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Judge Advocate General's Department

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Volume XL

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CM 260755 to CM 262189

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

SPJGQ
CM 260755

18 AUG 1944

UNITED STATES	)	LOS ANGELES PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Los Angeles Port of Embarkation, Los Angeles, California, 20 July 1944. Dismissal.
	)	
First Lieutenant JOHN A. McCORMICK (0-1314658), Transportation Corps.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant John A. McCormick, TC, Headquarters, Los Angeles Port of Embarkation, Los Angeles, California, did, at Long Beach, California, on or about 8 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to Edwin J. Riopelle, a certain check, in words and figures as follows:

Long Beach April 8 1944

Bank The Asbury Park and Ocean Grove Bank

Town Asbury Park, New Jersey

Pay to the order of Cash $20.00

Twenty and no/100 - - - - - - - - - - - - -Dollars

Home 831 East Ocean Blvd. J. A. McCormick
Long Beach 0-1314658

and by means thereof did fraudulently obtain from Edwin J. Riopelle $20.00, he, the said First Lieutenant John A. McCormick, then well knowing that he did not have and

not intending that he should have, any account with or sufficient funds in the Asbury Park and Ocean Grove Bank for the payment of said check.

Specification 2: Identical in form with Specification 1, except that the date of the check is 15 April 1944, and the amount of the check is $10.

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

3. Evidence for the Prosecution:

On the dates of the offenses alleged in the two Specifications, and at the time of the trial, the accused was in the military service, stationed at the Los Angeles Port of Embarkation, Los Angeles, California (R. 7, 14).

On 8 April 1944, the accused drew his personal check on the Asbury Park and Ocean Grove Bank, of Asbury Park, New Jersey, payable to cash, in the amount of $20, and delivered it to Edwin J. Riopelle, owner of a laundry and cleaning shop in Long Beach, California, in exchange for $20 in cash. On 15 April 1944, the accused drew a like check on the same bank in the amount of $10, and delivered it to Riopelle in exchange partly for cash and partly for cleaning services (R. 7; Pros. Exs. A and B). Both checks were returned, marked "no account" (R. 8).

Joseph Thummess, Cashier of the Asbury Park and Ocean Grove Bank, testified, by deposition, that to his knowledge the accused had not had any account in that bank at any time during the year 1944 (R. 14; Pros. Ex. C). On cross examination the accused himself admitted that he had not had an account in the bank in question in "11 or 12 years".

Not having received his money from the accused, Riopelle "finally got disgusted and called the Commanding Officer" of the accused more than two months after the checks had been returned unpaid (R. 9, 13). Meantime, he had tried unsuccessfully five to seven times to reach the accused by telephone (R. 9). After calling the Commanding Officer, Riopelle turned the two checks over to the Port authorities to collect. Subsequently, on 14 July 1944 the accused paid to Riopelle direct, in cash, the sum of $30 to cover the two checks (R. 8).

Over objections by the defense counsel, Lieutenant Colonel John O. Rasmussen, I.G.D., was permitted to testify that, during the course of an investigation made by him in February 1944, respecting five checks issued by the accused, in January 1944, to the Post Exchange of accused's station, each in the amount of $25 and each drawn on the

Asbury Park and Ocean Grove Bank, the accused, after being warned of his rights under Article of War 28, stated to Colonel Rasmussen, under oath, that he, the accused, had signed each of said checks (R. 17). As a result of the investigation, the accused paid the amount of these five checks to Colonel Rasmussen, in cash, and the latter in turn reimbursed the Post Exchange (R. 18).

4. Evidence for the Defense:

After having his rights as a witness explained to him, the accused elected to testify under oath in his own behalf. He briefly summarized his personal history, stating that he has been married 12 years, has a child about 5 years old, was an accountant in civilian life with a top income of about $2500 per year, and entered the service as an enlisted man 25 September 1942. He graduated from The Infantry School in March 1943, and since that time he has been a training officer at the New Orleans Port of Embarkation approximately 7 months, an administrative officer at the Los Angeles Port of Embarkation approximately 4 months, and a pier loading officer at the last named station approximately 4 months (R. 20, 21, 27).

With respect to the two checks in issue, the accused did not deny having made and negotiated them. Nor did he claim that he was acting under a mistaken impression that he had sufficient funds in the bank on which they were drawn to cover them. He frankly conceded that he had not had an account in that bank in 11 or 12 years (R. 27). Moreover, it is clear from his testimony that he did not intend to have the money in the bank, at Asbury Park, New Jersey, when the checks should arrive there from the West Coast. Upon being asked what he had "in mind" in issuing the checks, he replied. "Just temporary relief. I realized that it would take several days for the checks to clear and I had in mind repayment as soon as they returned" (R. 23).

In further support of his contention that he was seeking temporary relief only, and had no ultimate intention to defraud, the accused testified that in the early part of April 1944 his financial condition was critical due (a) to the fact that he had lent $115 to a friend to meet an emergency, and (b) to the fact that at about the same time he was notified of an overpayment to him while he was an enlisted man of allowances in the amount of $62, which he was called upon to repay at once (R. 22).

On cross examination, the accused admitted that he issued the two checks in question as "a matter of desperation" (R. 26).

5. The evidence of accused's guilt of the two offenses alleged is clear and conclusive. He knew that the two checks would not be paid when presented to the bank on which they were drawn. Failure to disclose this knowledge evidences an intent to deceive and defraud the

person to whom the checks were negotiated (CM 240347, Beserosky (1943); 26 Board of Review 33).

The admission, over defense's objection, of evidence that the accused had, in January 1944, issued five worthless checks, on the same bank, to the Post Exchange was not error. Two of the primary issues before the court were the accused's intent to defraud the person cashing his checks and his knowledge that he had no account in the bank on which the checks were drawn.

> "Where criminal intent and guilty knowledge are issues involved in the offenses charged against accused, his recent acts of a similar nature are admissible in evidence against him under paragraph 112b, M.C.M." (Dig. Op. JAG 1912-1940, Section 395 (7)).

To the same effect is the opinion of the Board of Review in CM 202366, Fox (6 Board of Review 129), where it was said (page 150):

> "It is, however, well settled that evidence of other similar transactions is admissible to show intent or design, especially where fraud is charged. Wood v. United States, 16 Peters 342; Bryan v. United States, 133 Fed. 495; Wigmore on Evidence, Sec. 302, and cases collected there and in 62 LRA 193, note; M.C.M. par. 112b; C.M. 201997, Mellon."

The two offenses alleged are both laid under Article of War 95. That the issuing of worthless checks and other instruments for the payment of money, with intent to defraud, is conduct unbecoming an officer and a gentleman, in violation of Article of War 95, has been held too many times to warrant any extended discussion of the subject (Dig. Op. JAG 1912-1940, Section 453(24)(25); Bull. JAG February 1944, Section 453(23)). The Board of Review is of the opinion, therefore, that the competent and legal evidence of record is sufficient, beyond any reasonable doubt, to establish the guilt of the accused of the offenses alleged.

6. The records of the War Department show that the accused is 36 years of age. He was born and reared in East Orange, New Jersey. He has the equivalent of a high school education, and in civilian life was employed variously, from 1929 until 1942, as a billing clerk, a mechanical dentist and a timekeeper. He was inducted into the service 25 September 1942, was commissioned a second lieutenant upon graduation from The Infantry School, 17 March 1943, and was promoted to first lieutenant on 15 November 1943. Since becoming an officer he has received five efficiency ratings, as follows: 24 May 1943, "superior"; 18 October 1943, "superior"; 22 November 1943, "excellent"; 31 December 1943, "excellent"; 30 June 1944, "very satisfactory". He is married and has a daughter five years old.

7. The court was legally constituted and had jurisdiction of 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 is mandatory upon a conviction of a violation of Article of War 95.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

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 First Lieutenant John A. McCormick (0-1314658), 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. There are apparently no mitigating or extenuating circumstances. 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 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

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. G.C.M.O. 557, 13 Oct 1944)

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

SPJGQ
CM 260774

26 AUG 1944

UNITED STATES	)	ICELAND BASE COMMAND
v.	)	Trial by G.C.M., convened at Camp Herskola, Iceland 26 May 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for two (2) years. Eastern Branch, Disciplinary Barracks.
Private CHARLES CATES (34545025), Battery C, 748th Antiaircraft Gun Battalion.	)	

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Charles (NMI) Cates, Battery C, 748th AAA Gun Bn, having received a lawful command from Capt. Douglas A. Kuehn, his superior officer, to shovel coal from 1545 hours to 1655 hours, did, at Camp Pimple Hill, Iceland, on or about 13 May 1944, willfully disobey same.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for six days in violation of Article of War 61. 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 two years. The reviewing authority approved the sentence and ordered it executed, suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement,

designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, but directed that pending further orders accused be confined in the Iceland Base Command Prison Stockade.

The result of trial was promulgated in General Court-Martial Order No. 27, Headquarters Iceland Base Command, APO 860, c/o Postmaster, New York, New York, 1 June 1944.

