been knocked down there.
- "Q. So while you were down there Private DeMasse pulled his penis out, is that right?
- "A. Yes, sir.
- "Q. And he said--he tried to force it in your mouth?
- "A. Yes, sir.

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"Q. How close did he get his penis, how close did Private DeMasse get his penis to your mouth?

"A. About six inches, sir.

"Q. What were you doing when he was trying to force his penis in your mouth?

"A. Sir, I was telling him to stop, and trying to push him away.

"Q. Now, you have already stated that before DeMasse started in that effort that he handed the carbine to Monett. Now, at the time you were on the floor and DeMasse was trying to force his penis into your mouth, what was Monett doing?

"A. Sir, he was saying do what the boss tells you, do what the boss tells you.

"Q. Now, who was he calling the boss?

"A. He had been referring to DeMasse as the boss.

"Q. Previously he had been calling Private DeMasse the boss?

"A. Yes, sir." (R. 21, 22, 23).

Thereafter, Parker was hit several more times. Then a shot was fired in the room, and the accused "dropped the carbine" and ran out of the door, one of them saying "we will have to go over the hill now". During this time, the other prisoner, Giordano, who was in the boiler room, neither assisted in nor attempted to prevent the accused from the commission of their acts (R. 19, 20, 21, 22, 23, 24, 29, 30, 31, 36, 37, 38, 39, 40).

Second Lieutenant M. Z. Wishon, 325th Engineer Combat Battalion, testified that he heard a shot in the vicinity of the Officers' Club at about 3:30 p.m. and saw the accused walking away from the building. He ordered them "to come here" and told them that he wanted to talk with them. Both "looked up" and Monett "walked as if he was going to come up". When about five yards from him, both accused started to walk away. He called them "to stop" but both began to run. Thereafter he called "Stop those two men" and several men in the vicinity of the 398th Infantry Officers' Mess surrounded them. Lieutenant Wishon was in uniform, wearing officer insignia (R. 49-51).

Sergeant Sheer "caught" DeMasse and Corporal Alexander McAllister held Monett. DeMasse cursed profusely. The fly of his trousers was open. He hit Sergeant Sheer twice on the face "as hard as he could swing" (R. 56-59, 61-63).

The two accused were then taken by the military police, who had been summoned, to the office of the Provost Marshal. While there and "without provocation", DeMasse struck Private First Class George W. Morris in the face with his fist. This occurred in the room next to that in which Major Cherry, the Provost Marshal, was interviewing

Private Giordano. First Lieutenant John J. O'Erien, Assistant Prison Officer, 100th Infantry Division, thereafter "marched" the accused to the stockade. En route there, the accused, DeMasse, stated to him, "Who was that, Major Cherry, that four-eyed cocksucker" (R. 64-68).

Upon reaching the stockade, each of the accused was locked in a "solitary cell". Lieutenant O'Erien ordered the accused, DeMasse, "to remove his belt and his shoes" which order the accused "refused" to obey. DeMasse's shoes were then forcibly removed and he then began "kicking and pounding * * * at the door" and called the officer "a dirty bastard, mother fucker, cocksucker" and other opprobrious names. A Lieutenant Whiting, another Assistant Prison Officer, then appeared on the scene and DeMasse proceeded to call him "a mother fucking son of a bitch, a blue eyed cocksucker, and a bastard" and additional vile names. During the time, there were several noncommissioned officers present in addition to the two officers (R. 68-70).

First Lieutenant Robert E. Johnstone, M.C., Company A, 325th Medical Battalion, 100th Infantry Division, who examined Private Parker a short time after his being assaulted by the accused, testified that Parker was in a "very bloody and in an almost exhausted state", suffering from wounds about the face and head, and that there was a question of "intercranial hemorrhage inside the head which * * * might have caused death" (R. 47, 48).

Both Parker and Giordano testified that the accused were not drunk, as did two other witnesses for the prosecution (R. 31, 47, 63, 66). No witness expressed the opinion that the accused were drunk.

4. The accused, whose rights as to testifying or remaining silent had been explained to them, elected to remain silent.

5. Specifications 1 and 2 of Charge I respectively allege that the accused, DeMasse and Monett, did "at Fort Bragg, North Carolina, on or about 13 June 1944, desert the service of the United States and did remain absent in desertion until * * * apprehended at Fort Bragg, North Carolina, on or about 13 June 1944."

As heretofore stated, the accused were each found guilty of absence without leave for the alleged period in violation of Article of War 61. The elements of proof required to sustain the offense of absence without leave are: (a) That 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 any one competent to give him leave" (MCM, 1928, par. 132).

The evidence for the prosecution shows that the accused assaulted the "prison chaser" under whose control and supervision they had been placed, struck him down, and left the building where they had been working. They were under constant observation by military personnel from the time of their emergence until they were captured within a few minutes a short distance away. The evidence clearly shows, therefore, that the accused were absent without leave for a short space of time from their command which at that particular time was at the "Officers' Club" under guard. Time is not of the essence in the offense of absence without leave (see MCM, 1928, pars. 104c, 130). The evidence supports the court's findings of guilty of the lesser included offense of absence without leave under Specifications 1 and 2 of Charge I in violation of Article of War 61.

6. The Specification under Charge II alleges that the two accused "being in confinement" did at Fort Bragg, North Carolina, on 13 June 1944 "join in a mutiny in camp, in that * * * acting jointly and concertedly in pursuance of a common intent they did overpower, disarm, beat and escape from Private Everett E. Parker" who was "guarding them" in accordance with instructions of "superior military authority."

"A mutiny in military law is a revolt by two or more soldiers with or without armed resistance against the authority of their commanding officers [citing authorities], and the offense of joining in a mutiny requires the performance of an overt act of insubordination by the person accused * * *" (CM NATO 1489, 3 Bull. JAG 143).

The prosecution's evidence clearly shows that at the time and place alleged the accused acting jointly and in pursuance of a common intent "overpowered, disarmed, beat and escaped from" their guard who had been directed by superior authority to exercise control over them. This revolt was against "the authority of their commanding officers" because such authority is frequently, as in this instance, exercised through duly authorized subordinates. The mere fact that no commanding officer was physically present at the times does not change the character of the offense. The commanding officer's authority is present and exists in the person who has been ordered to represent him. It, therefore, follows that the evidence amply supports the findings of guilty of Charge II and its Specification.

7. Specification 1 of Charge III alleges that the accused, DeMasse and Monett, "while acting jointly and in pursuance of a common intent" willfully disobeyed "a lawful command from Second Lieutenant M. Z. Wishon, a superior officer, to come to him". Specification 2 of Charge III alleges that the accused, DeMasse, willfully disobeyed "a lawful command from First Lieutenant John J. O'Brien, a superior officer to remove his, DeMasse's shoes". Willful disobedience is the refusal or deliberate omission manifesting an intentional defiance of authority to comply with an order relating to a military duty given by an author-

ized superior officer (MCM, 1928, par. 124b). Such disobedience is violative of Article of War 64.

The evidence for the prosecution shows that the two accused were ordered by Lieutenant Wishon "to come to him" when he saw them after he had heard a shot fired nearby. When he gave the order they "looked up" and apparently started to comply with it since they continued for a short time to walk toward him, but before reaching him, they turned, walked and then ran to avoid him despite his second order to stop. There exists sufficient facts to warrant an inference that the accused heard and understood the order, recognized the person who gave it as an officer, and deliberately avoided complying with it by running away. The evidence, therefore, supports the findings of guilty of Charge III and Specification 1 thereunder.

The prosecution's evidence also shows that after being returned to the stockade, the accused, DeMasse, was ordered by Lieutenant O'Brien to remove his (the accused's) shoes and that the accused promptly and deliberately refused to obey. This evidence, clearly justifies the findings of guilty of Specification 2 of Charge III and Charge III.

8. Specifications 1, 2, and 3 of Charge IV allege that the accused, DeMasse, at Fort Bragg, North Carolina, on 13 June 1944, did "behave himself with disrespect" respectively toward Major Cherry and Lieutenants O'Brien and Whiting, his superior officers, by calling them certain stated opprobrious names. "The disrespectful behavior contemplated by this article [Article of War 63] is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed. * * * Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language" (MCM, 1928, par. 133).

The evidence for the prosecution shows beyond a reasonable doubt the commission by the accused of each of the alleged offenses and supports the findings of guilty of Charge IV and Specifications 1, 2 and 3 thereunder.

9. Specification 1 of Charge V alleges that the accused, DeMasse and Monett, "acting jointly and in pursuance of a common intent" did at Fort Bragg, North Carolina, on 13 June 1944 "with intent to commit a felony, to wit: sodomy, commit an assault upon Private Everett E. Parker" by striking him and pointing a carbine at him.

"An assault with intent to commit any felony is an assault made with a specific intent to * * * commit sodomy, or other felony" (MCM, 1928, par. 1491). Such an assault contravenes Article of War 93.

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The prosecution's evidence clearly shows that the accused, acting jointly, assaulted the alleged victim in the manner stated. That the purpose of the assault was to accomplish the crime of sodomy is definitely and clearly established both by the words and acts of the two accused. When their indecent designs were thwarted by the persistent refusal of their victim, they beat him unmercifully. The evidence establishes the crime beyond a reasonable doubt and supports the court's findings of guilty of Charge V and Specification 1 thereunder.

10. Specifications 2 and 3 of Charge V allege that the accused, DeMasse, did at Fort Bragg, North Carolina, on 13 June 1944, "with intent to do * * * bodily harm" commit assaults respectively upon "Master Sergeant Solomon Sheer" and Private first class George Morris" by "willfully and feloniously striking" each of them in the face or body with his fists.

An assault with intent to do bodily harm is one which is "aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed" and is violative of Article of War 93 (MCM, 1928, par. 149n).

The prosecution's evidence shows that the accused, at the time and place alleged, twice struck Sergeant Sheer with his fist on the face, the blows occurring at the time when the noncommissioned officer "caught" him a short time after the assault had been made on Private Parker. Apparently the blows were hard ones because a witness testified that the accused delivered them "as hard as he could swing". Then, after the accused had been taken to the Provost Marshal's office, he hit Private First Class Morris in the face with his fist. The commission of the assaults is clear and it is equally clear that the assaults were accompanied by an "intent to do bodily harm" because of the force used. The evidence, therefore, beyond a reasonable doubt warrants the court's findings of guilty of Charge V and Specifications 2 and 3 thereunder.

11. The record shows that the accused, DeMasse, is 22 5/12 years of age and was inducted on 7 December 1942 and that the accused, Monnett, is 23 years of age and was inducted on 10 July 1942.

12. 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 all of the findings of guilty as found by the court.

Abner E. Lipscomb Judge Advocate.
Richard S. Lykes Judge Advocate.
Samuel H. Collier Judge Advocate.

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

SPJGN
CM 260398

4 AUG 1944

UNITED STATES)

SECOND AIR FORCE)

v.)

) Trial by G.C.M., convened at
) Army Air Field, McCook, Nebraska,
) 23, 27 June 1944. Dismissal and
) total forfeitures.

)
) Second Lieutenant THOMAS P.
) GALLAGHER (O-694280), Air
) Corps.)

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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 61st Article of War.

Specification: In that, Second Lieutenant Thomas P. Gallagher, 245th Army Air Forces Base Unit (Operational Training Unit (Heavy)), Section "A", Army Air Field, McCook, Nebraska, did, without proper leave, absent himself from his station at Army Air Field, McCook, Nebraska, from about 11 March 1944 to about 27 April 1944.

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

Specification 1: In that Second Lieutenant Thomas P. Gallagher, 245th Army Air Forces Base Unit (Operational Training Unit (Heavy)), Section "A",

Army Air Field, McCook, Nebraska, did at San Antonio, Texas, on or about 5 November 1943, with intent to defraud, wrongfully and unlawfully make and utter to Lauterstein's a certain check in words and figures, to wit:

San Antonio, Texas, 5 Nov. 1943 No.

30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE
ORDER OF Lauterstein's \$25.00

Twenty-five-----no/100 DOLLARS

T. P. Gallagher
0-694280

and by means thereof, did fraudulently obtain from Lauterstein's twenty-five dollars (\$25.00), he, the said Second Lieutenant Thomas P. Gallagher, 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, San Antonio, Texas, for the payment of said check.

Specifications 2, 3, and 4 are the same as Specification 1 except as to date, amount, and payee, as follows:

<u>Specification</u>	<u>Date</u>	<u>Amount</u>	<u>Payee</u>
Specification 2	5 November 1943	\$29	Lauterstein's, San Antonio, Texas.
Specification 3	31 December 1943	\$42.37	Biltmore Hotel, Los Angeles, Calif.
Specification 4	4 January 1944	\$10	Biltmore Hotel, Los Angeles, Calif.

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

Specification 1: In that, Second Lieutenant Thomas P. Gallagher, 245th Army Air Forces Base Unit (Operational

Training Unit (Heavy)), Section "A", Army Air Field, McCook, Nebraska, did, at McCook, Nebraska, on or about 13 April 1944, with intent to deceive and injure, wrongfully and unlawfully make and extend to the McCook National Bank of McCook, Nebraska, a certain check in words and figures as follows, to wit:

San Antonio, Texas 13 April 1944

NATIONAL BANK OF FORT SAM HOUSTON

PAY TO THE
ORDER OF Cash \$20.00

Twenty no/100 DOLLARS

T. P. Gallagher
2nd Lt. A.C. 493rd Bomb Gr. AAF
McCook, Neb.

and by means thereof did fraudulently obtain from said bank cash in the amount of twenty dollars (\$20.00), he, the said Thomas P. Gallagher, 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, San Antonio, Texas, for the payment of said check.

Specification 2: Similar to Specification 1 but alleging check drawn on same bank, dated 17 April 1944, at same place, payable to the order of cash, made and uttered to McCook National Bank, thereby fraudulently obtaining \$20.

He pleaded guilty to Charge I and its Specification and not guilty to all other Charges and Specifications. He was found guilty of Charge I and its Specification and guilty of Charge II and the Additional Charge and all Specifications excepting from each all the words thereof commencing with the words "with intent" and ending with the words "said check" of which he was found not guilty and substituting therefor the words "wrongfully and unlawfully make and utter to /the appropriate named party/ a certain check in words and figures as follows, to wit: /description of each check/ which when presented for payment at the National Bank of Fort Sam Houston at San Antonio, Texas, was not paid" of which substituted words he was found guilty. 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 the period of one year. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution supplementing the accused's pleas of guilty to Charge I and its Specification shows that by appropriate orders, dated 7 March 1944, the accused had been directed to proceed from Biggs Field, Texas, to the Army Air Field, McCook, Nebraska, for duty with the "493rd BB Gp" to which he had been assigned. He was directed to report not later than 11 March 1944 on which date by appropriate orders he was assigned to the "863rd Bomb Squadron". The accused did not report to the "CO" at his new assignment "not later" than 11 March 1944 on which date by appropriate orders he was assigned to the "863rd Bomb Squadron". The accused did not report at his new place of duty until 27 April 1944 and in the meantime by appropriate orders he had been relieved from assignment to the last mentioned organization. Official copies of the orders involved and extract copies of the appropriate morning reports showing his absence without leave for 48 days were admitted into evidence (R. 7; Pros. Exs. 1-6).

The court's action upon the remaining Charges and Specifications renders further recitation of the evidence wholly unnecessary as hereinafter shown.

4. The evidence for the defense upon Charge I and its Specification was adduced through the testimony of the accused who, after explanation of his rights as a witness, elected to testify. He admitted his absence without leave as alleged which he attributed to marital and financial difficulties and protracted drinking (R. 20-22).

As aforesaid a recitation of the evidence upon the remaining Charges and Specifications is unnecessary.

5. The Specification, Charge I, alleges that the accused absented himself without proper leave from his station at Army Air Field, McCook, Nebraska, from about 11 March 1944 to about 27 April 1944. The elements of the offense thereby alleged and the proof required for conviction thereof, according to applicable authority, are as follows:

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

The evidence for the prosecution abundantly supplements the accused's plea of guilty and his commission of the offense as alleged

is, therefore, established beyond a reasonable doubt. The accused's own testimony admits his guilt and sounds weakly even in extenuation. All of the evidence and the accused's plea of guilty, therefore, fully support and warrant the court's findings of guilty of Charge I and its Specification.

6. All of the Specifications of Charge II and the Additional Charge originally alleged by appropriate words of art and factual allegations offenses under Article of War 96. Such offenses originally alleged the wrongful, unlawful and fraudulent making and utterance to named parties of certain described checks whereby the accused fraudulently obtained value therefor when he knew that he did not have and without intending that he should have sufficient funds in the drawee bank for the payment thereof. The court by exceptions and substitutions found the accused not guilty of fraudulently making and uttering the described checks, not guilty of fraudulently obtaining value therefor, and not guilty of "well knowing that he did not have and not intending that he should have sufficient funds" in the drawee bank for the payment of the checks. By so finding the court emasculated the Specifications of essential elements upon which the accused's alleged offenses were predicated. The making and utterance of a check is wrongful and unlawful not because the drawee bank does not pay it upon presentation but because the maker knows at the time of its execution that he does not have and does not intend to have sufficient funds on deposit with the drawee bank to pay the check when presented. By finding the accused not guilty of such essential elements without finding him guilty by substituting other words of like or similar import therefor the court destroyed the factual basis upon which its findings that the checks were wrongfully and unlawfully made and uttered were based. The substituted words of which the accused was found guilty merely state that the accused did "wrongfully and unlawfully make and utter to named parties certain described checks which when presented for payment at the drawee bank were not paid". Such substituted words wholly fail to state any offense because they do not include facts or elements necessary to constitute an offense (CM 133625 (1919); CM 195323 (1931); CM 202601 (1935), Dig. Op. JAG., 1912-40, Secs. 452 (15) and 454 (66)). The court's findings therefore amounted to findings of not guilty of the original Specifications of Charge II and the Additional Charge.

Accordingly the findings of guilty of Charge II and the Additional Charge and all Specifications thereunder are unwarranted and must be disapproved.

7. The accused is about 30 years old. The War Department records

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show that he has had enlisted service from 20 May 1942 to 7 October 1943 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date.

8. The court was legally constituted. For the reasons stated the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge II and the Additional Charge and all Specifications thereunder; legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb Judge Advocate.

Charles S. Sykes Judge Advocate.

Gabriel H. Golden Judge Advocate.

SPJGN
CM 260398

1st Ind.

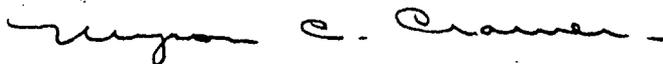
War Department, J.A.G.O., 19 AUG 1944 - To the Secretary of War.

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 P. Gallagher (O-694280), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge II and the Additional Charge and the Specifications thereunder, legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be ordered executed.

3. Consideration has been given to a letter from Thomas G. Gallagher, father of the accused, addressed to the Commanding General, Army Air Forces, requesting clemency for his son.

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 - Dft. of ltr. for sig. Sec. of War.
- Incl 3 - Form of Executive action.
- Incl 4 - Ltr. fr. T. G. Gallagher, father of accused.

(Findings of guilty of Charge II and Additional Charge and Specifications thereunder disapproved. Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 522, 26 Sep 1944)



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

SPJGK
CM 260403

18 AUG 1944

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

v.)

Private SHERMAN M. IRISH)
(39099887), Company A, 515th)
Parachute Infantry.)

THIRTEENTH AIRBORNE DIVISION

Trial by G.C.M., convened at
Camp Mackall, North Carolina,
21 June 1944. Dishonorable
discharge (suspended) and con-
finement for five (5) years.
Rehabilitation Center.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General, and there found legally insufficient in part to support the findings and the 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. There is no need to set forth the Specifications in full, except Specifications 1 and 5 of the Charge. In summary, they are as follows:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Sherman M. Irish, Company A, 515th Parachute Infantry, did, at New York, New York, on or about 22 September 1943 with the intent to defraud, wrongfully and unlawfully make and utter to the Hotel Pennsylvania, New York, New York, a certain check in words and figures as follows, to wit:

Sept 20	1943	No
Burlington Saving Bank Burlington Vermont		
Pay to the		100
order of	Cash	\$50.00
Fifty Dollars and No Cents		Dollars

Sherman Irish 39099887

He pleaded not guilty to and was found guilty of the Charge and all its Specifications. Evidence of three previous convictions by courts-martial for absences without leave of two, thirteen and nineteen days, respectively, was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, suspended the execution of the portion thereof adjudging dishonorable discharge until accused's release from confinement, designated the Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence supports the findings of guilty of Specifications 2, 3 and 4, and will not be discussed here. With respect to Specifications 1 and 5, there is sufficient evidence to show that at the places and on the dates alleged, accused uttered the checks and received from the Hotel Pennsylvania the sum of \$50 (Specification 1) and from Paul D. Moffett a like sum (Specification 5). There is also evidence that each check was returned unpaid to the hotel and to Mr. Moffett, respectively (Exs. 1, 2). Neither of the depositions taken for the purpose of showing that accused had no funds in the banks upon which the checks were drawn shows that the witness who makes the deposition is an official of the banks alleged in the Specifications. With respect to Specification 1, one Leland M. Brown testified that he was a banker residing in Burlington, Vermont, and that accused had no account in his bank (Ex. 3). With respect to Specification 5, one W. L. Cohen testified that he resided in Atlanta, Georgia and was Assistant Manager of the bookkeeping department of a bank and that accused had no account in that bank (Ex. 13). Neither deposition, however, contains any evidence to show by what bank the witness was employed. The designation of the bank as a part of the address of the witness in the directions that the depositions be taken is not a part of the testimony therein, and may not be regarded as evidence. It is true that the banks by which the witnesses were employed were each located in the city mentioned in the checks as described in the Specifications, but the checks were not mentioned or described by the witnesses. It is sufficient to say that we are not at liberty to assume that they were the only banks in those cities.

There is, then, only the testimony of the defrauded individuals who cashed the checks that they were returned unpaid. It has repeatedly been held that such testimony does not suffice to prove that the maker of the checks had not sufficient funds, or no account (Dig. Ops. JAG, 1912-40, Sec. 395, (16); CM 243091, Bull. JAG, Apr. 1944, p. 150; CM 121721, Dig. Ops. JAG, 1912-40, Sec. 454 (67)).

4. No specific maximum punishment is provided for the offense of making and uttering a check with insufficient funds, with intent to defraud. The most closely related offense is that of obtaining money under false pretenses. Where the amount obtained is \$50 or less, and more than \$20, the maximum confinement authorized is one (1) year. (Manual for Courts-Martial, 1928, par. 104c). In this case the court found accused guilty

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of five such offenses and sentenced accused to confinement for five (5) years. Since the record is insufficient to support the findings of guilty on two specifications, it follows that confinement for only three (3) years is authorized.

5. The Charge Sheet shows that accused is 22 years of age and was inducted 17 August 1942.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 1 and 5 of the Charge, legally sufficient to support the finding of guilty of the Charge, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for three (3) years.

Langley G. Gou, Judge Advocate.
Herman Wayne, Judge Advocate.
Samuel Connerford, Judge Advocate.

1st Ind.

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

25 AUG 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 August 20, 1937 (50 Stat. 724, 10 U.S.C. 1522), is the record of trial in the case of Private Sherman M. Irish (39099887), Company A, 515th Parachute Infantry, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review and, for the reasons therein stated, recommend that the findings of guilty of Specifications 1 and 5 (passing worthless checks) in violation of Article of War 96 be vacated; that so much of the sentence to confinement as is in excess of confinement at hard labor for three years be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated be restored.

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



Myron C. Cramer,
Major General,

The Judge Advocate General.

2 Incls.

Incl.1-Record of trial.

Incl.2-Form of Ex. action.

(Findings of guilty of Specifications 1 and 5 in violation of Article of War 96 vacated, and so much of sentence to confinement as is in excess of confinement at hard labor for three years vacated. All rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence hereby vacated restored by order of the Acting Secretary of War. G.C.M.O. 464, 31 Aug 1944)



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

(239)

SPJGV
CM 260404

9 AUG 1944

UNITED STATES	)	13TH AIRBORNE DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Mackall, North Carolina,
First Lieutenant JAMES R.	)	28 June 1944. Dismissal.
TUCKER (O-1309929), Infantry.)	

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant James R. Tucker, Company "B", 515th Parachute Infantry, was at Atlanta, Georgia, on or about 27 April 1944, drunk and disorderly in uniform in a public place, to wit, The Hanger Hotel Restaurant.

Specification 2: (Finding of not guilty).

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

He pleaded not guilty to the Charge and all Specifications. He was found guilty of the Charge and Specification 1, not guilty of Specification 2, and guilty of Specification 3, except the words "with intent to deceive". Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 3 as amended, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Since the accused was found not guilty of Specification 2 and the finding of guilty of Specification 3 was disapproved by the reviewing authority, the evidence relating to these Specifications will not be discussed except as it may pertain to Specification 1.

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4. Evidence for the prosecution is substantially as follows:

About 12:30 a.m. on 27 April 1944, Major Merlin H. Willey, a patient in the Lawson General Hospital, accompanied by a Captain Douglas and a girl friend, went to the Hangar Restaurant near the Atlanta Army Air Base. After ordering a drink Major Willey went to the washroom in the restaurant. As he emerged he saw accused and another Paratroop officer engaged in a fight. He motioned to Captain Douglas and together they separated the officers. Major Willey took the accused to one side and told him his behavior was unbecoming an officer, and he thought accused should leave the restaurant. Accused inquired, "Who in the hell are you" (R. 15) and witness replied, "I am Major Willey". Accused then quieted down. Someone behind Major Willey said something to accused and he swung with his fist, either at the major or at the other person. The major ducked and the blow grazed the side of his face, and the major then grabbed accused's arm. At this instant some unknown person hit the major over the head with an instrument, cutting his head and knocking him to the floor. Major Willey observed the accused at the time of intervening in the fight. Accused's eyes were glassy, he could not stand steady, his talk was affected, and in the opinion of the witness accused was drunk (R. 13, 14).

John P. Nunn, Assistant Chief of Police, Hapeville, Georgia, testified that as he was passing the Hangar Restaurant in a radio car early on the morning of 27 April an official of the city of Hapeville called to him to come into the restaurant as a free-for-all fight was on. When Nunn entered the restaurant he saw Lieutenant Williams, accused's companion, getting up off the floor. A girl was under a booth. Two tables and a chair were overturned. One of the waitresses called, "He is going out the door", so witness accompanied her outside where she pointed out accused who was sitting in a car with his wife. He had blood on his face. Witness told a Mr. Parker not to let accused drive off, and then turned his attention to Lieutenant Williams. When he did this accused drove off and entered the air base, driving the wrong direction on a one-way street until he entered a dead end street where he was overtaken by the witness. Witness then took accused and his wife to the police station. During this time accused was in uniform and under the influence of liquor. "He wasn't staggery drunk and he wasn't limber drunk, but he was under the influence of whisky" (R. 22-25).

5. For the defense.

The accused, after having his rights as a witness explained to him, elected to testify under oath. He testified that he, his wife, Lieutenant Williams and his girl had gone to the Hangar Restaurant where he procured a table. Shortly thereafter Lieutenant

Williams and his girl began arguing, and accused motioned his wife to go toward the rest room. When away from the table he told his wife to get her purse and coat and they would leave. As they were returning to the table accused saw Williams and his girl standing, and apparently Williams was trying to get her to leave. A lot of people were standing about, so he went up to Williams, took him by the arm and said "Williams, let's go". About that time "there was somebody that came up in between us, not only in between us but all around us and there were fists that started flying". A major pulled him aside and when he asked the major who he was he replied "Major Willey". Accused then told him all he was doing was trying to get his wife's belongings as they were leaving. As he and the major were leaving someone swung at him from one side and he threw up his hand, but was struck over the left eye. He then grabbed his wife and went outside and got in his car (R. 31-33).

On cross-examination and examination by the court accused said when Major Willey first approached him he asked the major, "Who the hell are you" (R. 39). He had had two drinks before coming to the Hangar Restaurant, and had taken about half of Lieutenant Williams' drink, a glass of bourbon and Coca Cola, at the restaurant before the disturbance began (R. 37). After leaving the restaurant he only drove across the street and parked (R. 37). He had not had any difficulty with Lieutenant Williams in the restaurant, and neither of them had at any time hit, or attempted to hit the other (R. 38).

6. The evidence shows that early on the morning of 27 April 1944 accused was at the Hangar Restaurant, in Atlanta, Georgia, in a party composed of accused, his wife, Lieutenant Williams and Lieutenant Williams' woman companion. A fight ensued between accused and Lieutenant Williams. Major Merlin H. Willey sought to quiet the disturbance which rapidly developed into a general brawl. Accused struck either at the major or someone near the major and his fist grazed the major's face. Accused was in uniform and was, in the opinion of Major Willey and John P. Nunn, Assistant Chief of Police who arrived during the brawl, drunk at the time.

7. War Department records show that accused is 25 years of age and a graduate of the Bisbee High School, Bisbee, Arizona. He entered military service 16 July 1942. After completing the Officer Candidate Course, The Infantry School, Fort Benning, Georgia, he was appointed second lieutenant, Army of the United States, 2 February 1943. On 23 October 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.

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In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, 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.

Thomas M. Taffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Truitt, Judge Advocate.

SPJGV
CM 260404

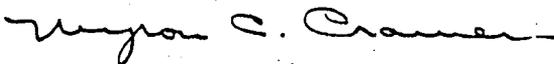
1st Ind.

War Department, J.A.G.O., **22 AUG 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 R. Tucker (O-1309929), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, to support the sentence and to warrant confirmation of the sentence. 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 - Dft ltr for sig. S/W.

Incl 3 - Form of action.

(Sentence confirmed. G.C.M.O. 534, 26 Sep 1944)



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

(245)

18 AUG 1944

SPJGH
CM 260443

UNITED STATES)

FIRST AIR FORCE

v.)

Trial by G.C.M., convened at
Langley Field, Virginia, 26
June 1944. Dismissal, total
forfeitures and confinement
for two (2) years.

Second Lieutenant GILBERT
J. DONOVAN (O-817640),
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 Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Gilbert J. Donovan, Air Corps, Section E, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 11 June 1944, feloniously take, steal, and carry away the sum of \$15.00, lawful currency of the United States of America, the property of Second Lieutenant Douglas A. Herrin.

Specification 2: In that Second Lieutenant Gilbert J. Donovan, Air Corps, Section E, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 15 June 1944, feloniously take, steal, and carry away the sum of \$60.00, lawful currency of the United States of America, the property of Second Lieutenant William E. Harris.

Specification 3: In that Second Lieutenant Gilbert J. Donovan, Air Corps, Section E, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 16 June 1944, feloniously take, steal, and carry away the sum of \$17.00, lawful currency of the United States of America, the property of Second Lieutenant Frank W. Bell, Jr.

Specification 4: In that Second Lieutenant Gilbert J. Donovan, Air Corps, Section E, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 21 June 1944, feloniously take, steal, and carry away the sum of \$5.00, lawful currency of the United States of America, the property of Second Lieutenant

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Donald N. Reynolds.

Specification 5: In that Second Lieutenant Gilbert J. Donovan, Air Corps, Section E, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 23 June 1944, feloniously take, steal, and carry away the sum of \$206.00, lawful currency of the United States of America, the property of Second Lieutenant Leo J. Antosz.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five (5) years. The reviewing authority approved the sentence, remitted three years of the confinement imposed and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution may be summarized as follows: On the afternoon of 11 June 1944 Second Lieutenant Douglas A. Herrin emptied the contents of his pockets on his bed in room No. 13, Building T-278, Langley Field, Virginia, and "went down" to take a shower. On returning to the room he discovered that his pocketbook containing \$15 was missing. The pocketbook was returned to him on 24 June with the contents intact except for the \$15 (R. 6-8).

On 15 June Second Lieutenant William E. Harris left a wallet containing \$60 in his trousers pocket in room No. 8, Building T-278. When he returned from flying that afternoon the wallet was gone. It was returned to him on 24 June with the \$60 missing (R. 8-9).

Second Lieutenant F. W. Bell, Jr., occupied Room 17, the room next to accused, in Building T-278. When he went to bed about midnight on 15 June he placed his wallet containing about \$17 in currency in his flying suit and upon awakening at about 7:30 the following morning discovered the wallet was gone. The wallet less the \$17 currency was returned to him on 24 June (R. 10-12).

On 21 June Second Lieutenant Donald N. Reynolds left his wallet containing \$5 and personal effects "on the side of the room" in Barracks T-279, across the road from Building T-278. The next morning when he looked for the wallet it was gone. The wallet was returned intact on 24 June except for the \$5 (R. 12-13).

On 23 June Second Lieutenant Leo J. Antosz left his wallet containing \$206 in the pocket of his trousers, hanging on the wall behind his bed in room 25, Building T-278, while he was sleeping. He awakened about 5:00 p.m. and went downstairs to the latrine. When he was returning to his

room he passed accused, who was coming down the stairway. On entering his room he discovered that his wallet was missing and immediately reported the loss. He then obtained the names of all the officers living on the upper floor of Building T-278 who had not been flying that afternoon and gave the names to Major Harry L. Barton, the provost marshal. He accompanied Major Barton to the "flight line" and arrangements were made with "Captain LaCase", in charge of briefing, to have the officers named by Lieutenant Antosz brought before Major Barton individually for questioning. Lieutenant Antosz noticed that accused "kept edging around" and asked Captain LaCase to stop him. Accused then walked toward Lieutenant Antosz, led him outside and said "I have your wallet, don't turn me in, don't cause me any trouble". Lieutenant Antosz "grabbed" the wallet, took accused to Major Barton and said "This is the thief that stole my wallet". Accused stated "Yes, I stole the wallet". Nothing was missing from the wallet. Accused was searched and the wallet belonging to Lieutenant Bell was found on his person. It contained personal effects but no currency. Major Barton placed accused under arrest and took him to the guardhouse, where accused was "warned" of his rights, told that anything he might say would be held against him, and "given an opportunity to make an oral statement, a signed statement, or a signed sworn statement". Accused chose to do the latter and made a statement (Ex. 1) that approximately a week before he had taken a wallet from Lieutenant Bell's clothing while he was asleep and that on Friday afternoon, 23 June 1944, he took a wallet from the trousers of Lieutenant Antosz while Lieutenant Antosz was "downstairs" (R 14-20).

The room of accused in building T-278 was searched that same evening (23 June 1944) and the wallets belonging to Lieutenants Harris and Reynolds were found in the pocket of a trench coat. The wallet belonging to Lieutenant Herrin was found in the side pocket of a "B-4 bag" in the room. No currency was found in the wallets except two "Short-Snorter" bills in the wallet of Lieutenant Reynolds (R. 17, 21-22).

On 26 June 1944 the accused, after being advised of his rights admitted to First Lieutenant William G. Johnson, the investigating officer, that "he had taken the money out of the pocketbooks". He stated that he had recently arrived at Langley Field from Savannah, Georgia, wanted to have his wife with him, but was without funds as he had spent the last of his money in buying dresses for her. It was necessary to obtain \$60 to rent a house and he took the money "from the various people". After his wife arrived he needed money from time to time to support her and "continued to take it". He stated that he had no idea the last pocketbook "he took" contained such a large sum of money. He kept the pocketbooks for the purpose of replacing the money when he received his pay check at the end of the month and was going to hand them back to the respective owners (R. 22-24).

4. For the defense: The accused testified that he had never been in any trouble "like this" before in his life. He was one of seven children, and his father was employed by the Government and the Pinkerton National Detective Agency. Accused had four years preparatory school and attended "St. Mary's" for two years preparing for the priesthood. He left school in May 1942 and went to work in an undercover capacity for Pinkerton's Detective Agency in the jewelry section of a Pittsburgh Department store where he was employed until January 1943. In September 1942 he enlisted in "the aviation cadets" and in March 1943 was "called" to attend school at Nashville. He received his commission 5 September 1943 and his present assignment was as first pilot on a B-24. Accused further testified that he was married three weeks "ago" at Savannah, Georgia. Neither he nor his wife had any money and he had to borrow funds to get married (R. 26-27).

With reference to taking the wallets accused stated that after purchasing a ticket for his wife to Langley Field and paying his officers' mess fee he was without funds. He attempted to borrow money but was unsuccessful and was unable to obtain a partial payment from the finance office. He stated that he took the pocketbooks he was charged with stealing. He took the wallet belonging to Lieutenant Herrin off the bed in the latter's room (Spec. 1), the one belonging to Lieutenant Harris, from his room (Spec. 2), and the one belonging to Lieutenant Bell from a flying suit pocket in his room (Spec. 3). He saw the wallet of Lieutenant Reynolds when he went into building T-279 to awaken another officer and "took it" (Spec. 4). He took the wallet belonging to Lieutenant Antosz from "his hip pocket in his room" (Spec. 5). Accused further testified that he kept the wallets because he wanted to replace the money when he received his pay. He intended to return the wallets to Lieutenants Herrin and Bell personally as he knew them quite well, and "put back the others". Accused added that he would like very much to go overseas with his crew (R. 27-31).

5. It is shown by the evidence and admitted in the testimony of accused that between 11 June and 23 June 1944 he wrongfully took and carried away money belonging to his fellow officers on dates and in amounts as follows: On 11 June a wallet containing \$15, property of Second Lieutenant Douglas A. Herrin (Spec. 1); on 15 June, a wallet containing \$60, property of Second Lieutenant William E. Harris (Spec. 2); on 16 June, a wallet containing about \$17, property of Second Lieutenant Frank W. Bell, Jr. (Spec. 3); on 21 June, a wallet containing \$5, property of Second Lieutenant Donald N. Reynolds (Spec. 4); and on 23 June, a wallet containing \$206, the property of Second Lieutenant Leo J. Antosz (Spec. 5).

Although accused testified that he did not intend to keep the money permanently nor deprive the owners of it, and that he kept the wallets in his possession in order to replace the money when he received his pay,

such testimony does not rebut the inference of intent to steal which arises from the specific acts of accused as shown by the evidence. Accused admittedly intended to use the money for his own purposes, and whether or not he intended to make restitution at a later date the offense of larceny was complete. The Board of Review is of the opinion that the finding of guilty of each Specification is sustained.

6. The accused is 22 years and 7 months of age. The records of the War Department show that he was born in the State of Pennsylvania, graduated from high school and for two years attended St. Mary's College, Erie, Pennsylvania, where he majored in the Classics and graduated in 1942. From April 1942 until March 1943 he was employed as a private detective by the Pinkerton National Detective Agency. He served as Aviation Cadet from 2 March 1943 until his appointment as temporary second lieutenant, Army of the United States and entry upon active duty as an officer on 5 December 1943. He was married about three weeks prior to his trial.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd Article of War.

Samuel M. Triver, Judge Advocate.

Robert H. Glavin, Judge Advocate.

J. F. Lottich, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 30 AUG 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 Gilbert J. Donovan (O-817640), 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 on five different occasions between 11 June and 23 June 1944 entered the rooms of other officers at times when they were absent or asleep and stole their wallets containing the following sums of money: \$15 (Spec. 1), \$60 (Spec. 2), about \$17 (Spec. 3), \$5 (Spec. 4), and \$206 (Spec. 5). Accused testified that he had been married recently, was desperately in need of funds to meet the added financial responsibilities involved and that it was his intention to return the wallets and refund the money to the owners when he received his pay. I recommend that the sentence as approved by the reviewing authority, to dismissal, total forfeitures and confinement at hard labor for 2 years be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution. I also recommend that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

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



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

- 4 Incls.
- Incl.1-Rec. of trial.
- Incl.2-Draft ltr. for sig.
S/W.
- Incl.3-Form of Action.
- Incl.4-Ltr. fr. Sen. Guffey,
7/26/44.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 552, 13 Oct 1944)

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

(251)

SPJGK
CM 260446

7 OCT 1944

UNITED STATES)

SECOND AIR FORCE

v.)

Trial by G.C.M., convened at
Dalhart Army Air Field, Dalhart,
Texas, 5 July 1944. Dismissal
and total forfeitures.

Second Lieutenant CLARENCE
G. MILLER (O-575609), Air
Corps.)

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Clarence G. Miller, Air Corps, 232nd Army Air Forces Base Unit, Section "A", did, without proper leave, absent himself from his station at Dalhart Army Air Field, Dalhart, Texas, from about 30 April 1944 to about 11 May 1944.

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

Specification 1: In that Second Lieutenant Clarence G. Miller, * * *, did, at Mount Clemens, Michigan, on or about 29 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Bannow Drug Company a certain check in words and figures as follows, to wit:

app April 29th 1944 No. _____

CITIZEN'S STATE BANK
Stratford Texas

Pay to the
order of

Cash ---

00
\$25xx

Twentyfive no 100

Dollars

C G Miller 0575609

AAB Dalhart, Texas

and by means thereof did fraudulently obtain from said Bannow Drug Company the sum of Twenty-five Dollars (\$25.00), lawful money of the United States, he, the said Second Lieutenant Clarence G. Miller then well knowing that he did not have and not intending that he should have sufficient funds in the Citizen's State Bank, Stratford, Texas, for the payment of said check.

Specifications 2 to 8, inclusive: Each of these specifications is identical in form and substance with Specification 1 with the exceptions of the dates, amounts, names of drawee banks and names of persons defrauded, which exceptions are, respectively, as follows:

<u>Specification</u>	<u>Date</u>	<u>Amount</u>	<u>Drawee Bank</u>	<u>Person Defrauded</u>
2	(same)	(same)	(same)	Theodore Beck
3	5/1/44	\$15.00	(same)	Theodore Beck
4	5/2/44	15.00	(same)	Western Union Tel.Co.
5	5/3/44	50.00	First State Bank, Stratford, Texas.	Fort Shelby Hotel Co.
6	5/4/44	25.00	First State Bank, Stratford, Texas.	Fort Shelby Hotel Co.
7	5/6/44	35.00	First State Bank, Stratford, Texas.	Fort Shelby Hotel Co.
8	5/8/44	20.00	First National Bank, Stratford, Texas.	Fort Shelby Hotel Co.

and with the further exceptions that the checks set forth in Specifications 5 and 6 contain the following on the face thereof:

"For value received, I represent that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof",

and that the checks set forth in Specifications 7 and 8 contain identical representations except that the word "claim" is substituted for the word "represent" in each.

The accused pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction for absence without leave from 21 June 1943 to 6 July 1943, for which offense accused was sentenced to forfeit fifty dollars (\$50.00) of his pay per month for 15 months and to be reprimanded. In the instant case accused 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, briefly summarized, is as follows:

The accused, a member of Section "A", Base Unit 232nd Army Air Forces stationed at Dalhart Army Air Field, Dalhart, Texas, was due to return from leave at midnight on 29 April 1944 and when he failed to report for duty was entered as absent without leave upon the morning report of his organization, a duly certified extract copy of which was received in evidence (R. 10,11; Pros. Ex. 1).

It was stipulated and agreed between counsel for the defense and the trial judge advocate, with the consent of the accused, that the accused "was picked up and put in arrest of quarters by military police of District Number 1, Sixth Service Command, in Detroit, Michigan, on 11 May 1944" (R. 47). A duly certified extract copy of the morning report of the Military Police Detachment Headquarters, District No. 1, Sixth Service Command showing that the accused was taken into custody by the Provost Marshal of said district at 11:45 a.m. on 11 May 1944 at Detroit, Michigan, was admitted in evidence (R. 47; Pros. Ex. 20).

During his sojourn in and around Detroit, Michigan, the accused drew and uttered eight different checks amounting in all to \$210.00, which are the basis of the specifications of Charge II. Four of these checks were drawn upon the Citizens State Bank, Stratford, Texas (Pros. Exs. 2,3,4 and 5) and one upon the First National Bank, Stratford, Texas (Pros. Ex. 9). The others were drawn upon the First State Bank, Stratford, Texas (Pros. Ex. 6, 7 and 8), and inasmuch as this was the only bank in Stratford, Texas, all of the checks were presented there for payment (R. 15-17).

The accused had previously had dealings with the First State Bank with which he had negotiated and paid one or more loans (R. 24,25).

On 1 April 1944 he had opened an account with the bank by depositing \$110.30. This sum, however, was depleted by withdrawals so that, on 24 April 1944, the balance to the credit of the accused was only \$1.02 (R. 18).

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The eight checks in question were each personally presented to the various persons or agencies alleged to have been defrauded by the accused and in each instance accused received cash in exchange therefor (Pros. Exs. 12-19 incl.). They were all tendered and cashed during the accused's period of absence without leave and ranged in date from 29 April to 8 May 1944.

On 22 April 1944 the accused had sent the following telegram to Mr. W. N. Price, Cashier of the First State Bank:

"BILL PRICE, CITIZENS STATE BANK, STRATFORD, TEXAS.
HOLD CHECKS. WILL BE HOME WEDNESDAY AND WILL SEE
YOU. LIEUTENANT C. G. MILLER" (R. 20).

Notwithstanding this telegram which was never answered, the First State Bank to which each of said checks was presented for payment refused to pay them because of insufficient funds and returned them dishonored (R. 15-17). The accused had made no arrangements other than the telegram for a credit extension or the coverage of any overdrafts (R. 18,24) and the bank never notified him of their refusal to pay the checks when presented (R. 21) nor did any of the holders of the checks give any notice to the accused of the dishonor of the checks (Pros. Exs. 12-19 incl.).

The assistant cashier of the bank testified that it was the practice of the bank to honor the checks of some well known customers even though funds were, at the time, insufficient (R. 19,22). In the matter of the accused's account however, the bank records show that there had been 16 presentments of accused's checks between 27 April 1944 and subsequent dates, none of which was honored, although whether these were of 16 separate checks or double presentments of the same checks is not disclosed (R. 23).

By arrangements made at the request of the accused, with his brother in Detroit, all of the checks which are the subject of specifications in this case were paid in full to the holders thereof (Pros. Exs. 10, 12-19 incl.).

4. The accused, having been informed of his rights, elected to be sworn as a witness and testified, substantially, as follows:

He is 41 years of age, married, and has been in the military service for 15 years, 5 years of which he served in Panama and 6 years in Hawaii. He had resided in Stratford, Texas, and "thought" he was well known there. In fact he said, "I think I know everybody in town". Among those with whom he is "pretty well" acquainted are Mr. Price and Mr. Flores, Cashier and Assistant Cashier, respectively, of the First State Bank of Stratford, Texas, with whom he had no difficulty in negotiating a loan of \$200 in November 1943, and which was duly repaid (R. 37,38).

Accused stated that although his wife had been living with him at his station for nearly 8 months, she had left him on 12 April 1944 (R. 37). It was because of worry over this situation that he obtained leave to go to Detroit on 13 April 1944 (R. 38).

He had not indulged in any drinking since 4 July 1943 but when he arrived in Detroit and failed to find his wife he was greatly disappointed and he then started to drink and continued doing so to excess (R. 38,39).

With regard to the issuance of the checks in question he admitted that he knew, at the time he cashed them, that he did not have sufficient funds in the bank upon which they were drawn to assure payment when presented and, for that reason, had sent the telegram to Mr. Price, the Cashier, asking him "to take care" of the matter. This he had done for two reasons: (1) because he felt he knew Mr. Price well enough as a result of previous dealings to ask the favor so close to the end of the month and (2) because the accused had money in Detroit which he could use in case of necessity, and which he did eventually use to pay the checks (R. 39).

He received no answer to the telegram and assumed that the bank would accommodate him and it was not until the early part of May that he learned from the credit manager of the Fort Shelby Hotel of a check being returned by the bank (R. 39,40).

Accused stated that his drinking had given him "the jitters" and he felt unable to return to duty because he was doubtful of his ability to sit in the train in the condition he was in. He did, however, continue drinking, and twice reported voluntarily to hospitals for treatment and was later sent to the hospital for treatment by the Provost Marshal (R. 40, 41).

When he learned of the nonpayment of the checks he arranged immediately with the credit manager of the Fort Shelby Hotel to obtain money from a joint fund which he had with his brother in Detroit and the brother sent \$375.00 to the credit manager of the hotel with which the four checks cashed by the hotel were paid. Miss Lane, the credit manager, upon the request of accused also obtained from the bank in Stratford, Texas, a list of all unpaid checks of the accused and arrangements were made whereby the balance of the unpaid checks was paid by the brother with money orders (R. 40,41,44,45). All of the eight checks were paid before the accused left Detroit and before the trial (R. 41).

The reason assigned by the accused for his failure to obtain the money from his brother in the first instance is that he did not want to be found by him in the condition which resulted from his drinking (R. 41,45).

The pastor of the First Christian Church of Stratford, Texas, testified

that the accused and his wife were regularly in attendance at church services whenever possible and that the accused took part in church and other civilian activities and was the assistant scoutmaster of the church. So far as he knew, all the people of the church held the accused in "the highest esteem concerning his truthfulness and veracity and honesty" and "everybody in the community appreciated him (the accused) as a straightforward, Christian gentleman" (R. 32,33).

Major John H. Sullivan the accused's commanding officer testified that the accused had reported to him prior to going on leave, and told him that he was having a little trouble with his wife; that she had left and gone home to see her folks and that he would "like to go down there and see if (he) can't get things straightened out" (R. 34).

Major Sullivan had never known the accused to be intemperate in the use of alcoholic beverages although he had drunk with him on many occasions after duty hours in the Officers' Club (R. 34). He has the highest regard for the accused's ability and other officers on the Base have commended him for devotion to duty and sought his help. Major Sullivan had never seen anyone who could "do a better job in the supply end of the business" than the accused. He rated the accused as "superior" and in his opinion "the government would suffer considerable loss if Lieutenant Miller's services were lost" (R. 35).

5. It was clearly shown that the accused, having obtained a leave of absence which expired at midnight 29 April 1944, failed to report for duty at the time when he was required to do so and remained absent without leave from that time to 11 May 1944 when he was taken into custody by military authorities. Although the accused offered domestic difficulties, excessive drinking, and despondency in explanation of his conduct, such matters, obviously, do not constitute a defense. The record of trial is legally sufficient to support the findings as to Charge I and its specification.

The evidence offered as proof of the specifications of Charge II, in which the accused is alleged to have made and uttered eight checks with intent to defraud during the period while he was thus absent without leave, requires closer scrutiny and must be carefully weighed in order to determine whether it is legally sufficient to support the findings of guilt thereon.

In order to convict the accused of the specifications as drawn, it was incumbent upon the prosecution to show, not only that the accused cashed the checks in question but that he did so with intent to defraud, well knowing that he did not have sufficient funds in the bank to pay the checks and not intending that he should have any.

It is evident that the accused had various dealings with the bank upon which the checks were drawn prior to the time when he made and cashed the eight checks which the bank dishonored. Just six months prior thereto he had contracted a loan of \$200 from the bank which loan was repaid and he had assurances from the cashier that the bank would assist him in financing the purchase of an automobile. Presuming upon what he evidently believed to be a friendly relationship based upon these transactions as well as upon personal acquaintanceship, the accused sent a telegram to the cashier of the bank and requested that his checks be held, stating in the telegram that he would see the cashier on the following Wednesday. The plain import of the telegram is that the accused requested accommodation from the bank with regard to the payment of certain checks issued or to be issued by him. When, therefore, he received no answer to the telegram, the accused contends that he assumed his request would be granted and the checks would be honored. While there was no legal justification for such an assumption, the guilt or innocence of the accused of issuing the checks with intent to defraud must be determined by viewing his conduct in the light of all the circumstances portrayed by the evidence.

The accused had a joint, or part ownership of a sum of money in the custody of his brother in Detroit at the time when the checks in question were issued and, while he could have availed himself of this fund before resorting to the issuance of bad checks, he stated that he was reluctant to have his brother discover the condition to which the accused had been reduced because of excessive drinking. The physical condition of accused was such that he twice, voluntarily, and once, on the insistence of the Provost Marshal, submitted himself to hospitalization.

That the accused was not in full possession of his normal faculties at the time he cashed some of the checks is shown by the patent fact that, in some instances, the checks were prepared for his signature by another, thus indicating that accused required assistance and the accused so testified. His mistaken designations of the bank in Stratford, Texas, is further evidence of his abnormal condition. Thus some of the checks are drawn upon "The Citizens State Bank", some on "The First State Bank" and one on "The First National Bank". All, however, were payable in Stratford, Texas, and all checks were in due course presented to The First State Bank, the only bank in Stratford, Texas.

That the accused had no evil purpose in the erroneous designation of the names of the banks is conclusively shown by the fact that when he sent the telegram to Mr. Price, the Cashier of the First State Bank, seeking accommodation with regard to the checks, he mistakingly addressed him at the "Citizens State Bank, Stratford, Texas".

While, these facts and circumstances are not of themselves a defense, they have an important bearing upon the question of intent.

Neither the bank nor any of the holders of the checks notified the accused of the dishonoring of the checks until some time in the fore part of May when the credit manager of the Fort Shelby Hotel advised him that a check had been returned from the bank unpaid. The accused thereupon immediately arranged with the credit manager to obtain from the bank in Stratford, Texas, a list of all unpaid checks which he had issued and, through her, made arrangements to obtain sufficient funds from the account he had with his brother to pay the holders of all checks.

Under these circumstances it has not been shown beyond reasonable doubt that the accused ever had any intent to defraud, when he cashed any of the checks. Indeed, the only fair inference to be drawn from the actions of the accused when viewed in the light of all the facts disclosed by the evidence is that, while he showed poor judgment and failed to display that acumen which sound business methods require, he did indicate an intention on his part to secure the payment of the checks by the bank when presented.

What the accused had in mind when he asked the Cashier of the bank to "hold the checks" until the accused could see him rests in conjecture. Since it was near the end of the month he may have intended to make a deposit of his pay check which he would shortly receive together with some of his funds then in the hands of his brother. Surely it seems reasonable to assume that, if he had been advised by the bank that it would not grant the request in his telegram, the accused would then have placed with the bank the funds which he readily and promptly placed later in the hands of the credit manager of the hotel for the payment of the checks he had issued.

The record is, therefore, deemed legally insufficient to support the findings of guilty of the offenses of uttering the checks with intent to defraud.

The exception of this element from the specifications does not, however, absolve the accused of all guilt under the Charge. It has been shown that the account of the accused with the First State Bank of Stratford, Texas, was so depleted by withdrawals that, on 24 April 1944, the balance standing to his credit was only \$1.02. That the accused knew of the precarious state of his account when he cashed the checks is admitted by him and shown by his telegram to the bank. Notwithstanding he hoped to be able, in some fashion, to provide funds for the payment of the checks, sufficient funds were not on hand when he uttered the checks to insure their payment upon presentment in due course and this he knew. Where one has knowledge of insufficient funds in a bank account it is an offense to draw upon such funds in excess of the amount then on hand without making actual definite arrangements to meet the payment of such checks upon presentment to the bank (CM 232592, Law). It was wrongful for the accused to issue checks upon an account in a bank in which there were not sufficient funds for the payment

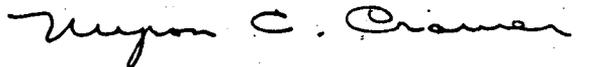
1st Ind.

War Department, J.A.G.O., **11 OCT 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 Clarence G. Miller (O-575609), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification (absence without leave, 11 days) in violation of Article of War 61, legally sufficient to support only so much of the findings of guilty of the specifications of Charge II as involves findings that accused wrongfully failed to maintain a bank balance to meet the checks described in the specifications in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Prior to receiving his commission in March 1943 the accused had had 14 years of active service as an enlisted man in the regular Army, serving in various noncommissioned grades from private to junior warrant officer. He has had one previous conviction by general court-martial for absence without leave of 15 days. In view of the long and honorable service of accused, and in further view of his superior rating as a supply officer as testified to by his commanding officer, 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-Drft. of ltr. for
sig. Sec. of War.
Incl.3-Form of Ex. action.

(Only so much of findings of guilty of Specifications of Charge II approved as involves finding that accused wrongfully failed to maintain sufficient bank balance to meet checks described in Specifications in violation of Article of War 96. Sentence confirmed but forfeitures remitted and execution suspended. G.C.M.O. 592, 25 Oct 1944)

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

(261)

SPJGN
CM 260476

24 AUG 1944
XXIII CORPS

UNITED STATES)

v.)

First Lieutenant JAMES W.
HAYS (O-1165121), 422nd
Field Artillery Group.)

) Trial by G.C.M., convened
) at Camp Howze, Texas, 7
) and 17 July 1944. Dis-
) missal and confinement
) for six (6) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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: Violation of the 61st Article of War.

Specification: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, did, without proper leave, absent himself from his organization at Camp Howze, Texas, from about 16 March 1944, to about 7 April 1944.

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

Specification 1: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, being indebted to The Army Emergency Relief, Fort Sill, Oklahoma, in the sum of two hundred fifty dollars (\$250.00), which amount became due and payable on or about 1 February 1944 (\$50.00), 1 March 1944 (\$100.00), 1 April 1944 (\$100.00), did, at Fort Sill, Oklahoma and Camp Howze, Texas, from 1 February 1944 to 6 May 1944, dishonorably fail and neglect to pay said debt.

Specification 2: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, being indebted to The Security National Bank, Lawton Oklahoma, in the sum of one hundred dollars (\$100.00), which amount became due and payable on or about 1 March 1944, did from 1 March 1944 to 6 May 1944, at Fort Sill, Oklahoma, and Camp Howze, Texas, dishonorably fail and neglect to pay said debt.

Specification 3: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, being indebted to The American Red Cross, Fort Sill, Oklahoma, in the sum of one hundred dollars (\$100.00), which amount became due and payable on or about 1 August 1943 (\$50.00), 1 September 1943 (\$50.00), did, at Fort Sill, Oklahoma, and Camp Howze, Texas, from 1 August 1943 to 6 May 1944 dishonorably fail and neglect to pay said debt.

Specification 4: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, being indebted to The Rice Hotel, Houston, Texas, in the sum of twenty-four dollars and fifty-three cents (\$24.53), which amount became due on or about 10 April 1944, did, at Houston, Texas, from 10 April 1944 to 6 May 1944, dishonorably fail and neglect to pay said debt.

Specification 5: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, did, at Dallas, Texas, on or about 12 March 1944, with intent to defraud wrongfully and unlawfully make and utter to The Baker Hotel, a certain check, in words and figures as follows, to wit:

(FRONT SIDE)

		#15
	THE BAKER HOTEL	
		Dallas, Texas <u>3/12 1944</u>
Pay To The		
Order Of	THE BAKER HOTEL	\$ <u>10.00</u>

Ten and no/100 DOLLARS
 I HAVE THE ABOVE AMOUNT TO MY CREDIT WITH DRAWEE FREE OF ANY CLAIMS AND HAVE AUTHORITY TO MAKE THIS DRAFT. THROUGH THIS REPRESENTATION I HAVE OBTAINED THE ABOVE AMOUNT IN CASH FROM THE BAKER HOTEL. VALUE RECEIVED AND CHARGE SAME TO ACCOUNT OF

/s/ J. Hays

(unreadable Arabic numbers)

To 1st National Bank of Houston 1st Lt

Houston Texas Houston Texas

J. W. HAYS

(REVERSE SIDE)

CASH RECEIVED \$10.00
 SIGNATURE /s/ J. Hays

O-1165212
 Camp 8th Serv Comd
 res - 5207 Woodlawn
 Chgo Ill

and by means thereof, did fraudulently obtain from The Baker Hotel, ten dollars (\$10.00), lawful money of the United States, he the said First Lieutenant James W. Hays, then well knowing that he did not have and not intending that he should have an account with the First National Bank of Houston, Houston, Texas, for the payment of said check.

Specification 6: Similar to Specification 5 but alleging check made and uttered to Lieutenant Paul J. Kerrigan, Camp Howze, Texas, on 11 March 1944, in the amount of \$50.00.

Specification 7: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, did, at Houston, Texas, on or about 6 April 1944, appear in public wrongfully wearing unauthorized insignia, to wit: captain's insignia, with intent to deceive.

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

Specification 1: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, did, at Dallas, Texas, on or about 14 March 1944, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit:

(FRONT SIDE)

THE BAKER HOTEL

DALLAS, TEXAS, 3/14 19 44

Pay To The THE BAKER HOTEL \$ 10.00
 Order Of

Ten and no/100 DOLLARS

(264)

I HAVE THE ABOVE AMOUNT TO MY CREDIT WITH DRAWEE
FREE OF ANY CLAIMS AND HAVE AUTHORITY TO MAKE THIS
DRAFT. THROUGH THIS REPRESENTATION I HAVE OBTAINED
THE ABOVE AMOUNT IN CASH FROM THE BAKER HOTEL.
VALUE RECEIVED AND CHARGE SAME TO ACCOUNT OF

/s/ Geo. P. South
(SIGNATURE)

To 1st National Bank of Houston, Tex.

Houston Texas

Houston, Texas
(STREET ADDRESS)

01165212
(CITY AND STATE)

5208 Woodlawn
Chgo

8th Svc Comd

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

Specifications 2 through 8 inclusive:

Each Specification is the same as Specification 1 except that
each check is shown to be drawn on the 1st National Bank of
Chicago, Chicago, Illinois, and except as to date, amount,
Payee and Alleged Maker, as follows:

<u>Specification</u>	<u>Date</u>	<u>Amount</u>	<u>Payee</u>	<u>Alleged Maker</u>
2	22 March 1944	\$41.40	Redmans	George J. South
3	16 March 1944	\$50	Gloria Ennis	George J. South
4	17 March 1944	\$20	Rice Hotel	George P. South
5	20 March 1944	\$25	Rice Hotel	George J. South
6	23 March 1944	\$20	Elton Hodges	George J. South
7	6 April 1944	\$50	V.G. Vickery	James W. Ford
8	3 April 1944	\$50	National Bank of Commerce	James W. Ford

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

Specification 1: In that First Lieutenant James W. Hays,
Four Hundred Twenty-second Field Artillery Group, did,
at Dallas, Texas, on or about 14 March 1944, with in-
tent to defraud willfully, unlawfully, and feloniously
utter as true and genuine a certain check in words and
figures as follows:

(FRONT SIDE)

THE BAKER HOTEL

DALLAS, TEXAS, 3/14 1944

Pay To The
Order Of

THE BAKER HOTEL

\$10.00

Ten and no/100 _____ DOLLARS
I HAVE THE ABOVE AMOUNT TO MY CREDIT WITH DRAWEE FREE
OF ANY CLAIMS AND HAVE AUTHORITY TO MAKE THIS DRAFT.
THROUGH THIS REPRESENTATION I HAVE OBTAINED THE ABOVE
AMOUNT IN CASH FROM THE BAKER HOTEL.

VALUE RECEIVED AND CHARGE SAME TO ACCOUNT OF

/s/ Geo. P. South
SIGNATURE

TO 1st National Bank of Houston, Tex.

Houston Texas

Houston, Texas
STREET ADDRESS
01165212
CITY AND STATE

5208 Woodlawn
Chgo

8th Svc Comd

a writing of a private nature, which might operate to the
prejudice of another, which said check was, as he, the
said First Lieutenant James W. Hays, Four Hundred Twenty-
second Field Artillery Group, then well knew, feloniously
made and forged.

Specifications 2 to 8 inclusive:

Each Specification is the same as Specification 1 except as to
date and description of forged instruments which are the same
checks described in Specifications 2 to 8 of Charge II.

Specification 9: (Finding of Not Guilty).

Specification 10: (Finding of Not Guilty).

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

Specification 1: In that First Lieutenant James W. Hays,
Four Hundred Twenty-second Field Artillery Group, did,
at Houston, Texas, on or about 29 March 1944, with
intent to defraud falsely make in its entirety a certain
check in the following words and figures, to wit:

(FRONT SIDE) THE CITY NATIONAL BANK 35-69 NO. 18
OF HOUSTON

HOUSTON, TEXAS, 3/29 19 44

PAY TO THE
ORDER OF Ambassador Hotel \$10.00

DOLLARS

WITH EXCHANGE

VALUE RECEIVED AND CHARGE THE SAME TO ACCOUNT OF

(266)

TO 1st National Bank of Chicago
Chicago Ill. /s/ James W. Ford
O-1165212 Capt FA 8th S.C - A-S Dallas
Tex

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

Specification 2: (Finding of not guilty).

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

Specification 1: In that First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, did, at Houston, Texas, on or about 29 March 1944, with intent to defraud willfully, unlawfully, and feloniously utter as true and genuine a certain check in words and figures as follows:

(FRONT SIDE) THE CITY NATIONAL BANK 35-69 NO. 18
OF HOUSTON

HOUSTON, TEXAS, 3/29 19 44

PAY TO THE
ORDER OF Ambassador Hotel \$10.00

DOLLARS

WITH EXCHANGE

VALUE RECEIVED AND CHARGE THE SAME TO ACCOUNT OF

TO 1st National Bank of Chicago
Chicago Ill. /s/ James W. Ford
O-1165212 Capt F A 8th S.C - A-S
Dallas
Tex

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said First Lieutenant James W. Hays, Four Hundred Twenty-second Field Artillery Group, then well knew, feloniously made and forged.

Specification 2: Similar to Specification 1 except uttering of check in amount of \$15.00, dated 30 March 1944, drawn on The 1st National Bank of Houston, Texas, at the same place.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications except Specification 2 of Charge II of which he was found guilty excepting the words "National Bank" and substituting therefor the words "Bank and Trust Company", and guilty of Specification 7, Charge II, in violation of Article of War 96, and not guilty of Specifications 9 and 10, Charge IV, and Specification 2 of Additional Charge I. 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 six years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused while stationed at Fort Sill, Oklahoma, borrowed from The American Red Cross on 28 June 1943 the sum of \$100 which was due and payable in two installments of \$50 each on 1 August and 1 September, 1943; that he borrowed from The Army Exchange Relief on 15 December 1943, the sum of \$250 which was due in three installments of \$50, \$100 and \$100 respectively on 1 February, 1 March and 1 April, 1944; and that he borrowed from The Security Bank and Trust Company, Lawton, Oklahoma, on 15 February 1944, the sum of \$100 which was due and payable on 1 March 1944. The accused was asked several times to pay the Red Cross debt. He finally agreed to pay it in February, March and April but failed to do so. In February 1944 the accused issued a check to pay the Lawton bank loan but the check was dishonored by the bank on which it was drawn. The accused actually failed to pay any of these loans until the charges in this case had been preferred against him. After that time he paid the "Red Cross" loan (R. 28-31, 33; Pros. Ex. C-J).

On 11 March 1944, after being transferred from Fort Sill, Oklahoma, to Camp Howze, Texas, the accused drew a check for \$50 on the South Carolina National Bank, Columbia, South Carolina, which was paid by the indorser, Lieutenant Paul J. Kerrigan, after the drawee bank failed to pay the check because of insufficiency of funds. This is the check described in Specification 6 of Charge II. When the check was uttered the amount in the accused's account in the bank was \$2.29. In June 1944, the accused paid \$50 to Lieutenant Kerrigan (R. 20-22, 39; Pros. Exs. B, P).

On 12 March 1944 at the Baker Hotel, Dallas, Texas, the accused cashed a check (Specification 5, Charge II) for \$10 drawn on the 1st National Bank of Houston, Texas. The check was returned to the hotel from the drawee bank with a "no account" notation thereon. The accused had no account with the drawee bank. Two days later at the same hotel, the accused cashed another \$10 check (Specifications 2 of Charges III and IV) drawn on the same bank, which was signed "Geo. P. South" as maker. The check was not paid because the bank had no account in the name of any such person. A handwriting expert testified that the accused had written the check (R. 34, 36, 63, 64, 66, 78; Pros. Exs. L, Q, V, W, AC).

The accused was absent without leave from Camp Howze from 16 March 1944 until he was apprehended at Houston, Texas, on 7 April 1944. At the time of apprehension, he was improperly and without authority wearing the insignia of a captain. During his unauthorized absence, the evidence shows that the accused at Houston, Texas, forged and uttered for cash eight checks, four of which were in the name of "George J. South", one in the name of "George P. South" and three in the name of "James W. Ford", in the total aggregate amount of \$266.40, all of which were drawn on the 1st National Bank of Chicago, Illinois, which had no account in any of said names. Such checks are more fully described as follows:

<u>Date</u>	<u>Amount</u>	<u>Payee</u>	<u>Maker</u>	<u>Alleged in</u>
3/16/44	\$50	Gloria Ennis	George J. South	Specs.3, Chg. III & IV
3/17/44	\$20	Rice Hotel	George P. South	Specs.4, Chg. III & IV
3/20/44	\$25	Rice Hotel	George J. South	Specs.5, Chg. III & IV
3/22/44	\$41.40	Redmans'	George J. South	Specs.2, Chg. III & IV
3/23/44	\$20	Elton Hodges	George J. South	Specs.6, Chg. III & IV
3/29/44	\$10	Ambassador Hotel	James W. Ford	Specs.1, Add.Chg. I & II
4/3/44	\$50	National Bank of Commerce	James W. Ford	Specs.8, Chg. III & IV
4/6/44	\$50	V. G. Vickery	James W. Ford	Specs.7, Chg. III & IV

In addition to the foregoing, the accused uttered a forged check for \$15 dated 30 March 1944, on the First National Bank of Houston, Texas, which had no account in the name of James W. Ford, the name appearing on the check as maker. This is the check described in Specification 2 of Additional Charge II. As in the other cases, he received cash for the check (R. 16-19, 23-28, 33, 35, 38, 40, 56-66, 69-78; Pros. Exs. A, K, M-O, Q, S-U, X-Z, AA-AC).

On 24 March 1944, the accused, as Captain George P. South, became indebted to the Rice Hotel, Houston, Texas, in the amount of \$24.52 for a room and incidentals which was due and payable at that time. Payment of such indebtedness has not been made (Pros. Ex. K).

Several witnesses for the prosecution testified that they had known the accused as Captain George South or as Captain James Ford during the period while he was absent without leave. The fact that the accused forged such names to the aforesaid checks was established either by direct evidence of witnesses who saw the acts or by the testimony of a handwriting expert. Some of the witnesses testified that the accused was intoxicated on each occasion when they saw him but that he seemed "normal" (R. 23, 25, 26, 36, 60, 61, 63, 71-77).

Upon being returned to Camp Howze, the accused was placed under observation for mental derangement or amnesia at the hospital where he remained from 10 April 1944 to the date of trial except during an occasion when he "was sent to Ashburn General Hospital at McKinney for special

study". Numerous tests and examinations of the accused were made during this period by Captain Herbert A. Schubert, Chief of the Neuropsychiatric Section, Station Hospital, Camp Howze, Texas, who testified that in his opinion the accused was and is sane, that he was not suffering from amnesia during the period in question, that he was able to determine right from wrong, that he was so far free from mental defect, disease or derangement to adhere to the right and refrain from the wrong, and that he was able to conduct his defense and cooperate intelligently with his counsel (R. 41-54).

4. The evidence for the defense consists of the stipulated testimony of the accused's wife, Mrs. Louise Hays, his mother, Mrs. Charlotte C. Hays, and of his own testimony (R. 82-92).

The stipulation concerning Mrs. Louise Hays' testimony shows that she and the accused were married in August 1942 and were "most happy", that after a separation for several months while the accused was at Officers' Candidate School she joined him at Pittsburg, Kansas, in April 1943, at which time she was "about six months pregnant" and that the accused "had changed". He was "not affectionate" and was "very nervous and fidgety * * * drank more often" and "was a different man entirely". In November 1943, the accused received word that his brother, a Marine Captain, was killed in action in the South Pacific which "upset him very much" (R. 82, 83).

The stipulated testimony of Mrs. Charlotte C. Hays shows that the "first time she noticed any change in the accused" was during a visit in January 1944 at which time he was "drinking heavily which he did not do before going into the Army * * * was heavily in debt and she arranged a loan for him in the amount of \$500.00". When she tried to discuss the death of his brother with the accused, "he seemed unable to talk about it, and was under a nervous strain". "During the past month, the accused has written letters telling of lapses of memory". The accused "has a brother, Robert, two years younger than he, who is in a hospital. He has been termed an embicile sic by the doctors" (R. 83, 84).

The accused, after his rights as to testifying or remaining silent had been explained to him, testified that he procured a loan of \$100 from the Red Cross before his "baby was born and sent the money to his wife." He borrowed the sum of \$250 from the Army Emergency Relief to maintain his "family * * * in a hotel", the housing facilities near Fort Sill being "inadequate". The loan of \$100 from the Lawton Bank was used by the accused to "move his wife and family and all their appertinences sic to her mother's house". The Red Cross loan was paid but not by him personally. He has not had "enough money over and above his normal living expenses" to repay the loan from the Army Emergency Relief. With reference to the Lawton bank loan, he "could have" paid it

"if he had cashed some War Bonds but at that time it happened that he had sent to get the bonds from his mother in law and they were sent to Ft. Sill and by the time they arrived, it was too late to pay the loan". During the first few months of 1944, the accused's pay was \$264 each month and he was entitled to flight pay when he earned it (R. 84-86, 91).

The accused further testified that he did not "remember the trip down to Camp Howze", but remembered "sitting in an office in Group Headquarters making out a chart for the training of Group pilots" which was "the last thing prior to the shots at the Camp Howze hospital that he can remember". He recalled nothing about any of the checks or the people who cashed or indorsed them for him. He does not know "James W. Ford", "George P. South", or "George J. South" and is unfamiliar with the name "James W. Ford". To his "knowledge" he did not appear "in Captain's insignia". The accused had never been in Houston in his life. He remembered however "a small hotel * * * in Dallas but is not sure" and his recollection is "very vague". With reference to liquor, he has "consumed as much, maybe more, than the average person". His brother's death and his bills were "kind of a shock" and any "number of things might have been worrying him" (R. 87-91).

5. Captain Schubert, who was recalled by the court, testified that from his observation of the accused from about "the tenth of April to" 7 July 1944 he had found "no evidence to substantiate an amnesia during the months of March or April 1944", and that it was his opinion "that this amnesia was feigned with possible alcoholic factors". There were no symptoms of "a recent alcoholic condition" when he first saw the accused which was on the day following his admission into the hospital. The accused had informed the witness in their initial interview "that he at least recalled a day in Houston" when "he had been picked up * * * because they accused him of being Lt. Hays and not Captain Ford" (R. 93-105).

6. The Specification of Charge I alleges that the accused "did, without proper leave, absent himself from his organization at Camp Howze, Texas, from about 16 March 1944 to about 7 April 1944".

The prosecution's evidence amply proves the allegations and supports the court's findings of guilty thereof in violation of Article of War 61.

The defense which was interposed to this offense and the other offenses alleged to have occurred during this period of time is based on the accused's testimony that he was a victim of amnesia and consequently had no knowledge of the commission of the offenses. The prosecution's evidence shows, however, that the accused was confined to the station hospital at Camp Howze for several months immediately

preceding the trial and was subjected to careful observation for the purpose of ascertaining his mental condition. The medical officer who had made numerous examinations of the accused during this period of time testified that the accused's amnesia was feigned, that he was sane and was capable of distinguishing right from wrong. Thus, a question of fact was presented which by its general finding of guilty, the court acting within its province, determined against the accused (see CM 225837, Bull. JAG, Vol. I, p. 360).

7. Specifications 1, 2 and 3 of Charge II allege that the accused "being indebted" to certain designated organizations in the respective amounts of \$250, \$100 and \$100 due and payable at stated times did from the alleged due dates "dishonorably fail and neglect to pay said" debts.

"Dishonorable neglect to pay debts" is definitive of an offense under Article of War 95 (M.C.M., 1928, par. 151).

The existence of the indebtedness to the designated organizations and the accused's failure to pay the indebtedness when due and thereafter, as alleged, is established by the prosecution's evidence and is admitted by the accused. During this time, the accused was an officer in the Army and, as such, was receiving the pay and allowances commensurate with his rank and length of service. The evidence even shows that in January 1944, the accused's mother arranged a \$500 loan for him because of his being "heavily in debt". That he had sufficient resources to pay at least one of the debts when due is clear from the accused's own testimony. Explanation as to why he did not do so is unconvincing and unsatisfactory. Thus, his consistent non-payment of these loans over a protracted period of time coupled with his failure to carry out a definite promise to pay one of them and his deceit in giving a worthless check in connection with another of the loans, and his other reprehensible acts, indicate a pattern of misconduct which excludes any inference except that of dishonesty and manifests a studied design to avoid payment of the debts incurred. The facts, therefore, form a sufficient basis to justify the court's findings of guilty of Specifications 1, 2 and 3 of Charge II and of Charge II.

8. Specification 4 of Charge II alleges that the accused "being indebted to the Rice Hotel, Houston, Texas" in the sum of \$24.53 which "became due on or about 10 April 1944" did "dishonorably fail and neglect to pay said debt".

Dishonorable failure and neglect to pay a debt is an offense violative of Article of War 95 (M.C.M., 1928, par. 151).

The alleged debt was incurred by the accused under the fictitious name of Captain George P. South for a room and incidental service at the hotel. It has never been paid. The facts are sufficient to sustain the court's finding of guilty of Specification 4 of Charge II and Charge II.

9. Specifications 5 and 6 of Charge II allege that the accused on designated dates and places did "with intent to defraud wrongfully and unlawfully make and utter to" specified parties certain described checks in the amounts of \$10 and \$50 drawn respectively on the First National Bank of Houston, Houston, Texas, and the South Carolina National Bank, Columbia, South Carolina, "and by means thereof, did fraudulently obtain" from said parties cash in the amount of said checks, "then well knowing that he did not have and not intending that he should have" sufficient funds in said banks for the payment of said checks.

These offenses are laid under Article of War 95, an instance of the violation of which is stated to be "giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be" (M.C.M., 1928, par. 151).

The evidence for the prosecution conclusively shows that the above described checks were made and uttered by the accused who received cash for them and that the checks were not paid by the drawee banks because the accused had either no account or insufficient funds in his account to pay the checks upon presentation. No effort was made by the accused to have on deposit in the drawee banks sufficient funds to pay the checks. These facts provide an adequate basis for an inference by the court of the accused's fraudulent intent which is not negatived by the accused's payment of one of the checks subsequent to the preference of these charges against him. The evidence, therefore, establishes beyond a reasonable doubt his guilt as alleged and fully supports the court's findings of guilty of Specifications 5 and 6 of Charge II and of Charge II.

10. Specification 7 of Charge II alleges that the accused "did, at Houston, Texas, on or about 6 April 1944, appear in public wrongfully wearing unauthorized insignia, to wit: captain's insignia, with intent to deceive".

Although the offense is laid under Article of War 95, the court found the accused guilty "but under the 96th Article of War" (R. 108).

An offense of this nature is a violation of Article of War 95 (CM 243926; Bull. JAG. Vol. III, No. 3, p. 100). It is also a violation of Article of War 96 (M.C.M., 1928, par. 152a).

The evidence for the prosecution shows that at the time and place alleged the accused, a lieutenant, was wearing without authority the insignia of a captain of Field Artillery and was "known" to the officers who apprehended him on that date as "Captain George J. South". From these facts, the court justifiably found the accused guilty of Specification 7 of Charge II in violation of "the 96th Article of War".