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

On 13 May 1944 accused, a member of Battery C, 748th Anti-aircraft Gun Battalion, was summoned to the office of Captain Douglas A. Kuehn, his battery commander, to explain why he disobeyed the orders of two noncommissioned officers. A Sergeant Curry informed the battery commander that accused refused to obey Curry's order "to fall out with the guns for artillery inspection" because he was ill. The defense stated that it had no objection to Captain Kuehn's hearsay testimony that the first sergeant (Sergeant Copeland) had gone to accused's hut where he again said that he was not feeling well, that Copeland ordered him to report to the dispensary, that accused replied "I'm not that sick", whereupon Copeland ordered him to report to the dispensary anyhow (R. 7, 8, 12, 15). When accused appeared at the office Captain Kuehn asked him if he felt all right and he answered "Yes". Kuehn also asked him why he was not at the gun position (R. 12, 14). After "it was determined that he had disobeyed Curry's order", Captain Kuehn said that he would give accused a week's company punishment and explained to him his rights under Article of War 104. Accused "refused it" and said that he would take a court-martial instead. Captain Kuehn asked him why he would rather be court-martialed than take a few hours' extra duty. Accused said that he wanted to get out of Battery C, and when asked the reason stated that he thought Kuehn "had it in for him ever since he entered the battery". Kuehn then placed him in arrest in quarters. After accused left, First Lieutenant George T. Campbell, an officer of the battery who was present during the interview, reminded the battery commander that he had forgotten to advise accused as to his rights under Article of War 24. Kuehn realized that he was at fault, summoned accused to the office a second time, advised him of his rights under this Article and "asked him every question I had before over" (R. 12-15, 22, 28).

After accused left a second time, Kuehn called the battalion commander and asked if he (Kuehn) was within his rights to have accused work while under arrest and was answered in the affirmative (R. 17, 36). Kuehn said to those present in his office:

> "How can I get that son of a bitch. He thinks he is smart. We can show him we're smarter than he is * * * I know how we'll do it, we'll send him out on the coal pile and give him a direct order and if he disobeys my order he can go ahead and hang himself" (R. 27, 30, 36).

Kuehn further stated that if accused disobeyed the order to shovel coal it would be more serious than his having disobeyed the two previous orders of the noncommissioned officers. He asserted to those present "I'm not giving it to him as punishment" (R. 28). Lieutenant Campbell told Kuehn that he (Campbell) thought they "already had got the boy on enough to hang him. He was a cinch to get six and six". Campbell also told Kuehn that he thought the latter was deliberately multiplying charges against accused. Kuehn replied

> "that it didn't make any difference, he was going out and give him that order and if he was going to disobey it he would be guilty of a more serious offense" (R. 29-30).

Accused was again summoned to the office. Captain Kuehn said "Come with me" and asked Lieutenant Campbell to accompany them. He wanted Campbell present as a witness in the event accused disobeyed the order about to be given (R. 10, 11, 16). On the way to the coal pile Kuehn told accused that he (Kuehn) found that it was necessary to shovel certain coal, that it was necessary work which had to be done, that it was not company punishment under Article of War 104 and "not to be deemed in any way punishment for your offense" (R. 17, 21, 23). At the coal pile Kuehn told him how he wanted the work done, that more coal was to be delivered later that evening and that it was necessary to shovel the coal from the bottom of the pile to the top so that the trucks could back further up on the pile. He then ordered him to shovel coal from 3:45 p.m. to 4:55 p.m., to report the following day (Sunday) at 8:00 a.m., work until 11:55 a.m. and from 12:30 p.m. until 4:55 p.m. He did not order him to work until 10:00 p.m. 13 May. Accused replied that Kuehn could not make him work while he was under arrest. Kuehn then repeated the order and asked if he was refusing to obey a direct order. After a short pause accused said "Yes". He did not shovel coal, was placed in arrest and sent to his quarters (R. 8, 16-18, 21, 23-24). At that time no one else was working at the coal pile (R. 17, 26). The order at the coal pile was given about 45 minutes after the termination of the second interview with accused (R. 24). About two days later Kuehn said to Lieutenant Campbell:

> "So you didn't want me to go ahead and give him that order because we already had enough on him. Do you realize the difference between his disobeying my order and disobeying the order of a non-com was the difference between six months and five years?" (R. 29)

A few days after the incident Kuehn also asked Second Lieutenant Merwin I. Page, 748th Antiaircraft Gun Battalion, if he knew the difference between disobeying the orders of a noncommissioned and a commissioned officer meant the difference between a general and a special court-martial. When Page replied in the negative, Kuehn said he did not know either (R. 36).

Captain Kuehn testified that he "had no expectation" that accused would disobey the order given at the coal pile (R. 18), nor did he wish or desire that he disobey it (R. 11). He took Lieutenant Campbell along to be a witness in the event accused disobeyed the order. Asked on cross-examination if he thought there was a possibility accused would disobey the order he replied "There was a thought as to his further actions" (R. 10-11). After the second interview and before the order was given, the witness was "quite upset because the man would not accept battery punishment" which the witness felt was lenient in view of the offense.

> "I was quite perturbed as to why he was of that opinion * * * That's why in a heated moment I may have said something to the effect that 'We will get him', something of that order, and by that I meant rather than the 104th Article of War we would get him by court-martial; we would try him by court-martial".

The witness may have said, "'That son of a bitch thinks he's smart. We'll get him and get him good'" (R. 14-15). He further testified that the work he ordered accused to do was necessary as some of the coal already delivered had spilled on the middle of the runway. It was necessary to move it to enable the trucks to get to the top of the coal pile to unload as loose coal on the runway caused the wheels to spin (R. 8, 19-20). The work had to be done and accused was available for the detail. The work was necessary and not in the nature of extra duty, and the witness found that accused could do it while he was under arrest. Otherwise he would not have given the order. It was the witness' experience in dealing with enlisted men that "direct explanation as to what is wanted to be done is necessary, and for that reason I took him to the coal pile and explained to him why and how I wanted it done" (R. 10, 17). Coal was being delivered all that day and night and on the following day - Sunday (R. 18). Although no one was working at the coal pile when he took accused there, other men were working at the pile on that day up to that time. The men afterwards were "standing by" until 9:00 p.m. that night, and also worked throughout the next day. Because of the shortage of labor a corporal "was out there" working as a private. Fifteen minutes before accused was given the order, the men at the pile were told it was not necessary for them to "stand by" at the coal pile, that they "could fall in and we would call them when the next truck came in" (R. 8-9, 18).

Captain Kuehn testified upon cross examination that after he became battery commander two sergeants were tried by court-martial and that he was a member of the court. Accused was "involved in the investigation of the offense". Kuehn told accused that if the first sergeant was tried that "all men who were involved or present and did not report the presence of civilians on the post should have been convicted" (R. 11-12). He testified upon redirect examination that after

he had commanded the battery for a month he summoned accused because his battery record showed two previous convictions in successive months. He told him that he hoped "he would straighten up and give me no more trouble". During the interview on the date of the offense alleged, witness told accused that "he had it in him to be one of the best men in the battery, one of our top non-coms, if he didn't have some peculiar quirk that made him--my word was 'goof off'". He had no personal prejudice against accused but wanted "my battery run with no trouble with any of the men. Disciplinary action has to be taken in exceptional cases" (R. 19).

Three other witnesses testified that in their opinion accused received fair treatment in the battery (R. 28, 33, 37), and there was evidence aside from Captain Kuehn's testimony that other men were working at the coal pile that day (R. 21, 26, 34-36, 38).

Admitted in evidence was a statement made by accused to Second Lieutenant Irving Frank, 748th Antiaircraft Gun Battalion after the latter advised the former as to his rights (R. 31-32; Pros. Ex. 1). As accused testified in conformance with the statement, the contents thereof are not set forth herein.

4. For the defense accused, after being advised as to his rights, testified that about 1:00 p.m. on the date alleged he was lying on his bunk when Sergeant Curry, his gun commander, entered and asked why he was not "on the gun". He replied that he was not feeling well and Curry smiled and walked out the door. First Sergeant Copeland then entered, asked the same question and then asked him if he felt bad enough to go to the dispensary. When he replied that he did not, Copeland left. He did not order accused to go to the dispensary (R. 40-41, 43-44). Accused was later told to report to the battery commander who asked why he was not "on the gun". Accused told him he was on his bunk and, when asked what the matter was, replied that he was not feeling well. Captain Kuehn then said "You get a week's extra duty for that" as punishment under Article of War 104, and when accused remarked he did not think he should do a week's extra duty, Captain Kuehn asked Copeland if he gave accused a direct order to go to the dispensary. Copeland said that he did not. Kuehn then said "If you don't take the extra duty you can be court-martialed", whereupon accused replied "That's all right with me". The battery commander then asked "Why do you take a chance of taking a court-martial when you can do extra duty and not be tried?" When accused said that perhaps he could "get out of the battery that way", Kuehn informed him he was under arrest in quarters and ordered him to return to the hut. The 24th Article of War was not read or explained to accused during this interview. He wanted to be transferred from the battery because Captain Kuehn "had it in" for him since the officer had been with the organization (R. 41, 44).

Later the corporal of the guard told accused that the battery commander wanted him to report to the office in "fatigues". Accused changed his clothing, reported and received an explanation of his rights under the 24th Article of War by Captain Kuehn, who also told him "how he could be a first three grader" any time (R. 42, 44, 46). Captain Kuehn told accused "to come along" and asked Lieutenant Campbell to accompany them. On the way to the coal pile he said:

> "Cates, this is not extra duty or battery punishment under the 104th Article of War, just a job I want you to do while waiting on trial. We got trucks hauling coal all night. I want you to get a shovel, come here and work to five minutes to five, go eat, come back at 5:30 and work till ten, then come back in the morning and work to ten o'clock tomorrow night, taking time out for eats".