11. Specifications 1 through 8 of Charge III and Specification 1 of Additional Charge I allege that the accused did on designated dates "with intent to defraud falsely make" nine described checks in stated sums varying from \$10 to \$50 in the total amount of \$276.40, one of which was drawn on the 1st National Bank of Houston, Houston, Texas, and the others of which were drawn on the First National Bank of Chicago, Chicago, Illinois and bearing the name, as maker, of either "George P. South", "George J. South", or "James W. Ford", each of "which said [checks] was a writing of a private nature, which might operate to the prejudice of another."

These Specifications appropriately allege forgery, an offense specifically condemned by Article of War 93, under which the Specifications are laid. "Forgery may * * * be committed by signing a fictitious name, as where a person makes a check * * * and signs it with a fictitious name as drawer" (M.C.M., 1928, par. 149j).

The evidence for the prosecution shows that the accused executed each of the described checks and that the banks on which the checks were drawn had no account in the name of the fictitious maker. That the accused by forging the checks intended "to defraud" is established unquestionably by his utterance of the checks for value, as hereinafter discussed. The evidence, therefore, beyond a reasonable doubt supports the court's findings of guilty of Specifications 1 through 8 of Charge III and of Charge III and of Specification 1 of Additional Charge I.

12. Specifications 1 through 8 of Charge IV and Specification 1 of Additional Charge II allege that the accused did on designated dates "with intent to defraud willfully, unlawfully, and feloniously utter as true and genuine" the nine forged checks discussed in paragraph 11 of this opinion and more fully described in Specifications 1 through 8 of Charge III and Specification 1 of Additional Charge I, each of such checks being "a writing of a private nature, which might operate to the prejudice of another, which was as he [the accused] then well knew, feloniously made and forged". Specification 2 of Additional Charge II alleges by appropriate words the utterance, "with intent to defraud", by the accused of a \$15 check made in the name of James W. Ford, well knowing the check was "feloniously made and uttered".

"Uttering a forged instrument is an offense under A.W. 96" (CM 182706, Dig. Op. JAG, 1912-40, sec. 454 (96)).

The prosecution's evidence conclusively shows that the accused uttered to various parties the described checks and received cash or its equivalent therefor, that the banks on which the checks were drawn had no accounts in any of the names signed as maker which names the accused himself had signed to the checks. This evidence clearly

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supports the court's findings of guilty of Specifications 1 through 8 of Charge IV and Charge IV and Specifications 1 and 2 of Additional Charge II, and Additional Charge II.

13. The accused is about 29 years of age. The records of the Office of The Adjutant General show that he had prior enlisted service from 5 March 1941 to 29 April 1942 when he was commissioned as a second lieutenant and that he was promoted to first lieutenant on 28 January 1943.

14. 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, and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61, 93 or 96, and is mandatory upon conviction of a violation of Article of War 95.

(On Leave), Judge Advocate.

Charles S. Sykes, Judge Advocate.

Frank H. Golden, Judge Advocate.

SPJGN
CM 260476

1st Ind.

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

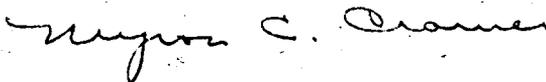
- To the Secretary of War.

2 SEP 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 First Lieutenant James W. Hays (O-1165121), 422nd Field Artillery Group.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed, and that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement.

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



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

3 Incls.

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

(Sentence confirmed. G.C.M.O. 546, 7 Oct 1944)



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

(277)

SPJGH
CM 260479

4 DEC 1944

UNITED STATES)

THIRD AIR FORCE

v.)

) Trial by G.C.M., convened at
) Morris Field, Charlotte,
) North Carolina, 30 June 1944.
) Dismissal.

) Second Lieutenant VINCENT
) J. MANKOWSKI (O-760705),
) Air Corps.)

OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, 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 2d Lt. VINCENT J. MANKOWSKI, Squadron S, Morris Field Replacement Training Unit (LB), Morris Field, North Carolina, did, on or about 14 June 1944, wrongfully and unlawfully fly a military airplane at an altitude of less than five hundred (500) feet; at or near Lake Lure, North Carolina, in violation of Section II, paragraph 16 a, (1) (d), AAF Regulation #60-16, dated 6 March 1944.

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

3. Of the officers detailed by the appointing authority to try

~~CONFIDENTIAL~~

Classification
changed - cancelled
Date - 18 May 1945
By - *JTAG*

Joseph P. ...
Major JTAG

(278)

accused the following nine were present at the opening of the trial:

Lt. Col. Norman L. Ballard
Lt. Col. Harold V. Maull
Major Raymond L. Jablonski
Major Raymond A. Bradley
Major Charles S. Seamans
Major Arthur Small
Major Harry E. Goldsworthy
Major George C. McElhoe
Major Richard S. Anderson

Lieutenant Colonel Harold V. Maull, the officer preferring the charge and Major George C. McElhoe, the officer investigating the charge were each excused and withdrew, leaving seven members present (R. 2-3). Prior to arraignment of accused, defense counsel, a civilian attorney, announced that he desired to examine the members of the court to determine if grounds for challenge for cause existed. The defense then interrogated all of the seven remaining members of the court upon matters touching their qualifications to serve on the court. Each of the seven members was asked, in substance, if he was familiar with a letter written by the Commanding General, Third Air Force, during the month of November 1943 and also one written by the same officer during the month of April 1944, in which the commanding general stated that the appropriate punishment to be inflicted by a general court-martial in case of a conviction of an offense involving intentional violation of Army Air Forces flying regulations, was dismissal. Each of the seven members answered that he had seen the letters and was familiar in a general way with their contents.

Defense counsel's examination of Major Arthur Small proceeded as follows:

"Q. Have you received the two letters about which I have spoken?

"A. I have read them and know their contents.

"Q. In view of the attitude of the Commanding General of the Third Air Force expressed in the two letters to which I have referred as to the appropriate punishment to be inflicted upon an officer found guilty of the 96th Article of War of violation of flying regulations, that is low flying, would you, if the accused were found guilty and extenuating circumstances were imposed, feel free to vote for punishment less severe than dismissal from the service?

"A. I do not see how he could be found guilty under those circumstances; it would be guilty or not guilty.

"Q. But if he were found guilty would you feel free in any case to vote for punishment less severe than dismissal from the army?

"A. No.

"Q. Is your statement based upon your own feeling or on your knowledge of the attitude of the Commanding General?

"A. Based upon my own.

"Q. In other words, Major, as I understand it if an accused is found guilty of an intentional violation of flying regulations then your vote would be for dismissal regardless of the length of service, prior service or any combat or other service?

"A. That is correct" (R. 5).

Major Charles S. Seamans was examined and the following questions asked and answers thereto given:

"Q. You are familiar with the two letters about which I have spoken?

"A. I am.

"Q. And familiar in a general way with the contents?

"A. I am.

"Q. In view of the attitude of the Commanding General of the Third Air Force expressed in the two letters about which I have referred, would you, if the accused were found guilty of an intentional violation of the flying regulations, feel free under any circumstances to vote for a less severe punishment than dismissal from the army?

"A. No, sir.

"Q. Do you make that statement because of your own attitude toward violation of flying regulations or because of the attitude of the Commanding General?

"A. Because of both reasons." (R. 6).

Lieutenant Colonel Norman L. Ballard was likewise examined and the following questions asked and answers thereto given:

"Q. You have heard the questions I have asked with reference to the two letters?

"A. Yes, sir.

"Q. If the accused was found guilty of violation of the flying regulations would you under any circumstances feel free to vote for any sentence less severe than dismissal from the service?

"A. I would not.

"Q. You would not?

"A. That is correct.

"Q. Is that answer based on your personal feeling or the attitude of the Commanding General?

"A. It is based on both; on the Commanding General, General Arnold and the President. If extenuating circumstances are presented it would be up to the Reviewing Authority.

"Q. My understanding of your answer then is you would not under any circumstances vote for a punishment less severe than dismissal from the service?

"A. Not if a man is found guilty of intentional violation of flying regulations." (R. 7).

Defense counsel thereupon challenged Major Seamans for cause. The challenged member withdrew, the court was closed and upon reopening the president announced that the challenge was not sustained and Major Seamans resumed his seat on the court. On being asked if accused objected to any other member present, defense counsel replied that Lieutenant Colonel Ballard had given approximately the same answers to the propounded questions touching his qualifications as had Major Seamans, but that he (defense counsel) imagined the ruling on the challenge would be the same and therefore had no further challenges (R. 8). The court was then sworn, and accused was arraigned, tried and found guilty as charged.

4. The first question presented by the record requiring consideration is whether accused was tried by a legally constituted court, or stating it another way, whether at the beginning of the trial certain members of the court when examined by defense counsel on their voir dire disqualified themselves by stating in effect that they had formed a fixed opinion as to the minimum sentence to be imposed and were predetermined to sentence accused to dismissal in the event he be found guilty of the offense charged.

5. Among the grounds of challenge for cause as contained in paragraph 58 of the Manual for Courts-Martial, 1928, at page 45, are:

"e. Challenges for cause.--Grounds for.--* * *

Ninth: Any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality.* * *"

and in the same paragraph at page 46 the following language appears:

"Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the

challenger. The burden of maintaining a challenge rests on the challenging party. A failure to sustain a challenge where good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused."

6. Before entering upon his duties as a member of a general court-martial, each member thereof is required to take the oath (or affirmation) prescribed by Article of War 19 which provides that such member will

"well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; * * *".

Such an oath, which was taken by each of the seven members who tried this accused, clearly placed each of them under a solemn sworn duty to adjudge accused's guilt or innocence according to the evidence produced at the trial and to administer justice according to his own conscience and the best of his understanding. Surely the words contained in Article of War 19 reading "you will duly administer justice * * * according to your conscience and the best of your understanding" apply equally to the punishment as to the guilt or innocence of the person being tried. In fact the punishment imposed following a finding of guilty is included in and constitutes an integral part of the administration of justice. Moreover, the Manual for Courts-Martial contains the following explanation concerning the duty of the court in determining the punishment to be imposed:

"Basis for Determining.-- To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment. See 102-104 (Punishments). In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment. The members should bear in mind that the punishment imposed must be justified by the necessities of justice and discipline" (MCM, 1928, par. 80a).

Since accused was on trial for an offense laid under the 96th Article of War, for which neither a maximum nor a minimum punishment had been prescribed by law, the court possessed, under the language of that Article, broad discretionary power to impose upon the accused any punishment, except death (AW 43). The controlling principle in the exercise of such discretionary power reposes in the court's sworn obligation to administer justice according to its conscience and the best of its understanding. The punishment so imposed must be "justified by the necessities of justice and discipline". On the other hand, when a member of a court surrenders his responsibility to adjudge punishment according to his own best understanding of the law and facts of the particular case then before the court, and seeks to wash his hands of such responsibility, as was indicated by at least one member (Lt. Col. Ballard) in the instant case, when he testified on his voir dire, in response to a question posed by defense counsel concerning extenuating circumstances that, "If extenuating circumstances are presented it would be up to the Reviewing Authority" (R. 7), and in such unmistakable language spreads upon the record of trial evidence of abdicating his sworn duty, at least in part, such member has conclusively established his disqualification to sit on the court. Obviously, such an attitude on the part of a member runs "* * * afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law * * *" (U.S. ex rel. Innes v. Hiatt, C.C.A. 3, 15 March 1944, Nos. 8455, 8536).

The above principle is well recognized in military law. In CM 156620, German, the court was closed during the trial of the case and before final argument. Upon reopening without having made any findings, it adjourned for the stated purpose of consulting higher authority on certain questions. The record fails to disclose the nature of these questions. Upon reconvening, the court, without disclosing what advice it had received, immediately proceeded to find the accused guilty. It was held that the procedure was unauthorized. A court-martial is not permitted in closed session to consult any outside authority. Under such circumstances the error was fatal to the conviction.

In CM 216707, Hester, 11 B.R. 145, during the trial, a circular letter announcing a mandatory policy of dishonorably discharging enlisted men in cases referred to general courts-martial was distributed to the members of the court after they had deliberated without result one hour and twenty minutes. Although the cited case involved an officer and not an enlisted man, it was held that the presentation of the letter to the court constituted an error injuriously affecting the substantial rights of the accused and vitiated both the findings and the sentence.

In CM 250472, Hoffman, 32 B.R. 381, a letter on the subject of hazardous flying which had been issued for the guidance of commanding officers and others of the Air Corps was read to the court prior to its action in making findings and imposing a sentence. The Board of Review, in passing on the issue which this action raised, stated that,

"While the introduction into trial of letters setting forth views of reviewing authorities might, under certain circumstances, constitute an error or irregularity injuriously prejudicing the substantial rights of the accused, there is nothing in this record to cause the Board to believe that the introduction of General Hunter's letter overcame the volition and independent judgment of the members of the court."

The Board of Review made the further observation:

"While the functions of a court-martial and the reviewing authority should remain separate and distinct, it is equally essential to the enforcement of military discipline that members of courts-martial be made aware of the gravity of certain offenses and the need of drastic punishments to deter commission thereof. For a commanding officer to inform his courts-martial of offenses that are impairing the efficiency and discipline of his command and to suggest to them his opinion of appropriate sentences, the ultimate decision in each specific case being left, of course, to the wisdom and judgment of the court is consistent with all our principles of military justice."

The record of trial in the Hoffman case is devoid of any indication that the court's volition and independent judgment were overcome. Even though it considered the contents of General Hunter's letter, which was introduced at the trial, the court's findings and sentence in that case appear to have been the expression of its own free will and judgment. The instant case is clearly distinguishable. Here it affirmatively appears from the statements of at least three members of the court, while being examined on their voir dire, that they had a fixed opinion of the minimum sentence to be imposed in the event accused be found guilty. The fixed opinion which each of the three members held was not predicated solely upon his own feeling, but that of the Commanding General of the Third Air Force as expressed in his letters which these court members had read. Indeed, one of them predicated his formed opinion upon the attitude of the Commanding General of the Third Air Force, General H. H. Arnold and the President of the United States. If three of the members of the court which tried accused had such a deep seated, fixed, unshakeable opinion of the degree of

punishment to be imposed before hearing a single iota of testimony touching upon accused's guilt or innocence or relevant in determining the appropriate punishment, did not such an opinion preclude accused from receiving a fair and impartial trial? In any event, a predetermined, fixed opinion as to the amount or degree of punishment to be imposed, which the three members of the court freely admitted they held, and which could not be changed regardless of the evidence or extenuating circumstances that might be shown during the trial, falls far short of leaving such members free to impose the punishment they might deem appropriate to the offense, without fear or favor and without regard to the opinion of any person as to the appropriateness or correctness of the punishment to be imposed. Such a state of facts indicates clearly that these three members, for all intents and purposes, had yielded to the wishes and announced policy of the Commanding General, Third Air Force, and had participated in imposing a sentence, not necessarily excessive, but at least without regard to their own free will and judgment, and not in conformity with their own conscience and their best understanding. The punishment to be imposed upon the accused was as much a part of the administration of justice, which these members had sworn to render, as was the findings of guilty. Measured by the minimum requirements that members of a court-martial, who determine the punishment to be imposed upon the person found guilty, must be unbiased, impartial and free to impose whatever punishment they deem appropriate to the offense, and "justified by the necessities of justice and discipline", the Board of Review is of the opinion that these three members were disqualified as a matter of law from sitting on the court. It follows therefore, that accused's trial was not conducted in accordance with due process of law as known to our system of jurisprudence. The findings and sentence should therefore be disapproved.

7. The records of the War Department show that the accused is 24 years of age and married. He is a high school graduate and in civil life he was employed by the Federal Shipyards and Dry Dock Company, South Kearney, New Jersey, as a sheet metal mechanic. He entered the military service as a private 30 January 1943, and upon completion of the prescribed course of instruction in flying at Army Air Forces Pilot School, Stockton, California, was commissioned a second lieutenant, Army of the United States, 5 December 1943, and ordered to active duty.

8. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Thomas W. Tapp, Judge Advocate.
Admiral, Judge Advocate.

William H. Lambell, Judge Advocate.

SPJGH
CM 260479

1st Ind.

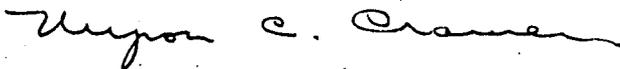
War Department, ASF, J.A.G.O., DEC 9 1944

TO: Commanding General, Third Air Force, Tampa, Florida.

1. In the case of Second Lieutenant Vincent J. Mankowski (O-760705), Air Corps, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50 $\frac{1}{2}$, and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 260479).



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.

28 AUG 1944

(287)

SPJGH
CM 260491

UNITED STATES)

ARMORED CENTER

v.)

Trial by G.C.M., convened at
Fort Knox, Kentucky, 16 June
1944. Dismissal.

Second Lieutenant DEAN A.
DESSENBERGER (O-1016488),
Cavalry.)

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 1: In that Second Lieutenant Dean A. Dessenberger, Cavalry, Headquarters, 777th Tank Battalion, did, at Fort Knox, Kentucky, on or about 5 April 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

THE CHASE NATIONAL BANK 1-74 3
of the City of New York
Grand Central Branch
Lexington Avenue at 43rd Street

No. _____ New York April 5, 1944
Pay to the order of L. M. Carter \$15.00
Fifteen and 00/100 Dollars

L.P., Hughes

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

Specification 2: (Withdrawn by direction of the appointing authority).

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

Specification: In that Second Lieutenant Dean A. Dessenberger, Cavalry, Headquarters, 777th Tank Battalion, did, at Fort Knox, Kentucky, on or about 13 April 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine to Citizens Union National Bank, Louisville, Kentucky, Fort Knox Branch, a certain check in words and figures as follows, to wit:

THE CHASE NATIONAL BANK 1-74 3
of the City of New York
Grand Central Branch
Lexington Avenue at 43rd Street
No 186 A New York 13 April 1944
Pay to the order of Lt. D. A. Dessenberger \$50.00
Fifty and no/100 Dollars

Henry A Stengel
and bearing an endorsement, to wit:

D.A. Dessenberger
2nd Lt. Cav. 01016488
777th Tk Bn. Hq. Co.

a writing of a private nature which might operate to the prejudice of another, which check was, as he, the said Dean A. Dessenberger, then well knew, falsely made and forged, and by means thereof did fraudulently obtain from said Citizens Union National Bank, Fort Knox Branch, the sum of \$50.00.

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 five (5) years. The reviewing authority approved the sentence, but remitted the confinement, and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution: It was stipulated between the prosecution and the defense, with the consent of accused, that no account was maintained with the Chase National Bank of the City of New York, by "L. P. Hughes" or "Henry A. Stengel" during the month of April 1944 (R. 8).

On 26 April 1944, the accused, after being advised of his rights, made a statement (Ex. 1) to Captain John I. Messmer, Assistant Director of Internal Security, Fort Knox, Kentucky, which was reduced to writing and signed by accused, wherein he identified a photostat (Ex. 2) of a check dated 5 April 1944, drawn on the Chase National Bank of the City of New York, Grand Central Branch, in the sum of \$15, payable to "L. M. Carter" signed by "L. P. Hughes" and indorsed on the reverse side "L. M. Carter, 1st Lt. Inf", which accused stated he wrote and gave to "Lt. Carter", who needed money and asked accused to do "this favor". Accused further stated that he received none of the proceeds and that the name "L. P. Hughes" was.

fictitious. Accused also identified a photostat (Ex. 3) of a check dated 13 April 1944, drawn on the Chase bank, in the sum of \$50, payable to "Lt. D. A. Dessenberger", signed "Henry A. Stengel" and indorsed on the reverse side "D. A. Dessenberger", which he said was written by "Lt. Carter" as "a return favor" for accused when he needed money. Accused stated he cashed the check at the Citizens Union National Bank "at the Post" and received \$50 (R. 8-11).

Mrs. Harriett Kobow, cashier of the Citizens Union National Bank, Fort Knox Agency, testified that approximately the middle of April she cashed the check for accused of which Exhibit 3 was a photostat and that accused "repaid" the bank for the check "immediately after he had been notified" by a telephone call (R. 13-14).

Major David T. Zweibel, the investigating officer in the case, testified that during the course of the investigation accused stated that the original checks, of which Exhibits 2 and 3 were photostats, "had been withdrawn and paid off" by him. Exhibits 2 and 3 were received in evidence (R. 14-16). On cross-examination Major Zweibel testified that accused served under him for about eighteen months, that he was a very capable officer and performed his duties as Headquarters Tank Section Commander and Liaison Officer efficiently and that if he were commanding a unit going overseas he would be willing to have accused serve as an officer under his command (R. 15-16).

4. For the defense: The accused made an unsworn statement as follows: The check signed "L. P. Hughes" (Spec. 1, Chg. I) was written by him, the check signed "Henry A. Stengel" (Chg. II) was written for him, and he indorsed and cashed the latter check knowing that it was wrong to do so. He stated that he had six years Government service to his credit, three of which he spent in the Army, and this was the first "black mark" on his record. He enlisted in the Army and went through officer candidate school "in record time". He stated that during his year and three months as a commissioned officer there had been no complaints about his work, that his ability as an officer was good, and that he knew how to handle men. Accused requested an opportunity to prove that the "tax payers money" had not been wasted on him, stating that he was capable of continuing his work, and believed that for the good of the service he should be permitted to remain an officer. He further stated that he did not expect to avoid punishment, but asked that consideration be given to his previous good record (R. 18).

5. It is established by the evidence for the prosecution and the admissions of the accused in his unsworn statement to the court that on 5 April 1944, accused wrote a check on the Chase National Bank of New York in the sum of \$15 payable to "L. M. Carter" to which accused signed the fictitious name of "L. P. Hughes" as maker. The check was written by accused for a friend, Lieutenant Carter, who was in need of money and asked accused to do him a "favor". The making of a forged instrument in violation of Article of War 93 as alleged in Specification 1, Charge I, is clearly proven.

It is also established that on 13 April 1944, accused indorsed and cashed at the Fort Knox Branch of the Citizens Union National Bank, a check payable to him in the sum of \$50 also drawn on the Chase National Bank of New York and signed with the name of "Henry A. Stengel" as maker. There was no account in the bank under such name. This check was made by Lieutenant Carter and given to accused as a "return favor" when accused needed money. The evidence shows beyond any reasonable doubt the fraudulent uttering by accused of a forged instrument in violation of Article of War 96, as alleged in the Specification, Charge II.

6. Except for the confession of accused, the only evidence introduced by the prosecution that the checks in question were forged instruments, consisted of photostats of the checks (the absence of the original checks being accounted for) and a stipulation that the purported makers of the checks did not have accounts in the bank on which drawn. The accused, however, in his unsworn statement to the court, admitted that he wrote the check signed "L. P. Hughes", that the check signed "Henry A. Stengel" was written for him and that he indorsed and cashed the latter knowing what he did was wrong.

In the opinion of the Board of Review the admissions made by an accused in an unsworn statement to the court are of an entirely different character than admissions made out of court and may properly be considered in establishing proof of the corpus delicti. The Manual for Courts-Martial (par. 76) provides that although the unsworn statement of the accused to the court is not evidence, admissions made therein may be considered as evidence. Accordingly, the admissions of accused in his unsworn statement, together with the checks and stipulation referred to, are sufficient to establish the corpus delicti of the offenses charged and to permit the use of the confession of accused by which the offenses are clearly proven.

7. The records of the War Department show that this officer is 25 years and 10 months of age and is married. He is a high school graduate and while attending school was employed at different times as a truck driver and machinist. He was employed as a vehicle dispatcher and clerk for the Benneville Power Administration from May 1939 to July 1942 when he was granted a military furlough to enter the Army as a voluntary inductee. He was inducted 24 July 1942, attended the Armored Force School, Fort Knox, Kentucky, and was commissioned a temporary second lieutenant, Army of the United States, 27 February 1943, and entered on active duty as an officer the same day.

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 of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd or the 96th Article of War.

Samuel M. Diver, Judge Advocate.

Robert Clemon, Judge Advocate.

F. J. Pottel, Judge Advocate.

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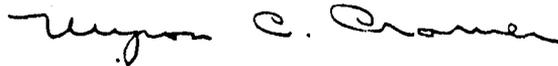
1st Ind.

War Department, J.A.G.O., 31 AUG 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 Dean A. Dessenberger (O-1016488), Cavalry.

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 guilty of forging a check in the sum of \$15, in violation of Article of War 93, and of uttering a forged check in the sum of \$50, in violation of Article of War 96. The evidence shows that the \$15 check, to which accused signed the name of a fictitious maker, was drawn by accused about 5 April 1944, and given to another officer to cash. The latter, about 13 April 1944, forged the \$50 check and gave it to accused, who knowing it to be a forgery, cashed it. I recommend that the sentence, to dismissal, 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 carrying into effect the above recommendation, should it 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.

S/W.

Incl.3-Form of Action.

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 551, 13 Oct 1944)

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

(293)

SPJGK
CM 260541

18 SEP 1944

UNITED STATES)

FIRST AIR FORCE)

v.)

) Trial by G.C.M., convened at Charleston
) Army Air Field, Charleston, South
) Carolina, 10 July 1944. Dismissal,
) total forfeitures and confinement for
) three (3) years.

) Second Lieutenant JOHN P.
) DOUGHERTY (O-706817), Air
) Corps.)

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, Judge Advocates.

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

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

Specification: In that Second Lieutenant John P. Dougherty, Sub Unit "E", 113th Army Air Forces, Base Unit (Bombardment (H)), did, at Charleston Army Air Field, Charleston, South Carolina, on or about 26 March 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at East Orange, New Jersey, on or about 7 May 1944.

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

Specification 1: In that Second Lieutenant John P. Dougherty, Sub Unit "E", 113th Army Air Forces, Base Unit (Bombardment (H)), did, at Charleston, South Carolina, on or about 24 April 1944, with intent to deceive, wrongfully and unlawfully make and utter to the "Uniform Shop", of Charleston, South Carolina, a certain check in words and figures as follows, te-wit:

San Antonio, Texas, April 24 1944 No. 26
30-65

NATIONAL BANK OF FORT SAM HOUSTON
At San Antonio

Pay to The
Order of Uniform Shop \$ 3.50
Three - - - - - DOLLARS
Lt. John P. Dougherty - O-706817

and by means thereof did fraudulently cause the said Uniform Shop to order merchandise for his account of the value of about \$3.50, he, the said Second Lieutenant John P. Dougherty, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston for the payment of said check.

Specification 2: In that Second Lieutenant John P. Dougherty, Sub Unit "E", 113th Army Air Forces, Base Unit (Bombardment (H)), did, at Charleston, South Carolina, on or about 20 April 1944, with intent to deceive, wrongfully and unlawfully make and utter to "Henry's Restaurant," Charleston, South Carolina, a certain check in words and figures as follows, to-wit:

San Antonio, Texas, April 20 1944 No. 20
30-65
NATIONAL BANK OF FORT SAM HOUSTON
At San Antonio
Pay To the
Order of Cash \$35.00
Thirty Five - - - - - DOLLARS

Lt. John P. Dougherty 0-706817

and by means thereof did fraudulently obtain from the said Henry's Restaurant lawful currency of the United States in the amount of \$35, he, the said Second Lieutenant John P. Dougherty, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston for the payment of said check.

NOTE: Each of the other six specifications of Charge II sets forth a similar offense, the sole variations being as to date, amount, payee, check number and value obtained, as follows:

Specification 3: Date, 22 April 1944; check number, 23; payee, Cash (M. Dumas); amount, \$35.95 (Thirty-five Dollars, in words); value obtained, \$9.95 in merchandise and \$26 in cash.

Specification 4: Date, 24 April 1944; check number, 25; payee, Berlins; amount, \$30; value obtained, cash.

Specification 5: Date, 22 April 1944; check number, 23; payee, Berlins; amount, \$2.35; value obtained, merchandise.

Specification 6: Date, 15 April 1944; check number, 15; payee, W. P. Rhett; amount, \$40.00; value obtained, professional services.

Specification 7: Date, 8 April 1944; check number, 14; payee, L. F. Dorn; amount, \$25.00; value obtained, cash and services.

Specification 8: Date, 9 April 1944, check number, 15; payee, L. F. Dorn; amount, \$25.00; value obtained, cash.

all charges and specifications

He pleaded not guilty to/and was found guilty of the Specification of Charge I, except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave"; not guilty of Charge I but guilty of a violation of the 61st Article of War; and guilty of Charge II and all of its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

a. Charge I and its Specification.

An extract copy of the morning report of accused's organization, the 611th Bomb Squadron, 400th Bomb Group, was introduced and showed accused's initial absence without leave on 26 March 1944 (Pros. Ex. 1). This organization was disbanded 7 April 1944 and its personnel transferred to the 113th Army Air Forces Base Unit (Pros. Ex. 2). Accused's apprehension, while in uniform, by the civil authorities in East Orange, New Jersey, on 7 May 1944, and his return to the control of the military authorities on 8 May were established by written stipulation (Pros. Ex. 3). Accused offered no testimony as to this charge.

b. Charge II and its Specifications.

On 28 March 1944 accused opened an account with the National Bank of Fort Sam Houston, San Antonio, Texas, by making a deposit of \$286.75, being the net proceeds of a loan which he negotiated with the bank. The only other credit to his account was the sum of \$150, deposited on 9 May 1944. This represented a payment made directly to the bank by the Government under an allotment executed by the accused at the time the loan was made (R. 34,35,38,39; Pros. Exs. 12,14). It is not disputed that during the month of April 1944 various individuals and firms located in Charleston, South Carolina, where accused was stationed when his absence without leave began, accepted from accused the eight checks described in the Specifications, which accused had drawn on the National Bank of Fort Sam Houston,

San Antonio, Texas. The Assistant Cashier of that bank testified that payment of all of these checks was refused upon presentation to the bank because of insufficient funds on deposit on the respective dates of presentation for payment. According to the offerings in connection with this official's testimony there were likewise insufficient funds at the time of the issuance of the several checks, except in the case of the check for \$2.35, issued to "Berlins" on 22 April 1944. On that date there was a balance of \$3.10, but when this check was presented for payment this balance had been reduced, apparently by the imputation of service charges, to sixty cents (Pros. Exs. 12,13 and 14). None of the checks had been paid at the time of the trial (R. 15,18,21,24,29,47). No specific representation was made by accused to any of the persons to whom he issued the checks that he had sufficient funds on deposit to meet them (R. 12,15,18,22,25,26,30). When accused gave the check for \$2.35 to "Berlins" he stated that he might be overdrawn a bit, but he also stated that he had an account with the bank, and referred the payee to certain persons who knew him at the "Windmill" (R. 23). All of the checks were returned by the drawee bank with a notation "Not sufficient funds", except the check for \$2.35 above referred to and that for \$35.95, given to Mr. Dumas (Specification 3), to both of which was attached a notation "Pay check not in" (R. 12,14,17,20,21,24,25,29; Pros. Exs. 4 to 11).

Uncontradicted testimony established the negotiation of the several checks at the times and, with the exception of the check issued to Dr. Rhett (Specification 6), for the purposes set forth in the specifications. On 24 April accused issued a check for \$3.50 (Specification 1) to Uniform Shop as an advance payment for a pair of bombardier wings to be ordered specially for accused. The wings were duly received by payee but had not been called for by accused (R. 11-13). On 20 April accused cashed a check for \$35.00 at Henry's Restaurant (Specification 2), receiving that amount in cash (R. 16,17). On 22 April the Dumas Uniform Shop accepted accused's check for \$35.95 (Specification 3), applying \$9.95 to the payment of merchandise purchased by accused at that time, and paying accused \$26.00 in cash (R. 28). On 24 and 22 April Berlin's accepted checks from accused for \$30.00 and \$2.35, respectively (Specifications 4 and 5), in payment of merchandise sold to accused on those dates (R. 23-26). On 15 April accused issued his check for \$40.00 (Specification 6) in favor of W. P. Rhett (M.D.) in payment of medical services rendered to a Miss Smith over a period of six weeks. Accused accompanied Miss Smith to Dr. Rhett's office on the occasion of the last treatment and signed the check and delivered it to Dr. Rhett at that time (R. 13,14). On 8 and 9 April accused issued checks in favor of L. F. Dorn for \$25.00 each (Specifications 7 and 8), a part of the first check being applied to the payment of meals served to accused, and the balance and all of the second check being paid to accused in cash (R. 13,14).

c. For the defense.

After an explanation of his rights (hereinafter commented on) accused elected to testify in his own behalf. Accused enlisted 4 August 1941, became an aviation cadet in March 1943, completed his course in January 1944, and was commissioned a second lieutenant at that time. During his advanced training period, he served as cadet adjutant and later as cadet wing commander (R. 36,37). When he graduated, accused borrowed \$150.00 from his uncle through his mother, and subsequently repaid the loan (R. 35,38). On 28 March 1944 accused opened an account with the National Bank of Fort Sam Houston, San Antonio, Texas, by borrowing \$300.00 from that institution, \$287.00 (actually \$286.75) of which was credited to his account. At that time he cancelled an existing allotment (the beneficiary thereof is not stated) and made an allotment of \$150.00 per month to the bank, effective 1 April 1944. It was contemplated that this amount would be deposited to accused's account, but that \$50.00 of it would be applied to the reduction of his indebtedness to the bank. Despite the fact that the allotment was not executed until 28 March and was not to become effective until 1 April, accused expected the first allotment to reach the bank by 5 or 8 April (R. 34,35,37,38,39,40). The first payment under the allotment was received by the bank on 9 May (R. 35,36). About 10 April accused wrote to his mother that he was sick and requested her to send \$300.00 to the bank for him. Accused "took it for granted" that his mother would comply with his request, although she would have to obtain the money from his uncle, because on every other occasion on which he had asked her for money accused had received it. Accused's mother did not deposit the money and explained in a letter (apparently after accused's return to military control) that she knew he was absent from camp and she felt that her failure to respond to his request might hasten his return (R. 35,37,38,46). On 28 April accused mailed a letter to his squadron commander, Captain Peterson, from Baltimore, Maryland, requesting him to forward the balance of accused's "last month's pay" to the bank. Accused estimated this amount to be \$150.00 and by the term, last month, meant March (R. 36,39,48; Pros. Ex. 25). Accused received no statement from the bank during March or April and did not know that he was overdrawn. He professed ignorance of the provisions of Army Regulations (AR 35-1420) which barred him from receiving pay and allowances while absent without leave. Accused had drawn against his account checks totaling \$1095.00. Of these, checks totaling \$840.01 had been returned to the payees by the bank without having been paid. Ten checks in addition to those described in the Specifications, totaling \$318.75, were offered by the prosecution in connection with the cross-examination of accused to show accused's knowledge of lack of sufficient funds to meet all of the checks which he had drawn (R. 42,43,44; Pros. Exs. 15 to 24).

4. The record of trial so clearly establishes accused's guilt of all offenses, except as hereinafter noted, that little summarization is necessary. Accused's absence without leave from 26 March 1944 until his

apprehension by civil authorities on 7 May 1944, was duly proved. As to the Specifications under Charge II, no effective testimony or justification was offered by accused to alter the inescapable conclusion, based on the testimony of the witnesses for and the offerings of the prosecution, that at the time of issuance of the eight checks accused was fully aware of the fact that he had insufficient funds on deposit in the National Bank of Fort Sam Houston to meet them; that he had no reason to believe that the checks would be paid; and that he did not intend that they should be paid. In less than a month accused drew checks, totaling over \$1000.00, against an account of less than \$300.00. There is nothing in the record to indicate what happened to accused's pay for the month of March, but accused could not have expected an allotment which he made on 28 March, effective 1 April, and which superseded an existing allotment, to be paid out of what was due him for March, nor may any justification for his actions be found in his contention that he "took it for granted" that his mother would immediately comply with his request about 10 April that she deposit \$300.00 to his credit in the bank. Not only is there no corroboration of this request, but if it was actually made, it indicates clearly that accused was aware of the parlous status of his account as early as that date. Even assuming that accused was referring to the month of March, the letter mailed by him to his Squadron Commander on 28 April, requesting that his "last month's pay" be forwarded to the bank, if it could be arranged, has no special significance in view of the large number of checks which accused had already issued and the easily inferable conclusion that this letter was written primarily, if not solely, as a self-serving declaration to mitigate the seriousness of the offense which his long absence without leave entailed. Accused was not entitled to any pay whatsoever for the month of April because of his unauthorized absence throughout that month (AR 35-1420), but, for some unexplained reason, the Government did not hold up the allotment of \$150.00 and that sum was received by the bank on 9 May. After the application by the bank of \$50.00 to accused's indebtedness to it there was left only a comparatively small reserve for the payment of the numerous checks which accused was continuing to draw. It is apparent that, if every source from which accused claims to have expected funds had been successfully tapped, accused still would not have had sufficient funds to meet all the checks which the record shows he issued.

The Record does disclose, however, that by virtue of the fact that a number of previously issued checks for larger amounts had been dishonored by the bank upon presentation, there were on deposit on the date of issuance of the check for \$2.35, made the basis for Specification 5 of Charge II, sufficient funds to the credit of accused to meet this check. On the date of its presentation for payment this balance had been reduced, apparently by the imputation of service charges, to an amount insufficient to cover this check, which was accordingly likewise dishonored. With respect to this specification accused may be considered guilty only of failing to maintain a sufficient balance to meet the check so issued by him, in

violation of Article of War 96 (CM 237741, Ralph, 24 B.R. 103). The record further discloses that the check issued to Dr. Rhett (Specification 6, Charge II) was not issued to obtain professional services but to reimburse payee for services already rendered. For the reasons hereinafter given, this variance does not affect accused's guilt of the basic offense charged in this Specification.

The Board of Review is of the opinion that all the facts and circumstances conclusively show that when accused, in complete disregard of the status of his account and without any reason for believing that it would be adequately augmented, indulged in an orgy of reckless issuance of checks he did so with intent to defraud the various persons and firms from whom he received service, merchandise or cash, knowing that he did not have and not intending that he should have sufficient funds on deposit for their payment (CM 240347, Beserosky, 26 B.R. 33, Bull, JAG Jan. 1944, 454(23)).

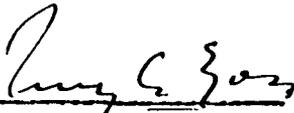
5. The eight specifications, alleging the issuance of worthless checks, were laid under Article of War 95. The scandal and disgrace to which the military establishment is subjected by the issuance by one of its commissioned members of a check which is subsequently properly dishonored for lack of sufficient funds is, in the final analysis, the evil sought to be guarded against. It has been held that a worthless check given by an officer in payment of a preexisting debt or a gambling debt or even as a charitable contribution or gift is properly the basis of a charge under Article of War 95 (CM 202601, Sperti, 6 B.R. 17, CM 256706, Siddons). The fact that the check issued to Dr. Rhett, alone among the eight given by accused, was for past services rather than for present value, does not alter accused's guilt under Specification 6 of Charge II. It is the opinion of the Board of Review that the record of trial supports the findings of guilty of Charge I and its Specification, Charge II and Specifications 1,2,3,4,6,7 and 8 thereof, except the words "by means thereof did fraudulently obtain" in Specification 6, substituting therefor the words, "in payment of"; and sufficient to support so much of the finding of guilty of Specification 5 of Charge II as involves a finding of failing to maintain a sufficient balance to meet the check therein described, in violation of Article of War 96.

6. When the prosecution rested, accused made a motion for a finding of not guilty of Charge II and its Specifications. The Board of Review is of the opinion that this motion was properly overruled, as the testimony already adduced clearly established accused's guilt. For the same reason the Board is of the opinion that the error committed by the President in explaining accused's rights to him prior to his taking the stand in his own behalf in no way affected injuriously accused's substantial rights. There is nothing in the Manual for Courts-Martial which justifies the

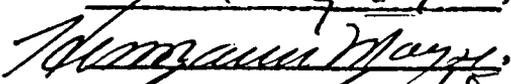
statements by the President of the court that "the court will give more credence to your statement under oath than to any other" and "the court, as a court, will give more credit to a sworn statement under oath than they will to an unsworn statement" (R. 33). On the other hand, in view of the fact that all of accused's testimony was an effort to explain away offenses which had been fully established, accused was not misled to his detriment into testifying under oath.

7. War Department records show that accused is 24-8/12 years of age. He completed eleven grades in the elementary schools, but did not graduate. He was subsequently employed as a refrigeration and air conditioning mechanic for a period of four years and seven months. He enlisted in the Army on 8 August 1941 and became an aviation cadet in March 1943. He was commissioned a second lieutenant, Air Corps Reserve, on 15 January 1944.

8. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted above, 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 under Charge I and its Specification of absence without leave for the designated time in violation of Article of War 61, and of Charge II and Specifications 1,2,3, 4,6,7 and 8 thereof, except the words "and by means thereof did fraudulently obtain" in Specification 6, substituting therefor the words, "in payment of"; ^{legally} sufficient to support only so much of the finding of guilty of Specification 5 of Charge II as involves a finding of guilty of failing to maintain a sufficient balance to meet the check therein described, in violation of Article of War 96; and ^{legally} sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of a violation of Articles of War 61 and 96.



Judge Advocate.



Judge Advocate.



Judge Advocate.

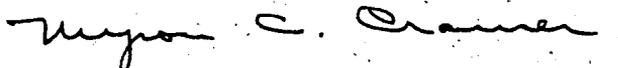
1st Ind.

War Department, J.A.G.O., **26 SEP 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 P. Dougherty (O-706817), 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, under Charge I and its Specification of absence without leave for the designated time, in violation of Article of War 61, and of Charge II and Specifications 1,2,3,4,6, 7 and 8 thereof, except the words, "and by means thereof did fraudulently obtain" in Specification 6, substituting therefor the words "in payment of"; legally sufficient to support only so much of the finding of guilty of Specification 5 of Charge II as involves a finding of guilty of failing to maintain a sufficient balance to meet the checks described therein, in violation of Article of War 96; and legally sufficient to support the sentence and to warrant confirmation thereof. The eight specifications, alleging issuance of worthless checks, were charged as violations of Article of War 95, the only authorized penalty for which is dismissal. The impossible punishment was not increased by virtue of the finding of guilty of Specification 5 of Charge II, in violation of Article of War 96. While accused's reckless financial irregularities may have influenced the court in fixing the period of confinement, accused's long and unexplained absence without leave from 26 March 1944 to 7 May 1944, terminated by his apprehension by the civil authorities, supports and justifies the imposition of the sentence of confinement for three years. I recommend that the sentence be confirmed, that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that 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-Drft. 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. 602,
3 Nov 1944).



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

SPJGN
CM 260542

22 AUG 1944
FIRST AIR FORCE

UNITED STATES)
) v.)
))
Second Lieutenant HERMAN W.)
MANDELBERG (O-821310), Air)
Corps.)

Trial by G.C.M., convened at
Westover Field, Massachusetts,
8 and 14 July 1944. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Herman W. Mandelberg, Air Corps, Section "E", 112th Army Air Forces Base Unit, did, at Baltimore, Maryland, on or about 8 June 1944, wrongfully and unlawfully fly a B-24 airplane over a building area at an altitude of less than 1,000 feet in violation of paragraph 16 a (1) (a), Army Air Forces Regulation 60-16, 6 March 1944.

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

3. The evidence for the prosecution shows that on 8 June 1944, the accused was the pilot of a B-24 airplane on a non-stop navigation training mission from Westover Field, Massachusetts. The flight was scheduled to be made at an altitude of 3,000 feet. The cities of Baltimore, Maryland, and Rochester, New York, were designated as turning points. The number of the airplane was 41-28561 but only the last three digits were painted on the outside of the airplane (R. 7-11, 41, 53; Exs. 1, 2, 3, 9).

The flight arrived over Baltimore, the accused's home city, between 0830 and 0900 o'clock. The plane was observed by various persons as it circled at a low altitude over parts of the city for fifteen to twenty minutes. The General Foreman of Airports for the city of Baltimore testified that at about 8:30 o'clock on the morning of 8 June 1944, he saw a B-24 bomber, number 561, flying near City College at an altitude of about 300 feet above the ground. At one time in its flight the plane was about 100 or 200 feet above the tower of City College (R. 40-44). The former Airport Traffic Controller for the Civil Aeronautics Administration of Baltimore, who was on duty on 8 June 1944, testified that he observed a B-24 Liberator bomber over Baltimore on the morning of 8 June 1944. In his estimation the plane was flying at an altitude of approximately 500 feet above the ground (R. 47-52). The engineer in charge of Eastern High School testified that he observed a large four-motored plane flying over Baltimore about 8:30 o'clock on the morning of 8 June 1944. He estimated that the plane was about 350 feet above the ground. He also testified that "It was at a height about half the distance from the top part of the building to the top of the tower - just about" (R. 79-81). Two other witnesses who observed the plane in question, testified that it flew at an altitude of 250 to 300 feet and "about as high as a church steeple" (R. 68-72, 73-77).

4. The defense presented the testimony of various members of the accused's crew. The navigator testified that the accused flew over the city of Baltimore at an altitude of approximately 3,000 feet. He did not notice the plane descending at any time while it was over the city. He had not looked at the altimeter during that time but estimated its elevation by observing that it was flying at approximately the same altitude as planes normally flew when entering the Westover Field traffic pattern. He admitted that the accused circled the city for 15 or 16 minutes looking for his home (R. 16-24).

The engineer of the plane who sat between the accused and

his co-pilot on the flight described testified that the plane was over Baltimore about 15 or 16 minutes during which time he looked at the altimeter about every half minute and that the plane's lowest altitude during that time was 1500 feet (R. 25-28).

The tail gunner testified that while the accused was circling over Baltimore for about 10 minutes he had looked out of the waist window twice and had estimated that their lowest altitude was 1200 feet above the ground (R. 22-34). By stipulation the prosecution and the defense agreed that another gunner would have testified that the accused had flown over the city of Baltimore for about 15 minutes during which time he had pointed out his home, a school, a racetrack, a swimming pool, and a tower. This gunner estimated that the lowest altitude to which the accused descended was about 1000 feet above the ground (Ex. A).

The co-pilot, who was called as a witness by the court, testified that the accused, upon arriving over Baltimore, descended from an altitude of about 4000 feet to an altitude of approximately 1000 feet, and circled the city twice. He testified also that the accused had flown over City College and that he had looked for the location of his home. The co-pilot did not remember having been asked by the accused to observe the altimeter while the plane was over Baltimore but he did recall that he had been requested to watch the air speed indicator and to caution the accused if the speed of the plane fell below 150 miles per hour. He also testified that the plane was over the city 15 or 20 minutes. After the plane was 25 to 30 miles away from Baltimore he had taken over the controls from the accused. At that time he looked at the altimeter and the plane was at an elevation of approximately 4,000 feet (R. 53-60).

The accused, at the first session of the court, made an unsworn statement in which he asserted that he instructed his co-pilot to stop him if he descended to an altitude lower than 1500 feet and that he had assumed, since his co-pilot had not stopped him, that he had not gone below that altitude. He also asserted that he had instructed his co-pilot "to stop him at 150 m.p.h. should he go faster" (R. 37). Near the conclusion of the second session of the court and after the prosecution had introduced the testimony of several witnesses in lieu of previous stipulations concerning their testimony, the accused elected to make a sworn statement. He testified that on the flight over Baltimore he had told the whole crew that he was going over his home and that they were to stop him at 1500 to 2000 feet. No member of the crew warned him that he was lower than 1500 feet and he did not watch the altimeter himself. In his judgment he at no time descended to an altitude below 1,000 feet. He had assumed that his co-pilot was watching the altimeter and would have warned him had he descended below 1000 feet. He also testified

that although he did not dispute the testimony of the other witnesses he did not know that he had flown over the high school or the college (R. 85-88).

5. The Specification alleges that the accused did, on or about 8 June 1944 " * * * wrongfully and unlawfully fly a B-24 airplane over a building area at an altitude of less than 1,000 feet in violation of paragraph 16 a (1) (a), Army Air Forces Regulation 60-16, 6 March 1944". The court was charged with judicial knowledge of the flying regulation referred to. A violation of Army Air Forces flying regulation is clearly a disorder or a neglect to the prejudice of the military service within the purview of Article of War 96.

The evidence for the prosecution clearly shows that on the morning of 8 June 1944 the accused violated the Army Air Forces Regulation referred to in the Specification, by flying over buildings in different parts of the city of Baltimore, Maryland, at an altitude of less than 1000 feet. On the other hand, the accused and five members of his crew testified that the accused, while flying over Baltimore, did not descend below an altitude of 1000 feet above the ground. The record thus presents an irreconcilable conflict between the testimony of the witnesses for the prosecution and the testimony of the witnesses for the defense. The witnesses for the prosecution appear to have been altogether disinterested and unbiased. Furthermore, two of the prosecution's witnesses were men experienced in flying and flight observation. Their estimate of the altitude of the plane was apparently aided by observing the plane in its relationship to the tower of City College. The other witnesses for the prosecution appear to have been firm in their conviction that the accused was flying at an altitude of less than 500 feet. The members of the court who heard and observed the witnesses accepted the testimony of the witnesses for the prosecution and rejected the testimony of the accused and his companions. The evidence beyond a reasonable doubt justified their action and sustains the court's findings of guilty of the Charge and Specification thereunder.

6. The records of the office of The Adjutant General show that the accused is approximately 19½ years of age and that he was commissioned a temporary second lieutenant, Army of the United States on 7 January 1944, 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence

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

(On Leave), Judge Advocate.

Thomas S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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SPJGN
CM 260542

1st Ind.

War Department, J.A.G.O., 1 - SEP 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 Herman W. Mandelberg (O-821310), 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. Subsequent to the commission of the present offense, the accused has been officially charged with feloniously stealing one officer's blouse of the value of \$19.50, in violation of Article of War 93; and of absenting himself without leave from his station for four days, in violation of Article of War 61. In view of all the circumstances he appears to be unworthy of clemency. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Consideration has been given to the attached letters, addressed to the President, from Mr. Harry H. Mandelberg, father of accused, dated 14 July 1944, from Mr. Max Grossman, dated 6 August 1944, requesting clemency in behalf of the accused, and from the Commanding General, Army Air Forces, dated 19 August 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 foregoing recommendation, 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. of ltr. for
sig. Sec. of War.
- Incl 3 - Form of Executive
action.
- Incl 4 - Ltr. from Mr. Harry H. Mandelberg.
- Incl 5 - Ltr. from Mr. Max Grossman.
- Incl 6 - Ltr. from Commanding General,
Army Air Forces.

(Sentence confirmed. G.C.M.O. 662, 16 Dec 1944)

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Specification 2: Finding of not guilty.

Specification 3: Finding of not guilty upon motion of defense counsel.

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

Specification 1: In that Captain Morrison J. Wilkinson, Jr., Air Corps, did, at or near Los Angeles, California, on or about 21 April 1944, with intent to commit a felony, viz, sodomy, commit an assault upon Caprice Capron by willfully and feloniously grabbing hold of her hair with his hands and willfully and feloniously attempting to place his penis in the mouth of the said Caprice Capron.

Specification 2: In that Captain Morrison J. Wilkinson, Jr., Air Corps, did, at or near Burbank, California, on or about 13 April 1944, with intent to commit a felony, viz, rape, commit an assault upon Dean Stull by willfully and feloniously choking her with his hands, throwing her down on the ground, placing his hands underneath her dress and placing his body on top of her body.

Specification 3: In that Captain Morrison J. Wilkinson, Jr., Air Corps, did, at Balboa Island, California, on or about 14 April 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection with Peggy Apperson, a female person, by placing his penis in the mouth of the said Peggy Apperson.

Specification 4: Finding of not guilty.

Specification 5: In that Captain Morrison J. Wilkinson, Jr., Air Corps, did, at Los Angeles, California, on or about 18 April 1944, feloniously take, steal, and carry away one rectangular-shaped white solid gold Swiss watch with three (3) approximately one-quarter karat diamonds at each end of same, of a value of about Thirty-Five (\$35.00), the property of Margaret Gonzales Wilkinson.

ADDITIONAL CHARGE III: Finding of not guilty.

Specifications 1 and 2: Finding of not guilty.

He pleaded not guilty to all of the Charges and Specifications. He was found not guilty of Specifications 2 and 3 of Additional Charge I, Specification 4 of Additional Charge II, and Charge III and its Specifications. He was found guilty of the remaining Charges and Specifications. No

evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for thirty years. The reviewing authority approved the sentence, designated the U. S. Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 48.

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

The Charge and Specification. (Statutory rape of Caprice Capron) and Specification 1 of Additional Charge II. (Assault with intent to commit sodomy upon Caprice Capron.)

Caprice Dianne Capron, born in Hollywood, California, 27 June 1926 (Pros. Ex. G) testified that on 20 April 1944 she was employed as a show girl in Earl Carroll's Theater-Restaurant and between shows that evening she was introduced to the accused by a Miss Beryl Wallace, one of the actresses (R. 106-110). After the last show she joined Miss Wallace, the accused, Jackie Glass (another show girl) and a Lieutenant Hall in Miss Wallace's dressing room where liquor was served (R. 111-113). All five then went to Miss Wallace's apartment where refreshments including champagne were served. Miss Capron claimed she did not drink any liquor and in fact did not "drink" (R. 110).

About 4:30 a.m. all but Miss Wallace left Miss Wallace's apartment and went down to the lobby of the building. Miss Capron urged accused to return to the apartment and apologize to Miss Wallace for his conduct which she considered rude. He left the three for that purpose but was gone so long that Lieutenant Hall and Jackie Glass stretched out on two couches in the lobby and promptly fell asleep (R. 118). Miss Capron then telephoned to the apartment and requested accused to come down and take them home in his automobile. Accused came down in about 15 minutes and being unable to awaken Lieutenant Hall and Miss Glass she asked accused to take her home (R. 122). They both entered the accused's convertible coupe. Accused said he had to stop some place and pick up a brief case that he would need later in the day and then drove up to Lookout Mountain (R. 123). There he stopped the car and leaned over and kissed her. To this she made no protest (R. 125-126). Accused said at the time, "I intend to make you", to which she replied "It is physically impossible - because I am menstruating and I don't want you to" (R. 100). Accused replied "I intend to make you anyway" and pushed her down on the seat of the car and pulled her slacks down to her knees (R. 130). He finally pulled them entirely off over her shoes (R. 134). Whether this was accomplished in the car or later on the ground she could

not remember (R. 100). She fought and struggled and in doing so leaned against the door of the car. She opened the door and the two fell out to the street (R. 101, 138-140). It was the door nearest the steering wheel. She received a bump on the head as a result of the fall (R. 138). Her only underclothing consisted of a braziere and a G-string - the garment that she wore during the show in the theater (R. 133). In her direct testimony she described the events that followed thus:

Questions by Prosecution (through Major Garibaldi) (R. 101):

*Q. All right, Miss Capron, what did he do then when he got you on the ground?

*A. He pulled my hair and I tried to fight him and he knocked my head against the pavement, and he got on top of me and he tried to put his head between my legs.

*Q. Did he put his head between your legs?

*A. Yes.

*Q. What, if anything, did he try to do when he was hitting your head by against the ground?

*A. Will you repeat that, please?

*Q. I will strike the question.

Did he try to do anything to you while he was hitting your head up against the ground.

*A. Well, during that time he was trying to make a penetration, after he tried to put his head between my legs.

*Q. Did he ask you to do anything or try to do anything with you when he was hitting your head up and down on the ground?

*A. I don't understand.

*Q. Well, Miss Capron, did he try to get you to put his penis in your mouth?

Defense (Major Duvall): It is leading, but I won't object.

* * * * *

*Q. Did the accused, Captain Wilkinson, succeed in putting his penis in your mouth?

"A. Once and I got away.

"Q. Now, after you got up from the ground where did you go from there?

"A. Back into the car.

"Q. And did the accused, Captain Wilkinson, make a penetration of your private parts with his private parts in the car?

"A. Yes.

On cross-examination after a short recess she testified as follows (R. 140):

"Q. Now what happened when you got on the ground?

"The Witness: When I was on the ground, the Captain tried to make me put his penis in my mouth.

"Q. Now, that is your conclusion, Miss Capron. You tell us what he did.

"A. He tried to put his penis in my mouth.

"Q. What did he do?

"A. He hit my head against the pavement and then he leaned over and that is what he tried to do.

"Q. How did he do it? Tell the Court, please.

"A. I was pulling his hair and he was pulling mine and then he sat where my neck would be, on my chest, and that is what he tried to do.

"Q. What did he do?

"A. (Pause).

"Q. Don't say what he tried to do. Say just what he did.

"A. He tried to put his penis in my mouth".

* * *

She testified that after that occurrence they engaged in sexual intercourse on the ground until she complained of the cold and the gravel

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that was cutting her. So "he let" her get back in the car.

She claimed that she had "never had an affair" in her life before - that this was the first time (R. 143); that prior to this occasion she was a virgin and denied having had sexual relation with another man in an automobile in front of her home (R. 160).

She testified that during the alleged intercourse that followed on the seat of the car accused had a complete penetration; that her only sensation was one of pain; and that she knew that accused had a complete penetration at that time because the doctor who subsequently examined her "said he did". She herself "wouldn't be able to tell if he had or not" (R. 146). Because of her menstruation accused "had blood all over his pants" (R. 147). She thereafter got out of the car, wiped the blood off of herself with her socks and put her slacks on (R. 153-163). On the way to her home she did not "say a word", because she was hysterical (R. 154). She changed this statement to include the fact that she told accused her address (R. 155).

Dr. George E. Cassidy, Police Surgeon of the Hollywood Receiving Hospital testified (R. 173) that at 7:44 a.m., 21 April 1944, he examined Miss Capron. At that time her clothes were disheveled and her hair was matted and tangled with weeds (R. 174). There were scratches or abrasions on the lower portion of her back and buttocks and the lower abdomen (R. 175). Her female genitalia disclosed only menstrual blood (R. 179). He had no difficulty in inserting his two fingers into her vagina and a medium sized speculum (R. 178). The hymen was broken and the break was not of a recent origin (R. 177). The size of the entrance to the vagina indicated previous intercourse or stretching (R. 179). He denied that he told Miss Capron that accused had made a complete penetration (R. 180). Miss Capron came to the hospital with her mother who was extremely hysterical. Miss Capron appeared to be afraid of her mother (R. 180).

On or about 21 April 1944 the accused was arrested on the charge of rape. No mention was made of statutory rape. While in the custody of the Provost Marshall after he had been properly warned that he was not required to make any statement and that if he did make a statement it might be used against him, the accused voluntarily stated that he had "intercourse" with Caprice Capron (R. 277, 280, 282).

Specification 1 of Additional Charge I. (Bigamy) and

Specification 5 of Additional Charge II. (Larceny of watch).

On 23 May 1940 Margaret Gonzales at Yuma, Arizona, married the accused who at the time used the name of Jeffers Michael Wilkinson (R. 56; Pros. Ex. A). They lived together "only on week-ends, once in a while"

(R. 57). They remarried at the same place on 31 March 1942. The accused then used the name Morrison J. Wilkinson, Jr., which was the name by which he was known in the service. The second marriage was performed in order that she as his wife might receive her allotment from the accused (R. 57-58; Pros. Ex. B).

In June 1943 Mrs. Margaret Gonzales Wilkinson obtained an interlocutory judgment or decree of divorce against the accused in a California court which would become final one year thereafter. The year had not expired on the date of the trial, 6 June 1944 (R. 59).

By stipulation there was introduced in evidence a certified copy of a marriage license and a marriage certificate certifying that on 6 August 1943 "Morrison J. Wilkinson, Jr" and "Lawriene T. Murphy" were united in marriage at Phoenix, Arizona according to the laws of the State of Arizona (R. 59; Pros. Ex. C).

On 17 April 1944 in Los Angeles, California accused met Mrs. Margaret Gonzales Wilkinson for the purpose of obtaining from her some of his "papers" and a traveling grip of his. They visited the "Mocambo" together and then drove back to her apartment. Accused procured his bag and left but shortly thereafter returned and "pushed his way into" the apartment (R. 61). In order to escape unwelcome advances made by accused Mrs. Wilkinson locked herself in the bathroom for several hours. While in the bathroom Mrs. Wilkinson heard accused "going through" her desk. She had left a watch, which she had found in 1939, lying on the coffee table in the apartment. (R. 64, 89). By stipulation the value of the watch was \$35.00 (R. 64). The watch was gone from the table when Mrs. Wilkinson came out of the bathroom (R. 64). It was stipulated that after accused was arrested the watch was found in his pocket (R. 65; Pros. Ex. D). On 18 April 1944 Mrs. Wilkinson wrote a letter to the accused's "Aunt Bee" in which she described the same incident as follows: (Pros. Ex. E)

"Received your letter Saturday ----- Jr. came up to my door last night. He knocked and said, 'Telegram!'. I like a fool opened wide my door, because I never in the world expected him after just reading he was in some hospital. He barged right into the apartment, tried to make love to me (all this, 'I can't live without you, Marge' stuff). We had a 'banging' good time until I ran into the bathroom, locked the door, and stayed there the rest of the night. I didn't want to yell out the window for help, because for the time being I was safe, and I hated to be further embarrassed. Jr. went through all my stuff --- took the notarized letter you sent me, his confirmation record, and letters I have received from the fellow I plan to marry. He remained in the living room --- I got tired of waiting for him to leave so I fell asleep on the bathroom floor. I knew it was morning and about time for me to get ready for work --- walked into

the front-room — and there sat Jr. snoring in the big-chair. He woke up, pounced on me like a lion (because by that time he read of all my intentions to marry again, and also he was almost mad because I locked myself in the bathroom. We had a big 'russ and tustle'. I resisted him, he tore half my clothes off. — only thing left for me to do besides risking myself to a couple of black eyes was to scream. And Aunt Bee, that I did! Practically every one on the floor came into the hall including the mgr. from first floor. Jr. turned yellow then, couldn't grab his coat and hat quick enough. He grabbed my white gold and platinum wrist-watch with the diamonds in it on his way out. (it was on the coffee table). I didn't want to stop him — I just wanted to crawl in some deep hole, that's all. This all happened between 5:30 and 6:00 a.m. when everything is so still in the apartment building * * *(Pros. Ex. E).

When the court reconvened on 8 June 1944 defense counsel moved to strike out all of the testimony of Mrs. Wilkinson pertaining to the alleged larceny of the watch on the grounds that the witness was shown to be the lawful wife of the accused at the time she testified and was therefore an incompetent witness to testify against her husband. The motion was denied by the law member (R. 241).

Defense Counsel also requested the Court to find the accused not guilty of Specification 5 of Additional Charge II on the ground that if the watch belonged to Margaret Gonzales Wilkinson and she was the wife of the accused the latter could not legally be guilty of larceny of her property. The motion was denied (R. 293-294).

Specification 2 of Additional Charge II. (Assault with intent to commit rape on Jean Stull).

Miss Jean Stull, sixteen years of age, lived in Burbank, California, with her parents. She was employed as a tap dancer or show girl at the Florentine Gardens. About 1:30 a.m. of 13 April 1944 at the conclusion of the last performance she was leaving the Gardens to go home when she was introduced to the accused by the band leader (R. 241-3). Upon the invitation of the accused and some urging by the band leader she accompanied the accused to a restaurant for something to eat. She then entered the accused's automobile to be driven to her home. Instead of taking her home accused drove off the main road into a secluded path bordered by tall trees and stopped the car. Accused got out of the car for a few minutes and then entered it again on the driver's side. Miss Stull became suspicious of his conduct and started to get out of the car to walk home. Without making any comment accused "grabbed" her and threw her down on the seat of the car with her head under the steering wheel and got on top of her. She fought with him, kicked,

scratched, and pushed him. This continued for about five minutes when she managed to get the door of the car open and fell out of the car. She then started to run but succeeded in getting only ten feet away when accused grasped her by the hair of her head and threw her to the ground. He then got on top of her and put his hands around her throat and choked her. She hit, scratched and kicked him. She pulled his hands away from her throat and told him that it was her "sick period". That did not stop the accused. "He tried to get his hands under my dress". She was not actually sick. She finally kicked him "in the wrong place" and pushed him off, got up and ran. She did not know whether he followed or not. When she looked back she saw him get back into the car and drive off. She walked to her home three or four miles away. Her neck was red and sore, she had a scratch behind one ear, bruises "all over" her legs. Her coat was dirty, her hair torn, face dirty and make-up off. The struggle on the ground lasted about ten minutes (R. 244-247).

When questioned by the court Miss Stull testified that during the alleged attack the accused said nothing to indicate his intentions. When asked if accused put his hand under her dress while they were on the ground she replied that "he tried to" and "he put it maybe about this far but he didn't get it very far". She indicated half way between the knee and hip on her left leg (R. 274-275). At no time did the accused expose himself (R. 275).

Defense counsel's motion for a finding of not guilty of this offense on the grounds that there was not sufficient evidence introduced to support a finding of an intention to commit rape was denied by the Law Member (R. 287-289).

Specification 3 of Additional Charge II: (Sodomy with Peggy Apperson).

On 13 April 1944 Lenora (also known as Peggy) Apperson met the accused as "Mike O'Day" dressed in the uniform of a captain of the United States Army Air Corps (R. 229-230). It was about midnight. The two went to the home of another officer in Balboa Island where they spent the night together and engaged in sexual intercourse (R. 232). Her first act of intercourse with the accused was the "putting" of the "mouth on him". This was followed by normal intercourse (R. 233). On cross-examination she testified that the accused treated her like a gentleman and didn't "attempt any unusual sex practices on her". She made no complaint concerning the accused but was questioned by the assistant trial judge advocate on 25 April 1944 and for her own protection lead him to believe that she had been forced by the accused to commit the sexual acts charged (R. 235). If the information had not been solicited by an officer of the U.S. Army no one would have known anything about it (R. 236).

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4. The accused elected to testify on his own behalf. He gave a summary of his origin and past. He is 28 years of age and was born in Spokane, Washington of Catholic parents. His parents' name was Wilkinson. He was not sure of his first name because the birth records simply described him as "Baby Wilkinson". Upon the death of his parents when he was about four years of age he went to live with his grandmother and step-grandfather whose name was Kegel (R. 299). He was given and used the name of Kegel and graduated from high school under that name (R. 302). His nickname is "Mike". He was adopted by the Kegels (R. 303). He joined a C.C.C. camp when he was 18 and then married in Wisconsin. There was one child by this marriage. The marriage lasted about one year and a half (R. 303). A divorce was obtained in Wisconsin (R. 304). He became interested in airplanes and worked his way out to California for the purpose of getting into Army aviation. In this he was blocked because of the requirement of a college education. In order to comply with this requirement he secured the college "credits" of an uncle and enlisted under the uncle's name "Raymond" Kegel. He was, however, eliminated after three or four months' training because he had not solo-ed in eight or ten hours (R. 307-308). He met a girl in Texas with whom he eloped after a few days acquaintance. The marriage was kept a secret from her family. He returned to California a few days later and the marriage was subsequently annulled (R. 309). He then took a job at the "Lockheed Aircraft" for about six months and then applied for enlistment in Navy aviation. Pending action on this application he was operated on for appendicitis and while in the hospital met Margaret Gonzales who was employed as a nurse in the hospital. They lived together as man and wife for a time. He married her in May 1940 at Yuma, Arizona, under the name of Jeffers Michael Wilkinson, which was also the name he used when he, about the same time, joined the Navy (R. 313, 318). He again used his uncle's college credits to get into Navy aviation (R. 314). He received several months flight training with the Navy in California and in Florida but was dismissed within two weeks of graduating because of his marriage to Margaret and other reasons not material (R. 316). He blamed his dismissal on his wife and wanted to divorce her. They returned to California and he left her in Los Angeles (R. 319-320) and again made an application to become an aviation cadet. This time he used the name of Morrison J. Wilkinson, Jr., which was the name of his father. He again used the college credits of his uncle by changing the name on the papers he had (R. 323). He was accepted and after successfully completing his training he was commissioned a second lieutenant in the Air Corps on 31 October 1941 (R. 324) and assigned to duty at March Field. He contacted Margaret about getting a divorce. She did not want to get a divorce but wanted to give their marriage another trial. To this he agreed and they again lived together for about a month. Not being able to get along they separated (R. 325).

After several military assignments he was sent to San Diego. He met Rennie Murphy and they began "going together and fell very much in love" (R. 328).

He volunteered to go to China and was accepted. He again contacted his wife and asked for a divorce. She refused to divorce him and when she heard that he was going overseas in military service she became interested in his insurance and, knowing that he was known in the service as Morrison J. Wilkinson, insisted that he remarry her under that name. She threatened to expose his deception of the military authorities if he did not do as she requested. She promised to give him a divorce if he returned safely. Under duress he agreed to this and they were remarried at Yuma, Arizona, using the name Morrison J. Wilkinson, Jr., on 31 March 1942. Before going overseas he made an allotment to his bank upon which she could draw funds (R. 328-331). He wanted to marry Rennie but could not under the circumstances. Rennie accompanied him to New York to see him off.

In May of 1942 he went to China and India and there flew with the American Volunteer Group known as the "Flying Tigers" for about two months. He contracted malaria and an infected ear and was grounded. After undergoing treatment at various medical centers in India he was returned to the United States in February 1943 and was treated at the Walter Reed Hospital in Washington (R. 332).

While in China he made about \$4000 in exchanging American and Chinese money and by playing poker. With this money he paid all of his debts (R. 335).

With reference to Specification 1 of Additional Charge I accused testified that upon his return to the States he landed in Florida, and immediately telephoned Margaret (his wife) to find out what had become of some of his money and about getting a divorce. She flew to Florida and spent several days there with him. She returned to California and he went to the Walter Reed Hospital in Washington, D. C. (R. 339-341). Later he telephoned her about the divorce. She told him that she had employed a lawyer to get her a divorce and told him the name of the lawyer (R. 341). Several months later while in Washington there was served upon him by a plainclothes detective some divorce papers indicating that Margaret had instituted divorce proceedings. He signed the papers and returned them (R. 341-342). Some months later he had occasion to fly out to San Francisco, California, and when there he telephoned to the lawyer who was conducting the divorce proceedings. Upon asking him about the divorce the lawyer said that he had forgotten to procure a waiver from him of the provisions of the Soldiers and Sailors Relief Act. Accused told him to mail it to him by special delivery and he would sign and return it. He received it the next day and signed it before a notary in the hotel where he was staying and gave it to the notary with money to return it by air mail special delivery stamp. This was done (R. 343).

He telephoned the same attorney several times thereafter from Washington where he was stationed. During the first telephone conversation the lawyer told him the day when he expected the decree to be granted.

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He telephoned him again on that day and the lawyer told him "that the judge had granted me my divorce that day" (R. 344-345). He then telephoned to Rennie and told her that the judge had granted him a divorce that day (R. 346). On 6 August 1943 he went to Phoenix, Arizona and there married Rennie. He has been living with her ever since. A child was born to them on 29 May 1944 (R. 347).

As to the Charge and its Specification the accused testified that he met Caprice Capron on the night of 20 April 1944 at Earl Carroll's night club (R. 398). He was introduced to her by Miss Beryl Wallace whom he knew. At the same time he met the other show girl, Jackie Glass. After the show he, Lieutenant Hall, Miss Capron, Miss Glass, and Miss Wallace went upstairs in the night club to the dressing rooms where they sat around in a semi-circle and each one had a drink from a bottle of liquor that the accused provided. As they sat there Miss Capron's knees were close to his and she placed her hands on his knees and "fooled" around his legs (R. 399-400). They decided to go to Miss Wallace's apartment for champagne. As they left the dressing room Miss Capron patted the accused on the buttocks. While at Miss Wallace's apartment they drank several bottles of champagne. Miss Capron drank like the others. He was out in the kitchen alone with Miss Capron on one occasion when he kissed her several times. They stood close together. She moved her hips like in a rhumba and patted his buttocks. About 3:30 or 4:00 a.m. they left the apartment to go home. They went downstairs. The girls insisted that he return and apologize to Miss Wallace. This he did. Miss Capron then telephoned upstairs and told him that they could not get a taxi to take them home and to come down and take her home. He went down in about 15 minutes and the two got in his car. She sat close to him and put her hand on his leg. He asked her if she would like to go for a ride. She said it would be all right but not to stay too long, as her mother "would give her hell if she stayed out too late" (R. 404-5).

He then drove up into the hills and parked. He kissed her a few times and fondled her breasts. She returned his kisses and lay down on the seat. He continued to caress her and then sat up and asked her to take off her slacks. She sat up and he assisted her in unbuttoning and unhooking them. He turned his head away while she removed one leg from the slacks. They lay down again. He started to have intercourse with her. She remarked that she "shouldn't be doing this the first night I go out with you" (R. 405-406). She also remarked that "This is going to be messy", but he did not know then, nor did it occur to him, that she was menstruating. She then removed her other leg from the slacks and threw the slacks in the back seat. They then both got out of the car and she lay on the ground where they both engaged in sexual intercourse for 15 or 20 minutes. She complained that the gravel and rocks were hurting her and suggested that they get back in the car. This they did, and there again on the seat they completed "the act of intercourse" (R. 407-408). Her hair was mussed up from the grass and weeds and he offered her his

comb. She refused it and urged him to get her home because of her mother. It was then about 6:30 a.m. so he drove her home. On the way home she wanted to know whether he was going to marry her. He did not answer that but changed the subject. He wanted to stop back and pick up Lieutenant Hall and Miss Glass but she insisted upon going home first so he took her home and when he asked her where he would see her again, she called back "Call me at the theater tonight" (R. 409, 412).

That afternoon he was told that he was charged with rape. It was not until several days later that he was told it was to be a charge of statutory rape. He believed the girl was over 18 years of age because she was employed and because she was drinking (R. 415-416). He denied that he at any time attempted any act of sodomy (R. 410, 533).

First Lieutenant Dean G. Hall testified (R. 565) that he was in the dressing room the same night and observed Caprice Capron whom they had just met pinch accused on the legs (R. 568). He corroborated the story of the other witnesses regarding visiting the apartment of Miss Wallace and falling asleep in the lobby of the apartment building. When he awakened the only one of the party left was Jackie Glass. He put her in a cab and sent her home. About 15 minutes later accused drove up and the two went to a restaurant for breakfast. He did not observe anything wrong with the accused's clothing nor any injuries or scratches on him (R. 570-572).

Private First Class Lawrence S. Krieger testified that he knew Caprice Capron and called upon her several times. He saw her in an intoxicated condition on one occasion and saw her drinking several times (R. 577-8). He also had kissed her and she had cooperated and moved her hips against him (R. 579).

Mrs. George F. Walker who lived in an apartment adjoining that occupied by Caprice Capron for six months preceding 21 April 1944 testified (R. 585-587), that she (Caprice) lived there with her mother; that her mother was out from 7 in the morning until 5 in the afternoon each day; and during her absence different men would call at the apartment one at a time. At times there would be six calling separately in an afternoon (R. 588). Caprice would go out at night and return about 3:30 in the morning with a male companion and sit outside in cars until 6 o'clock (R. 589). She saw her come home the morning of 21 April 1944 about 6:45 a.m. in a car with a man in uniform. She got out and went four or five feet, turned around and looked back, and then ran into her apartment. She could see nothing wrong or unusual about her. She then heard laughter and tap dancing in the apartment. At 7:00 a.m. Caprice's mother backed her automobile out, drove up to the gate and honked her horn. Caprice and a blond girl came and got in the car. Caprice's hair was mussed up. She looked pleased. The blond girl looked a little sad (R. 591-592). She admitted that she did not like Caprice's mother and that they had had an altercation (R. 594-595).

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Earl J. Apsahl, an attorney, testified (R. 595) that he owned an apartment house in which Caprice Capron and her mother occupied one apartment from February to August 1943 and because of the complaints of the other occupants he terminated their tenancy.

Everett Duncan, a service station operator testified that he saw Caprice Capron in January of 1943 drinking out of a whiskey bottle and later on at the same place she appeared to be intoxicated (R. 605-606).

Albert DePew, a writer, who lived in the same apartment building as Caprice Capron on two occasions witnessed indecent behavior on her part. Once he saw her engaged in sexual intercourse with a man in an automobile parked near the apartment house, and on the other occasion she was engaged in act of sexual perversion on a man in an automobile (R. 611-612). Her reputation in the neighborhood was bad (R. 612).

Mrs. Genevieve Hanner, another occupant of the same apartment building, testified that during the absence of Caprice's mother during the day "streams" of men would visit the apartment. Sometimes Caprice with nothing but nightgown and robe on would go down on the sidewalk and talk to her callers and sit in cars with them (R. 619-620). In July 1943 she saw Caprice lying on the back seat of an automobile parked by the apartment in the embrace of a man (R. 621-622).

With reference to Specification 2 of Additional Charge II. (Attack on Dean Stull) the accused testified that he met Dean Stull outside of the Florentine Gardens about 1:30 a.m. on 13 April 1944. He was introduced to her by an orchestra leader. He invited her to get something to eat. They drove in his car to the "California Kitchens" for that purpose. He had been drinking during the earlier part of the night. He then started to take her home. She said she lived in Burbank and after he became confused regarding the route she directed him. He was on a road leading to Burbank when he turned off into a small road for a distance of 25 or 30 yards and stopped (R. 351-3). His primary object was to urinate. He got out of the car and urinated in back of the car. He then got back in the car, talked to Miss Stull a while then put his arm around her and started kissing her. She returned his kisses. He put his hand on her leg. He kissed her again and put his hand on her breast. She backed away, slapped him on the face, opened the door and got out. She mumbled. "I am going to get home by myself. I am not going to take any chances" (R. 354). He got out and started to walk after her urging her to return to the car-that he would take her home. It was dark. The road was rough and he had been drinking. He reached for her hand and fell on his face. His head or shoulder clipped her ankles as he fell. She may have fallen too. By the time he got up Miss Stull was running or walking rapidly up the road. He backed the car out on the main road but could not find her. He did not know where in Burbank she lived (R. 355-6). At no time during this occurrence had he unbuttoned any of his clothing. He was never on

top of her. He did not intend to have any sexual relations with her except to the extent which she might permit (R. 356, 357, 358, 559).

Mr. Muzzy Marcellino testified that he was the orchestra leader who introduced accused to Dean Stull and that the next day after he had heard about Miss Stull's accusation he looked her over carefully while she was in the floor show under a spot light and did not observe and bruises or scratches or abrasions on her body or neck (R. 629-631).

With reference to Specification 3 of Additional Charge II - (Sodomy with Peggy Apperson) the accused testified that on or about the evening of 14 April 1944 he was at the bar of the Hurley Bell Cafe in Corona Del Mar (Cal.) and saw three girls sitting there. He introduced himself to one of them by inviting her to have a drink. She was Peggy Apperson (R. 360). About 2½ hours later he drove her in his car to the home of a fellow officer who was also with them. Accused and Peggy Apperson went to a bedroom on the second floor and spent the rest of the night there together. He drove her to her home about 7 o'clock in the morning. She invited him in but he had to report to duty (R. 364-5). As they lay on the bed "she began kissing my body and she put her mouth on my private parts" (R. 366).