When accused asked if he had to work while under arrest of quarters Kuehn replied "whether or not I had to work; 'You go shovel coal'". Accused said "'No, sir'". When asked by Kuehn if he was refusing to obey his direct order, accused said "'Yes, sir.' I told him I wasn't going to shovel coal" (R. 42, 44, 46). The battery commander was angry and his attitude was belligerent. Accused knew this to be a fact because "I had been around him long enough to know" (R. 46-47).

He further testified that he refused to shovel coal because "I had already refused a week's extra duty to take a court-martial and I didn't see why I should shovel coal after I refused the extra duty". If Captain Kuehn told him to shovel coal only until 4:55 p.m. he would have worked because "it was regular duty until five o'clock" but not after that hour (R. 42, 45). He did not refuse to work because he thought he did not have to work while under arrest (R. 43). He did not work until 4:55 p.m. because when the battery commander told him he had to work until 10:00 p.m. and the next morning "I knew he had it in for me. It all sounded like extra duty. I didn't see why I should. I already had refused extra duty" (R. 45). It was the custom in the battery to ask for volunteers for night duty and one who volunteered for such duty "got time off" the following day (R. 43, 46). The only men who worked at night or on Sundays were men who got into trouble in the battery during the day and were given extra duty (R. 46). He had previously been on duty in the battery from noon to midnight (R. 47). The reason he believed Captain Kuehn "had it in" for him was the fact that accused was on duty where the events occurred for which the two sergeants were court-martialed. He was questioned but no charges were preferred against him. Captain Kuehn told him "You are lucky, you should have been court-martialed along with Feinstein and Taft, you should be in the stockade" (R. 42).

5. Technical Sergeant Carl Copeland of accused's battery, called as a rebuttal witness by the prosecution, testified that he went to accused's hut and asked him why he did not "fall out on the gun". When

he said he was sick Copeland replied "'You go to the dispensary'". He said he was not "sick enough", whereupon Copeland said "Go anyway" (R. 48-49).

6. The evidence in the case under consideration is most superficial with respect to the explanation given accused by Captain Kuehn as to the former's rights under the 104th Article of War when company punishment of extra duty for one week was imposed. The details of the explanation were not established in evidence. However, the evidence does establish the fact that an explanation of such rights was made, and that accused then exercised his privilege to demand trial by court-martial. For the purposes of discussion of the merits of the case it will be assumed that there was full compliance with the provisions of Article 104. It will also be assumed for the purposes of discussion that accused committed the offenses for which disciplinary punishment was imposed, namely, disobedience of orders given by two noncommissioned officers "to fall out with the guns for artillery inspection" and to report to the dispensary.

It is an elementary principle that if an order is given by a superior officer for the sole purpose of subjecting accused to the maximum punishment imposable, and with the expectation that he will disobey it, the order is unlawful and disobedience thereof is not punishable under Article of War 64 (CM 219946 (1942), Bull. JAG, Vol. I, No. 1, Jan-June 1942, sec. 422(6), p. 18).

> "The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which * * * is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this Article" (M.C.M. 1928, par. 134b, p. 148).

> "In the absence of an affirmative showing that the order was given for the sole purpose of increasing the penalty, the fact that a noncommissioned officer had previously given accused a similar order does not preclude punishment under A.W. 64" (CM 244537, 5 Nov 1943, Bull. JAG, Vol. II, No. 11, sec. 422 (6), p. 426).

In CM 219946, Tracz, Barone and Harrison, each of the three accused, whose cases were consolidated and tried in one proceeding with their consent, was charged with and found guilty of disobedience of a superior officer's command "to move from the large cell block to the small one". The evidence showed that the officer, a Captain Lowry, directed a Sergeant Stickan to move the three accused from the large to the small cell block. Captain Lowry testified that Stickan later told him that the three men refused to move. The captain then went to each accused in turn and gave each a direct order to move to the small cell block.

Tracz and Harrison each stated his refusal to obey the order. Barone failed to obey the order until two members of the guard were summoned and aligned themselves on each side of him. Upon cross examination Captain Lowry was asked why he did not prefer charges against Tracz for disobeying Sergeant Stickan. He replied:

> "I didn't prefer charges against Private Tracz for disobeying Sergeant Stickan because it was then a minor offense, that is, the disobedience of the order of a noncommissioned officer, as compared with the major offense of direct disobedience of the order of a superior officer while in the performance of his duty."

Upon cross examination Captain Lowry was asked a similar question with respect to accused Barone and the following colloquy occurred:

> "A. I didn't prefer charges because I wanted to give him --
> "PROSECUTION: If it please the court, I object to that question; it is immaterial.
> "LAW MEMBER: The objection is not sustained.
> "A. -- I wanted to give him an opportunity to think it over, for one thing; for another thing, after he had failed to obey my order to move from the large cell block to the small cell block, I remembered that the Manual for Courts-Martial is fairly specific that you don't clutter up the charge sheet with minor charges when there are major charges to prefer.
> "Q. Did you believe that this should be a major charge?
> "A. I thought, and still think, that any prisoner who directly and flatly refuses to obey the order of a Prison Officer, does commit a major breach of discipline.
> "Q. Then the reason for the order was to be sure that the maximum penalty was inflicted for disobedience -- is that correct?
> "A. That is correct."

The Board of Review held the record of trial legally insufficient to support the findings of guilty and the sentence as to each accused, on the ground that although Captain Lowry's testimony related particularly to the order given to accused Barone, the evidence viewed in its entirety disclosed that all the orders were given for the sole reason that the officer wished to subject accused to the maximum punishment imposable under the Articles of War for disobedience of orders, and that when giving the orders he expected accused would disobey them.

In the case under consideration Captain Kuehn twice interviewed accused, who, despite questioning as to the reason for his decision,

adhered to his election to be tried by court-martial instead of accepting company punishment under Article of War 104. The battery commander admitted that he was "quite upset because the man would not accept battery punishment" and that he was "quite perturbed". He asked others in the office:

> "How can I get that son of a bitch. He thinks he is smart. We can show him we're smarter than he is * * * I know how we'll do it, we'll send him out on the coal pile and give him a direct order and if he disobeys my order he can go ahead and hang himself."

The captain admitted that he might have said that "We'll get him and get him good", and explained that by this remark he meant that rather than administer disciplinary punishment under Article of War 104 "we would try him by court-martial". He called attention of the others to the fact that he would not give the order to shovel coal "as punishment", that if accused disobeyed such an order it would constitute a more serious offense than those arising as a result of his having disobeyed the orders of the noncommissioned officers. When Lieutenant Campbell remonstrated with him and said that he was deliberately multiplying the charges, Captain Kuehn replied that it made no difference, that he would issue the order and if he disobeyed "he would be guilty of a more serious offense". Although he testified he had no expectation that accused would disobey the order, he took Lieutenant Campbell along as a witness in the event he did disobey the order, and when asked upon cross examination if he thought there was a possibility accused would disobey the order, he testified "There was a thought as to his further actions". About two days later he chided Campbell for not wanting him to issue the order and asked if he realized the difference in punishment for disobeying the orders of noncommissioned and commissioned officers was the difference between six months and five years.

In view of the foregoing authorities and the evidence, including the testimony of Captain Kuehn and the admissions contained therein, the conclusion is inescapable that the battery commander gave accused the direct order to shovel coal with the sole purpose of subjecting him to the maximum punishment imposable, and with the expectation that he would refuse to obey the order. It is true that it was not a case of the battery commander repeating either of the two orders previously given by Curry and Copeland, namely, to "fall out with the guns for artillery inspection" and to report to the dispensary, but that he gave accused an entirely different order, namely, to shovel coal. However, the very reason for Captain Kuehn's giving the order to shovel coal was clearly because of accused's prior disobedience of the orders of the two noncommissioned officers, and because the captain was irked by accused's insistence upon being tried by court-martial for such disobedience instead of accepting disciplinary punishment under Article of War

104. The only reasonable conclusion to be drawn from the evidence is that because of these facts Kuehn purposefully issued the order to shovel coal with the full expectation that accused would refuse to obey it, and that he would be tried by court-martial and would be convicted of the more serious offense of disobeying the order of a commissioned officer, which would naturally result in the imposition of a punishment more severe than that which he had imposed on accused under Article of War 104. Under such circumstances the Board of Review is of the opinion that the foregoing authorities are applicable even though the order of the battery commander was distinctly different in character than the previous orders of Curry and Copeland.

It is noted that the Specification alleges that the order given accused was shovel coal from 3:45 to 4:55 p.m., whereas Captain Kuehn testified that he ordered him also to shovel coal on the following day. However, such a variance between the allegations and the proof is immaterial under the circumstances of the case.

For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

William H. Crawford, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

SPJGQ
CM 260774

1st Ind.