Specification 5 of Additional Charge II. (Larceny of watch).

On 18 April 1944 accused telephoned to Margaret Gonzales and requested to see her. He wanted to get from her a power of attorney that he had given her, some Navy logs, and a notarized statement regarding his use of different names. She agreed to meet him at her apartment and told him the address. He drove there in his car about 9:30 p.m. She came down to the car and gave him his Navy log books. Being desirous of settling things with her amicably he took her to the "Mocambo" (a night club). About 12 o'clock they returned to her apartment house where she unlocked the doors and cautioned him to be quiet. He followed her in. He assumed from their previous conversation that he was to spend the night with her. She pulled down the Murphy bed and got undressed. He removed his clothing. They both lay on the bed and he started to caress her. When he endeavored to have intercourse with her she objected because he had no contraceptive with him. She said "wait a minute" and got up and pulled down the other Murphy bed and told him to sleep in it while she slept in the other one. He remonstrated with her. She went into the bathroom. When she failed to come out for ten or more minutes he went to the door and asked her what she was doing. She called out that she was not coming out until he had gone to sleep in the other bed - that she was not "taking any chances" (R. 389-390). She had told him that she intended to get married in two months. He told her that he would get dressed and go. So he got partially dressed and then searched for the papers. He found the power of attorney and the notarized statement in the desk. He also picked up the watch and placed it with these papers. He found some letters written to Margaret by her intended husband which he read. He put the papers in his pocket and unconsciously included the watch. He found his grip in the closet and put it on the floor. He then sat down

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and fell asleep. Sometime later he was awakened by Margaret pulling the letters out of his hand. They argued and struggled over the letters. She screamed. Some man came to the door which she opened. He picked up the grip and walked out (R. 392-4). During his search he found some money in her bag which he did not disturb. He had no intention of stealing the watch, it was a "sheer accident" (R. 394).

On cross examination he reiterated that he unconsciously placed the watch in his pocket with the papers he had found and had been carrying it around in his pocket waiting for an opportunity to give it back (R. 513-14).

Accused also testified that the watch was his property as he had found it one afternoon on the sidewalk on 30th Street about a half a block west of Figueroa when he was living with Margaret Gonzales. Margaret was with him at the time he picked it up (R. 349). This occurred about October of 1939. He took it to a jeweler and had it oiled and cleaned. As it was a woman's watch it was "understood" that Margaret should wear it. He made no formal presentation of it to her. "I just handed it to her. It was hers so far as I was concerned" (R. 556).

5. A. The Charge and its Specification and Specification 1 of Additional Charge II.

The Specification of the Charge avers that the accused on 20 April 1944 near Hollywood, California, wrongfully and unlawfully had carnal knowledge of Caprice Capron, a female below the age of eighteen years, "the age of consent established by the laws of California".

It was clearly shown by the evidence and admitted by the accused that he did have carnal knowledge of Caprice Capron on or about 20 April 1944 in California. The evidence was also clear and uncontradicted that Caprice Capron at that time was 17 years and approximately 10 months of age.

The pertinent section of the California Penal Code is section 261 which provides substantially that "Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator * * *. 1. Where the female is under the age of eighteen years;".

The accused raised no legal defense to the charge. The evidence introduced by the defense with reference to the charge constituted mitigating circumstances only. He showed that he believed Caprice Capron was over 18 years of age because she was employed

and had represented to her employers that she was over 18 years of age. He showed that she was not a virgin but on the other hand was a girl experienced in sexual relations and had a bad moral reputation in the neighborhood where she lived. The evidence is convincing that she voluntarily engaged in sexual relations with the accused, and because of her fear of her mother who was not satisfied with her explanation of being out practically the entire night blamed her delinquencies upon the accused. Her story of force and coercion alleged to have been exercised by the accused when coupled with the doctor's examination and the reports of her conduct by her neighbors does not ring true. Apparently it did not impress the appointing authority as the charge made against the accused was that of statutory rape rather than rape by force under Article of War 92. Nevertheless, no matter how bad her character may have been and no matter how willing she may have been to engage in sexual intercourse with the accused, the accused has violated the California statute and he committed the offense under such circumstances as to bring discredit upon the military service in violation of Article of War 96 (M.C.M. par. 152, p. 188). The record is legally sufficient to sustain the findings of guilty of this Charge and Specification.

The accused, however, is also charged with an assault upon Caprice Capron with the intent to commit sodomy upon her by attempting to place his penis in her mouth (Specification 1 of Additional Charge II). This charge is brought under A.W. 93 and bears no relation to the California Penal Code. It appears from the decisions of the California courts that the term sodomy or infamous crime against nature does not include the penetration of the male sexual organ per os. California Jurisprudence, Vol. 23 par. 3, page 395; State v. Johnson 137 Pac. 632; People v. Boyle 48 Pac. 800. The accused, however, may properly be convicted of sodomy or an assault with intent to commit sodomy by a court-martial even if the act does not constitute a violation of the local or state law provided it does violate an Article of War and he is subject to the provisions of the Articles of War. The accused unquestionably was in the military service at the time of the commission of the act and therefore was subject to the provisions of the Articles of War no matter where he was. Article of War 93 punishes one thus subject to its provisions who "commits an assault with intent to commit any felony". The same article punishes those subject to its provisions who commit "sodomy" and permits a punishment by imprisonment for a term exceeding a year. All offenses which may be punishable "by death or imprisonment for a term exceeding one

year shall be deemed felonies". Title 18, par. 541 U.S. Code. It therefore follows that one guilty of an assault with intent to commit sodomy is guilty of an assault with intent to commit a felony.

It has been urged by defense counsel, however, that the term sodomy even under the Articles of War does not cover the alleged act of the accused in that it does not include penetration per os because such an act was not recognized as sodomy at common law. This same defense was raised in the case of Hazlewood v. Magruder, U.S.D.C. N.D. Texas 9 April 1943 and sustained. The Judge Advocate General has, however, held to the contrary opinion - namely, that a penetration per os also constitutes sodomy and bases his authority on the definition of sodomy appearing in M.C.M. par. 149k, page 177, "Sodomy consists of sexual connection with any brute animal, or any sexual connection, by rectum or by mouth, by a man with a human being". CM 241161 26 BR 207 and CM 241597, 26 BR 305.

The Board therefore holds that the term "sodomy" in the 93rd Article of War includes the act of a man subject to its provisions who inserts his male organ in the mouth of a female and that if he assaults the female with that intent he may properly be convicted of an "assault with intent to commit a felony".

Having disposed of the legal defenses raised we turn now to the evidence introduced to support the finding of guilty. The evidence consists entirely of the uncorroborated testimony of Caprice Capron set forth at length in paragraph 3 above. The act was denied by the accused. A reading of the testimony of each does not impress us with the veracity of either. Caprice, the young but sexually experienced show-girl, was shown to have told numerous untruths during her testimony and contradicted herself in many places. She claimed she was a virgin prior to this experience. Medical testimony and her neighbors proved this to be untrue. She at first testified that she did not speak a word to the accused on the trip to her home. When she realized that he had no means of knowing where her home was so as to take her there, she changed this part of her testimony. She lied to her employers about her age. On direct examination she at first stated that accused tried to put his head between her legs after they were on the ground. It was not until the prosecution by leading questions brought out the sodomy feature of the case that she told of any attempt to commit sodomy. Then, after a recess, she changed her story and stated that the first thing the accused attempted after they were on the ground was to "make me put his penis in my mouth" (R. 140). The charge is a serious one and one punishable by a long term of confinement. The proof of its commission should be clear. No man's freedom would be secure if the uncorroborated testimony of a woman who voluntarily engages in sexual intercourse with him to the effect that at some time during their unlawful intercourse he offered or attempted

to commit sodomy per os upon her were permitted to sustain a verdict of guilty of assault with intent to commit sodomy over his own denial. Such a situation would open the doors to fraud and blackmail and be the source of much crime. Sex cases of this nature should be brought under the rules of law announced in CM 243927, Strong, CM ETO 2625, Pridgen and CM 255443, Steckler, to the effect that the uncorroborated testimony of a prosecutrix is insufficient to justify a conviction where her contradictions are numerous and serious - her testimony must be clear and convincing. See also Weston v. State, 138 P. 2nd (Okla.) 553; annotation 60 ALR 1131; Kidwell v. U.S., 38 App. DC. 566.

Under this principle of law the conviction may not be sustained. It is also the duty of this Board to weigh the evidence in the subject case. In the performance of that duty, the Board is of the opinion that the weight of the evidence did not favor conviction of this offense. The Board therefore concludes that the finding of guilty of this offense is not legally supported by the record.

B. Specification 1 of Additional Charge I avers that accused entered into a bigamous marriage contract with Rennie T. Murphy on 6 August 1943 in Phoenix, Arizona, while having a lawful living wife.

It was clearly established and not denied by the accused that he did, on 31 March 1942, marry Margaret Gonzales and that on 6 August 1943 he also entered into a marriage contract with Rennie T. Murphy at which time Margaret Gonzales was still living and their marriage had not been finally dissolved by any court. His defense to this charge was that he believed he had been divorced by Margaret Gonzales prior to 6 August 1943 and that he had reasonable grounds upon which to base that belief.

The prosecution showed that Margaret Gonzales in April 1943 applied for a divorce from the accused and that in June of that year she obtained an interlocutory decree of divorce that would become final one year later (R. 59). As defense counsel raised no objection to this informal manner of proving the nature and the time of the decree of divorce and offered no evidence to the contrary it must be accepted as a fact that the decree which was obtained could not legally become final until June 1944 and that, therefore, Margaret Gonzales was still the lawful living wife of the accused on 6 August 1943.

The accused did, therefore, while having a wife living marry another person. This act is declared to be bigamy by the statutes of the State of Arizona where both marriages were performed; Arizona Code Annotated 1939, par. 43-403. The statute however, by its terms does not apply to "any person whose former marriage has been pronounced void, annulled, or dissolved by the judgment of a competent court". There was, as stated, no evidence that any court had pronounced void, annulled, or dissolved the accused's marriage to Margaret Gonzales.

The only question to be determined therefore is whether the accused's mistaken belief that the interlocutory decree of divorce was in fact a final decree is a valid defense. Legal authorities are divided on the question. Some jurisdictions take the view that a mistaken belief of divorce is no defense to the crime because the crime of bigamy is purely statutory and the statutes do not require criminal intent. Others hold that it is a defense if founded upon creditable information disclosed by a diligent investigation which furnishes reasonable grounds for such belief. See 57 A.L.R. 792. In the latter decisions the accused who defends on a mistaken belief of divorce need not establish this defense beyond a reasonable doubt. The burden of proof is on him to show that he had reasonable grounds for his belief and that he did believe it.

In CM 123267, Twigg (1918), the accused defended on his mistaken belief of a divorce from his wife when he married another woman in Pennsylvania. The Board of Review held that "Such belief is no defense to the crime of bigamy unless founded upon creditable information disclosed by diligent investigation which furnishes reasonable grounds for such belief". In applying this test to the facts of that particular case the Board concluded that, "The evidence fell far short of proving any investigation by him sufficient to warrant this belief".

This principle of the law has been cited with approval in subsequent decisions of The Judge Advocate General: CM 230938, 18 BR 127, 134; CM 233132, 19 BR 323; and CM 245510 (1944). In the last case the Board of Review held however that a mistaken belief of divorce would not be a valid defense if the bigamous marriage took place in a State wherein the law was well established that such a defense is not valid. It was shown that the law of the State of Maryland in that case followed the view that mistaken belief is no defense to the crime of bigamy.

The accused's alleged bigamous marriage in the instant case took place in Arizona. Neither the record nor other available means disclose that the law of Arizona has been established on this point and therefore for the purposes of this case the exception created by CM 245510 to the rule adopted in CM 123267 will not prevent the application of the rule itself.

It is conceded that this rule is contrary to the majority of jurisdictions that have passed upon the subject. - Wharton's Criminal Law (12th Edition) par. 2044 and 2064. The same division of thought exists in bigamy cases where the accused has defended on the mistaken belief of the death of his or her first spouse. No doubt there will be instances where marriages will be contracted upon the honest belief of the death of a soldier based upon an official notification of death by the War Department which proves to be erroneous. An honest defense of this nature should be valid in law to the statutory crime of bigamy.

We are, therefore, of the opinion that in military jurisprudence the better rule, even though in the minority, is to recognize and permit as legal a defense of an honest mistaken belief that the first wife has obtained a divorce induced by reasonable diligence to ascertain the truth.

We therefore turn to the facts to ascertain whether Wilkinson believed he was divorced from his wife Margaret at the time of his marriage to Rennie Murphy and whether he had reasonable grounds for such belief.

It was established without contradiction that after numerous discussions between accused and his wife Margaret concerning the procurement of a divorce that the latter did institute legal proceedings in California to obtain a divorce in April 1943. The accused was aware of this because he was served with copies of the proceedings in Washington, D. C. He accepted service by signing his name to an acceptance. He must have been aware of the nature of the proceedings for shortly thereafter he was in California and telephoned the attorney who was handling the case and learned from him that the proceedings had been delayed because the attorney had neglected to obtain from the accused a waiver of his rights as required by the provision of the Soldiers and Sailors Relief Act. As evidence of his anxiety to obtain the divorce and cooperation therein he had the attorney immediately send him the release to be signed and he signed, notarized and returned it. Under those circumstances it was reasonable for him to assume that the proceedings would continue and in time culminate in a divorce. He testified that he subsequently telephoned the same attorney from Washington upon two occasions. During his first contact he was told the date upon which the attorney expected to obtain the decree. His second contact was on that date and then it was that he testified the attorney told him that the divorce decree had been granted. This fact is corroborated by the record of the divorce proceedings. A decree in divorce was granted in June 1943 but it was only an interlocutory decree which would not according to its terms become final until one year thereafter. The accused contends that he did not know that the decree was of that nature, but believing it was final he shortly thereafter - in August - remarried.

Consideration should be given to the accused's military duties which required him to be in Washington three thousand miles away from the state wherein the divorce proceedings were taking place.

The presumption of innocence to which all accused are entitled should be accorded the accused in connection with the solution of the problem and tip the scales in his favor.

The testimony of the attorney was available but not used to rebut the contention of the defense. Most States require in their form of marriage application information regarding former marriages and if any are disclosed require a certified copy of the decree of divorce. If such existed in Arizona it was available in rebuttal by the prosecution to show, if it did, the manner in which the accused satisfied these requirements.

Under all of the circumstances we are convinced that the evidence favors the conclusion that the accused did believe he was divorced from his

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wife Margaret at the time he married Rennie Murphy in August 1943 and that he had reasonable grounds for that belief.

In Pruitt v. State 98 Tex. Crim. Rep. 325; 265 S.W. 575 the appellate court reversed a verdict of guilty of bigamy by a jury in a case in which the defendant showed that he had signed an acceptance of service and a waiver of process prepared by his first wife's attorney preparatory to a divorce proceeding and was subsequently informed by his wife's brother that she had obtained the divorce. In truth, the divorce proceedings had never been instituted. His failure to inquire of the clerk of the proper court was held not to be a lack of diligence which would make him guilty of bigamy.

For the reasons stated we hold that the record of trial is not legally sufficient to sustain the findings of guilty of the Charge and Specification.

C. Nor can the conviction of larceny of the watch be properly sustained. The accused raised as a defense to this charge (1) that the only evidence concerning its alleged theft was the testimony of his then lawful wife, who is not a competent witness in such a matter, (2) that a husband can not be convicted of larceny of his wife's goods, and (3) that the watch was not her property but his. The first two reasons are debatable and it would serve no good purpose in this case to determine either one. The Board is of the opinion that the prosecution has failed to prove beyond a reasonable doubt that Margaret Gonzales was the owner of the watch. She claimed that she found it in 1939. He claimed that he was the one who found it at that time and being a lady's watch permitted her to wear it. For the reason stated the conviction of the accused of larceny should not be approved. One of the essential elements of the crime of larceny that must be proved beyond a reasonable doubt is "(c) that such property belonged to a certain other person named or described" M.C.M. 149g, p. 173.

D. Specification 2 of Additional Charge II avers that accused at a certain time and place committed an assault upon Dean Stull with intent to commit rape. It was clearly established and not seriously denied that the accused did at the time and place averred commit an assault upon Dean Stull. It is denied, however, that he had any intent to commit rape at the time and defense counsel has urged the insufficiency of the evidence to support such a finding citing as an authority the case of Hammond v. United States, 127 Fed. Rep. 2nd, 752 (1942).

The case cited was decided by the U.S. Court of Appeals for the District of Columbia. The evidence therein was that the defendant went to the home of his mother-in-law and entered the bedroom of his 17 year old

sister-in-law, pulled off the covers and put his hand on her private parts. She awakened and screamed. He ran away. The appellate court held that this was insufficient evidence to sustain a conviction of "assault with intent to commit rape". The pertinent extracts of its decision were:

"We think the court should have directed a verdict. In order to make out a case of assault with intent to commit rape, it is essential that the evidence should show beyond a reasonable doubt (1) an assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female. Dorsey v. State, 108 Ga. 477, 34 S.E. 135. Wharton states the rule as follows:

'The assault must be such as to show a purpose to have sexual intercourse despite resistance, and the consent of the female must be wanting. * * *—he must, in addition to this, have done some act which, in connection with the intent, constitutes the attempt. * * * There must be an intent to use such force and violence as may be necessary to overcome resistance * * *. Wharton's Criminal Law, Vol. 1, 12th Ed., PP. 748.'

"In the present case there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved guilty beyond a reasonable doubt. 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him'. Isbell v. United States, 8 Cir., 227 F. 788, 792.

"In the light of the circumstances we have related, we think it impossible that a jury of reasonable men could have fairly reached the conclusion that appellant, in which he did, necessarily intended to commit rape. True enough, his intent can only be determined by his acts. But on the facts shown here, the conclusion that he intended rape would be pure conjecture. Appellant was himself at the time fully dressed. It is not claimed that he had exposed his person or that he said anything indicating a purpose to have sexual intercourse. The room was lighted and was occupied, not only by his sister-in-law, but by two children, and the adjoining room was occupied by his mother-in-law and wife. Except that he used his hand to touch the body of the girl, he did nothing to carry out a carnal purpose. To assume in these circumstances that he intended to force his sister-in-law is neither reasonable nor credible. That he had a lustful desire is not enough. There must have been the intent to ravish if the desire were denied. That he was guilty of a serious offense goes with-

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out saying, cf. *Beausoliel v. United States*, 71 App. D.C. 111, 107 F. 2d 292, but that he was guilty of attempted rape we think may not be inferred from the evidence on which the Government relied. See *Pew v. State*, 172 Miss 885, 161 So. 678; *State v. Neil*, 13 Idaho 539, 90 P. 860, 91 P. 318; *Warren v. State*, 51 Tex Cr. R. 598, 103 S.W. 888; *People v. Fleming*, 94 Cal. 309, 29 P. 647; *Commonwealth v. Merrill*, 14 Gray, Mass., 415, 77 Am. Dec. 336; *State v. Massey*, 86 N.C. 658, 41 Am. Rep. 478; *Fields v. State*, Tex. Cr. App., 24 S.W. 907; *Huss v. State*, 22 Wis. 580; *Mungilla v. State*, 135 Tex. Cr., R. 287, 118 S.W. 2d 598; *State v. Coram*, 116 W.Va. 492, 182 S.E. 83; *State v. Perkins*, 31 S.D. 447, 141 N.W. 364.

■The above cited cases and many others which might be cited are to the effect that to warrant conviction the evidence must show beyond a reasonable doubt that intercourse was the immediate design and that force was intended to its accomplishment. In the instant case, it can just as well be assumed that appellant's purpose was to look or to fondle or to have intercourse if consent were forthcoming, rather than to ravish. That he should be punished goes without saying—but not for attempted rape.■

With the principles of law thus announced we are fully in accord. As usual, difficulty arises when applying them to a different set of facts. Of course, if the accused's story of the occurrence is accepted as true there could be no proper conviction of the charge. The only evidence tending to support the conviction is the uncorroborated testimony of Dean Stull. As appears in the summary of the evidence above she was another infant show girl wearing a "G" string in a night club. There was no evidence concerning her character or other behavior introduced in evidence. Nor were any conflicting written statements of hers introduced in evidence to throw any doubt upon her veracity. Under the other principles of law set forth above as her testimony was not contradictory nor improbable, nor impeached by anyone other than the accused, corroboration of it is not legally necessary in order that the court may properly adopt it as a basis for a finding. In view of the accused sex crazed conduct testified to by various witnesses Dean Stull's testimony is more convincing as a correct statement of what occurred than that of the accused and this Board is convinced that the accused did the things she said he did after he drove her into the secluded rendezvous. The question then remains, do those acts as told by Dean Stull legally support a finding of guilty of the Charge? As in the Hammond case the accused said nothing to indicate his intent and he did not unfasten or remove any part of his clothing. In the Hammond case, however, it was unlikely that the defendant intended to rape the girl by force because there were two younger brothers in the same room, and in the adjoining room were the defendant's mother-in-law, and wife. The least outcry would prevent any thought of rape. In the subject case it was shown that there were no people available to hear any outcry. The accused admitted that he hoped to have sexual intercourse with her if she

would have permitted it. There was no justification or reason for throwing her down, getting on top of her and choking her and putting his hand up her dress on her thigh unless it was for the purpose of having intercourse with her. If it was just to improperly fondle her or to take indecent liberties with her it was not necessary to choke her and to get on top of her. We are of the opinion that the court was justified in its conclusion and that there was substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions fairly tended to establish the intent to commit rape.

B. Specification 3 of Additional Charge II (Sodomy with Peggy Apperson). With reference to this charge the evidence establishes that the accused "picked up" Peggy Apperson, one of the local "bar flies" of Hollywood and after a few drinks took her to bed with him. During the sexual relations that followed Peggy in her usual manner of love making and as preliminary to normal sexual intercourse, kissed the body of the accused as he lay upon the bed and put her mouth over his penis. This was admitted by the accused. There was therefore no other corroboration necessary. The act described constitutes sodomy as this Board has held, supra. The accused is therefore guilty as charged. The finding of guilty is legally supported by the record.

6. The records of the War Department show the accused to be 28 years and approximately six months of age having been born in Spokane, Washington, on 5 February 1916. When about four years of age his parents died and he was thereafter reared by his grandparents, Kegal. While living with them he adopted the name of Kegal. He graduated from high school in 1934. When about the age of 21 years accused went to live in California where for six months he was employed on an avocado farm. On 22 March 1941 he enlisted in the service as an Aviation Cadet and completed his training as such 18 August 1941. On 31 October 1941 he was commissioned second lieutenant, Air Corps and ordered to active duty on that date at March Field. On 23 May 1942 he was promoted to first lieutenant, and on 31 March 1943 to captain, Army of the United States, Air Corps. He served with the "Flying Tigers" in China and India where he contracted malaria and suffered an infection in the left ear. He entered a hospital in China in July 1942 and was discharged as cured 17 August 1942. In September he was returned to flying status but after flying at an altitude of 17,000 feet his left ear was again affected. The affected area did not respond to treatment. At a date not appearing in the records, accused was transferred to the Walter Reed Hospital, Washington, D. C., where on 4 March 1943 a Board of Medical Officers, after examination, recommended that accused be returned to a limited duty status.

7. The court was legally constituted and had jurisdiction over the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial other than those set forth above. For the reasons stated the Board of Review

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is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Additional Charge I and its Specification 1, and Specification 1 and Specification 5 of Additional Charge II, legally sufficient to support the findings of guilty of the Charge and its Specification, Specification 2 and Specification 3 of Additional Charge II and Additional Charge II and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93. Confinement in a penitentiary is authorized by Article of War 42 for the offense of statutory rape, assault with intent to commit rape and sodomy, each of which is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 2801, Title 22, Code of the District of Columbia, as to statutory rape, by section 455, Title 18, United States Code, as to assault with intent to rape and by specific provision of the Manual for Courts-Martial, as to sodomy (par. 90, M.C.M. 1928; sec. 107, Title 22, Code of the District of Columbia).

William H. Lambell, Judge Advocate.

Herbert A. Fredericks, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

12 OCT 1944

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

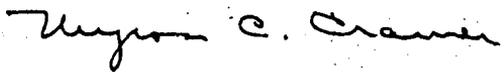
- To the Secretary of War.

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 Captain Morrison J. Wilkinson (O-430008), 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 Additional Charge I and Specification 1 thereof, and Specifications 1 and 5 of Additional Charge II, but is legally sufficient to support the findings of guilty of the original Charge and its Specification, Specifications 2 and 3 of Additional Charge II and Additional Charge II and the sentence, and to warrant confirmation of the sentence. I recommend that the findings of guilty of Additional Charge I and Specification 1 thereof, and Specifications 1 and 5 of Additional Charge II, be disapproved and that the sentence be confirmed, but, in view of the legal insufficiency of the record to sustain the findings of guilty of three of the offenses charged, that the confinement be reduced to 10 years, and that the sentence as thus modified be carried into execution. I further recommend that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement.

3. Consideration has been given to numerous letters attached to the record requesting clemency for the accused and protesting against the severity of the sentence imposed by the court upon the accused.

4. Inclosed are a draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry the above recommendation into effect, 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.
of S/W.
- 3 -Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to ten years. G.C.M.O. 667, 16 Dec 1944)



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

SPJGN
CM 260613

8 AUG 1944

UNITED STATES)

ANTILLES DEPARTMENT

v.)

Private First Class JUAN
ALBIZU-ROSA (30405432),
Battery B, 35th Coast
Artillery.)

) Trial by G.C.M., convened at
) A.P.O. 851, c/o Postmaster,
) Miami, Florida; 24 May, 30 June
) and 1 July 1944. Dishonorable
) discharge and confinement for
) life. Penitentiary.

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, 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 Charges and Specifications:

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

Specification: In that Private First Class Juan Albizu-Rosa, Battery B, 35th Coast Artillery, did, at or near "La Parada" bar, at or near APO 851, c/o Postmaster, Miami, Florida, on or about 22 April 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one German Roman, a human being, by shooting him with a rifle.

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

Specification 1: In that Private First Class Juan Albizu-Rosa, Battery B, 35th Coast Artillery, did, at or near "La Parada" bar, at or near APO 851, c/o Postmaster, Miami,

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Florida, on or about 22 April 1944, with intent to commit murder, commit an assault upon Julia Martinez-Carmona, by shooting her in the face with a dangerous weapon to wit, a rifle.

Specification 2: In that Private First Class Juan Albizu-Rosa, Battery B, 35th Coast Artillery, did at or near "La Parada" bar, at or near APO 851, c/o Postmaster, Miami, Florida, on or about 22 April 1944, with intent to commit murder, commit an assault upon Marcos Quiles-Perez, by shooting him in the hand, with a dangerous weapon to wit, a rifle.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for 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 50¹.

3. After the accused's arraignment but before his entrance of any pleas the defense interposed a motion for a psychiatric examination of the accused. The assistant defense counsel testified in support of the motion that his observations of the accused had indicated that he, the accused, was "queer" and "mentally not well". The court sustained the motion and adjourned pending the examination. Upon reconvening about five weeks later two medical officers, one of whom was a psychiatrist, testified that they had examined the accused and that in their opinion he could distinguish right from wrong, that he was able to adhere to the right and refrain from wrong and that he was able intelligently to cooperate with his counsel in his defense. The court then ruled that no issue of accused's insanity had been made. The accused thereupon pleaded not guilty to all Charges and Specifications and no further reference to this preliminary proceeding appears in the record (R. 6-20; Ex. A).

4. The evidence for the prosecution shows that on the evening of 22 April 1944 the accused attended a dance in the La Parada bar which was located near the accused's camp. Some eighty persons, mostly civilians, attended the affair where the accused at about 2000 o'clock engaged in an argument with a civilian named Felix Pastrana when the latter attempted to "cut in" upon the accused who was dancing with Guillermina Soler. Shortly afterwards the accused jumped out of the bar through a window where on the

outside he encountered another civilian, Jose Reyes Negron, with whom he also engaged in both an argument and an exchange of fisticuffs before disappearing from the vicinity. Numerous witnesses testified to the accused's argument with Pastrana and his exit from the bar through the window (R. 21-23, 37-43, 43-45, 64).

About thirty minutes later the accused was observed approaching with a rifle in his hands by the bar's proprietor, who was standing in front of the establishment. During a momentary distraction of the proprietor's view the accused was cautioned by Rafael Pinto, a civilian who was also outside of the bar, to "be very careful what you are going to do because no one has done anything to you and everyone is having a good time dancing and drinking". The accused told him that he had no reason to worry and appeared to be leaving but stopped and then reapproached the bar when he was again observed by the proprietor at a distance of about 150 to 200 feet. At this point the accused fired a fusillade of eight shots into the bar whose occupants all fell to the floor or attempted to do so after the first shot. After the last shot several persons saw the accused running, rifle in hand, towards his nearby camp. All witnesses who testified upon the issue denied that the accused had been mistreated at the dance and that he had been pursued by anyone upon leaving the bar the first time or after the shots had been fired which were the only shots heard (R. 45-56, 56-63).

After the ensuing pandemonium had subsided German Roman, a civilian who had been near the bar's door, lay dead from an abdominal bullet wound; Julio Martinez Carmona had received a superficial bullet wound on her nose which was treated at the District Hospital; and Marcos Quiles Perez, one of the musicians, was bleeding from a superficial bullet wound to his right hand. Competent medical testimony established that Roman's death had been caused by the bullet wound. Eight exploded .30 caliber shells and a clip were found near the spot where the accused had been observed when he commenced firing. They were so located as to indicate that they had been fired while the accused was approaching the bar. A fragment of one of the bullets was also found in the bar and competent ballistic experts testified that the eight shells and the bullet fragment had been fired from the .30 caliber rifle which had been issued to the accused. The shells, the clip, the bullet fragment and the rifle, after proper identification, were admitted into evidence as were a picture of the deceased, and two pictures of the bar and its vicinity upon which were indicated the window through which the accused had exited, the spot where the accused commenced firing and the location where the exploded shells and the clip had been found (R. 33-36, 46-56, 59, 61, 65-67, 67-70, 71-72, 73-79, 79-82, 82-86, 86-87, 87-88, 89-92, 93-100, 109-110; Exs. B-D).

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An investigator for the criminal section of the Military Police at about 0400 o'clock on 23 April 1944 engaged the accused in conversation and after the accused had been advised of his right to speak or remain silent and the consequences thereof he admitted to the investigator that resentment over Pastrana's discourteous attempt to dance with Guillermina Soler and the belligerent attitude of other civilians at the dance had motivated his departure through the window of the bar, that outside the window he had an argument and exchanged blows with Negron, that he was thereafter pursued by several civilians to the camp where he eluded them after taking a pistol away from one of them and throwing it into the ocean, that he heard some of the civilians say that they were going back to the bar and kill the soldiers remaining there, that he then secured his rifle and a clip with eight live rounds of ammunition and returned to the bar to defend his soldier companions, that as he approached the bar he heard a civilian say "Here comes this son of a * * * again" and several shots were fired at him; that as he was retreating he inserted the clip of ammunition in his rifle and fired one shot to scare the civilians, and that he continued firing because of nervousness and then returned to camp where he cleaned his rifle and went to bed. After repeated explanations to him of the provisions of Article of War 24 the accused signed a statement before a military police lieutenant. This statement was substantially in accord with the above-mentioned admissions to the investigator and was admitted into evidence (R. 100-109; Ex. D-1).

5. The accused, after explanation of his rights as a witness, elected to remain silent and the defense presented no evidence.

6. The Specification, Charge I, alleges that the accused at a designated time and place "with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation," killed German Roman, a human being, by shooting him with a rifle. The offense alleged is that of murder which is violative of Article of War 92.

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 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" (Underscoring supplied).

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 evidence for the prosecution conclusively shows that the accused, after engaging in arguments with two persons at the dance, precipitately departed but returned within 30 minutes armed with his rifle. A few moments before firing the shots he was cautioned by a civilian to be careful and agreed to again depart. Feigning departure and heedless of caution within a brief period he deliberately and wantonly fired a volley of eight shots into the bar where some eighty persons were dancing upon a crowded floor resulting in the deceased's death and then fled to the camp where he immediately cleaned his weapon in an effort to avoid detection and calmly retired. Such acts impel the conclusion that the accused's actions were the result of the exercise by him of thought, premeditation and design and that they were not the result of sudden passion aroused by any resentment or anger which might have been stimulated by his arguments and altercations with Pastrana and Negron more than 30 minutes before because an ample "cooling" time had elapsed. The testimony of numerous witnesses belie the accused's assertions in his statement that he was twice pursued from the bar and that he fired the shots only after having been fired upon. The court, acting within its appropriate province, rejected such assertions as being pure fabrications. All of the prosecution's evidence, including the credible portion of the accused's admissions, establishes beyond a reasonable doubt the accused's guilt of the crime of murder and amply supports the court's findings of guilty of Charge I and its Specification.

7. Specifications 1 and 2, Charge II, respectively allege that the accused at a designated time and place "with intent to commit murder" committed assaults upon Julio Martinez Carmona and Marcos Quiles Perez by shooting the former in the face and the latter in the hand with a dangerous weapon to wit, a rifle. The offenses alleged are those of attempts to murder. Such offense is defined as "an assault aggravated by the concurrence of a specific intent to murder" and it is violative of Article of War 93 (M.C.M., 1928, par. 149n). The accused's specific

intent to murder each of the named persons is implied from his actions because "where a man fires into a group with intent to murder some one he is guilty of an assault with intent to murder each member of the group" (Id).

The accused being guilty of murdering one person in the group into which he fired the fusillade of shots as hereinabove shown, it is clear that he is likewise guilty of an attempt to murder as alleged the two persons who were part of the same group and were wounded by the same hail of bullets. Further comment would be superfluous. The evidence as hereinabove discussed conclusively supports and warrants the court's findings of guilty of Charge II and both Specifications thereunder.

8. The accused is about 25 years of age. He was inducted on 6 March 1942. His record shows no prior service.

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

Abner E. Lipscomb, Judge Advocate.

William S. Hughes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.



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

(345)

SPJGQ
CM 260623

- 6 SEP 1944

UNITED STATES)

v.)

Private CALVIN C. SIMMS
(33751189), 435th Aviation
Squadron.)

SPOKANE AIR SERVICE COMMAND

Trial by G.C.M., convened at
Spokane Army Air Field, Spokane,
Washington, 29 June and 3-4
July 1944. Dishonorable dis-
charge and confinement for life.
Penitentiary.

REVIEW by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Calvin C. Simms, 435th Aviation Squadron, did, at Spokane, Washington, on or about 17 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Myrtle Storseth.

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 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 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 50 $\frac{1}{2}$.

3. The evidence for the prosecution, briefly summarized, is as follows:

Mr. Oscar Storseth and his wife Myrtle, who had been married 18 years, resided, together with their baby, in the Reno Hotel at No. 5 $\frac{1}{2}$ West Main Street, Spokane, Washington during the month of June 1944 (R. 10, 11, 17, 42, 43). Mrs. Storseth is 35 years of age and her husband is 54 (R. 10, 42).

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On the evening of 17 June 1944, Mr. Storseth returned from his work at 5:30 o'clock and as Mrs. Storseth had worked hard washing clothes he assisted her in rinsing them and hanging them up, after which Mrs. Storseth got dressed, hired a woman to take care of the baby, and then she and her husband went downtown at about 7 or 7:30 p.m. (R. 11, 21, 42). They left the door to their room unlocked so that the woman caring for the baby could get in for more milk, if necessary (R. 11). During the course of the evening they visited the Garni bar, where they had a pitcher of beer; the O.K. Restaurant, where they had dinner; the Mora Tavern, where each had a glass of beer; the Norwegian Hall; and, finally, returned to the Garni bar, where they had two pitchers of beer, after which, at about 11 or 11:30 p.m. they went home (R. 11, 21, 26, 42, 44-48). Mr. Storseth had a conversation with a Norwegian friend by the name of Olson in the Garni Bar on their last visit there (R. 25, 47) and neither Mr. nor Mrs. Storseth could remember Mr. Storseth talking to any other person (R. 26, 48) although both were positive they had never seen or talked with the accused before the incidents which transpired later in their room. (R. 18, 48)

From the Garni Bar Mr. and Mrs. Storseth proceeded together to the Reno Hotel where she entered first, and they went up the stairs together, side by side. When they reached the door Mrs. Storseth told her husband to "step back and get the baby" while she fixed the baby's bed (R. 11, 12, 26, 43). He then went on for the baby while Mrs. Storseth opened the door to her room and switched on the light (R. 12, 49). She had barely entered the room and started to take off her coat when the accused entered, slammed the door shut, struck her twice, once over the eye and once on the nose and mouth, grabbed Mrs. Storseth and threw her crosswise on the bed with her head against the locked door to an adjoining apartment and her feet on the floor (R. 12, 18, 26, 29). She said "You black bastard son-of-bitch, you had better get out of here, you are not my husband and my husband is right behind you" but he nevertheless smothered her with a pillow with which he covered her face and proceeded to rape her. Mrs. Storseth was bleeding profusely from the injuries to her nose, mouth and eye (R. 12, 13). She was fully dressed except that she wore no underwear at the time. The accused continued to hold the pillow tightly against her face and threatened to cut her throat if she screamed and she was "very much afraid (her) throat would be cut before the attacker left" and for that reason made no outcry (R. 13, 27, 30). Mrs. Storseth struggled against the accused and fought so hard that at one time she freed herself momentarily from the pillow and she tried to rap on the door to the adjoining room (R. 17, 18). The rape was, however, fully accomplished. On the morning of 18 June 1944 Captain David D. Holaday, Medical Corps, on duty at the Station Hospital, Spokane Army Air Field, made a physical examination of Mrs. Storseth and took a smear of the contents of her vagina and found sperm cells "in large numbers" which indicated to him that she had sexual intercourse within the previous 24 hours (R. 75, 76). Mrs. Storseth

testified that she had not had sexual intercourse with her husband on the night of 17/18 June 1944 nor for several days previous thereto, nor with any other person than the accused within three days prior to the examination by Captain Holaday (R. 77, 78).

While the rape was being perpetrated, Mr. Storseth, who had found the baby asleep and, deciding not to disturb it, had returned to his room, found the door closed and locked so he knocked upon it. He wondered whether his wife had gone to the landlady's room and rather than disturb the neighbors by any more "hammering" on the door he went downstairs and to "Louie's Tavern" across the street and bought four quart bottles of beer and then returned (R. 43, 51). Although Mrs. Storseth heard her husband knocking on the door she was unable to answer him (R. 13).

Meanwhile, the accused, having accomplished the rape, left the room and disappeared and Mrs. Storseth, within a few minutes, went to the room of Mrs. Christesen, the landlady to whom, after she answered the rap on the door, Mrs. Storseth reported the incident. In her own words she "asked the landlady to call the police; that there was a colored man that had raped me--tried to rape me" (R. 17). This, Mrs. Bertha Christesen, the landlady, corroborated. She testified that at about 11:30 p.m. on the night of 17 June 1944, Mrs. Storseth came to her apartment, knocked on the door and reported to her "There is a negro in my room" and asked her to call the police which she did. Mrs. Christesen was not sure whether Mrs. Storseth was intoxicated or merely excited "because she was in such a condition. Her face was bleeding, her nose was bleeding and her eye was swollen" (R. 53). Upon cross-examination, Mrs. Christesen was asked whether she had, on a previous occasion, stated that Mrs. Storseth had said "Will you call the police? There is a nigger in my room and he tried to rape me" she stated "That is what she said at first" (R. 54).