War Department, J.A.G.O., 2 SEP 1944 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial and the opinion of the Board of Review in the case of Private Charles Cates (34545025), Battery C, 748th AAA Gun Battalion. This case was tried at Camp Herskola, Iceland, on 26 May 1944. After that date and after the result of the trial was promulgated by General Court-Martial Order No. 27, Headquarters Iceland Base Command, APO 860, c/o Postmaster, New York, New York, 1 June 1944, but before the record of trial was processed in the Branch Office of The Judge Advocate General with the European Theatre of Operations, the Iceland Base Command was transferred out of the jurisdiction of the European Theatre of Operations, such transfer having taken place on 30 July 1944. Because of these circumstances the record of trial has been examined in the Office of The Judge Advocate General in Washington, D. C., and is now forwarded to you for your action.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence; and, for the reasons stated in said opinion, I recommend that the findings and sentence be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

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

Myron C. Cramer

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

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

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 490, 11 Sep 1944)

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

SPJGN
CM 260797

18 AUG 1944

UNITED STATES	)	92ND INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 13-14 July 1944. Each: Forfeiture of $75 per month for six (6) months.
Second Lieutenant SEYMOUR (NMI) HUNDLEY (0-517597), 371st Infantry, and Second Lieutenant WENDELL P. IMES (0-1325572), 365th Infantry.	)	

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

1. The record of trial in the case of the two officers named above has been examined in the Office of The Judge Advocate General and there found legally sufficient to sustain the sentence as to accused Second Lieutenant Seymour (NMI) Hundley but legally insufficient to sustain the findings and sentence as to accused Second Lieutenant Wendell P. Imes. The record has now been examined by the Board of Review solely as to accused Second Lieutenant Wendell P. Imes and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Seymour Hundly, 371st Infantry (then 370th Infantry), did, in the vicinity of Hereford, Arizona, on or about 23 April 1944, in conjunction with Second Lieutenant Wendell P. Imes, 365th Infantry (then 370th Infantry) feloniously take, steal and carry away one (1) automobile tire, tube and wheel, value of about thirty-five dollars ($35.00) the property of Mr. Doc Bettis, Tombstone, Arizona.

Each accused pleaded not guilty to and was found guilty of the Charge and its Specification. Each accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the period of one year. The reviewing authority approved only so much of the sentences as provides for forfeiture of $75 of each officer's pay per month

for six months and ordered the sentences as approved to be duly executed.

3. A recitation of the prosecution's evidence is unnecessary as hereinafter shown.

4. Both accused, after explanation of their rights as witnesses, elected to remain silent and no evidence whatsoever was adduced by the defense.

5. The Specification alleges that the accused Hundley did, in the vicinity of Hereford, Arizona, on or about 23 April 1944, in conjunction with the accused Imes feloniously take, steal and carry away one automobile tire, tube and wheel, value of about $35 the property of Mr. Doc Bettis (underscoring supplied).

The Specification merely alleges that Hundley, while associated with Imes, did feloniously take, steal and carry away the described personal property. The authorities are manifold that such Specification is organically fatally defective as to the accused Imes and that such defect nullified the entire prosecution against him (CM ETO 882 [1943], Biondi and White, 3 Bull. JAG 59; CM 201710, Reynolds, CM 250668 [1944], 3 Bull. JAG 285; M.C.M., 1928, par. 126c).

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

6. The accused Imes is about 28 years old. The records of the Office of The Adjutant General show that he has had prior enlisted service from 1 May 1942 until 16 November 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 but as to the accused Imes, was without jurisdiction of either the person or the offense. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to the accused Second Lieutenant Wendell P. Imes.

Abner E. Lipscomb, Judge Advocate.

Charles S. Byers, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 260797

1st Ind.

War Department, J.A.G.O., 31 AUG 1944 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½ is the record of trial in the case of Second Lieutenant Seymour (NMI) Hundley (0-517597), 371st Infantry, and Second Lieutenant Wendell P. Imes (0-1325572), 365th Infantry, together with the foregoing opinion of the Board of Review.

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 and the sentence as to Second Lieutenant Wendell P. Imes and recommend that the findings of guilty and the sentence as to Second Lieutenant Wendell P. Imes, be vacated; and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

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

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

(Findings and sentence as to Second Lieutenant Wendell P. Imes vacated by order of the Under Secretary of War. G.C.M.O. 487, 9 Sep 1944)

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

SPJGV
CM 260819

17 AUG 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Pyote, Texas, 20 and 21 June 1944. Dismissal and total forfeitures.
Second Lieutenant FREDERICK R. STEESE (0-682734), 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: (Finding of not guilty).

Specification 2: In that Second Lieutenant Frederick R. Steese, Combat Crew Detachment, did, at Pete's Hotel, Monahans, Texas, from about 14 December 1943 to about 29 December 1943, wrongfully and unlawfully live and cohabit with Mrs. Lucy D. Weaver, a woman not his wife.

Specification 3: (Finding of not guilty).

Specification 4: In that Second Lieutenant Frederick R. Steese, Combat Crew Detachment, did, at Monahans, Texas, on or about 26 November 1943, with intent to deceive, wrongfully and unlawfully make and utter to Private Fred P. De Mase a certain check in words and figures as follows:

~~First-State-Bank~~
VALLEY NATIONAL BANK
TUSCON, ARIZONA

Monahans, Texas 11-26 1943 No.

Pay to the Order of Fred Paul De Masse $10.00

Ten & xx/100 Dollars

19th Gp. 28th Sqd
Pyote /s/ Frederick R. Steese,
2nd Lt., AC, 0-682734

and by means thereof did fraudulently obtain from the said Private Fred P. De Mase, ten dollars ($10.00) he, the said Second Lieutenant Frederick R. Steese, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Tucson, Arizona, for payment of said check.

Specification 5: In that Second Lieutenant Frederick R. Steese, Combat Crew Detachment, did, at Monahans, Texas, on or about 18 December 1943, with intent to deceive, wrongfully and unlawfully make and utter to the City Pharmacy Drug Store, a certain check in words and figures as follows:

VALLEY NATIONAL BANK
~~First-State-Bank~~
Tuscon, Arizona

Monahans, Texas Dec 18 1943 No.

Pay to the Order of City Pharmacy $20.00

Twenty & xx/100 Dollars

HBCTD /s/ Frederick R. Steese
AAB Pyote, Texas 2nd Lt., AC, 0-682734

and by means thereof did fraudulently obtain from the said City Pharmacy, Drug Store, twenty dollars ($20.00), he, the said Second Lieutenant Frederick R. Steese, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Tucson, Arizona for payment of said check.

Specification 6: (Finding of not guilty).

Specification 7: In that Second Lieutenant Frederick R. Steese, Combat Crew Detachment, did, at Army Air Field, Pyote, Texas, on or about 14 April 1944, with intent to deceive, wrongfully and unlawfully make and utter to the Pyote Army Air Field Exchange a certain check in words and figures as follows:

April 14 1944 No.

VALLEY NATIONAL BANK
TUCSON, ARIZONA

Pay to the Order of Pyote AAF Exchange $10.00

Ten & xx/100 Dollars

/s/ Frederick R. Steese
2nd Lt., AC, 0-682734

and by means thereof did fraudulently obtain from the said Pyote Army Air Field Exchange, ten dollars ($10.00) he, the said Second Lieutenant Frederick R. Steese, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Tucson, Arizona for payment of said check.

Specification 8: In that Second Lieutenant Frederick R. Steese, Combat Crew Detachment, did, at Army Air Field, Pyote, Texas, on or about 20 April 1944, with intent to deceive, wrongfully and unlawfully make and utter to "Cash", a certain check in words and figures as follows:

April 20 1944 No.

VALLEY NAT'L-TUSCON ARIZONA
TUSCON ARIZONA

Pay to the Order of Cash $10.00

Ten & xx/100 Dollars

/s/ Frederick R. Steese
2nd Lt., AC, 0-682734

CC Pool

and by means thereof did fraudulently obtain from the Pyote Army Air Field Exchange, ten dollars ($10.00) he, the said Second Lieutenant Frederick R. Steese, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Tucson, Arizona for payment of said check.

He pleaded not guilty to the Charge and all Specifications. He was found guilty of the Charge and Specifications 2, 4, 5, 7 and 8 and not guilty of Specifications 1, 3 and 6. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The evidence pertaining to Specifications 1, 3 and 6 under which there were findings of not guilty will be discussed only to the extent that it is relative to the Specifications under which there were findings of guilty.

4. Evidence for the prosecution is substantially as follows:

a. Specification 2.

Mr. Leeman E. Peters, owner and manager of Pete's Hotel, Monahans, Texas, testified that on or about 14 December 1943 the accused obtained Room 21 in the hotel, signing the register as Lieutenant F. E. Steese and wife. Accused and a woman whom he introduced as his wife occupied this room until 27 December 1943. Upon Mrs. Elton Weaver being brought into the courtroom witness identified her as being the same woman who occupied the hotel room with accused as his wife (R. 42, 43, 49). Mrs. Leeman Peters, wife of above witness who assists in the operation of Pete's hotel testified substantially the same as did Mr. Peters (R. 49, 51).

Lucy Doilene Weaver testified that she had known accused since October 1943. She lived with accused from 14 December to 27 December 1943 at Pete's Hotel, in Monahans, Texas. She and accused told Mr. and Mrs. Peters and people "all over Monahans" that they were married (R. 9-11). She had been married to Elton Weaver, now in the armed forces in New Guinea, for over a year (R. 19, 20, 40). It was stipulated that accused had sexual intercourse with Mrs. Weaver in the State of Texas between 14 and 22 December 1943 (R. 15).

b. Specifications 4, 5, 7 and 8.

Private Fred P. DeMase testified that at a party at Tubbs Hall, a dance Hall in Monahans, Texas, accused asked him if he could get a check cashed in order to get more liquor for the party. The proprietress agreed to cash a check if it was made out to and endorsed by DeMase. Accused thereupon gave to DeMase a check dated 26 November 1943 in the amount of $10 drawn on the Valley National Bank, Tucson, Arizona, and payable to DeMase (R . 78). DeMase received $10 from the proprietress for the check and turned this money over to accused (R. 80). The check was received in evidence as Exhibit 9 (R. 28).