When Mr. Storseth returned from across the street, he found the door to his apartment open and the room dark. When he "flashed on the light" he saw "an awful mess, the chairs tipped over, and clothes all over". He also saw blood and "wondered what was going on". Just then the accused entered the room and said that somebody had "nicked or nipped" his watch and wallet at which Mr. Storseth, seeing that he was a "colored man", called him "a name" and "Told him to get the hell out, he had nothing there" (R. 43, 50).

Meanwhile Mrs. Storseth and Mrs. Christesen had started down the hall toward the Storseth room (R. 17, 53, 54). Mrs. Storseth testified that she saw the accused in the room with her husband and heard the conversation in which the accused said that somebody "nipped" or took his watch and wallet and her husband answered by calling him "a name" saying "No, you have nothing here, you never was here before" (R. 17). Then, as the accused was leaving the room, Mrs. Storseth shoved

him back toward Mr. Storseth and said; "Yes, Oscar, that is the black bastard son-of-a-bitch that raped your wife" (R. 17) or "Yes, Oscar, that is the black son-of-a-bitch that beat up on me and raped me on top of it" and she urged him to hold the accused until the police came (R. 53). Mrs. Christesen stated that "the colored man tried to come out and she gave him a push and pushed him back in and she said to her husband: 'Keep him here. That is the nigger that raped your wife'" (R. 54). Mr. Storseth thereupon seized the accused and held him until the police came (R. 17, 32, 43).

Homer D. Pike, a police officer of the city of Spokane, testified that on the night of Saturday, 17 June 1944, while he and his partner, Officer Corkburn, were driving around in a prowler car in the downtown area of Spokane, they received a call to investigate trouble at 5½ West Main Street. Upon arriving at the Reno Hotel and going to the second floor he found Mrs. Storseth in an excited and hysterical condition, pounding on the door of her room. The door was locked and the officer could hear scuffling and loud voices inside. He continued to beat on the door and demand admission and finally the door was opened. Then, in his own words:

"When the door was opened the room was dark. I fumbled around for a light so I could see. I had a flash light with me, and there was hanging down a drop cord in the room, and I believe my partner turned it on from the wall switch in a few seconds, after we got there. The entire room was torn up. You couldn't take two steps along the floor, because it was cluttered with turned over articles" (R. 55-57).

"We were asking what the trouble was and all three people were talking at the same time and trying to make a statement, but we wanted to hear what the woman had to say first. The woman said 'This dirty son-of-a-bitch raped me'. She said 'Look at my eye and look at the blood'. She repeated that a number of times. We did not go into the details of it at all. We got a brief statement from each of them and took them over to the police station".

When the door was opened they did, however, see Mr. Storseth and the accused "standing up with their hands on each other" (R. 59). The accused stated; "I am after my money and my watch - my wrist watch". He was "very excited" and when the officers indicated they were going to take him to the police station he said; "You don't have to hang on to me like that. I didn't do nothing. I will not run away" (R. 60).

Mr. P. B. Anderson, Police Detective of the city of Spokane, testified that on the night of 17/18 June 1944 at about 12:20 or 12:30 a.m. Officers Pike and Cochran, Mr. and Mrs. Storseth and the accused were brought to the police station. Mrs. Storseth's face was quite bloody, her nose was bleeding from a cut on the end of it and one eye was swollen and black. She was crying and "somewhat hysterical".

The accused was wearing a shirt, trousers and a raincoat, all of which appeared bloodstained. On his right arm he was wearing a watch band and wrist watch case without any works in it. When asked about it the accused stated he had lost the works out of his watch. Later, Mr. Anderson searched the Storseth room in the Reno Hotel and found the works of a "Benrus" wrist watch near the foot end of the bed (R. 61-65). The accused stated that he had gone up to the Storseth room "looking for a room and he saw the door open and he walked in". He admitted that he did not obtain what he had sought (R. 67). He maintained that he had lost his bill-fold with \$15.00 and his watch (R. 66). Mr. Anderson identified the raincoat, trousers and shirt (Pros. Exs. 3, 10 and 11) by the location of blood stains upon them (R. 62-64).

Technical Sergeant George F. Snyder, of Base Unit 4134 of the Army Air Forces, testified that he was acting as a member of the Military Police at the Spokane Army Air Field on 17 June 1944. On the morning of 18 June 1944 at about 3:15 o'clock he saw the accused in the military police station in Spokane, Washington. At that time the accused was wearing the shirt, trousers, a pair of shorts and raincoat identified at the trial by Sergeant Snyder. These articles of clothing were taken by the Sergeant and delivered to the Provost Marshal who locked them up in a cabinet for two or three days where they remained in the Sergeant's custody until they were delivered to Captain Reginald Williams, the trial judge advocate. In addition, a billfold (Pros. Ex. 15) and the contents (Pros. Ex. 16 and 17) were shown to the accused, admitted by him to be his property, and were likewise delivered to Captain Williams. At the time of identification by the accused the Sergeant removed 58¢, some keys, a new set of identification tags and a skeleton key from the wallet, all of which articles were admitted by the accused to be his (R. 67-70). This billfold had been taken from the accused by noncommissioned officer Frank J. Baker (grade not shown), who was in charge of the military police station in Spokane, Washington on the night of 17/18 June 1944 at about 12:30 or 12:45 a.m. It was found in the upper, left-hand pocket of the accused's shirt (R. 74).

Both Officer Pike and Detective Anderson were of the opinion that Mrs. Storseth had been drinking but Officer Pike, did not believe either Mr. or Mrs. Storseth could be classed as being drunk at the time and Det. Anderson stated that Mrs. Storseth was not intoxicated to a great extent and she and her husband gave coherent answers to his questions (R. 59, 61, 62). The accused did not appear to be under the influence of liquor to either Officer Pike (R. 60), or Detective Anderson (R. 62).

Various articles of wearing apparel which appeared to be bloodstained were admitted in evidence, among which were Mrs. Storseth's dress (R. 14, Pros. Ex. 2); her coat (R. 14, Pros. Ex. 1); a nightgown which she was not wearing at the time of the assault but with which she said she later stanchd the flow of blood from her face (R. 35, 36; Pros. Ex. 8); an army raincoat (R. 73; Pros. Ex. 3); a pair of Army trousers (R. 73; Pros. Ex. 10); an Army shirt, (R. 73, Pros. Ex. 11) and a pair of Army shorts (R. 73, Pros. Ex. 14); a pillow case and pillow were likewise admitted (R. 15; Pros. Ex. 4 and 5).

4. Testimony for the defense is substantially as follows:

The accused, having been informed of his rights, elected to be sworn as a witness. He stated he was born in Washington, D. C. on 23 September 1925 and completed the Junior High School Course. He admitted having made a statement on 18 June 1944 to the investigating officer (not introduced in evidence) but he does not think he was sworn to tell the truth at the time because he did not hold up his hand (R. 79, 80, 96, 97) although he said the officer asked if he "would tell the truth" and the accused told him that what he said was true and signed the statement (R. 89, 98). At the trial, when asked whether the statement thus made was true and correct he answered "No, sir" (R. 80). When then asked to tell the court "the true situation * * * in relation to this alleged crime, starting at the beginning * * *" he said that he was sitting in the Garni Bar with a couple of soldiers on the night in question. Mr. and Mrs. Storseth were sitting in a booth drinking and when they got up to go the accused followed them and asked Mr. Storseth "where a soldier can get a little sport", meaning "get a woman". Mr. Storseth told the accused to follow him and went on up the street arm in arm with his wife. As they went into the Reno Hotel and up the stairs Mrs. Storseth stumbled and fell. When the accused got to the top of the steps Mr. Storseth said "there was the door open". The accused asked him how much it would cost and was told "\$5.00". Although the accused did not have \$5.00 he did not tell Mr. Storseth so but, when Mr. Storseth went on down the hall the accused went into the room where Mrs. Storseth "was laying on the bed". He asked her about the price and when she gave him the same figure the accused told her he had only \$2.00. Whereupon Mrs. Storseth said "You have got your nerve coming in with \$2.00" to which she added "You little black bastard, get out of here" (R. 80, 81, 84-86). The accused then hit her twice in the face (R. 80, 83). He was standing by the bed as he did so and the room was dark (R. 83). Mr. Storseth then returned and said he was going after some beer and the accused left. He went down the street some distance to a "little colored place" where he met and talked to two soldiers he knew and bought beer for them. One of these soldiers was Lafayette Smith, cook for the 435th aviation squadron (R. 82, 93). When he looked for his watch to see what time it was he saw it was gone and he "thought the only place (he) could lose it was up there". Accordingly he returned to the Reno Hotel. He could hear Mr. and Mrs. Storseth inside talking

so he knocked on the door and when they opened the door and asked what he wanted he told them he had come back for his watch. Mrs. Storseth then went out and Mr. Storseth helped him look for his watch until the police arrived, knocked on the door, and when it was opened, took him to the police station. The accused denied having sexual intercourse with Mrs. Storseth (R. 81, 82).

On cross-examination the accused admitted he had never seen Mr. and Mrs. Storseth before he observed them in the Garni Bar (R. 84) and that he had told Sergeant Snyder that, although he did not know them and had never seen them before, he followed them on the street that night (R. 88). He further admitted that he had told the investigating officer that he heard Mr. Storseth return while he (the accused) was in the room with Mrs. Storseth, and that when he knocked on the door it scared him and he held the door shut with his foot because he thought Mr. Storseth might have a key (R. 89). He likewise admitted telling Sergeant Snyder that he "went in and lay down on the bed beside this woman and unbuttoned (his) pants", although he denied that he had done those things (R. 95). He denied having lost his wallet on the night of 17 June 1944 (R. 82), insisted that he had \$2.00 at the time he told Mrs. Storseth he had the money and denied telling Sergeant Snyder that he lost no money in the Storseth room and only had 58¢ when he first went into the room (R. 86, 87). He accounted for the difference in the story he told the investigating officer and the one told at the trial by saying "This is true, and I told him (the investigating officer) a story because I didn't have to tell him, but now I have to tell the truth in court here" (R. 96).

When asked whether he had ever been convicted of a felony he admitted that "he was accused of a stolen car" and was sent to a training school for boys. He was also convicted of crime at Hyattsville, Maryland but served no time (R. 92, 93).

Mrs. Helen Ernst, Spokane County welfare worker, testified that Mrs. Storseth's reputation for truth and veracity "in the community" was bad. Upon cross-examination she stated that her knowledge was based upon what "the landlady of the hotel down there on West Main" had told her and from information that "would come from fellow-workers who handled this case". An offer in evidence of files and records of the Social Security Department of the State of Washington to prove her reputation for truth and veracity was denied (R. 98-104). Objection to an inquiry into her reputation for chastity was sustained (R. 99).

Mrs. Storseth was recalled as a witness by the defense and identified a statement which she had made to the investigating officer. (This statement was admitted in evidence as Defense Exhibit A). She testified that she saw no knife in the possession of the accused but on examination by the court stated "He (the accused) threatened to cut my throat if I screamed" (R. 104-106).

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Oscar M. Storseth, recalled as a witness by the defense denied ever having been convicted of crime. An offer in evidence of records of the Police Justice Court of Deer Park, Washington, certified as true and correct copies of the docket of the "Police Court of the Town of Deer Park" by "G.H. Rice, Notary Public residing in Deer Park" was denied (R. 107, 108).

By stipulation, however, these records were later admitted in evidence (R. 114; Def. Exs. E, F, and G). They indicate, respectively, a finding of guilty by the Police Judge, on 23 January 1935, of "forcing entrance into Adolph Steinmetz's home and was party of the assault"; a finding of guilty by the Police Judge on 5 September 1939 of "breaking lock on tool house at the Fair Grounds"; and a plea of guilty on the same date of "being intoxicated on the streets of Deer Park". The sentence was suspended on promise of good behavior in the first case; he was fined \$5.00, costs of \$1.50 and 10 days in jail, suspended, in the second case; and was fined \$2.00 and costs of \$1.50 in the third case. Mr. Storseth on examination by the court reiterated his former statements that he had never before seen the accused until he came into the Storseth room in the Reno Hotel, had not seen him outside of the Garni Bar, and if he had he would not have left his wife alone (R. 109).

Mrs. Bernadine Baldwin, 17 years of age, residing with her grandmother, Mrs. Christesen, in the Reno Hotel, was present on the night of 17 June 1944 when Mrs. Storseth came to Mrs. Christensen's room. She testified that Mrs. Storseth walked in the door and said "Call the police. There is a nigger in my room". Thereupon her grandmother called the police and as they then started down the hall she added; "He tried to rape me". When they got to the door of the Storseth apartment the "nigger started to come out and she (Mrs. Storseth) shoved him back in the room, and said to her husband; 'This is the nigger that raped your wife' and she pushed him in and she said 'Keep him there, the police will be up in a minute'". In answer to questions by the court Mrs. Baldwin said Mrs. Storseth appeared to have been drinking and staggered as she returned to her room (R. 111, 112). Upon cross-examination Mrs. Baldwin described Mrs. Storseth's physical condition otherwise. She said her eye was swollen and her nose was bleeding. She also stated that she did not go down the hall with her grandmother and Mrs. Storseth but she could see and hear plainly from where she stood outside of the door of her grandmother's apartment (R. 113, 114).

5. In rebuttal the prosecution called Private First Class Lafayette Smith, cook for the 435th Aviation Squadron, who testified that, although he had been with a companion by the name of John Washington, another cook, and they had seen the accused in a "beer

parlor" between 10:30 or 10:45 p.m. on 17 June 1944 and again sometime between 11 and 12 p.m., he had not drunk any beer with the accused nor did the accused buy them any. On neither occasion did the accused mention that "he wanted to go out and have a little sport with a woman", nor did he show any money nor say anything about his watch (R. 117-120).

Lawrence Watson, bartender at the Garni Bar, testified that he knows Mr. and Mrs. Storseth and saw them in the Garni Bar on the evening of 17 June 1944 between 10 and 11 o'clock. He did not, however, see the accused nor any other "colored boys" there on that night; in fact, the Garni Bar does not cater to colored trade and colored people rarely come into the bar. He started to work at 4:00 p.m. and was on duty until midnight with another bartender. Mr. and Mrs. Storseth were not intoxicated on that night, in his opinion, and he had never seen them under the influence of liquor on any other occasion (R. 120-122).

Captain Vernon W. Moritz, Air Corps, the investigating officer, testified that before interrogating the accused and obtaining a statement from him he warned him of his rights, whereupon the accused made a statement, and after it had been typed Captain Moritz read it to him; he was asked if it was correct to which he replied in the affirmative; and he then signed it, raised his right hand and swore to the truth of it (R. 131-133). Technical Sergeant George F. Snyder, recalled as a witness by the defense, testified that at about 3:15 a.m. on 18 June 1944, after warning the accused of his rights, he had a conversation with him (R. 123, 126, 128). The accused then told Sergeant Snyder the story he had told the police but admitted "that story was a lie" (R. 126-128). In this first story he stated he had lost his wallet in the Storseth room but admitted later that was untrue. The accused then proceeded to tell Sergeant Snyder "the truth" (R. 127). He stated that "on the night of 17 June he entered the Reno Hotel, walked up the steps, looked around in the hallway, saw an open door and walked in" and that "no one asked (him) in this room". "He got in bed with this lady, took his pants down and started in". "He * * * had left his shoes on but * * * he had taken his raincoat off and laid it on the bed. This woman then said * * * 'You are not my husband' and calling him a name". Sergeant Snyder had then asked the accused whether he had struck the woman, to which he replied "Yes." When asked how hard he hit the lady the accused said "he was aiming to hit her pretty hard". He also told of hearing Mr. Storseth knocking on the door, calling to his wife who did not answer and of going over to the window, looking out but deciding "it was too high to jump". The accused then stated he had looked for another door but could not find one. When the knocking continued the accused had held his foot against the door so it could not be opened. The accused further stated that he had lost no money in the room, because he only had 58¢ when he went there (R. 125, 126).

6. After the defense had rested, and the court had reconvened after adjournment, the defense was permitted to call Mr. Earl Knapp, a former cook and dishwasher but now unemployed and confined to his room in the Reno Hotel because of diabetes. He testified that sometime at about 10, 11 or 12 o'clock on a night (he thought it was Thursday), in a week which he could not recall and a month which he first called "this month" and then "last month", he saw Mr. and Mrs. Storseth accompanied by a negro whom he could not identify come up the stairs of the Reno Hotel. He was observing them from his room, #15, about 45 or 50 feet away. The three persons entered room #3, Mrs. Storseth going first followed next by the negro and then by Mr. Storseth. He remained looking toward Room #3 for a few minutes but saw nothing further. About a half hour later he "heard an awful pounding on the door". He went out in the hallway again and found Mrs. Storseth pounding with both hands on the landlady's door. She "seemed a little hurt" and "she had a black eye" (R. 138-140).

On cross-examination he stated that none of the three who entered Room 3 appeared to be drunk. He then said he reported the matter to Mrs. Baldwin (the landlady's granddaughter) that night around 11 or 12 o'clock but she had said he must be mistaken (R. 142). Later he stated that he had never told her and "there is a mistake there". He then said that two days before the trial he had told the story to "the fellow that followed them up" explaining that he meant a man who roomed across the hall from him and who had come upstairs "a little while after they came up" (R. 143, 144). When asked whether he had ever told anyone else the story he answered "Not until a few days ago. I told this fellow across the hallway from me. And me and the landlady was talking and he mentioned me seeing them come in there". He then stated that this incident occurred on the night before the trial and he thought he had been subpoenaed because the landlady "mist have done it" although he had told her he "didn't want to get mixed up in it". But, as he said, "Of course, I had told it then and I might as well stick with it". He had told the landlady he "didn't want to take the stand and didn't want to swear" because he had "no use for a colored man to tell the truth of it" (R. 144, 145).

Later in the cross-examination he stated that while he did not see Mr. Storseth come out of the room he did meet him in the hall afterward proceeding toward the room of Mrs. Vernon (who had charge of the Storseth baby that night) and then going out the back way (R. 145) and repeated and enlarged upon the testimony he had given regarding the entrance of Mr. and Mrs. Storseth and the negro into Room 3 (R. 146-150).

7. The testimony thus adduced presents two conflicting and irreconcilable views regarding the episode which transpired on the night of 17 June 1944 in the humble, one-room "apartment" which Mr. and Mrs. Storseth occupied with their infant child.

Mrs. Storseth testified that upon returning to their room on the second floor of an apartment hotel after a few hours of recreation, she and her husband parted momentarily. She entered the room intending to prepare the baby's bed while her husband walked down the hall to the room of a woman in whose care the baby had been left for the evening. She had turned on the light and had just removed her coat when she noticed a negro whom she had never seen before enter the open door, which he closed, snapping the spring lock. Without further ado the intruder, who was the accused, struck her once on the left eye and again on the nose and mouth. The blows were severe enough to blacken the eye and cause it to swell and to bring about profuse bleeding from the nose. She, thereupon, called him a "black bastard son-of-a-bitch" and ordered him to get out. Nevertheless, he threw her upon the bed, smothered her head with a pillow and succeeded in having sexual intercourse with her after threatening to cut her throat if she screamed. During the act Mr. Storseth, who had found the baby asleep and decided not to disturb it, returned and knocked on the door calling to Mrs. Storseth by name. Although she heard him she was unable to answer. After the rape was completed the accused left and Mrs. Storseth went to the room of the landlady and reported the incident.

Meanwhile Mr. Storseth had returned to find the room empty but in great disorder and he was followed by the accused who entered and claimed to have been "nipped" of his wallet and watch. Mr. Storseth, likewise, had never before seen this man and was astonished by the situation until Mrs. Storseth and the landlady appeared on the scene just as the accused was about to leave, whereupon, Mrs. Storseth shoved him back into the room shouting to her husband that he should hold him until the police arrived because he had raped her.

The accused, on the other hand, told conflicting stories, none of which admitted sexual relation with Mrs. Storseth but all of which did admit his presence, alone, in the apartment room with Mrs. Storseth on the night in question.

Although the instrument was not in evidence it was shown that shortly after the commission of the crime the accused, after proper warning, made a sworn statement to the investigating officer which he signed. Later, after proper warning, he gave two conflicting stories to an investigating, noncommissioned officer of the Provost Marshal's office. The first of these, according to the accused, was, in substance, the same as what he had told the investigating

officer; but he then repudiated certain damaging portions thereof and made the second statement to the noncommissioned officer. At the trial, in his testimony under oath he reiterated his claim that his first statements were untrue in some respects and reaffirmed most of what he had told the noncommissioned officer.

According to the accused's sworn testimony he was sitting in the Garni Bar drinking with a couple of soldiers on the night of 17 June 1944. Mrs. Storseth and her husband were also in the bar and, although he had never seen them before, he followed them as they went out and, accosting Mr. Storseth asked him where he could get a "little sport". Upon Mr. Storseth answering "follow me", he did so to the top of the steps in the Reno Hotel. There he directly asked Mr. Storseth "How much does it cost", and was told "\$5.00". He had \$2.00 with him. As the door to the Storseth room was open, the accused entered forthwith as Mr. Storseth went down the hallway. Mrs. Storseth was lying on the bed in the dark room. After a discussion as to the price he admitted hitting her twice and then leaving, after which he met two soldiers, one of whom was Lafayette Smith, the cook of his squadron. He said he purchased beer for them and then, discovering that he had lost his watch from the strap and case on his wrist he returned to the Storseth apartment to look for it where he found Mr. and Mrs. Storseth together and was then detained by Mr. Storseth until the police came.

While such a situation as the accused portrayed is not an impossible one it is, to say the least, highly improbable that a negro would openly and on a public street accost a white man accompanied by his wife, neither of whom he had ever seen before, and ask where he might "get a little sport". It is even less credible that arrangements for sexual relations with the woman at a price, would be as blandly discussed and arranged and as crudely executed as the accused testified. Indeed, it is far more likely that the tale which the accused first told after his apprehension was the truth. In the statement made to Sergeant Snyder he admitted entering the Reno Hotel, walking up the stairs, looking around the hallway and entering an open door without invitation from anyone. He then said he "got in bed with this lady, took his pants down, and started in". When the woman said "You are not my husband" and called him "a name" he struck her twice, "aiming to hit her pretty hard", and when Mr. Storseth returned and knocked on the door, he went to the window, looked out and finding it too high to jump looked for another door. Finally he put his foot against the hall door so that it could not be opened. He further admitted that he had lost no money in the room because he had only 58¢ when he went there.

In a case of this kind, it is not the function of the Board of Review, in passing upon the legal sufficiency of the record, to weigh evidence, judge of the credibility of witnesses, or determine controverted questions of fact. The law gives to the court-martial and the reviewing authority, exclusively, this function of weighing the evidence and determining what facts are proved thereby. Therefore, if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the Board of Review and The Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider, as established, such facts as are inconsistent with the findings, even though there be uncontradicted evidence of such facts (C.M. 152797; p. 216 M.C.M. 1928).

Even though this is so, attention is invited to the fact that the attempt to impeach the credibility of Mrs. Storseth failed of its purpose under appropriate rulings of the court. The evidence offered by the defense on the question of her chastity was properly excluded inasmuch as the accused specifically denied the act of sexual intercourse (Sec. 676 (621) Underhills Criminal Evidence, 4th Edition). So also, an offer on the part of the defense to show an order of the Superior Court of Osotin County, Washington, touching the welfare of some of the Storseth children, and an offer to introduce the file and record of the Social Security Department of the State of Washington regarding Mr. and Mrs. Storseth in order to establish their reputations for truth and veracity were properly denied.

On the other hand, testimony of the accused was positively rebutted by a number of disinterested witnesses. Thus, the bartender at the Garni Bar, where accused said he saw Mr. and Mrs. Storseth, denied ever seeing the accused in his place of business and Lafayette Smith, for whom the accused said he bought beer after the rape, denied his doing so. So also, the investigating officer testified that the accused held up his hand and was sworn before signing the statement he had made although the accused, under oath at the trial, denied that he was sworn.

Considerable confusion was interjected by allowing the defense, after the case had been closed and the court had adjourned under the agreement to hear argument of counsel the next day, to offer a surprise witness. Inasmuch as his testimony was vague and, in many respects contradictory, and wholly at variance with testimony of both the prosecution and the defense on the issue of who entered the Storseth room before the rape and how and when the entry was made, the court was fully justified in rejecting it.

Rape is the unlawful carnal knowledge of a woman by force and without her consent (par. 148b, M.C.M. 1928). There is sufficient evidence to prove that the accused did have complete sexual intercourse with Mrs. Storseth. She said that he made a sexual penetration and a medical officer who examined her within a short while after the rape testified that he found spermatazoa in a smear

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of her vaginal contents. This indicated to him that she had sexual intercourse during the previous twenty-four hours. Since she testified she had no sexual relations with anyone during the three days immediately prior to the rape, except that forced upon her by the accused, this evidence is strongly persuasive in corroboration of her testimony regarding the accused's copulation with her.

On the issue of consent mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent (par. 148b, M.C.M. 1928). In this case there is evidence that there was far more than mere verbal protestation and pretense of resistance. Mrs. Storseth testified that she was suddenly accosted by a strange negro who had come, uninvited, into her room while she was preparing to fix her baby's bed for the night. She was alone, for the time, because her husband had gone to another part of the hotel to get the child which had been in the custody of a friend. Without warning she was hit in the eye and upon the nose and mouth by the accused as soon as he had entered. Several witnesses corroborated her statement that her eye was swollen and her face was bleeding soon after the attack and two photographs of her taken on 19 June 1944 plainly show her physical injuries. She also said that she was forcibly thrown upon the bed and suffocated with a pillow and that when she attempted resistance she was told by the accused that he would cut her throat if she screamed. When the will to resist is paralyzed by a well-founded fear of grievous injury or death there can be no implication of consent from the failure to persist in a resistance which might prove not only useless but dangerous as well.

The record of trial contains ample evidence, in the opinion of the Board of Review, to support the finding of guilty.

8. Careful consideration has been given by the Board to a brief submitted by Thurgood Marshall, Special Counsel for the National Association for the Advancement of Colored People Legal Defense and Educational Fund, Incorporated.

9. The charge sheet discloses that the accused was 18 years and 8 months of age when the charge was preferred. He was inducted at Fort Myer, Virginia, on 2 December 1943 and has had no prior service.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial

is legally sufficient to support the findings and the sentence. A sentence of death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2801, Title 22, Code of the District of Columbia.

William H. Lambell, Judge Advocate.

Herbert B. Redman, Judge Advocate.

John R. Anderson, Judge Advocate.



WAR DEPARTMENT
Army Service Forces

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In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 260624

18 SEP 1944

U N I T E D S T A T E S	)	13TH AIRBORNE DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Mackall, North Carolina,
Private HOMER RICHMOND	)	12 July 1944. Dishonorable
(35204495), Headquarters	)	discharge and confinement for
Company, 13th Airborne	)	life. Penitentiary.
Division.)	

REVIEW by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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: Violation of the 92nd Article of War.

Specification: In that Private Homer (NMI) Richmond, Headquarters Company, 13th Airborne Division, did, at Camp Mackall, North Carolina, on or about 30 May 1944 forcibly and feloniously, against her will, have carnal knowledge of Miss Dorothy Bowman.

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

Specification: In that Private Homer (NMI) Richmond, Headquarters Company, 13th Airborne Division, did, without proper leave, absent himself from his duties at the 13th Airborne Division Stockade at Camp Mackall, North Carolina, from about 14 June 1944 to about 16 June 1944.

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

Specification: In that Private Homer (NMI) Richmond, Headquarters Company, 13th Airborne Division, having been duly placed in confinement at the 13th Airborne Division Stockade, Camp Mackall, North Carolina, on or about 30 May 1944, did, at Camp Mackall, North Carolina, on or about 14 June 1944, escape from said confinement before he was set at liberty by proper authority.

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ADDITIONAL CHARGE III: Violation of the 93rd Article of War.
(Finding of not guilty).

Specification: . (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications and was found guilty of the Charge and its Specification and of Additional Charges I and II and their Specifications. He was found not guilty of Additional Charge III and its Specification. Evidence of one previous conviction was introduced at the trial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution, in pertinent part, briefly summarized, is as follows:

The Specification of the Original Charge:

On the evening of 29 May 1944 at about 8 o'clock, Private First Class Mack W. Cartwright, Military Police Platoon, 13th Airborne Division, the accused and Technician 4th Grade Thomas W. Shafer, both members of Headquarters Company, 13th Airborne Division, were riding in Shafer's car in the southern area of Camp Mackall, North Carolina toward Guest House No. 2 when they passed a girl walking along the road in the same direction. The girl was a stranger to them, but was later known to be Miss Dorothy Bowman who had come to visit her brother and sister-in-law at the camp and, perhaps, find employment. Some one of the group called to her and asked if she wanted a ride and when she nodded her head affirmatively they backed up to where she was standing. She then got into the car, a 1940 model Chevrolet, two-door sedan, sitting alone on the rear seat after saying that she was only going to the Guest House which was about a quarter of a mile away. When they arrived at the corner opposite the Guest House she got out, followed by Pfc. Cartwright and the accused. There was some conversation about swimming and Pfc. Cartwright made a dinner engagement for the next day. They then parted (R. 8, 9, 14, 15, 19, 20, 25, 32, 33).

At about 9 o'clock on the same evening the accused, in company with T/4 Shafer and Pfc. Cartwright attended a service club dance in the northern area of the camp. Miss Bowman also attended, accompanied by a sergeant named "Wiggins" or "Wigginson". (R. 9, 20, 33). The sergeant was a "jitterbug" and Miss Bowman was not, so that during the evening Pfc. Cartwright cut in on them a good deal and Miss Bowman did most of her dancing with him.

During the course of the evening Cartwright urged her to go home with him and his friends, Shafer and the accused, who were quartered just across the street from her lodgings. So it was that, when, at about 10:30 p.m., the sergeant who had escorted her to the dance decided to go home, she decided to stay and go home with the others (R. 20, 21, 33, 34).

Sometime between 11:45 p.m. and midnight the dance broke up and Miss Bowman left in company with the three soldiers with whom she had previously ridden for the first time at 8:00 p.m.. Shafer and the accused got into the front seat and Cartwright and Miss Bowman sat in the back, Miss Bowman sitting behind Shafer, who was driving. Soon thereafter, Miss Bowman said she was thirsty and since there were three bottles of beer in the car Cartwright gave one to her, one to Shafer and he and the accused shared the third. Miss Bowman said, however, that she took only a couple of sips from her bottle and then gave it to Cartwright who finished it (R. 10, 15, 21, 34).

The conversation drifted to swimming and it was decided to drive to Muddy Lake to show Miss Bowman where the local swimming was done. When they arrived there Shafer "pulled off of the black top road in front of the road that . . . leads out into the water". The accused and Shafer after tuning the radio, got out of the car and went down to the lake where they remained for a period of between five and ten minutes (R. 11, 22, 26). Miss Bowman had suggested that she and Cartwright go along but Cartwright had refused and they remained in the car (R. 27, 35). After the others had gone Miss Bowman and Cartwright indulged in little pleasantries during which he tickled or scratched her back and tried to kiss her but, upon her demurring, merely "brushed her cheek" (R. 27, 28, 35).

In about ten minutes Shafer and the accused returned to the car but again left the others, walking a distance of about 140 feet away from the car for another ten minute period. When they again returned they stopped at a point about 25 or 30 feet from the car, the accused telling Shafer that he was going to tell Cartwright that he (Shafer) wanted to see him. Whereupon he continued on to the car alone (R. 11). The accused then told Cartwright "the sergeant wanted to see him" and Cartwright got out of the car and went over to Shafer while Richmond got in with Miss Bowman (R. 11, 12, 22). Shafer had not asked the accused to tell Cartwright he wanted to see him (R. 11, 12).

Miss Bowman testified that about five minutes after the accused and Shafer had come back to the car from the lake and had gone away again, the accused returned and as Cartwright got out of the car he got in (R. 36). When he had done so his first words were "I am here to get a little loving and I am going to get it". Miss Bowman "immediately sensed trouble" and said "Oh! You have me all wrong". Notwithstanding, and without "any preliminaries" or "love making of any kind" the accused engaged in a struggle with Miss Bowman. She "knew he was going to rape" her so she started screaming but he said that if she made

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any noise he would kill her. He hit her on the left side of her jaw, causing a decided bruise there for "way over a week" and tried to knock her out. She testified that " * * * he said that he was going to kill me and he tried to strangle me and he put his hands up here (indicating the region of the throat) and he started choking me to death, and I can remember feeling that I was going to die * * * " (R. 37). Her attempts to scream were unavailing for, as she said: "I can remember thinking how futile it all was because I used all my strength and nothing hardly came out" (R. 38). She was never in a stationary position being either pushed to the floor or pulling herself up again so that she was "always half sitting down and half on the floor". The accused was constantly pinning her down with his body "half on top" of her. Again he threatened to kill her if "he didn't get what he wanted". "And I remember him opening his pants and - er I believe he did. And I got half free and I can remember grabbing hold of it and trying to push it, squeeze it or ruin it or do something to it. And I can remember the next thing he had one leg in between my legs and he was pinning me down - and I - er I realized -- er it was going in me". There was a complete penetration and the intercourse lasted about a minute. Miss Bowman said that it was "definitely, decidedly and without a question of a doubt" against her will and that she would not even have allowed the accused to kiss her.

The next thing she knew she was free and she jumped out of the car crying and half-hysterical. She feared that all three of the men were "in league" but ran down the road to Cartwright, sobbing and crying, because she did not know what to do as it was dark and there were no houses around. She stated that Cartwright was "hardly far at all" from the car at the time (R. 37, 38). She asked Cartwright "Are you going to kill me too?" and when he said "No, what is the matter?" she told him the accused tried to kill her. Cartwright tried to soothe and calm her, took her back to the car and got in with her. Cartwright asked the accused "My God! What did you do to this girl?" to which he answered: "Nothing". Miss Bowman then discovered that she was "all wet" when she sat down and told Cartwright about it. She also exclaimed "I am going to have a baby, what will I ever do?" and Cartwright and Shafer said "Oh, what a mess of trouble this is going to be. We had better stop and calm her down or we will be getting into trouble. We had better do something, maybe she will tell her brother". Nevertheless they took her directly home. When they arrived at the Guest House she "jumped out of the car and tore up to the Guest House and knocked on the door of (her) brother and his wife's room" (R. 39).

As soon as they let her in she went to pieces screaming "He tried to kill me and maybe he is going to kill me now" and then she told the story of her experience. Her sister-in-law assisted her in taking a douche and then put her to bed shortly after which a doctor arrived and made a physical examination of her (R. 39, 40).

On cross-examination Miss Bowman stated that she was 27 years of age and employed as a stenographer in New York City. She had come to

Camp Mackall both to visit her brother and sister-in-law and to look for a job. She stated that she was "used to blind dates * * * and going to dances with girls and meeting fellows" as that was the only way she could meet them. She admitted that she made no physical attempt to leave the car on the night of the assault. She did not think there was anything wrong when Shafer and the accused got out of the car and left her alone with Cartwright because Cartwright had been with her most of the evening and "his nature wasn't the kind that would give (her) any indication or suspicion that anything could be wrong * * *". She was impressed, however, by the fact that later Cartwright got out and the accused got into the car at that time and as soon as the accused was in the car the struggle started at once. She was wearing a skirt, a thin blouse and a brassiere but no panties at the time. The blouse was ripped at the throat during the encounter. She testified that she attempted to scratch the accused, kick him and hit him, her arms and feet being in motion constantly, struggling with all her strength, but she was no match for him. She felt "it was a struggle for (her) life" (R. 40-53).

Sergeant Shafer testified that the accused remained in the car with Miss Bowman about ten to fifteen minutes (R. 12), and after Cartwright joined Shafer they walked up the road to the end of the lake about 250 to 300 feet from the car and he heard nothing at all unusual coming from the direction of the automobile during this period (R. 16). When Shafer and Cartwright returned to the car the accused got out first followed by Miss Bowman. She was crying hysterically at the time. She ran over to Cartwright and talked with him while Shafer turned off the radio (R. 12). Thereafter Shafer and the accused got into the front seat and Cartwright and Miss Bowman in the back. She "was still crying at that time but just sobbing a little bit" (R. 13). On cross-examination he stated that when Miss Bowman got out of the car and ran over to Cartwright "she was saying something about wanting to know whether she was going to have a baby". He noticed nothing unusual about the appearance of either the accused or Miss Bowman, except her crying (R. 18).

Cartwright stated that he got out of the car where he had been sitting with Miss Bowman when the accused came up and told him Shafer wanted to see him. The accused then got into the car with Miss Bowman (R. 22). Shafer was standing in back of the car and both then walked away "a distance of about fifty feet where they conversed for a period of five to ten minutes (R. 23, 24, 28). By this time the accused got out of the car and said "Let's go" and as Cartwright and Shafer approached the car Miss Bowman had gotten out of the car and approached Cartwright, caught hold of him and started crying "pretty soft at first then she got a little bit louder" (R. 24, 29). She told Cartwright that the accused had "mistreated" her (R. 25). They then got into the car where she continued to cry intermittently and say "that she was going to have a baby" (R. 24). At one time Cartwright got up to say something to the accused but Miss Bowman restrained him. He did ask the accused what he did to which he replied "Nothing" and "not to baby her, that she was just baby-ish" (R. 25).

Upon cross-examination Cartwright said he heard no sounds coming from the car while he was with Shafer (R. 28); nor was the radio playing at this time insofar as he could recall (R. 28, 31). He further stated that he saw nothing unusual about the condition of Miss Bowman's clothes or about the accused (R. 30).

Upon her arrival at the Guest House at about 1:00 a.m. Miss Bowman's brother and sister-in-law were in bed but were aroused by the sound of someone crying. When Private David L. Bowman, the brother, got up he saw his sister crying as she ran up the walk away from Cartwright. He let her in and when he turned on the light found her in a very hysterical condition. He had "never seen a person in that state before. She just seemed to be almost crazy. She was screaming and crying and her face was drawn taut and she was doubled, she would run over in the corner and double over and try to tell (him) something and finally she blurted out * * * 'Davey he hit me, he hit me, he tried to knock me out, he tried to knock me out' * * *". Her clothing was twisted, and she had wet spots in the back of her dress. Her general appearance was disheveled. He was, however, not present at the examination made a short time later by the doctor but when Miss Bowman left Camp Mackall almost a week later the bruise on her jaw was still visible and he had seen the bruises on her leg and heard her complain of the pain in her neck (R. 54, 55).

Mrs. Bowman, the sister-in-law, corroborated much of what Miss Bowman had said. She said Miss Bowman's "skirt was all wrinkled and her blouse was all out and her hair was all tangled and her face was just drawn and she just looked so miserable". Miss Bowman said: "He tried to kill me, he tried to kill me" yelling that the accused had choked her (R. 67). When the doctor came Mrs. Bowman witnessed the examination and saw "a horrible bruise on her leg and . . . also in her vagina, which the doctor pointed out to me, and as definite proof, she screamed as he would touch the place". There was also a bruise on Miss Bowman's jaw which became swollen. Mrs. Bowman also saw wet stains on Miss Bowman's under-skirt and skirt.