On 18 December 1943, accused gave to the City Pharmacy, Monahans, Texas, a check dated 18 December 1943 in the amount of $20, drawn on the Valley National Bank, Tucson, Arizona. Accused obtained the amount of the check in cash (R . 54; Ex. 3).

On 14 April 1944, accused cashed a check at the Pyote Army Air Field Exchange, the check being dated 14 April 1944 in the amount of $10, payable to the Pyote Army Air Field Exchange, and drawn on the Valley National Bank, Tucson, Arizona (R. 74; Ex. 7).

On 20 April 1944, accused cashed a check at the Pyote Army Air Field Exchange, the check being dated 20 April 1944 in the amount of $10, payable to cash, and drawn on the Valley National Bank, Tucson, Arizona (R. 75; Ex. 8).

William I. Ganz, Chief Clerk, Valley National Bank, Tucson, Arizona, testified by deposition that each of the above described checks was presented to the drawee bank for payment and each check was dishonored because there were insufficient funds on deposit in accused's account for its payment. M r. Ganz testified further that on the respective dates each check was written accused's account was insufficient to pay the check written on such respective date (R. 84; Ex. 10).

By letter dated 23 November the Valley National Bank wrote accused that it was against its policy to hold unpaid checks, or carry overdrafts, and informed accused that his balance was $9.14 (R. 85; Ex. 12). This letter was in reply to one written by accused on 18 November 1944 stating that he knew his account was overdrawn and requesting the bank to hold his checks (R. 85; Ex. 11).

5. For the defense.

Second Lieutenant Jerome P. Phillips, the investigating officer in this case, was called and examined at great length by the defense. The pertinent part of his testimony is that during the course of his investigation he discovered that the register of Pete's Hotel, Monahans, Texas, had been mutilated between the time he first saw the register about 1600 on 21 April and 1400 on 22 April 1944, when he took a picture of the register (R. 124). Lieutenant Phillips executed a sworn statement setting forth the facts concerning the register, and listed himself on the report of investigation as a witness, and incorporated such facts in the summary of the evidence (Exs. B, C, and D). Based on these facts the defense moved that this case be dismissed and again referred to the Second Air Force for investigation and consideration, on the grounds that the investigation made was not thorough and impartial (R. 136). The motion was denied by the court. After an examination of Lieutenant Phillips full testimony as to his procedure in investigating this case the Board of Review is of the opinion that he

complied substantially with the provisions of Article of War 70 and paragraph 35a, MCM. Merely listing himself as a witness to certain facts uncovered during the course of the investigation in no way evidences prejudice, and the record discloses that Lieutenant Phillip's investigation was both thorough and impartial.

After having his rights as a witness explained the accused elected to testify under oath. He admitted that he had lived with Mrs. Weaver in the Bankhead Courts, in Monahans, from which they moved at the request of the management. He took her to her sister's address, and about the middle of December 1943 he took her to Pete's Hotel in Monahans where he registered her as his wife. They lived together at the hotel until 22 December 1943 when Mrs. Weaver returned to her home (R. 144, 145). He is married and the father of children, though he and his wife are estranged (R. 163).

Accused likewise admitted writing and cashing the checks described in Specifications 4, 5, 7 and 8 (R. 155-158). It was not his intent to defraud anyone when he gave the checks, and he believed at the time he wrote them that he had sufficient funds on deposit for their payment (R. 157).

On cross examination accused stated he did not keep track of his bank account, did not know exactly the status of his account when he issued the checks (R. 161), and had never asked the bank for a statement between November 1943 and April 1944 (R. 166). He made good the $20 check dated 18 December when he returned from Denver, on 14 April 1944 (R.152) and redeemed the two $10 checks cashed by the Pyote AAF Exchange immediately upon being advised that the checks had been returned by the bank, about 30 April 1944. He did not know that the check given Private DeMase had not been paid as no one had ever advised him to that effect, or requested that it be paid (R. 157).

The Board of Review is of the opinion that accused's failure to make any effort to determine the status of his account in the Valley National Bank was conduct so careless and reprehensible that the court was amply justified in inferring a fraudulent intent on the accused's part at the time he issued the checks which are the basis of the charges against him. While it is true that accused did take up the $20 check issued to the City Pharmacy on 18 December and the two $10 checks issued to the Pyote AAF Exchange on 14 April and 20 April 1944, respectively, an analysis of the evidence shows that the $20 check issued on 18 December 1943 was not redeemed by accused until April, and the checks given to the Pyote AAF Exchange were not redeemed until after charges based on these checks had been preferred against him. The inference of fraud on accused's part when he issued these checks is not weakened by these self serving and belated efforts on the part of the accused.

5. The evidence shows that accused, a married man, unlawfully lived with Mrs. Lucy Doilene Weaver, wife of a member of the armed forces overseas, from about 14 December 1943 to about 27 December 1943, at Pete's Hotel, Monahans, Texas. Accused and Mrs. Weaver held themselves out to be married to each other and accused registered Mrs. Weaver at the hotel as his wife.

Between 26 November 1943 and 20 April 1944 accused issued four checks to various parties in amounts of $20, $10, $10, and $10, respectively, without sufficient funds on deposit in the drawee bank for their payment either on the dates the checks were written or when they were presented to the bank for payment.

6. War Department records show that accused is 29 years of age and a high school graduate. He was on active duty as a member of the U. S. Marine Corps Reserve from 1937 to 1941. He entered the Army 4 June 1942 and was appointed Aviation Cadet 13 August 1942. Upon graduation from the AAF Bombardier School, Big Springs, Texas, he was appointed second lieutenant, AUS on 24 June 1943.

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

Thomas N. Tabby, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGV
CM 260819

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 Frederick R. Steese (0-682734), Air Corps.

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

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 565, 14 Oct 1944)

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

SPJGK
CM 260828

18 AUG 1944

UNITED STATES v. Private GEORGE E. PARKER (39147839), Company D, 27th Infantry Training Battalion.	INFANTRY REPLACEMENT TRAINING CENTER ARMY GROUND FORCES Trial by G.C.M., convened at Camp Croft, South Carolina, 10, 11, 12, 18 July 1944. Dishonorable discharge, confinement for fifteen (15) years. Penitentiary.

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HOLDING by 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. The record has now been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General.

2. It is not necessary to set forth in full all the Charges and Specifications upon which accused was found guilty, but only those which are directly involved in the Board of Review's holding herein. The others will be summarized. They are as follows:

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

Specification: Absence without leave from 13 June to 15 June 1944.

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

Specification: Escape from confinement, 13 June 1944 at Camp Croft, South Carolina.

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

Specification 1: Larceny of 1940 Buick automobile at Spartanburg, South Carolina, on 13 May 1944.

Specification 2: Unlawful entry of Jonesville, South Carolina, Drug Store with intent to commit larceny on 26 May 1944.

Specification 3: Larceny of 1937 Chevrolet automobile at Glendale, South Carolina, on 15 June 1944.

Specification 4: Burglary of store of Rubin Earl Coleman, Pacolet, South Carolina, on 13 June 1944.

Specification 5: In that Private George E. Parker, Company "D", 27th Infantry Training Battalion, Camp Croft, South Carolina, did, at Pacolet, South Carolina, on or about 13 June 1944, in the nighttime feloniously break and enter the dwelling house of Mrs. Uarda Powell Hicks, Pacolet, South Carolina, with intent to commit a felony, viz larceny therein.

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

Specification 1: In that Private George E. Parker, Company "D", 27th Infantry Training Battalion, Camp Croft, South Carolina, did, at Camp Croft, South Carolina, on or about 10 June 1944, feloniously have in his possession 21½ pairs ladies rayon hose, value about $16.00, property of Doctor Lewis Perrin, owner of Jonesville Drug Store, Jonesville, South Carolina, recently stolen goods; he, the said Private George E. Parker, then well knowing the said goods to have been feloniously stolen, taken, and carried away.

Specification 2: In that Private George E. Parker, Company "D", 27th Infantry Training Battalion, Camp Croft, South Carolina, did, at Camp Croft, South Carolina, on or about 10 June 1944, feloniously have in his possession one brown suitcase, value about $8.00, property of Mr. Boyce P. Lancaster, Jonesville, South Carolina, recently stolen goods; he, the said Private George E. Parker, then well knowing the said goods to have been feloniously stolen, taken, and carried away.

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 dishonorable discharge, total forfeitures, and confinement at hard labor for twenty-five (25) years. The reviewing authority approved the sentence, but reduced the period of confinement to fifteen (15) years, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The evidence shows that Mrs. Uarda Powell Hicks was sitting alone in the bedroom of her home in Pacolet, South Carolina, between 2200 and 2300 on the evening of 13 June 1944. The bedroom adjoined the living room; the French doors which gave access to the living room were open, but Mrs. Hicks had her back to them as she worked on some sewing. There was no light in the living room, but those in the bedroom cast some light into the living room. Turning "sideways" to sew, Mrs. Hicks glanced into the living room, and noticed "a black head of hair", looking over the top of and from behind the sofa. She arose, took a few steps into the living room in order to turn on the light there, and recognized the head to belong to a man. She screamed, and turned and ran from the house (R. 37, 38).

A neighbor called a local police officer, who came to the Hicks' home. Mrs. Hicks did not return home until about 0930 or 1000 the next day, 14 June. It was discovered then that the screen on the window of another bedroom, also adjoining the living room but on the other side of the house, had been torn loose and pulled back and the window itself had been raised. This condition had not existed previously (R. 38, 40, 41).

On Monday, 12 June, Mrs. Hicks had washed a pajama-top which belonged to her husband, and which she was able positively to identify (Pros. Ex. 7). She had last seen it that day, on her trunk. She did not state where (in what room) her trunk was. She had not looked for, or noticed it, thereafter (R. 38, 39). She was unable to identify accused as the man she had surprised in her living room, other than to say that accused had "his characteristics" (R. 39, 41).

During the night of 13-14 June 1944, the general merchandise store of Mr. Rubin Earl Coleman, of Pacolet, was broken into. The testimony does not show what time the store was closed on the evening of the 13th. About 0600 on the 14th, Mr. Coleman discovered the burglarious entry. Upon careful examination of the premises it was found that they had been ransacked. Many articles carried in stock were missing. Most of them had been recovered and were satisfactorily identified by the witness and by other witnesses in the chain of persons handling them from the time of their recovery to the time of trial. A description of them is not necessary for the purposes of this holding (R. 42-45; Pros. Exs. 11,12, 13; R. 46, 47, 50, 57, 59, 60, 62, 63, 65, 66, 68).

Mr. Coleman and the policeman who entered the store with him on the morning of 14 June discovered Mrs. Hicks' husband's pajama coat in the store. Specifically, it was found in the bottom of a new wooden water bucket. The bucket had been placed on top of a counter, where it did not belong. On top of the pajama coat were "some tooth brushes and stuff", the latter noun being perhaps explained further by one witness's description of "some soap, and a pair of small tin-snips * * * and several other things". Both men positively identified the same pajama top which had been identified by Mrs. Hicks (R. 45, 47, 49, 50; Pros. Ex. 7).

Mrs. Mildred L. Keenen, of a nearby town, owned a black 1937 Chevrolet coupe. It was missing on the morning of 15 June from the place in front of her home where it had been parked the night before (R. 53, 54). At 0715 on the 15th accused parked this car on the edge of the road near the rural house of Mrs. Mary Clack, of Chester, South Carolina. He left it there, but was apprehended nearby during the forenoon or early afternoon of that day (R. 54-58, 59, 60, 62). The articles identified by Mr. Coleman as having been taken from his store during the night were seen in the car by Mrs. Clack, and were found in it by police officers and others who had seen or who apprehended accused (R. 44-46, 57, 60, 62, 63, 64, 68). Accused admitted that he had come in the automobile to the place where it was found (although he denied having driven it there), but said that "he didn't know anything about" the articles found in it (R. 64, 65).

Accused elected to remain silent (R. 86).

4. The question to be decided is whether the record contains evidence sufficient to support the finding of guilty of Specification 5 of Charge III, which alleged (except for the omission therein of the words "and burglariously") the offense of burglary by accused of the home of Mrs. Hicks. (MCM, 1928, App. 4, p. 249). Accused was also tried for larceny of Mrs. Keenen's automobile (Specification 3, Charge III) and for unlawfully entering Mr. Coleman's store with the intent of committing larceny therein (Specification 4, Charge III), and was found guilty of these offenses. The evidence supports these findings. A prima facie case of guilt of the larceny of the automobile is made by showing the unexplained possession by accused of the chattel, taken without authorization but a few hours before he was seen with it, (CM 202720, Glen, 6 BR. 251; CM 230928, Lanyon, 18 BR. 115), and while accused was charged with unlawfully entering Mr. Coleman's store, rather than with the larceny of the articles taken from the store, the same permissible inference may be drawn and a presumption of guilt arise from his possession of the missing articles. The combination of the established unlawful entry and the possession by accused of articles missing immediately thereafter does not do violence to this Board's sense of logic and sequence. It is reasonable to assume that he made the unlawful entry.

The pajama top, however, was not shown ever to have been in accused's possession. It was not found in his automobile, but in the store. In other words, the presumption of guilt of larceny, or of unlawful entry of Mrs. Hicks' home, has no foundation of this sort upon which to rest. His guilt, if any, must be based upon a speculation that since the garment was found in a store which he is found by circumstantial evidence to have burglarized, he must have taken it there, and therefore, he must have been the man who unlawfully entered Mrs. Hicks' home. Stating the proposition in a different form, having concluded that accused entered the store, we must needs proceed to infer that he left the pajama-top there, and from that infer back that he got the garment by unlawfully entering the Hicks' home. Inference upon inference is not permissible, particularly in an instance in which human life and liberty are at stake. (See SOBOLOVITZ v. LUBRIC OIL COMPANY, 107 Ohio State, 204; 140 N.E., 634). To sustain this finding requires a mental agility which regards outward suggestions of guilt, without seeking for the underlying thread and fabric of a connected process of reasoning. Such speculation may be permissible in detective novels. It is not in a court-martial procedure. The evidence creates a strong suspicion, but its probative value is insufficient to establish guilt beyond a reasonable doubt. Mere probabilities and suspicions will not support a conviction of a criminal offense. We hold the evidence insufficient to support the findings of guilty of Specification 5, Charge III.

5. It was also shown by the evidence that drug store premises of Dr. Lewis Perrin, trading as the Jonesville Drug Store, were burglarized on the night of 26-27 May 1944, and that 21½ pairs of ladies' rayon hose, property of Dr. Perrin, were taken therefrom. At the same time, the person who thus entered took a brown suitcase which an employee, Mr. Boyce F. Lancaster, had left there (R. 24-27, 28, 29; Pros. Exs. 2, 3-A, -B, -C, and -D).

While the values alleged in the two Specifications of the Charge were not satisfactorily proved, failure to do so is not involved in the sufficiency of the court's findings or of the sentence.

The evidence also shows that the rayon hose and the suitcase were later found in the trunk of a 1940 Buick sedan previously shown to have been in accused's possession and operated by him (R. 19, 22).

6. Accused was charged with and found guilty of the unlawful possession of the rayon hose (Charge IV, Specification 1) and separately, with the unlawful possession of the suitcase (Charge IV, Specification 2). The Manual for Courts-Martial, 1928, at page 171, reads as follows:

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

Accused could, therefore, have been properly charged with only one larceny, only one unlawful entry of the drug store having been shown. It follows that he is properly chargeable with only one unlawful possession of the goods stolen in that unlawful entry. Inasmuch, however, as the multiplication of offenses had no effect upon the legality of the sentence in this case, and in view of the failure of accused to object to the defective specifications, it cannot be said that any substantial right of accused was prejudiced thereby. CM 193971, Reed, 2 BR. 109.

7. The finding of guilty of Charge I and its Specification alone supports the sentence as approved by the reviewing authority. The holdings herein by the Board of Review do not affect the sentence.

8. The Charge Sheet shows that accused is 34 years of age. He had prior service with the 52nd Coast Artillery from 19 July 1935 to 19 September 1935, from which he was discharged as a private, with character, "Fair". The staff judge advocate states in his review that accused was discharged for concealing a criminal record and allowing prisoners to smoke. He was inducted into the Army of the United States at San Francisco, California, on 11 February, 1944.

9. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 5 of Charge III, legally sufficient to support the findings of guilty of Charge III and of all other Charges and Specifications, and legally sufficient to support the sentence as approved by the reviewing authority.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., AUG 29 1944 - To the Commanding General, Infantry Replacement Training Center, Army Ground Forces, Camp Croft, South Carolina.

1. In the case of Private George E. Parker (39147839), Company D, 27th Infantry Training Battalion, 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 5 of Charge III but legally sufficient to support the findings of guilty of Charge III and all other Charges and Specifications and legally sufficient to support the sentence, which holding is hereby approved. Upon disapproval of the finding of guilty of Specification 5 of Charge III, you will have authority to order the execution of the sentence.

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

(CM 260828).

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.

SPJGN
CM 260835

16 AUG 1944

UNITED STATES v. Second Lieutenant RAYMOND J. GEERON (0-1305758), Infantry, Officers School, Army Ground Forces Replacement Depot Number 2.	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 2 Trial by G.C.M., convened at Fort Ord, California, 21 July 1944. Dismissal, total forfeitures and confinement for seven (7) years.

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

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

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

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

Specification: In that Second Lieutenant Raymond J. Geeron, Officers School, Army Ground Forces Replacement Depot Number 2, Fort Ord, California, did, without proper leave, absent himself from his organization at Fort Ord, California from about 18 March 1944 to about 2 July 1944.

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

Specification: In that Second Lieutenant Raymond J. Geeron, Officers School, Army Ground Forces Replacement Depot

Number 2, Fort Ord, California, did, at Los Angeles, California, on or about 24 April 1944, with intent to defraud wrongfully and unlawfully make and utter to Bank of America National Trust and Savings Association, a certain check, in words and figures as follows, to-wit:

Wheaton, Mo., April 24, 1944 No.___

BANK OF WHEATON 80-1256

Pay to the order of Bearer $15 00/100

Fifteen and No/One Hundredths ----------DOLLARS

For_____ Lt. Raymond J. Geeron
01305758

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and by means thereof did fraudulently obtain from Bank of America National Trust and Savings Association $15.00, he the said Second Lieutenant Raymond J. Geeron, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Wheaton for the payment of said check.