Captain Floyd Katske, Medical Corps, the doctor who was summoned by the Bowmans, made an examination of Miss Bowman at the Guest House at about 2:00 a.m. following her return with Cartwright and his friends. He found that she "had an abrasion over her left shoulder, and an ecchymosis on the inner surface of her left thigh * * * and a small abrasion in the region of her pubic hairs". She complained of tenderness around the jaw and she was obviously nervously upset, very emotionally unstable, almost to the point of hysteria. She was crying and mentioned her fear of becoming pregnant. He also found a crusted, glary, colorless material among the pubic hairs and in the vagina. This material which had the characteristic odor of semen was likewise found upon her slip. He took smears of her vaginal contents and delivered them personally to Lieutenant Sell at the Station Hospital laboratory (R. 57, 58). These smears were

found to contain human spermatozoa (R. 64, 65). At 4:30 p.m. he made a more thorough examination of Miss Bowman, using a speculum. On this occasion he found a purulent, white discharge in her vagina. He also then noticed a linear area three or four inches long showing a contusion of her jaw. In explanation of his failure to notice the contusion of the jaw on his first examination and in answer to the question:

"* * * * Would it have been possible that those bruises could have been so inconspicuous the first time as to make it reasonable that you would overlook them and be obvious the next examination * * *?"

He answered:

"The force that might have caused those bruises, if that force had been applied within a very recent period there might not be any external evidence at the time - at the time of my first examination" (R. 60).

There were similar areas along the inner portion of both thighs. All of these bruises were "very young" from 6 hours to a day old (R. 58). Captain Katske expressed the opinion that there had been a sexual penetration of Miss Bowman's private parts within 24 hours prior to his examination (R. 59).

Captain Katske also examined the accused and his clothing at 3 a.m. on the same day. He found no evidence of injury to or abrasions on the penis nor was there any indication of seminal fluid on his person at that time. There were likewise no signs of injuries, abrasions or cuts on any other part of his body. He made the accused "strip down" his penis and thus obtained a small quantity of white, glary, colorless discharge from which he made smears which he delivered to Lieutenant Sell at the laboratory (R. 97, 98). No spermatozoa were found in these smears (R. 65).

Evidence was introduced to show that Lieutenant Colonel Greathouse, Inspector General's Department, had obtained specimens of upholstery taken from the rear seat of Sergeant Shafer's car, placed them in envelopes and marked them as exhibits (R. 70-71). These were examined by a member of the Federal Bureau of Investigation and several were found to contain seminal stains containing spermatozoa (R. 74).

The accused's trousers worn on the night in question were identified by Major Metcalf, the investigating officer and the FBI specialist who made a laboratory analysis of spots appearing on them. These spots were found to be seminal stains (R. 75, 77).

The accused made three statements after his arrest. The first was made to First Lieutenant Frederick B. Kupferer, commanding the accused's company in the absence of senior officers. On 30 May 1944 he went to the stockade to discuss with the accused "what charges would be preferred against him on the allegation of Miss Bowman". After proper warning

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the accused in his own words admitted that on the night of 29 May he had been with Shafer, Cartwright and Miss Bowman at Muddy Lake where he had arranged to tell Cartwright, who was alone in the automobile with Miss Bowman, that Shafer wanted to see him. Cartwright then left and the accused got into the car. He made advances to Miss Bowman and tried to embrace her, telling her he "wanted to get a piece". She knocked his arm from her shoulder and "sort of sidled away" but he again said "he was after it, that he wanted a piece of ass" but she refused, offering, however, to masturbate him, which he refused. A few minutes went by and Shafer and Cartwright came back to the car whereupon Miss Bowman got out of the car, walked over to Cartwright, began to sob and cry on his shoulder asking Cartwright "was she going to have a baby" (R. 80-82).

The second statement was made to Second Lieutenant George M. Purdey, Military Police Platoon, 13th Airborne Division, who, in the performance of his official duties was investigating the reason for the accused's detention at the stockade. On the morning of 31 May 1944 he had a conversation with the accused who, after proper warning, again admitted his presence, alone, with Miss Bowman on the night in question, that he made advances to her which were repulsed and her offer to masturbate him and his refusal (R. 78-80).

The third was made to Major George T. Metcalf, the investigating officer on or about 13 June 1944. On that occasion the accused, upon being shown a pair of trousers, admitted they were his and were worn by him on the night of 29 May 1944 (R. 76-77).

The Specifications of Additional Charges I and II:

A duly certified extract copy of the morning report of the 13th Airborne Division Stockade, Camp Mackall, North Carolina, dated 30 May 1944, and showing the accused confined in the stockade at 4:00 a.m. on said date, was admitted in evidence without objection (R. 82; Pros. Ex. 3). It was then shown, by the testimony of Sergeant M. G. Smart, on special duty with the Military Police as Provost Sergeant at the stockade in Camp Mackall, that, on 14 June 1944, he assigned the accused and two other prisoners to a work detail under a guard by the name of Pemberton (R. 82, 83). Private Raymond Pemberton testified that he was the guard to whom accused was assigned and that, while on the work detail he was overpowered and disarmed by the three prisoners. He could not identify the prisoner who assaulted him or the one who took the rifle but the latter pointed the gun at his head and threatened to shoot him if he did not remove his clothes (R. 84, 86, 93). Private John Smith, one of the three prisoners, testified that he was the one who struck Pemberton, the guard, and that the accused is the one who took the rifle (R. 88).

A duly certified extract copy of the morning report of 13th Airborne Division Stockade dated 14 June 1944 containing an entry showing the escape of the accused and two other prisoners from the stockade at

10 a.m., 14 June 1944 was admitted in evidence without objection (R. 95; Pros. Ex. 4). Corporal David J. Conner, Military Police Platoon, 13th Airborne Division, accompanied by Lieutenant Wade, proceeded from Raeford, North Carolina at 10 o'clock a.m. on 16 June 1944 to a point five miles out on the Fayetteville road where, after stalking three men in blue denims in and about a pine grove, they finally apprehended the accused and his companions. The rifle of the guard Pemberton was found in a bush from which the prisoners had emerged (R. 95, 96).

A duly certified extract copy of the morning report of the 13th Airborne Division stockade dated 16 June 1944 and showing the confinement in the stockade of the accused and two other prisoners at 12:15 p.m. on that date, was admitted in evidence without objection (R. 96; Pros. Ex. 5).

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

5. In order to lawfully convict the accused of the crime of rape as alleged in the Specification of the Charge it is required that proof beyond reasonable doubt be adduced by the prosecution that:

- (a) the accused had carnal knowledge of Miss Bowman, the woman named in the Specification, as alleged, and
- (b) that the act was done by force and without her consent. (par. 148b, MCM, 1928).

In order to prove the first essential element of the offense it is not necessary to show that an emission occurred as any penetration of a woman's genitals, however slight, is sufficient carnal knowledge. But proof of emission does tend strongly to prove penetration and penetration is an almost inescapable conclusion when human, male sperm is found within the vaginal cavity of the woman alleged to have been raped shortly after association with the man charged with assaulting her. So, in this case, where it is shown that the accused was in company alone with the woman, at the time when the assault occurred, and that very shortly thereafter a specimen of the contents of her vagina is shown to contain human spermatozoa, it is a fair inference that the accused deposited the semen in her vagina by penetrating it with his penis; and this inference is strengthened by the testimony of the woman who said that he did, in fact, penetrate her private organs. In addition, seminal stains were found, not only upon the upholstery of the automobile, where the accused and the woman were admittedly sitting, but also upon the trousers which the accused said he wore at the time. It was also shown by the accused's own admissions that he intended to have sexual intercourse with Miss Bowman when he got into the car with her. Thus, it is apparent that the court was fully justified in concluding that the accused did have sexual relations with Miss Bowman at the time and place alleged.

Whether this act constituted rape depends wholly upon whether it was without Miss Bowman's consent. While force is also a requisite, the force involved in the act of penetration alone is sufficient where there is, in fact, no consent.

Of course, mere verbal protestations and a pretense of resistance are not sufficient to show want of consent; for, when a woman fails to take such measures as she is able to and are called for by the circumstances in order to frustrate a man's design to have sexual relations with her, the inference may be drawn that she did, in fact, consent.

What then, are the circumstances disclosed by the evidence in this case? Of course, the weighing of the evidence to determine the credibility of Miss Bowman and as an aid in reaching a conclusion as to whether the sexual intercourse was with or without her consent was solely within the province of the court and the reviewing authority and, if the record of trial is now found to contain any evidence which, if true, is sufficient to support the findings of guilty, the Board of Review is not permitted to inquire into the effect which any or all of the circumstances shown may have had upon the result reached in an effort to substitute its judgment for that of the court. Had there been no proof of actual physical violence of the accused toward Miss Bowman the question of consent might have remained in the realm of reasonable doubt. But in the light of all the evidence, this doubt is resolved. It was shown that the accused got into the car with Miss Bowman after resorting to a ruse whereby he got rid of Cartwright. Then, without any of the preparatory preliminaries with which a mutually satisfactory sexual relation may be presumed to be ordinarily prefaced, he rudely and obscenely advised her of his intent. She said he commenced to struggle with her at once. He admitted that he tried to embrace her but was repulsed and that his crude request for intercourse was denied. Then, according to Miss Bowman's testimony, followed a constant struggle which started with a severe blow upon her jaw, physical evidence of which remained for over a week, an attempt to choke her, two specific threats to kill her if she screamed or made a sound and a continual effort on his part to overpower her by his strength countered by futile but constant efforts on her part to prevent him from doing so. While it is true that the medical officer stated that he had found no marks of physical violence upon Miss Bowman's throat, it is common knowledge that the trachea may be squeezed and the power of breathing impeded if not completely shut off by other methods than grasping the throat with bare hands. Numerous simple holds in wrestling accomplish the purpose by forcing the arm of the assailant against the throat of the victim by pressure which would not necessarily leave a surface mark of any kind. Miss Bowman said "he tried to strangle me and he put his hands up here (indicating the region of the throat) and he started choking me to death". It was solely within the province of the court to determine whether the accused attempted to strangle her as she stated he did even though no marks were found upon her throat later.

The extent and character of the resistance of a woman to establish her lack of consent depends upon the circumstances and the relative strength of the parties (52 C.J. 1019-1020; 44 Am. Jur. 905-906; C.M. 239356 Brown). Although even reluctant consent negatives rape, where the woman ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity) the consummated act is rape (1 Wharton's Criminal Law, 12th Edition p. 942; C.M. 236612 Tyree; C.M. 238172 Spear). (C.M. 240674, Rinke, 26 B.R. 91).

In this case the accused had carnal knowledge of Miss Bowman by force and without her consent. Failure on her part to actively resist by every means within her physical power to the very end of the contest of strength between her and her assailant was palpably due to a weakened will and fear of her life induced by the threats of the accused accompanied by actual physical violence. Even though the evidence could be so construed as to justify an implication of final consent (which is not admitted) such consent would not palliate the acts of the accused; for consent of the woman from fear of personal violence is void. Even though a man lay no hands on a woman, yet if by an array of physical force he overpowers her mind so that she dares not resist, or if she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape (44 Am. Jur. 910). In the opinion of the Board of Review the evidence sustains the findings of guilty of rape as alleged.

It is likewise clear, that the record of trial is legally sufficient to support the findings of guilty of Additional Charges I and II and the Specifications thereof. The evidence is clear that the accused was lawfully in confinement and after escaping from a guard by violent assault, he was absent until apprehended during the period alleged.

In this connection it should be noted that, upon proof of the corpus delicti, evidence of the conduct of the accused, who was in confinement awaiting trial for the crime of rape, was admissible to prove his consciousness of guilt of the offense with which he stood charged and proof of his escape was not only competent but clearly relevant evidence as to his guilt (Wharton's Criminal Evidence, 11th Edition, Sections 298, 307; 44 Am. Jur. 947).

6. The charge sheet shows the accused to be 24 years of age. He was inducted at Beckley, West Virginia, 14 April 1941. He has had no prior service.

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

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Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 2801, Title 22, Code of the District of Columbia.

(dissent), Judge Advocate.

Nestor B. Friedman, Judge Advocate.

John R. Anderson, Judge Advocate.

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

SPJGV
CM 260626

17 AUG 1944

U N I T E D S T A T E S	)	ARMORED CENTER
)	
v.	)	Trial by G.C.M., convened
	)	at Fort Knox, Kentucky,
First Lieutenant LESLIE M.	)	17 June 1944. Dismissal.
CARTER (O-455072), Infantry.)	

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

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

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

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

Specification 1: (Withdrawn by direction of appointing authority at inception of trial).

Specification 2: In that First Lieutenant Leslie M. Carter, Infantry, Service Company, 777th Tank Battalion, did, at Fort Knox, Kentucky, on or about 14 April 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

4-5	
FIRST NATIONAL BANK	No. _____
in St. Louis	

St. Louis, Mo., April 14 1944

Pay to the order of	Ft. Knox Officers Club	\$10.00
Ten and no/100		Dollars

O-422687 George P. Clayton

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

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Specification 3: Same allegations as Specification 2 except check was drawn on Citizens Union National Bank and bears the name "R. P. Alexander" as maker.

Specification 4: Same allegations as Specification 2 except check made on or about 15 April 1944, was drawn on Citizens Union National Bank and bears name of "N. C. Waters" as maker.

Specification 5: Same allegations as Specification 2 except check made on or about 15 April 1944, was drawn on Citizens Union National Bank and bears name of "George Knight" as maker.

Specification 6: Same allegations as Specification 2 except check made on or about 15 April 1944, was drawn on Citizens Union National Bank and bears name of "Hugh Garvin" as maker.

Specification 7: Same allegations as Specification 2 except check made on or about 15 April 1944, was drawn on Citizens Union National Bank and bears name of "M. R. Spillers" as maker.

Specification 8: Same allegations as Specification 2 except check made on or about 15 April 1944, and bears name of "Marvin Bedford" as maker.

Specification 9: Same allegations as Specification 2 except check made on or about 15 April 1944, and bears name of "Layton H. Humphries" as maker.

Specification 10: Same allegations as Specification 2 except check bears name of "H. P. Karen" as maker.

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

Specification 1: In that First Lieutenant Leslie M. Carter, Infantry, Service Company, 777th Tank Battalion, did, at Fort Knox, Kentucky, on or about 5 April 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine to Fort Knox Post Exchange a certain check in words and figures as follows, to wit:

THE CHASE NATIONAL BANK 1-74 3
of the City of New York
Grand Central Branch
Lexington Avenue at 43rd Street

No. _____ New York April 5 1944
 Pay to the order of L. M. Carter \$15.00
 Fifteen and 00/100 Dollars

L. P. Hughes

and bearing an endorsement, to wit:

L. M. Carter
 1st Lt. Inf.

a writing of a private nature which might operate to the prejudice of another, which check was, as he, the said Leslie M. Carter, then well knew, falsely made and forged, and by means thereof did fraudulently obtain from said Fort Knox Post Exchange the sum of \$15.00.

Specification 2: In that First Lieutenant Leslie M. Carter, Infantry, Service Company, 777th Tank Battalion, did, at Fort Knox, Kentucky, on or about 14 April 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine to Fort Knox Officers Club, RC-1 Branch, a certain check in words and figures as follows, to wit:

4-5
 FIRST NATIONAL BANK No. _____
 in St. Louis

St. Louis, Mo., April 14 1944

Pay to the order of Ft. Knox Officers Club \$10.00
 Ten and no/100 Dollars

0-422687 George P. Clayton

a writing of a private nature which might operate to the prejudice of another, which check was, as he, the said Leslie M. Carter, then well knew, falsely made and forged, and by means thereof did fraudulently obtain from said Fort Knox Officers Club, RC-1 Branch, the sum of \$10.00

Specification 3: Same allegations as Specification 2 except check drawn on Citizens Union National Bank, and bears name of "R. P. Alexander" as maker.

Specification 4: Same allegations as Specification 2 except check drawn on Citizens Union National Bank, uttered on or about 15 April 1944 and bears name of "N. C. Waters" as maker.

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Specification 5: Same allegations as Specification 2 except check drawn on Citizens Union National Bank, uttered on or about 15 April 1944 and bears name of "George Knight" as maker.

Specification 6: Same allegations as Specification 2 except check drawn on Citizens Union National Bank, uttered on or about 15 April 1944 and bears name of "Hugh Garvin" as maker.

Specification 7: Same allegations as Specification 2 except check drawn on Citizens Union National Bank, uttered on or about 15 April 1944 and bears name of "M. R. Spillers" as maker.

Specification 8: Same allegations as Specification 2 except check uttered on or about 15 April 1944 and bears name of "Marvin Bedford" as maker.

Specification 9: Same allegations as Specification 2 except check uttered on or about 15 April 1944 and bears name of "Layton H. Humphries" as maker.

Specification 10: Same allegations as Specification 2 except check bears name of "H. P. Karen" as maker.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for ten years. The reviewing authority approved the sentence, remitted the confinement for ten years and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence demonstrating that the checks identified below by exhibit numbers given them in these proceedings were presented to, and cashed by, the following establishments on 14 and 15 April 1944, and forwarded to the following drawee banks for payment (R. 22-26):

<u>Specification and Charge Covering Check</u>	<u>Maker's Name On Check</u>	<u>Exhibit No. Of Check</u>	<u>Check Cashed By</u>	<u>Check Drawn On</u>
Spec.1, Ch.II	L. P. Hughes	Ex. 11	Fort Knox Exchange	Chase National Bank, New York, N. Y.
Spec.2, Ch.I) Spec.2, Ch.II)	George P. Clayton	Ex. 2	ARTC Branch of Fort Knox Officers' Club	First National Bank, St. Louis, Mo.

<u>Specification and Charge Covering Check</u>	<u>Maker's Name On Check</u>	<u>Exhibit No. Of Check</u>	<u>Check Cashed By</u>	<u>Check Drawn On</u>
Spec.3, Ch.I) Spec.3, Ch.II)	R. P. Alexander	Ex.3	Fort Knox Officers' Club	Citizens Union National Bank, Louisville, Ky.
Spec.4, Ch.I) Spec.4, Ch.II)	N. C. Waters	Ex.4	Fort Knox Officers' Club	Citizens Union National Bank, Louisville, Ky.
Spec.5, Ch.I) Spec.5, Ch.II)	George Knight	Ex.5	Fort Knox Officers' Club	Citizens Union National Bank, Louisville, Ky.
Spec.6, Ch. I) Spec.6, Ch.II)	Hugh Garvin	Ex.6	Fort Knox Officers' Club	Citizens Union National Bank, Louisville, Ky.
Spec.7, Ch.I) Spec.7, Ch.II)	M. R. Spillers	Ex.7	Fort Knox Officers' Club	Citizens Union National Bank, Louisville, Ky.
Spec.8, Ch.I) Spec.8, Ch.II)	Marvin Bedford	Ex.8	Fort Knox Officers' Club	First National Bank, St. Louis, Mo.
Spec.9,Ch. I) Spec.9,Ch. II)	Layton H. Humphries	Ex.9	Fort Knox Officers' Club	First National Bank, St. Louis, Mo.
Spec.10,Ch.I) Spec.10,Ch.II)	H. P. Karen	Ex.10	Fort Knox Officers' Club	First National Bank, St. Louis, Mo.

It was stipulated by the prosecution, defense counsel and accused that there were no accounts maintained during the month of April 1944 in the above named drawee banks in the names of the persons who appeared as makers on the various checks drawn on these banks (R. 16).

On 2 May 1944, accused came to the office of Captain John I. Messmer, the investigating officer appointed in these proceedings, and paid him \$40 to be used to redeem four of these checks identified as Exhibits 2, 3, 4 and 5 (R. 21, 22). On 13 June 1944, accused called upon Miss Sabina Brown, manager of Fort Knox Officers' Club, and paid her a total of \$60 to redeem six of these checks, which were cashed by the club and which are identified as Exhibits 6, 7, 8, 9, 10 and 11 (R. 26, 27; Def. Ex. A).

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Sometime shortly before 26 April 1944, Captain Messmer questioned accused and a Lieutenant Dessenberger concerning two unidentified checks of which he had photostatic copies and they readily admitted writing them. On 26 April 1944 accused voluntarily returned to Captain Messmer's office, told him he had issued other checks and wished to repair the damage occasioned thereby and, after being fully advised of his rights under Article of War 24, he made a full and free confession (R. 16, 17, 21; Ex. 1). He confessed that he wrote all of the checks identified as Exhibits 2-10 inclusive, inserting a fictitious name as the maker of each check and that, on or about the dates shown on each respective check, he cashed them at the Fort Knox Officers' Club, RG-1, obtaining the face amounts thereof. He also confessed that he cashed the check identified as Exhibit 11 at the Fort Knox Post Exchange on or about the date shown on the check, knowing that it was a forged check although he did not write it, and received the face amount thereof. Accused endorsed this last check and used the artifice of a fictitious maker to obtain funds temporarily although he knew that as endorser he would be compelled to redeem it after dishonor. He stated it was his intention to pay all these checks before they progressed through collection channels but that, although he had no intention of defrauding anybody, he became so deeply involved that he found it impossible to extricate himself. He apparently had lost some \$30 or \$40 playing slot machines and cashed all of these checks to finance efforts to recoup his losses. All but some \$4 or \$5 of the money obtained on these worthless checks was consumed by these gambling devices (Ex. 1).

4. The accused elected to remain silent. Major David T. Zweibel, Executive Officer of accused's battalion, testified that accused had been platoon leader of a service company for approximately eight months, that he was a capable officer able to carry out any mission assigned to him and that he had never given the major cause to mistrust him. The major indicated his willingness to have accused as a member of his command overseas (R. 28, 29).

5. Accused is charged in Specifications 2-10, inclusive, of Charge I with forgery of nine separate checks each bearing a fictitious name as maker and in Specifications 2-10, inclusive, of Charge II he is charged with uttering each of these forged instruments. In Specification 1 of Charge II he is charged with uttering a forged check which had not been written by him. The accused's confession fully established the commission of the offenses as charged. However, his confession cannot be considered in evidence unless there is other evidence in the record, direct or circumstantial, establishing the corpus delicti, i.e., the fact that the offense has probably been committed (MCM, 1928, par. 114a). The corpus delicti is established by the prosecution's evidence that all of these checks were cashed by certain organizations, that the purported makers of them had no accounts in the respective

banks on which they were drawn, and that subsequently accused redeemed all of these checks. The accused's confession was therefore properly before the court for its consideration.

Even if complete credence be accorded the statements in accused's confession that he intended to redeem these worthless checks, it does not purge him of the offenses charged. The offense of forgery is committed if one makes a false obligation with the intent to defraud. Similarly the offense of uttering a forged check is committed if, when the instrument is uttered, it is the intention of the utterer then to obtain funds thereon. The intent to defraud which exists when the acts are done is not negated by a corollary intent to repair at some future time the damage about to be committed. Fraudulently making a check and signing it with a fictitious name as that of the maker constitutes the offense of forgery (MCM, 1928, par. 149j). The evidence fully sustains the court's findings of guilty of all Charges and Specifications.

6. The accused is 36 years of age. He has had eight years previous service in the National Guard. He was inducted on 11 April 1941. On 11 April 1942 he was commissioned a second lieutenant. He was promoted to first lieutenant on 5 October 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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violations of Articles of War 93 and 96.

Thomas M. Jaffy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

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SPJGV
CM 260626

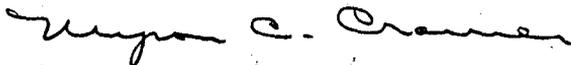
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War Department, J.A.G.O., **22 AUG 1944** - To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant Leslie M. Carter (O-455072), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. The accused was found guilty of forging nine checks aggregating \$90 in face amount, in violation of Article of War 93, and guilty of uttering these forged checks plus an additional one in the face amount of \$15, in violation of Article of War 96. As approved by the reviewing authority, the accused was sentenced to dismissal. 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. ltr. for sig. S/W.
Incl. 3 - Form of action.

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 516, 26 Sep 1944)

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

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SPJGK
CM 260637

19 SEP 1944

UNITED STATES

v.

Second Lieutenant WILLIAM
G. ARTHUR (O-823233), Air
Corps.

ARMY AIR FORCES EASTERN FLYING
TRAINING COMMAND

Trial by G.C.M., convened at Moody
Field, Georgia, 23 and 24 June 1944.
Dismissal.

OPINION of the BOARD OF REVIEW
LYON, MOYSE and SONENFIELD, 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 on the following Charges and Specifications:

CHARGE I: Violation of the 93rd Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

CHARGE II: Violation of the 83rd Article of War.

Specification: In that Second Lieutenant William G. Arthur, Air Corps, Section B, 2144th Army Air Forces Base Unit (Pilot School Advanced - 2 Engine), Moody Field, Valdosta, Georgia, did, at or near Dead Man's Bay, Florida, on or about 15 May 1944, while on a routine training mission, through neglect, suffer an airplane described as an AT-10, No. MO-435, which, together with its accessories and equipment represented a value of \$42,467.00, military property belonging to the United States, to be damaged by wrongfully allowing same to crash into the water.

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

Specification 1: In that Second Lieutenant William G. Arthur, * * *, did, at or near Dead Man's Bay, Florida, on or about 15 May 1944, while on a routine training mission, violate the written provisions of Paragraph 16 a (1) (d), Section II, Army Air Forces Regulation 60-16, dated 6 March 1944, to which he was subject and which provides as follows:

"Minimum Altitudes of Flight:

a. Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

- (a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.
- (b) At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such section in the event of complete power failure.
- (c) 1,000 feet above any open air assembly of persons.
- (d) 500 feet above the ground elsewhere than as specified above",

in that he wrongfully piloted and flew an airplane described as an AT-10, No. MO-435, at an altitude of less than 500 feet above the surface of the water, at a time when he was not engaged in taking off or landing.

Specification 2: Same as Specification 1 except that it alleges that -

"*** he permitted a student under his direct supervision and command, to wit: Aviation Cadet John G. Woodward, Section H-2, 2144th Army Air Forces Base Unit (Pilot School Advanced - 2 Engine), Moody Field, Valdosta, Georgia, to pilot and fly an airplane described as an AT-10, No. MO-435, at an altitude of less than 500 feet above the water, at a time when the airplane was not engaged in landing or taking off."

Specification 3: In that Second Lieutenant William G. Arthur, * * *, did, at or near Dead Man's Bay, Florida, on or about 15 May 1944, while on a routine training mission, violate the written provisions of Paragraph 1a, Army Air Forces Regulation 60-16A, dated 15 April 1944, to which he was subject and which provides as follows:

"1. General:

- a. Reckless Operation: An AAF 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".

in that he wrongfully flew an airplane described as an AT-10, No. MO-435, to a distance of about 50 feet above a boat in which friendly persons were riding.

Specification 4: In that Second Lieutenant William G. Arthur, * * *, did, at or near Dead Man's Bay, Florida, on or about 15 May 1944, while on a routine training mission, violate the written provisions of Paragraph 1b, Army Air Forces Regulation 60-16A, dated 15 April 1944, to which he was subject and which provides as follows:

"1. General:

b. Proximity to Other Aircraft:

No aircraft will be flown closer than 500 feet to any other aircraft in flight, except when two or more aircraft are flown in duly authorized formation. On authorized formation flights, aircraft will not be flown closer to each other than the distance of one-half wingspan of the largest aircraft concerned",

in that he piloted and flew an airplane described as an AT-10, No. MO-435, closer than 500 feet to another airplane while both airplanes were in flight, and while not in duly authorized formation.

He pleaded not guilty to all Charges and Specifications and was found not guilty of Charge I and its Specification, and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for one (1) year. The reviewing authority approved the sentence, remitted "so much thereof as imposes forfeiture of all pay and allowances and confinement at hard labor for one year", and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

a. The offenses with which accused was charged and of which he was found guilty all bear such close relationship to each other that it will be simpler merely to set forth the evidence in the order in which the facts occurred, leaving to a later discussion of the effect of the evidence the

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different portions thereof which bear upon the separate offenses.

b. Accused was an instructor in advanced flying of twin-engined planes at Moody Field, Georgia; he was a member of Squadron H, Training Group II, and a "rated pilot". The commanding officer of Squadron H was Captain Paul T. Hoover, Air Corps, and the commanding officer of Group II was Major Joe C. Seale, Air Corps (R. 15,18,23-25,27,35).

A training flight was scheduled for Squadron H on the morning of 15 May 1944 under the direction of Major Seale and Captain Hoover. It consisted of a "mission", to be flown at low altitude and across country, from Valdosta, Georgia, to Scanlon, Florida, thence to Cedar Keys, Florida, and then back to Valdosta. (Reference to a standard atlas shows this to be a triangular course, the last lap constituting the long side of the triangle. Scanlon is southwest of Valdosta, and Cedar Keys, on the west coast of Florida, is still further south of Scanlon and east of both it and Valdosta.) Major Seale "briefed" all 19 instructor pilots and their students prior to the mission, which he himself was to lead. He instructed them to fly at an altitude no lower than 500 feet above land and water. The operations order contained similar instructions. It assigned to accused and Aviation Cadet John C. Woodward ship number 435. No landings were scheduled en route, "except in case of forced landing or emergency". Flying in formation was not authorized by the order, by Major Seale, or by Captain Hoover (R. 15,16,24,27,28,30,31,35; Pres. Ex.C).

The same order assigned ship number 540 to Second Lieutenant Duane S. Barrett as instructor and Aviation Cadet Richard H. Whippy as his student. After reaching Scanlon and setting their course for Cedar Keys they flew above some marshland, and then out over the Gulf of Mexico. A direct course from Scanlon to Cedar Keys extended over some 45 to 50 miles of open water, with one shore line a few miles eastward on their left. Lieutenant Barrett and Cadet Whippy descended from an altitude of 500 feet to about 300 feet when they reached the marshland, and to about 100 feet when they were over the open water (R. 31,32,35,36). Whippy's testimony was to the effect that their altitude over the marshland was 100 feet and over the ocean 300 feet, but the difference is not material to the facts which follow (R. 32,33).

Referring again to an atlas, it will be seen that a few miles north of Cedar Keys is a broad bay, known as Dead Man's Bay, in which there are a few small islands, one of them called Grass Island.

Mr. James R. Goodbread and his father were fishing from their boat near Grass Island, and nearby them Mr. J. L. Peppell and two other men were fishing from theirs. A group of AT-10 planes flew by them, first five planes in formation, then a scattered group, and finally two, less than 100 feet apart. All had been flying at about 100 feet altitude, but the last two were at "less than 100 feet", or, as stated by Mr. Goodbread,

"about 30 or 40 feet" above the water and "about 15 or 20 feet - maybe 10 or 20 feet" apart (R. 40,42,43,44).

About 40 or 45 minutes after their take-off from Moody Field, Lieutenant Barrett and Cadet Whippy noticed plane number 435 on their left and about 700 feet behind them. It slowly drew even with them, passed them by "about 100 feet", then dropped behind again. This maneuver was then repeated by plane number 435 (R. 32,33,36,37). Lieutenant Barrett testified that he was flying at 100 feet and that the other ship was at the same level (R. 37, 38,39); Whippy testified that their ship was at about 300 feet and that number 435 was about 100 feet below them (R. 32,33,35).

Lieutenant Barrett and Cadet Whippy testified that they and one other ship had started to climb, upon seeing the fishing boats (R. 32,36,39). After their plane lifted over the boat, Whippy saw ship number 435 start back toward the water, averted his eyes for a moment, and then saw "a large splash in the water where the other ship had been" (R. 32). Mr. Goodbread testified that "the ship on the right" (it must necessarily have been that in which Whippy and Lieutenant Barrett were riding) climbed slightly as it passed directly over his boat, while the one on the left crashed into the shallow water about 50 feet from his boat (R. 40-42). Neither Lieutenant Barrett nor Mr. Popell actually saw the plane crash, and none of the witnesses was able to say what caused it to do so, or who was piloting it (R. 33,37,42,45). The crash occurred at about 1145 on 15 May (R. 34), about ten minutes after Lieutenant Barrett and Whippy first saw the other ship.

Cadet Woodward, flying with accused, was killed (R. 41,44,45,46-49). First Lieutenant Herbert E. Wolstencroft, Air Corps, the Engineering Officer and Technical Air Inspector at Perry (Florida) Army Air Field, testified that it was his official duty to examine aircraft damaged in the vicinity of Perry Field, and to submit reports of the damage and responsibility therefor. At approximately 1000 on 15 May he examined the wreckage of an AT-10 airplane in shallow water approximately one and one-half (1½) miles off Grass Island. He identified the plane by the serial number on the tail, but did not state what that number was. He found the right wing and right engine torn off. The "empennage" (tail) was floating, held by the control cables and electrical wiring, while the left wing was still attached to what remained of the cockpit. Witness recommended that a report of survey be made as to the entire plane, and that the wreckage be blown up. A report of survey is made only when no salvage is possible; none was possible on this ship. Witness did not know the condition of this plane as of 1145 the previous day, nor of his own knowledge anything that had happened to it in the interim between that time and the time he saw it (R. 51-54).

First Lieutenant George E. Marsh, Air Corps, a Supply Officer at

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Moody Field, testified that the value of a fully equipped AT-10 training plane is listed in an official Army publication as \$42,467, regardless of its age (R. 55).

Mr. Goodbread testified that the first four planes which came over were flying "in formation", implying the the last two were not (R. 42). Lieutenant Barrett testified that "approximately 50 to 100 feet" separated ship number 435 from his own, but that this interval was maintained only for "about two minutes" (R. 36,37). Major Seale testified that he saw three ships violate regulations against flying in formation during the flight, but all at an altitude of 500 feet. He identified none of them as accused's (R. 21). Captain Hoover saw no violations of Army regulations (R. 27). Some 10 or 12 participants in the mission had been punished under Article of War 104 by fines or restrictions to the limits of their post for violation of flying regulations during the flight (R. 28,37).

Mr. Goodbread and Mr. Poppell were both American citizens (R. 40, 43).

c. First Lieutenant Vanderhorst B. Murray, Air Corps, was the investigating officer in the case. After an explanation by witness to accused of the latter's right, accused signed a sworn statement. It was introduced as prosecution's Exhibit D, and the material portions thereof are set forth verbatim:

"I am familiar with Army Air Forces Regulation 60-16, Section II, par. 16 a (1) (d), which provides as follows: 'Minimum Altitudes of Flight: a. Except during take-off and landing, aircraft will be operated: (1) Below the following altitudes: (d) 500 feet above the ground elsewhere than as specified above.' I am also familiar with Flying and Safety Regulations, Army Air Forces Pilot School, (Advanced 2 Engine), Moody Field, Georgia, Section III, Flight Regulations, Par. 6 c, Local Flying, which provides as follows: 'Airplanes are forbidden to dive on or come nearer than five hundred (500) feet to any other airplanes in the air except pre-arranged formation flights, or unless necessary in the interest of safety to the airplane or to render assistance.' On 15 May 1944, I participated in a low altitude cross-country flight from Moody Field, to Scanlon, to Cedar Keys and return to Moody Field, flying Airplane No. 435, with Aviation Cadet Woodward riding with me. Before take-off, we were briefed at approximately 1100 by Captain Hoover. He told us we were supposed to fly 500 feet above the terrain, to Scanlon, to Cedar Keys, where we were to circle there and come back, and not to fly too close to Cross City. We took off at 1110. I took off behind Major Seale, the lead ship, No. 424. When we started on our cross-country, I took over and flew at 1000 feet and then let down, after setting my course, to about 800 feet. Cadet Woodward

flew the airplane and as we came to a check point I would take over. We got our check points all right and I took over a couple of times. As we approached the coastline, we caught up to another ship. We were flying alone up to this time. We took off behind ships that were going in another direction, but we stayed on our course. There were several ships and one of them was Lt. Barrett's. When we got to the coast, I took over and we went down rather low, to approximately 50 or 100 feet. When I got to Scanlon and flew below 500 feet, Lt. Barrett's ship was the only other airplane around. There were some airplanes away ahead. Lt. Barrett's ship was No. 540. We did not arrange this low flying we indulged in. I had made one dive on the boat myself, but the cadet was at the controls when we made the last dive. I have no idea of what caused the accident. I don't think it was engine trouble, because we had no previous trouble on this particular flight. I had flown the ship since 0715 that morning and it had been operating satisfactorily. We flew at that altitude for awhile and then pulled up to 400 feet. Cadet Woodward then took over and we went down again. I was watching Lt. Barrett's ship out of the right side. There was a fishing boat ahead of us and one to the right. The Cadet was at the controls. Lt. Barrett's airplane was above and to the right and I was watching him at the time. I don't know whether or not Cadet Woodward looked over and saw Lt. Barrett's plane and then lost control. I was not watching him, because I was watching Lt. Barrett's ship at the time. We went off to the left and I looked around, just as we hit the water. The left wing hit first, the cockpit was flooded with water, and we spun over. The ship hit on the left side, spun over backwards and ended up upside down. * * *. (R. 55,56; Pros. Ex. D.)

d. The court took judicial notice of the provisions of and received in evidence copies of Army Air Forces Regulations 60-16 and 60-16a (R.14), and took judicial notice of paragraph 3 of Army Regulation 95-15 (R.24).

e. Accused's rights were explained to him by the law member (R. 60). He elected to remain silent, and offered no evidence in his own behalf (R. 61).

4. It thus appears that accused was the pilot of an AT-10 plane which was part of a flight of 19 such planes engaged on an instruction mission. Accused had been told that he was to fly no lower than 500 feet throughout the mission, and was familiar with the Army Air Forces Regulation which forbade this. He was also familiar with Army Air Forces Regulations which forbade his coming closer than 500 feet to another airplane in the air, unless arrangements had previously been made to do so. After leaving the sea coast and flying out over the Gulf of Mexico, he descended to an altitude which he admitted was "approximately 50 or 100 feet". Likewise, it is shown by his own admissions that his was the plane which flew near and with Lieutenant Barrett's and that while accused was at the controls, he made one dive at

a fishing boat. He claimed that Cadet Woodward was at the controls when a second dive at a boat was made and at the time the plane crashed into the water. There is also evidence, both of Lieutenant Barrett and of a witness in one of the boats, that the planes were but a few feet apart at the time they came over the boats. The plane was a total loss, its value being as alleged in the Specification of Charge II, which alleged the sufferance of its destruction by neglect. There is no evidence of the actual cause of its destruction, except the negative proof afforded by accused's admission that they had had no previous trouble during the flight.

5. The Board of Review is of the opinion that the record of trial supports the court's findings of all the Charges and their Specifications of which the court found accused guilty. They will be discussed separately below.

a. Charge II and Specification.

That the plane was of the value alleged and that it was a total loss was adequately proved by testimony of experts. While it was not identified by Lieutenant Wolstencroft as the same one which was piloted by accused and Cadet Woodward, the evidence concerning the location in which accused's plane crashed ties in so completely with the evidence concerning the place where Lieutenant Wolstencroft made his examination that one may safely conclude that it was one and the same craft. It is most unlikely that two AT-10 planes crashed in the same spot within 24 hours, and the court was not required to speculate whether two had done so. It could properly be inferred that the plane was the property of the United States from the evidence that it was being used in the military service thereof (par. 149, MCM 1928).

The Specification is somewhat lacking in allegations which might advise accused of the exact manner in which he was negligent. It is merely to the effect that he suffered the plane to be destroyed by neglect in that he wrongfully permitted it to crash into the water. Defense did not, however, object to this feature of the Specification, either in a preliminary motion to strike (R. 11,12), or in argument upon a motion for a finding of not guilty (R. 58). The specific objections on other grounds and the failure to object on this, may be taken as a waiver. There is evidence from which the court could properly infer negligence. In a discussion of this Article of War, the Manual for Courts-Martial, 1928, says, at page 158:

"* * * A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damages, etc.

"The willful or neglectful sufferance specified by the

Article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; * * *." (Underscoring supplied.)