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

Specification: In that Second Lieutenant Raymond J. Geeron, Officers School, Army Ground Forces Replacement Depot Number 2, Fort Ord, California, did, at Los Angeles, California, on or about 2 June 1944, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit:

LONGVIEW NATIONAL BANK
Longview, Texas

No.

June 2, 1944

Pay to the order of HOTEL TRAYMORE $15 00/100

Fifteen and ---------- oo/100 DOLLARS

Lt. Raymond J. Garret
01305758

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

He pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for a period of seven 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, supplementing the accused's pleas of guilty, shows that at 1245 o'clock on 18 March 1944 the accused absented himself from the Officers School, Army Ground Forces Replacement Depot Number 2, Fort Ord, California. According to the school's morning report and the testimony of its commanding officer the accused's absence was wholly without authorization for its entire duration. It was stipulated that the accused's absence was terminated on 2 July 1944 when he was returned to military control at Los Angeles, California (R. 7-9; Pros. Exs. 1-2).

The investigating officer testified that he interviewed the accused on several occasions and repeatedly read and explained to him the provisions of Article of War 24 concerning his right to speak or remain silent and that on 10 July 1944 the accused freely and voluntarily executed a sworn statement admitting his unauthorized absence from 18 March 1944 until he was apprehended and returned to military control at Los Angeles, California, on 2 July 1944. Thereafter on 19 July 1944 the accused similarly executed two other sworn statements. The first admitted that on 24 April 1944 he executed a $15 check drawn upon the Bank of Wheaton, Wheaton, Missouri, which he cashed at the Bank of America at one of its branches in Los Angeles, California, that he did not have and had not had an account with the drawee bank, and that he had cashed the check with a fraudulent intent. The second admitted that on 2 June 1944 he executed and cashed a $15 check drawn upon the Longview National Bank, Longview, Texas, under the fictitious name of "Lt. Raymond J. Garret" which fictitious name he used to conceal his true identity and as a device to defraud the Traymore Hotel where it was cashed. According to the stipulated testimony of the cashier of the Bank of Wheaton the accused had never had an account with such bank. Prior to executing the aforementioned sworn statements, the accused had orally admitted the substance thereof to the investigating officer who also testified concerning such admissions. Photostatic copies of the two checks and the sworn statements were admitted into evidence without objection (R. 9-17; Pros. Exs. 3-8).

4. The accused after explanation of his rights as a witness, elected

to remain silent. A medical officer, a psychiatrist, testified that he had examined the accused and that he - the accused - was and is able to distinguish between right and wrong and to adhere to the right, that he was and is able to cooperate in his defense, but that he suffered from psychoneurosis which was manifested by tremors, difficulty in speech and momentary "black-outs". It was stiuplated that the accused had volunteered for military service on 23 June 1938, that he had been promoted to the grade of staff sergeant on 5 June 1942 and that he had so served until he had been commissioned a second lieutenant (R. 17-21; Def. Ex. A).

5. The Specification, Charge I, alleges that the accused absented himself without proper leave from his organization at Fort Ord, California, from about 18 March 1944 to about 2 July 1944. The elements of the offense of absence without leave and the proof required for conviction thereof, according to applicable authority, are as follows:

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

The evidence for the prosecution, both documentary and by the testimony of the accused's commanding officer, conclusively establishes the accused's unauthorized absence as alleged and abundantly supplements the accused's plea of guilty. All the evidence and the accused's plea consequently, shows his guilt beyond a reasonable doubt as alleged and amply supports the court's findings of guilty of Charge I and its Specification.

6. The Specification, Charge II, alleges that the accused at a designated time and place with intent to defraud, wrongfully and unlawfully made and uttered a described check in the sum of $15 and thereby fraudulently obtained such sum from the Bank of America National Trust and Saving's Association where it was cashed when he well knew that he did not have and without intending that he should have sufficient funds in 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 that there should be" is definitive of an offense which is violative of Article of War 95 (M.C.M., 1928, par. 151).

The prosecution's evidence, consisting of the testimony of the investigating officer concerning the accused's oral admissions,

the photostatic copy of the check in question, the stipulated testimony of the drawee bank's cashier that the accused had never had an account with such bank and the accused's sworn confession, establishes all elements of the offense alleged. Even had the accused not confessed to his fraudulent intent in uttering the check, such intent would be inexorably impelled because the check was given against a non-existent bank account. All of the evidence and the accused's plea of guilty, therefore, establish the accused's guilt as alleged and fully warrant the court's findings of guilty of Charge II and its Specification.

7. The Specification, Charge III, alleges that the accused at a designated time and place with intent to defraud falsely made in its entirety a certain described check in the amount of $15 which said check was "a writing of a private nature, which might operate to the prejudice of another". The offense thereby alleged is that of forgery which is defined as "the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice (Clark)" (M.C.M., 1928, par. 149j). Furthermore, "forgery may also be committed by signing a fictitious name, as where a person makes a check payable to himself as drawee and signs it with a fictitious name as drawee" (Id). The offense alleged is violative of Article of War 93.

The prosecution's evidence abundantly supplements the accused's plea of guilty and shows that he deliberately and with fraudulent intent drew and uttered the $15 check in question to the Hotel Traymore using for his nefarious purpose the fictitious name of "Lt. Raymond J. Garret". The photostatic copy of the check shows that he gave his correct serial number thereon but neither that nor the similiarity of his real name to the fictitious one used constitutes any defense to the crime shown. All of the evidence and the accused's plea of guilty, therefore, establishes the accused's guilt as alleged beyond a reasonable doubt and fully supports the court's findings of guilty of Charge III and the Specification thereunder.

8. The accused is about 26½ years old. The records of the Office of The Adjutant General show that he has had enlisted service from 23 June 1938 until 26 December 1942 when he was commissioned a second lieutenant upon graduation from Officers' Candidate School and that he has had active duty as an officer since the latter date.

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

that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 93 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes Judge Advocate.

Fabian H. Golden, Judge Advocate.

SPJGN
CM 260835

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 Raymond J. Geeron (0-1305758), Infantry, Officers School, Army Ground Forces Replacement Depot No. 2.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted, that the period of confinement be reduced to five years, that the sentence as thus modified be ordered executed and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted and confinement reduced to five years. G.C.M.O. 543, 5 Oct 1944)

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

SPJGK
CM 260877

16 AUG 1944

UNITED STATES	XXIII CORPS
v.	Trial by G.C.M., convened at Camp Swift, Texas, 15 July 1944. Dishonorable discharge and confinement for eight (8) years. Disciplinary Barracks.
Private JOHN S. HARMON (14943119), Headquarters & Service Company, 1258th Engineer Combat Battalion.	

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

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

2. The accused was charged with and found guilty of (a) absence without leave for five days (Charge I, Spec.) in violation of Article of War 61, (b) wrongfully and unlawfully and with fraudulent intent having in his possession an "enlisted man's temporary pass, WD AGO Form No. 7, being a military pass purporting to be issued under the authority of the United States", (Spec. 1, Charge II) and (c) wrongfully and unlawfully and with fraudulent intent having in his possession "a certain furlough certificate, WD AGO Form No. 31, being a military pass purporting to be issued under the authority of the United States", (Spec. 2, Charge II), in violation of Article of War 96. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen (15) years. The reviewing authority approved the sentence, reduced the period of confinement to eight 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 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and Charge II and Specification 1 thereof and the sentence as approved by the reviewing authority.

The only question requiring consideration is the legality of the findings as to Specification 2 of Charge II. This Specification alleges that accused wrongfully and unlawfully and with fraudulent intent had in his possession "a certain furlough certificate, WD AGO Form No. 31, being a military pass, purporting to be issued under the authority of the United States". The Specification alleges an offense within the purview of

Title 18, Section 132, United States Code. In support of this Specification there was introduced in evidence a stipulation (Ex. C) tending to show that when accused was apprehended he had in his possession WD AGO Form No. 31, "incompletely filled out". This document was in evidence as Exhibit 2. There is not a scintilla of evidence that accused used or attempted to use the document for any purpose. An examination of exhibit E discloses that it was not a furlough certificate or military pass as alleged nor does it purport to be one. It is nothing more than the naked form itself, with a typed reference to Army Regulation 615-275 and the typed name of "Ford, Albert S. 32266689 Pvt. 1cl Pvt". It was not signed by anyone. Certainly the mere possession of an incompleted, unsigned WD AGO Form No. 31 does not constitute an offense within the meaning of Title 18, Section 132, United States Code, nor is it a violation of Article of War 96.

4. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 2 of Charge II, legally sufficient to support the findings of guilty of Charge I and its Specification, and Charge II and Specification 1 thereof and legally sufficient to support the sentence as approved by the reviewing authority.

Irving C. Zoll, Judge Advocate.

Hermann Moyse, Judge Advocate.

Samuel Bornfield, Judge Advocate.

1st Ind.

22 AUG 1944

War Department, J.A.G.O., - To the Commanding General, Headquarters XXIII Corps, APO 103, Brownwood, Texas.

1. In the case of Private John S. Harmon (14043119), Headquarters & Service Company, 1258th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge II, and legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 1 thereof and legally sufficient to support the sentence as approved by the reviewing authority which holding is hereby approved. Upon disapproval of the finding of guilty of Specification 2 of Charge II, you will have authority to order execution of the sentence.

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

(CM 260877).

Myron C. Cramer

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

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

SPJGV
CM 260880

23 AUG 1944

UNITED STATES	92ND INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, 18 July 1944. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
Private JAMES R. ROBINSON (33137430), Company F, 365th Infantry.	