Upon the testimony of witnesses, coupled with his own admissions, accused is guilty of a deliberate violation and positive disregard of the Air Force Regulations concerning altitude to be maintained, and of the specific instructions given to all the pilots in the briefing session. The evidence showing him to have dived at least once upon the fishing boat (and, if his own testimony be true, to have permitted his student pilot to do so,) and to have flown for some time at a low altitude, shows a failure to use that degree of care and caution in the operation of the plane which an ordinary pilot should have observed. Whoever was piloting, it was accused's duty himself to have maintained an altitude prescribed by Air Force Regulations and by the briefing orders of Major Seale as a safe one, or to have ordered his student to do so. Assuming even a mechanical failure, the very small margin of safety to be found in their close proximity to the surface of the water may reasonably be said to have contributed in major part to the sudden crash of the plane and to its resulting destruction, this regardless of who was piloting at the moment.

In defining "negligence" as used in Army Air Forces Regulation Number 62-14, 28 May 1942, Part Nine, Section II, paragraph 2b (1) (d) (1), says:

"Failure to lower the landing gear on landing in an airplane is carelessness. Diving at a crowd on the ground or a boat on the water, etc., when the least failure of materiel or the slightest display of poor technique would result in the death of or injury to personnel, is negligence".
(See also CM 254880, Williams.)

It must be kept in mind that criminal intent is not a necessary element of the offense of violation of Article of War 83, but only "a special neglect, * * * of a positive and gross character". (Winthrop, Military Law and Precedents, reprint, 1920, p. 559). This neglect, we believe, is established by the evidence. Accused had a duty to return the plane for which he was responsible, to an altitude above 500 feet, and to refrain from diving at objects on the water. This he not only neglected to do when he turned the controls over to Woodward at the conclusion of the first dive and climb, but he failed to instruct his student to do so, and, in fact, did not remonstrate when the student commenced to descend. All these facts are found in accused's confession, which is more favorable to him than is the testimony of the prosecution's witnesses. The neglect is such that it is not unreasonable to presume that failure of materiel

er display of poor technique within the narrow margin of safety did result in the crash. There is nothing to indicate that Woodward deliberately flew the plane into the water. The other alternatives are the only ones left. Indulging in a presumption of either or both, we are compelled to conclude that accused made possible by a combination of his acts and his failures to act a situation which ripened into disaster. The known facts serve to rebut all the reasonable hypotheses of lack of responsibility on accused's part.

While the facts are not quite as fully set forth as in the case of Lieutenant Bell (CM 233196, 19 B.R. 365), the analogy is sufficiently close for reliance upon that authority in deciding the present case. There was, in neither case, any suggestion of mechanical failure, but only a clear showing of violation of regulations prohibiting low flying and diving at objects on the water. An inference that the violations resulted in the accident is proper under such circumstances.

b. Charge III, Specification 1.

In his confession accused admitted that he was the pilot while the plane was being flown at an altitude below 500 feet while the plane was in the vicinity of Dead Man's Bay. There is sufficient evidence outside of his confession to show that it was flown below the prescribed altitude, and to establish a corpus delicti. In argument upon a motion for a finding of not guilty of this Specification, accused's counsel relied upon the fact that the plane was, at the time of the crash, above water, and not above land, and pointed out that paragraph 16 (a) (1) (d) of Army Air Force Regulation 60-16 forbade flying at an altitude less than 500 feet above the ground.

The Board of Review holds that the motion was properly denied, and that the clear intent of paragraph 16 (a) (1) as a whole is to prohibit flying at less than certain altitudes above the surface of the earth, despite the use of words which at first seem to be restricted in their application. Paragraph 16 (a) (1) (a) forbids flying at less than 1000 feet above "any building, house, boat, or other obstructions to flight" (underscoring supplied). Paragraph 16 (a) (1) (d) forbids flying below 500 feet "above the ground elsewhere than as specified above". Obviously, a boat will only in the most rare instances be anywhere than on the water. The reference in (d) to (a) is evidence enough to us that the framers of the regulation had every intent to refer to the earth's surface, whatever its composition might be at any particular geographical spot. The primary definition of "ground" in Webster's New International Dictionary, 2nd Ed., unabridged, is, "The surface of the earth, or the earth itself considered as a basis or an abode". We are satisfied that the wording of neither the regulation or the Specification misled accused to his prejudice, either in apprising him of what he could do while flying a plane, or in preparing his defense.

c. Charge III, Specification 2.

Proof of the commission of this offense is found in the same testimony which supports the finding of guilty of the previous Specification, plus accused's admission that he turned the controls over to Cadet Whippy while flying at the prohibited altitude. It was not specifically shown that Whippy was under accused's direct supervision and command. This was properly inferable from their admitted relationships as officer and enlisted man, and instructor and student, and from the provisions of paragraph 3, Army Regulations 95-15, which provides that:

"The senior member of the operating crew of an aircraft who holds an appropriate military pilot rating will command the aircraft, except when the organization commander responsible for the aircraft specifically designates who shall command."

d. Charge III, Specification 3.

The findings of guilty of this Specification may be upheld upon the evidence that the plane flew over Mr. Poppell's boat, that it was about 30 or 40 feet above the water, and that Mr. Poppell and Mr. Goodbread were American citizens. The presumption from this latter evidence is that they were "friendly" within the meaning of paragraph (1) (a) of Army Air Forces Regulation 60-16A. The Board of Review is of the opinion that the word "ground" is here used in the same sense as it is in the regulation construed above in (b).

e. Charge III, Specification 4.

There is evidence in Lieutenant Barrett's and Cadet Whippy's testimony that for at least two minutes accused flew his plane within 500 feet of theirs. Several witnesses referred to the two planes as flying "in formation". Whether or not they were is not material, for it is clear that they were closer together than 500 feet, that they knew it, that accused's plane was the one primarily responsible for it, and that no authorization to do this had been granted to him. That the violation was of short duration does not excuse its commission.

6. All of the offenses of which accused was found guilty grew out of the same series of events, and are so closely connected with each other in time and space that they may be said to be substantially one transaction. Each, however, does require an element of proof different from the others, and they are therefore not within the rules forbidding duplicitous charges and specifications. The sentence as approved by the reviewing authority is authorized upon conviction of any one of them, and no prejudice to any substantial right of accused is found in the number of them.

7. Counsel for defense objected to trial of accused by the court on the ground that the first indorsement on the charge sheet referred the charges for trial to a general court-martial appointed by paragraph 9, Special Orders Number 120, Headquarters Army Air Forces Eastern Flying Training Command, dated 4 May 1944, whereas the court which did try him was appointed for that specific purpose by paragraph 8, Special Orders Number 160, of the same headquarters, dated 14 June 1944. This special plea to the jurisdiction was properly overruled on several grounds. It is within the discretion of an appointing authority to make such changes as he sees fit in the personnel of a court appointed by him (par. 37, M.C.M.1928). Likewise, the reviewing authority by his approval of a court's findings and sentence ratifies its actions even in instances in which an accused is tried by a court to which charges against him have never properly been referred (Vol. III, Bull, JAG, Feb. 1944, sec. 365 (I), p. 54). The defense then challenged all the members of the court on the ground that they were not the members of the general court-martial to which the first indorsement referred the charges. This blanket challenge was overruled by the law member, subject to objection by any member of the court. The ruling was correct, both on the reasoning set forth above concerning the right of the appointing authority to change the constitution of his courts-martial, and on the basis of the requirement that challenges be made to individual members and voted upon by those not challenged (AW 31; par. 58f, MCM 1928).

8. The record discloses that the court met at 1000 on 23 June 1944, and that after arraignment but before pleading the regularly appointed defense counsel requested a continuance until 1200, at which time accused's individual defense counsel arrived. Accused's individual defense counsel was Captain Marion J. Blake, Air Corps, who was stationed at Greensboro, North Carolina, between 400 and 500 miles from the place of trial. He had been assigned as such counsel on 22 June by Special Orders Number 53, Headquarters Army Air Forces Overseas Replacement Depot, Greensboro, North Carolina. On that day, he "wired" the president of the court, which was not then in session, but the exact nature of his telegram was not disclosed. Upon arrival, he requested a continuance of "24 hours at a minimum" in order to acquaint himself with the case. He had never seen accused before (R. 7; Def. Ex.A). After further discussion by Captain Blake, the law member, and the trial judge advocate, during which Captain Blake was asked if he would be ready to proceed by 0900 on the following morning (24 June), he requested a continuance until 0900 on 26 June (R. 8). The court was closed, apparently voted on the motion, and opened to announce that it was denied. The court, however, did recess from 1300 on 23 June until 1300 on 24 June at which time the trial resumed (R.9). Individual defense counsel again requested a continuance, stating that he had not had sufficient time for preparation of his case. Prosecution opposed the motion, which was denied by the law member (R. 9).

It further appears that accused had been served with a copy of the charges and specifications on 16 June 1944, one day after their receipt by the trial judge advocate (R. 9).

It is not denied that accused had before him the charges and specifications upon which he was to be tried nine days before the first meeting of the court, and that the services of the regularly appointed defense counsel and assistant defense counsel were available to him during that period. There is nothing in the record to indicate that this counsel was not competent to prepare his defense, to marshal evidence, and procure witnesses. It is likewise clear from the record before us that there were no substantial issues of fact, in the sense of contested versions of what occurred, which required extensive study by the individual defense counsel prior to trial.

The granting of a continuance is discretionary with a court-martial, and its refusal to do so will not be questioned upon review in the absence of a showing of an arbitrary abuse of discretion by the court (par. 52, MCM 1928; CM 135095, CM A-1120). We have considered the record and find in it nothing to indicate that accused had not had ample time to prepare his defense, or to meet the charges against him.

9. Numerous other errors occurred during the trial. A full discussion of them may be found in the review of the staff judge advocate. None operated to the prejudice of any substantial right possessed by accused, and, in fact, most of them tend to operate to his advantage.

10. Careful consideration has been given to the brief in behalf of accused filed by his civilian counsel, Mr. Clarence R. McNabb, of the Fort Wayne, Indiana, bar.

11. War Department records show that accused is 20 years of age. He graduated from high school, but did not attend college. He enlisted in the Air Corps on 15 October 1942, was appointed an aviation cadet on 31 May 1943, and was commissioned a second lieutenant, Air Corps, on 8 February 1944.

12. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 83 and of Article of War 96.

Lucy G. Goss Judge Advocate.
Wm. J. Stearns Judge Advocate.
Samuel Connors Judge Advocate.

1st Ind.

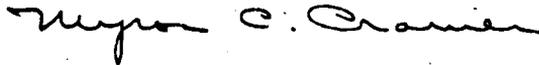
War Department, J.A.G.O., **11 OCT 1944** - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William G. Arthur (O-823233), Air Corps.

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

3. Consideration has been given to a brief filed in accused's behalf by Clarence R. McNabb, Esquire, of the Fort Wayne, Indiana, bar. This brief accompanies the record, and contains letters written in accused's behalf by Honorable Harry W. Baals, Mayor, Merle J. Abbett, Esquire, Superintendent of Schools, Ermin P. Ruf, President of the Chamber of Commerce, and Frank Roberts, managing editor of the Journal-Gazette, all of Fort Wayne. It also contains letters from First Lieutenant Winthrop P. Smith, Jr., Air Corps, and Captain James R. Herdrich, Air Corps, who have been accused's instructor and commanding officer in the past, and who speak highly of his character and his ability as an officer and a pilot. Consideration has also been given to a letter of 26 July 1944, from the Honorable Samuel D. Jackson, United States Senate, and to a letter from Jack Davis, of Valdosta, Georgia, to the President, in behalf of accused. Finally, consideration has been given to the attached memorandum from General Henry H. Arnold, Commanding General, Army Air Forces, dated 30 September 1944, stating that he is familiar with the facts in this case and strongly recommending that the sentence so approved by the reviewing authority be confirmed and ordered executed, in which recommendation I concur.

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.

7 Incls.

- Incl.1-Record of trial.
- Incl.2-Op.Bd.Rev/w. JAG Ind.
- Incl.3-Form of Ex. action.
- Incl.4-Brief, w/incls.
- Incl.5-Ltr. fr. Senator Jackson.
- Incl.6-Ltr. fr. Mr. Jack Davis.
- Incl.7-Ltr. fr. CG, AAF.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 593,
28 Oct 1944)

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

(395)

SPJGN
CM 260737

1 SEP 1944

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

v.)

Second Lieutenant EDWARD
T. LILLIS (O-1797841),)
Corps of Military Police.)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened
at Camp Wheeler, Georgia,
18 and 19 July 1944. Dis-
missal, total forfeitures
and confinement for five
(5) years. Disciplinary
Barracks.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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 94th Article of War.

Specification: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, (Then of the Dublin, Georgia Detachment, SCU 4417, Camp Blanding, Florida) did at Prisoner of War Side Camp, Dublin, Georgia on or about 21 May 1944 knowingly and willfully misappropriate approximately ten (10) gallons of gasoline of the value of about two dollars and fifty cents (\$2.50), property of the United States furnished and intended for the Military Service thereof.

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

Specification 1: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, (then of 315th Military Police Escort Guard Company, Section 2, Dublin, Georgia Detachment, Camp

Blanding, Florida) was, at Prisoner of War Side Camp, Dublin, Georgia on or about 26 February 1944 drunk and disorderly in uniform while in station and in the presence of military inferiors.

Specification 2: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama (then of 315th Military Police Escort Guard Company, Section 2, Dublin, Georgia Detachment, Camp Blanding, Florida), was at Prisoner of War Side Camp, Dublin, Georgia on or about 27 March 1944 drunk and disorderly in uniform while in station and in the presence of military inferiors.

Specification 3: (Withdrawn by command of appointing authority).

Specification 4: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, (then of 315th Military Police Escort Guard Company, Section 2, Dublin, Georgia Detachment, Camp Blanding, Florida), was at Prisoner of War Side Camp, Dublin, Georgia on or about 14 April 1944 drunk and disorderly in uniform while in station and in the presence of military inferiors.

Specification 5: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, (then of the Dublin, Georgia Detachment, SCU 4417, Camp Blanding, Florida), was at Dublin, Georgia on or about 23 April 1944 drunk and disorderly while in uniform at the home of Private Henry K. Cox, Jr., an enlisted man, in the presence of other persons.

Specification 6: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, (then of 315th Military Police Escort Guard Company, Section 2, Dublin, Georgia Detachment, Camp Blanding, Florida), did at Prisoner of War Side Camp, Dublin, Georgia on or about 1 April 1944 wrongfully gamble with enlisted men.

Specification 7: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, (then of the Dublin, Georgia Detachment, SCU 4417, Camp Blanding, Florida), did at Prisoner of War Side Camp, Dublin, Georgia on or about 6 May 1944 wrongfully gamble with enlisted men.

Specification 8: (Finding of not guilty).

Specification 9: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, formerly of 315th Military Police Escort Guard Company, Section 2, Dublin, Georgia Detachment, Camp Blanding, Florida, did at Prisoner of War Side Camp, Dublin, Georgia on or about 15 April 1944 wrongfully exact and receive from Private Louis Spitaleri, of his organization, an enlisted man, the sum of twenty-five dollars (\$25.00) for a furlough.

Specification 10: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, (then of the Dublin, Georgia Detachment, SCU 4417, Camp Blanding, Florida), did at Prisoner of War Side Camp, Dublin, Georgia on or about 20 April 1944 wrongfully exact and receive from Private James W. Cudd, Jr., of his organization, an enlisted man, the sum of five dollars (\$5.00) for a three (3) day pass.

Specification 11: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama (then of the Dublin, Georgia Detachment, SCU 4417, Camp Blanding, Florida), did at Prisoner of War Side Camp, Dublin, Georgia on or about 24 April 1944 wrongfully exact and receive from Private Jack L. Sachs of his organization, an enlisted man, the sum of fifteen dollars (\$15.00) for a three (3) day pass.

Specification 12: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama (then of the Dublin, Georgia Detachment, SCU 4417, Camp Blanding, Florida), did at Prisoner of War Side Camp, Dublin, Georgia on or about 13 May 1944 wrongfully exact and receive from Private Jack L. Sachs of his organization, an enlisted man, the sum of twenty dollars (\$20.00) for a furlough.

Specification 13: (Finding of not guilty).

Specification 14: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, formerly of 315th Military Police Escort Guard Company, Section 2, Dublin, Georgia Detachment, Camp Blanding, Florida, did at Prisoner of War Side Camp, Dublin,

Georgia on or about 26 February 1944 wrongfully and unlawfully without the consent of the owner, take, carry away and use one command car, of a value above fifty dollars (\$50.00), property of the United States furnished and intended for the military service thereof.

Specification 15: (Withdrawn by command of appointing authority).

Specification 16: In that Second Lieutenant Edward T. Lillis, Corps of Military Police, SCU 1438, Prisoner of War Camp, Opelika, Alabama, formerly of 315th Military Police Escort Guard Company, Section 2, Dublin, Georgia Detachment, Camp Blanding, Florida, did at Prisoner of War Side Camp, Dublin, Georgia on or about 7 March 1944 wrongfully and unlawfully without the consent of the owner, take, carry away and use one command car, of a value above fifty dollars (\$50.00), property of the United States furnished and intended for the military service thereof.

Specification 17: (Finding of not guilty).

Specification 18: In that Second Lieutenant Edward T. Lillis, Corps of Military Police SCU 1438, Prisoner of War Camp, Opelika, Alabama (then of the Dublin, Georgia Detachment SCU 4417, Camp Blanding, Florida), did at Prisoner of War Side Camp, Dublin, Georgia on or about 23 April 1944 wrongfully and unlawfully without the consent of the owner, take, carry away and use one command car, of a value above fifty dollars (\$50.00), property of the United States furnished and intended for the military service thereof.

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specifications 8, 13, and 17 of Charge II, guilty of Specification 4 of Charge II, "except the word disorderly", and guilty of both Charges and all other 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 a period of five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks at Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, a member of the Military Police Corps, was the Commanding Officer of the Dublin Detachment, Branch Prisoner of War Camp, Dublin, Georgia. About 6 p.m. on Sunday, 21 May 1944, he ordered Private First Class

Lilburn R. Atwater "to pour some gasoline" into "a two tone, light blue and light gray" Chevrolet coupe which was parked near the entrance to the company area. Seated within the car at the time was a Miss Mildred Fowler. The gasoline referred to was contained in two five-gallon "G.I. cans", was worth about \$2.50, was furnished by the United States Government, and was intended to be used in the auxiliary lighting system and in the motor of a saw. When Atwater expressed some reluctance to carry out the instructions given to him, the accused said, "I don't care what you think, it's my gas, go get it, and that's an order." Atwater began to transfer the gasoline from one of the cans to the tank of the car, but, having no funnel available, he spilled some of the liquid on the ground. The accused accordingly suggested to Private Louis R. Spitaleri, who had in the meantime come upon the scene, that a fire extinguisher be employed to prevent the wastage. The proposed solution proved effective. The gasoline was poured into the fire extinguisher and pumped from it into the automobile. When the transfer was completed the accused seated himself behind the driver's wheel and drove away. The pumping was witnessed by Technician Fifth Grade Edmund Podsiadlo. When he examined the fire extinguisher two or three hours later, "it still had the smell of gas on it." He did not report what he had seen to Lieutenant Fulton, the administrative officer for the camp, "because there was so many irregularities going on" (R. 7-22, 38, 50, 53, 56, 78, 80, 98).

Prior to this event the accused, on 26 February 1944, at about 10 p.m. was driving in Dublin, Georgia, in a command car assigned to the Dublin Prisoner of War Camp. He was accompanied by a Sergeant Evans in a jeep. The two cars stopped at the Service Center, and a number of enlisted men were "picked up". They were asked by the accused whether they "wanted to go to a square dance at Wrightsville", which was about 18 miles away. Their replies all being in the affirmative, the journey was commenced with seven men in the command car and four in the jeep. Before setting out the accused surrendered the wheel of the command car to a Corporal Kanaba. Upon arriving at the dance the accused "took one drink". He and his entourage stayed for only "a half hour to a hour" and then departed taking five or six girls with them. After conveying two of the soldiers back to the camp, they proceeded for another two miles to O'Neal's White Cottage where they "drank and danced". Private Jack L. Sachs, who was present, was "not sure" that the accused danced but did see him drinking. At the end of an hour or two all of the girls, with the exception of a Miss Clyde Keene, were taken home in the command car by a Private Fennel. Upon his return the rest of the party, including Miss Keene who was drunk, set out for the camp. She rode in the command car with the accused who was "pretty high". At the camp all of the enlisted men left the cars and went to their "respective huts". The accused was last seen standing outside the mess hall "very close" to Miss Keene. Her dress was "raised up to her shoulders". Although the accused

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was "pretty high", his faculties were not impaired, he did not stagger, nor talk abnormally or more than usual. He was not "drunk" in the opinion of Private Sachs. Miss Keene lost consciousness at the camp. When she "woke up", the accused drove her in the command car to her home. They arrived there about 4:30 a.m., "Just about daylight". The command car had a value which has been stipulated to be in excess of \$50 (R. 23-37, 100; Pros. Ex. P-1).

Shortly after midnight on 27 March 1944 Corporal Kanaba removed a pint of liquor from the filing cabinet in the orderly room, took a drink himself, and offered one to Private First Class Thaddeus S. Dzierzowski who had just come off guard duty. The accused, who had meanwhile joined them, also partook of the bottle's contents. He, Dzierzowski, Kanaba, and Spitaleri entered the command car and drove to Dublin. In town, upon seeing a soldier on the street, the accused ordered the vehicle stopped and proceeded toward the man with a fully loaded .45 caliber pistol pointed directly at him. The accused did not have his own cap on but was wearing Dzierzowski's fatigue hat. The soldier accosted was not a member of the camp detachment. He was asked for his pass and, upon producing it, he was permitted to go on his way. Since the trip to town was allegedly "for the purpose of investigating Private [Harry G.] Thompson who was on restriction," his residence was the next place to be visited by the accused and his companions. Upon their arriving at the house, the accused went to the front door. For about an hour he talked to a young lady who subsequently became Thompson's wife (R. 37-40, 44, 47-49).

Having concluded his conversation, he reentered the car and directed that it be driven around the corner to a field at the rear of the Thompson house. Accompanied by Spitaleri, he walked into the thick brush, pulled out his pistol, and fired a shot. After a few minutes they returned to the car and went, first, to the Fred Roberts Hotel and, secondly, to the New Dublin Hotel. The accused "was the only one who went inside". Upon his rejoining his companions, they all proceeded to Academy Road. In front of Miss Fowler's house at about 1:30 a.m. the accused drew his pistol and fired five more shots in the air. The reason given by him for this conduct was his desire "to put a little life in the town because it was too dead". The car headed back to the camp. Spitaleri and Kanaba immediately went to bed but the accused and Dzierzowski "remained in the area". The accused sought out the Acting Corporal of the Guard and obtained two more shells from him. Having loaded his pistol with these, he fired one in front of Post No. 4 and the other in front of the tent jointly occupied by him and Spitaleri, "who was acting first sergeant at that time". As a final bit of horseplay the accused sprayed water out of a hand pump at Spitaleri and at Private Charles M. Shuler and ordered Dzierzowski to assist him in throwing buckets of water at Shuler. Spitaleri escaped a wetting because of accused's poor aim. Shuler, who was not so fortunate, started to chase his tormentors. He and a Private Holfacter ultimately found them around the

back of the latrine near Post No. 4 where they had fallen to the ground. The accused "either stumbled or couldn't stand up on his feet." After the lapse of a few minutes Holfactor obtained a jeep and came toward the accused and Dzierzowski in it. They eluded him and made their way back to the tents. Upon Holfactor's return trip along the company street, they threw water at him also. The accused seemed "to think that it was all pretty much fun." He was "under the influence of intoxicants" (R. 40-48, 51-55).

After attending a party at Sessions Lake on 14 April 1944, he returned to camp at about midnight. Private Conyers and Private Turner became involved in an argument. In their presence the accused took his pistol out, placed a round of ammunition in its chamber, replaced it in his holster, and informed Turner that he was under arrest. The accused had had "too much to drink" and was "heavily intoxicated." He was "pretty noisey [sic] and was staggering", but he was not disorderly (R. 56, 100; Pros. Ex. P-1).

On 23 April 1944 he visited the home of Private Henry K. Cox, who had recently been married. It was purely a social call. The accused had provided himself with a quart bottle of whiskey about three quarters full, and some Pepsi-Cola intended for use as a "chaser". Mrs. Cox and her mother and Miss Fowler were present when he arrived. Miss Fowler left early. The accused and Cox "sat there talking and kept drinking and drinking". Sometimes the accused "didn't even use a chaser". His speech was punctuated with "common curse words" such as "hell" and "damn". At about midnight when the whiskey was "all gone", he took his departure. With Cox's assistance he entered the command car. "He turned on the switch, threw it in reverse, raced the motor and backed into a ditch. He then fell over the wheel." Cox went to camp, obtained a truck, and returned in it with a Private Cordle. They "pulled the command car out of the ditch", placed the accused in it, brought him back to camp, and helped him to get out of the vehicle (R. 57-61).

He had used the command car for his personal purposes on at least one other occasion. Chauffeured by Private First Class James W. Cudd, he had ridden into town on 7 March 1944 to meet a Miss Ruth Hilbun. While the accused and his "girl friend" enjoyed the "picture show" for two and one half hours, Cudd awaited in the command car. When the accused and Miss Hilbun emerged from the theater, they were driven to her home which was only three blocks away. Cudd waited another 45 minutes while the accused said "Good-night" (R. 82-85).

The accused gambled with enlisted men on 1 April and 6 May 1944. No other officers were present. The accused played both dice and poker on the first date and poker on the last date. He made, paid, and collected bets. These on the first occasion ranged from ten cents to ten dollars (R. 62-73).

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Not having had a furlough for eight months, Spitaleri on 13 April 1944 requested one of the accused. The accused asked "what was it worth". Spitaleri's reply was "\$25.00". This being acceptable, he wired home for the money. Upon receiving it he gave the accused \$20, promising to pay the other \$5 "later". The next day Spitaleri was granted a furlough for the period between 14 and 27 April 1944. The money was returned to him in full by Technician Fifth Grade Walter Grunow in the "latter part of May or the first part of June", on the "day Colonel Armstrong came down for the investigation". Grunow had been entrusted by the accused with funds sufficient to repay this and other sums to various individuals. The original transaction was considered by Spitaleri to be a purchase and not a loan (R. 76-79).

Cudd on 20 April 1944 asked for a three day pass to visit his brother at their home in Spartanburg, South Carolina. The accused stated that he could give only a week end pass, which was inadequate for the trip contemplated. Upon Cudd's representing that he "couldn't make it * * * without being AWOL" the accused inquired how much the longer period "was worth". Since Cudd had only \$5 on hand, he offered that sum. The accused did not forthwith accept it but a few minutes later sent Shuler to collect it. The money was handed to Shuler and turned over by him to the accused. The pass was issued. On 1 June 1944 \$10 was paid to Cudd by Shuler who obtained it from Grunow. The excess of \$5 was accepted and spent (R. 80-82, 85-89).

During the evening of 23 April 1944 the accused was heard "to mention something about the fact he needed money". Private Jack L. Sachs, who had "a little to spare at the time", offered to lend him \$20. The accused accepted and undertook to make repayment the following week. The money was "laid" on his desk that night about 2300 o'clock. Next day Sachs asked him for "a three day pass for a consideration." The accused fixed the price at \$15, and, after some haggling, a sale was consummated. The pass was issued, and the sum agreed upon was deducted from the accused's obligation to Sachs. The balance of \$5 was repaid to Sachs at the end of the month. The purchase price of \$15 has never been returned to him (R. 89-92).

Around 6 May 1944 Sachs and the accused had a conversation in which the latter stated "that he needed money and that it would be a good idea he thought to give the boys furloughs, 10 days for \$20.00, ten for twenty he put it." Two days later they again talked with one another, and Sachs remarked that he "would take /the accused/ up on the 10 for 20 deal." The accused replied that he would think about it. Acting upon his instructions, Shuler on 9 May 1944 approached Sachs for the \$20. When Sachs queried "What for?" Shuler replied, "Give me \$20.00 and you will get a furlough." Upon checking with the accused Sachs was told that "Shuler needed money as his mother was sick or his wife was

sick * * *. The money was paid, and a pass marked "emergency" was granted. When the investigation began, Grunow gave Shuler \$20 to deliver to Sachs. Shuler made the payment as directed. The money had been obtained by Grunow from the accused (R. 92-97).

4. After having been fully apprised of his rights relative to testifying or remaining silent, the accused elected to make an unsworn statement. Six other witnesses were presented on his behalf. Private Harry G. Thompson testified that he was on guard duty on 29 or 30 February 1944, that Miss Clyde Keene got out of the command car about 9 p.m., that her reputation was that of a "girl around town", that he saw neither the accused nor Private Sachs, who was the principal witness of the disorderly conduct on 26 February 1944, and that, if the accused and Miss Keene had come to the camp after midnight, he, Thompson, would not have observed them. Private First Class John D. Wilkinson denied that he had given the accused two .45 caliber rounds on 27 March 1944, but he had heard the shots fired. In his opinion the accused "acted like he was drunk." Technician Fifth Grade Edmund Podsiadlo remembered that he had been aroused from his sleep on the night on which the accused had attempted to drench Shuler but he recalled nothing of the events occurring on 14 April 1944 forming the basis of Specification 4 of Charge II. Private Burton Conyers admitted that he had been in a "fight" with Private Turner that night. The accused had ordered them "to break it up" and they had obeyed. Although "he had been drinking," he did not swear at them nor was he disorderly in any way. Miss Fowler had been at the home of Private Cox on 23 April 1944. She recalled that both he and the accused had been drinking. When her mother called for her after midnight, the accused was neither drunk nor disorderly. He had not indulged in any cursing. Technician Fifth Grade Walter Grunow testified only that "M.P.'s were stationed in the town of Dublin when [the accused] was commanding officer" (R. 101-109).

In his unsworn statement the accused asserted that the gasoline poured into Miss Fowler's car on 21 May 1944 had been purchased at a gasoline station and paid for out of his own pocket; that on 26 February 1944, after checking on a number of enlisted men in Dublin, he was asked by Sachs to take "over 10" men to the barn dance in Wrightsville; that he agreed to take them out there but the driving was done by a Private; that Sachs had represented that there was nothing to do and no place to go at that hour; that the accused had accommodated the men to bolster their morale; that water was thrown on the night of 27 March 1944 but no shots were fired, and there was "no order of a command car"; that Private Holfacter's use of a jeep was entirely unauthorized; that the accused had full possession of his faculties and fell only because of a hole; that he was not drunk on 14 April 1944; that the fight that day had so enraged Private Turner that he threatened to kill Conyers; that Turner spoke with a knife in his hand; that the accused ordered it turned over to him and, upon obtaining it, locked it in the safe; that his pistol remained in his holster at all times; that he had a few drinks at the Cox home on 23 April 1944 but he was

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neither drunk nor disorderly; that he had injured himself when backing out of the driveway because he "swung the car back too sharp and the left rear wheel went into the ditch"; that his feet became "tangled" and he fell and in so doing hit his "head against the tire"; that in making his rounds it was necessary to "circle" the Cox home; that he had gambled with enlisted men on 1 April and 6 May 1944; that the only other officer in the camp was married and went home each evening; that he was "with the enlisted men so much * * * he associated with them in camp"; that he "did not do it with the intention of winning"; that he always lost, sometimes deliberately; that he had never sold any furloughs or passes but had merely borrowed money from enlisted men; that he always intended to and did pay "it all back"; that on 7 March 1944 he noticed "a storm coming up"; that, since he was the only one who knew how to operate the auxiliary lighting system, he instructed Cudd to call for him at the movies in the event that rain came; that, as the accused was leaving the theater, he met Miss Hilbun; that it was then raining hard; that Cudd came by and "hollered to come on get in"; that after looking for enlisted men at the bus station and at the beer gardens, the accused had Miss Hilbun, who lived only one or two blocks away, taken home; that all of his "mistakes" were due to "ignorance"; that, in his own words,

"I put in a request for combat duty which I have been refused on account of my job with the Prisoner of War Camp. My record, as far as my duties performed are concerned, is excellent plus. This can be proven by Colonel R. H. Wood at Fort Benning, Georgia. I asked permission to leave the M. P. Detachment to go into the Infantry, but was refused. In my present status and being with the Prisoner of War Camp I knew I could not get out of it. I would like to go to combat and serve in any way the War Department sees fit" (R. 109-114).

5. The Specification of Charge I alleges that the accused did "on or about 21 May 1944 knowingly and willfully misappropriate approximately ten (10) gallons of gasoline of the value of about two dollars and fifty cents (\$2.50), property of the United States furnished and intended for the Military Service thereof." This act was set forth as a violation of Article of War 94.

Misappropriation is defined in paragraph 150i of the Manual for Courts-Martial, 1928, as "devoting to an unauthorized purpose". The accused knew that the two five-gallon cans of gasoline were property of the United States and had been furnished for use in the auxiliary lighting system and in the motor powering the wood saw. In transferring their contents to a civilian automobile, whether his own or Miss Fowler's

he committed an unlawful conversion. It was obviously a diversion to "an unauthorized purpose" and in contravention of Article of War 94. There is nothing in the record to indicate that the court erred in disbelieving his unsworn statement that he had purchased the gasoline out of his own funds.

6. Specifications 1, 2, and 4 of Charge II allege that the accused was "drunk and disorderly in uniform while in station and in the presence of military inferiors" on 26 February, 27 March, and 14 April 1944, respectively. Specification 5 of Charge II alleges that the accused was "on or about 23 April 1944 drunk and disorderly while in uniform at the home of Private Henry K. Cox, Jr., an enlisted man, in the presence of other persons". These acts were laid under Article of War 96.

The only testimony adduced relative to the accused's condition on the night of 26 February 1944 fails to establish either drunkenness or disorderly conduct. True, he was "pretty high" but he did not stagger, speak incoherently or more than usual, and his faculties were unimpaired. To the question "He wasn't drunk that night?" Private Sachs rendered an unequivocal answer of "No, sir". As used by him, the phrase "pretty high" does not describe intoxication of the type for which punishment may be imposed.

That the accused was standing "very close" to Miss Keene that night and that "her dress was raised up to her shoulders" does not necessarily and inescapably lead to an inference of disorderly conduct. She was so highly intoxicated that she lost consciousness at the camp, and the disarray of her dress may have been attributable to the inept manner in which he was holding her preparatory to her removal to the car. The record is legally insufficient to support the finding of guilty of Specification 1 of Charge II.

The court properly found the accused guilty of being drunk in uniform but not disorderly on 14 April 1944. He was noisy, staggering, and "heavily intoxicated". Although he loaded his pistol, he immediately replaced it in his holster and did not again draw it. He did not create a scene of any kind, but on the contrary restored peace and order between Turner and Conyers.

His conduct on both 27 March and 23 April 1944 was obviously the result of drunkenness. The pointing of a fully loaded pistol at a strange soldier, the firing of numerous shots in town and in camp, and the spraying and throwing of water on his subordinates on the first date are all indicia of a mind clouded by intoxicants. The same is equally true of the accused's backing of a command car into a ditch and his helpless condition after a long evening at Private Cox's home on 23 April 1944. In pointing a loaded pistol at a peaceable and law-abiding soldier and in wildly and senselessly firing several shots the accused was disorderly beyond a reasonable doubt. His use of such mild profanity as "hell" and "damn" and his backing of a car into a ditch on 23 April 1944, were not, on the other hand, either breaches of the public peace,

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provocative of the reasonable resentment of any witnesses, or shocking to the moral standards of the community. The record is legally sufficient to support the finding of guilty of Specification 2 of Charge II but is legally sufficient to support only so much of the finding of guilty of Specification 5 of Charge II as involves a finding of guilty of being drunk in uniform only.

7. Specifications 6 and 7 of Charge II allege that the accused did on or about 1 April and 6 May 1944, respectively, "wrongfully gamble with enlisted men". These acts were alleged to be violations of Article of War 96.

Gambling by an officer with enlisted men contains the same inherent vices as drinking with, or borrowing from, enlisted men. All three offenses tend to weaken respect for authority. They bring the commissioned officer into contempt and expose him to the secret jeers of his subordinates. The victim of drink, financial stringency, or the gambling passion is exposed in a moment of weakness to those to whom he should be an exemplar of all soldierly virtues. The human foibles in which enlisted men themselves indulge or which they may freely tolerate in other enlisted men cannot be forgiven in an officer.

This is not the only characteristic evil of the offense alleged. Gambling with enlisted men, like borrowing from them, may be the means of coercing them into an involuntary disposition of their funds. The subordinate who is requested to lend or to gamble by his superior may hesitate to decline for fear of discrimination or reprisal. The prohibition against gambling with enlisted men is essential to the adequate protection of the subordinate.

The evidence clearly proves that the accused participated in dice and poker games with enlisted men under his command. The record is legally sufficient beyond a reasonable doubt to support the findings of guilty of Specifications 6 and 7 of Charge II.

8. Specifications 9, 10, 11, and 12 allege that the accused on 15 April, 20 April, 24 April, and 13 May 1944, did "wrongfully exact and receive" from various enlisted men certain sums of money for furloughs and three day passes. These acts were charged in violation of Article of War 96.

The testimony of several witnesses is clearly and convincingly to the effect that the accused created and maintained a flourishing business in the sale of passes and furloughs. His contention that the sums paid to him were mere loans rings hollow and, at best, convicts him out of his own mouth of the offense of borrowing money from enlisted men. When his misbehavior came under investigation, he revealed his guilty conscience by hastening to return three of the four amounts he had exacted. The \$15 paid by Private Sachs on 24 April 1944 was not refunded even then.

9. Specifications 14, 16, and 18 allege that the accused did on or about 26 February, 7 March and 23 April 1944 "wrongfully and unlawfully without the consent of the owner, take, carry away and use one command car, of a value above fifty dollars (\$50.00), property of the United States furnished and intended for the military service thereof." These offenses were also laid under Article of War 96.

Paragraph 6a, Army Regulation 850-15, specifically forbids the use of Army motor vehicles by Army personnel for non-military purposes with certain exceptions not pertinent here. The accused, as an officer and particularly as the Commanding Officer of an installation, was charged with knowledge of this prohibition. Nevertheless, in direct violation of its terms he used the command car assigned to the camp to facilitate his social activities on the three occasions specified. He is guilty beyond a reasonable doubt of the acts alleged in Specifications 14, 16, and 18 of Charge II.

10. The accused is about 25 years old. The records of the War Department show that he had three years of high school at Avoca, Pennsylvania; that his last civilian job was that of a gas station attendant; that he had enlisted service in the Pennsylvania National Guard from 1937 to 1940 and in the Army from 6 January 1940 to 22 April 1943; that he was commissioned a second lieutenant on 23 April 1943; that he has been on active duty as an officer since the last date.

11. 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 insufficient to support the findings of guilty of Specification 1 of Charge II; legally sufficient to support only so much of the finding of guilty of Specification 5 of Charge II as involves a finding of being drunk in uniform only; and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 or Article of War 96.

Abner E. Lipscomb Judge Advocate.

Thomas S. Sykes Judge Advocate.

Gabriel H. Golden Judge Advocate.

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SPJGN
CM 260737

1st Ind.

War Department, J.A.G.O., **12 SEP 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 Edward T. Lillis (O-1797841), Corps of Military Police.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of being drunk and disorderly on 26 February 1944 (Spec. 1, Chg. II); legally sufficient to support only so much of the finding of guilty of Specification 5, Charge II, alleging that the accused was drunk and disorderly while in uniform at the home of an enlisted man, as involves a finding of guilty of being drunk in uniform; legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the period of confinement be reduced to three years 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.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to three years. G.C.M.O. 562, 14 Oct 1944)

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