HOLDING by 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.

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

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

Specification 1: In that Pvt James R. Robinson, Company "F", 365th Infantry, did at Douglas, Arizona, on or about 8 June 1944, with intent to defraud, falsely receipt a certain United States money order, in words and figures as follows to-wit, Money Order # 375093, May 15, 1944, Fort Knox, Ky. Postmaster at New York, N.Y., pay amount stated above (100 dollars and no cents) to the order of payee named (James A. Mack) in attached coupon. (signed Stanley H. Jones, P.M.) Signature on face - James A. Mack, Sig. Corps. (acknowledging payment) the name of James A. Mack, payee therein which said United States money order was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that Pvt James R. Robinson,* * *, did at Douglas, Arizona, on or about 8 June 1944, with intent to defraud, falsely receipt a certain United States money order, in words and figures as follows to-wit, Money Order #375096, May 15, 1944, Fort Knox, Ky. Postmaster at New York, N.Y., pay amount stated above (100 dollars and no cents) to the order of payee named (James A. Mack) in attached coupon. (signed Stanley H. Jones, P.M.) Signature on face - James A. Mack, Sig. Corps. (acknowledging payment) the name of James A. Mack, payee therein, which said United States money order 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 Pvt James R. Robinson, * * *, did at Douglas, Arizona, on or about 8 June 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine, a certain United States money order, to-wit: Money Order # 375093, May 15, 1944 - Fort Knox, Ky., Postmaster at New York, N.Y., pay amount stated above (100 dollars and no cents) to the order of payee named (James A. Mack) in attached coupon. (signed Stanley H. Jones, P.M.) Signature on face - James A. Mack, Sig. Corps. (acknowledging payment) on the face of which the said Pvt James R. Robinson signed the name of James A. Mack, payee therein named, well knowing that he was not James A. Mack, payee, which indorsement was, as he, the said James R. Robinson, well knew, falsely made and forged.

Specification 2: In that Pvt James R. Robinson, * * *, did at Douglas, Arizona, on or about 8 June 1944, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine, a certain United States money order, to-wit: Money Order # 375096, May 15, 1944 - Fort Knox, Ky. Postmaster at New York, N.Y., pay amount stated above (100 dollars and no cents) to the order of payee named (James A. Mack) in attached coupon. (signed Stanley H. Jones, P.M.) Signature on face - James A. Mack, Sig. Corps. (acknowledging payment) on the face of which the said Pvt James R.Robinson signed the name of James A. Mack, payee therein named, well knowing that he was not James A. Mack, payee, which indorsement was, as he, the said James R. Robinson, well knew, falsely made and forged.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 25 years. The reviewing authority approved the sentence, reduced the period of confinement to ten 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 50½.

3. The prosecution introduced evidence demonstrating that Private James A. Mack, stationed at Fort Huachuca, Arizona, went to Mexico on 3 June 1944, and after consuming a bottle of beer he experienced a spell of "dizziness", seated himself in a room in which there was a substantial number of soldiers and fell asleep about 7 or 8 p.m. When he awoke he discovered his wallet was missing from his shirt pocket. He then went in search of a Sergeant Williams whom he had agreed to meet, failed to locate him and returned across the border informing the military police there on duty of his loss. He spent the night at the Gilmore Hotel in Douglas, Arizona, and the next day, Sunday, he reported his loss to military police headquarters (R. 7, 8, 11, 12). In his wallet, among other things, Private Mack had five money orders, each for $100, his dog tags and the stubs or receipts for the money orders (R. 7-10). Three of these money orders were numbered 375093, 375096 and 375092. They were all issued 15 May 1944 to James A. Mack and were payable to him. When identified by Private Mack at the trial, these money orders bore the purported signatures of James A. Mack in an appropriate blank under the printed words "Received Payment" (R. 9, 10; Pros. Exs. A, B, C). However, Private Mack had not given these money orders to anyone, had not authorized anyone to sign his name to them, and the signatures appearing thereon were not in fact his signatures (R. 8, 10, 11, 12).

On Monday, 5 June 1944, Private Mack reported his loss to his battalion commander and also wrote the postal authorities to advise them of it. Subsequently, he received a report from the post office at Douglas, Arizona, that two of the money orders had there been cashed (R. 11).

On Monday evening, 5 June 1944, Private Henry E. Nicholes accompanied accused to two or three different establishments, apparently in Douglas, Arizona, while accused sought to cash a money order. Nicholes "believed" accused finally obtained cash for it at the "Blue Cafe, Blue Moon or Blue Star", or at some establishment with a similar name, although Nicholes did not see the money order nor enter the establishment

where he presumed it was cashed (R. 13, 14). The following morning, 6 June 1944, Nicholes and accused had breakfast in a cafe in Douglas and during the meal accused engaged an unidentified lieutenant in conversation following which the three of them set forth for the post office where accused said he was going to cash a money order. Nicholes did not enter the post office and did not see accused sign the money order or cash it (R. 14-16). The following Monday night, 12 June 1944, was passed by Nicholes and accused in a hotel in Douglas after they had missed the last bus to camp. The next day they went to the post office and were requested to step into an office where they were questioned by two men. The military police were soon summoned who took Nicholes and accused into custody and questioned them concerning some money orders. They were told by Nicholes that he knew nothing about them (R. 15, 16).

Two of the money orders issued to Private Mack, numbered 375093 and 375096, were presented by a soldier, who was accompanied by another enlisted man, to Bertha L. Allison, the money order clerk at the Douglas post office, on the evening of 6 or 7 June 1944 just before closing time and payment thereof was requested (R. 21, 23). She refused to pay them unless the soldier was identified by an officer. The following day this soldier returned with an officer who vouched for him; he then receipted the money order, submitted other identification and received $200, the total face amounts of the two money orders. The next day the post office received a letter apparently from James A. Mack indicating that these two money orders had been stolen from him (R. 19-21). A soldier who resembled the one who presented these money orders for payment and another soldier who resembled his companion visited the post office on 13 June 1944 to cash two more money orders. Miss Allison summoned Caleb O. Rice, the postmaster, who conducted the two men to his office and then notified the military police who took them into custody. A search of the soldier who presented the money orders revealed that he had one Army identification tag bearing the name James A. Mack, a wallet, some cards and pictures and two money orders all apparently the property of James A. Mack. He claimed to be James A. Mack and signed his name as such (R. 21-23, 26).

Miss Allison was not sure that the two soldiers who had been apprehended were the same two who had previously received payment on money orders numbered 375093 and 375096 but they appeared to be the same individuals. When asked if she saw either of those two soldiers in the courtroom, she stated that she "could not identify them"; that she "could not be sure" (R. 21). Although Mr. Rice believed he would recognize the man who represented himself to be James A. Mack, when asked if the man was present in the courtroom he replied, "I could not positively say that he was"; and "If he is [present], I could not positively identify him" (R. 24, 25).

5. Other than the fact that the accused visited the post office in the company of a lieutenant to cash a money order on or about the same day as did the culprit in this case, there is nothing in this record to identify accused as the perpetrator of the offenses charged. Indeed, the postal officials who were in contact with the culprit on the occasions of his two visits to the post office could not identify him among those present in the courtroom. The evidence at most indicates only a thin possibility that accused and the culprit were the same person. The guilt of accused must be established beyond a reasonable doubt which means that the proof must be such as to exclude "any fair and rational hypothesis except that of guilt" (MCM, 1928, par. 78a). The court was not warranted in concluding that the identity of accused as the culprit was the only "fair and rational hypothesis" to be drawn from such scant evidence. Accordingly, the Board of Review holds the evidence not legally sufficient to support the findings of guilty and the sentence.

Thomas N. Jaffy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevithan, Judge Advocate.

SPJGV
CM 260880

1st Ind.

War Department, J.A.G.O., 26 AUG 1944

TO: Commanding General, 92nd Infantry Division, Fort Huachuca, Arizona.

1. In the case of Private James R. Robinson (33137430), Company F, 365th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

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 260880).

Myron C. Cramer

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

1 Incl.
Record of trial.

(Rehearing not held. Case forwarded and filed as incomplete record.)

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

SPJGQ
CM 260901

18 AUG 1944

UNITED STATES	SACRAMENTO AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at McClellan Field, California, 11 July 1944. Dismissal and total forfeitures.
First Lieutenant MAURICE A. ROBBINS, JR., (0-581138) 4010th Army Air Forces Base Unit (Area Command).	

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

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

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

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

Specification: In that First Lieutenant Maurice A. Robbins, Junior, 4010th Army Air Forces Base Unit (Area Command), McClellan Field, California, did, at Sacramento, California, on or about 8 May 1944, wrongfully, unlawfully and dishonorably prepare and mail, by United States mail, to Mrs. Betty Phillips, Sacramento, California an obscene letter, the obscene portions thereof being in words as follows, to-wit:

> You may think of me as you like after this letter but you will always be in my mind nothing more than a low down good for nothing mother fucking son of a bitch. Further more if you think that you can get me on any more of your shitty deals your just shit out of luck you bastard as you've met up with someone thats not afraid of your hot air, Goodbye my dearest Betty and if I never see you again it will be to soon. In plain English you can go fuck yourself. Oh yes! You can take that damn silver spoon of yours an blow it out your ass.

THE END

And I mean the end of our relationship. Does this answer your questions? If not you can shut that cock sucking mouth of yours as I'm through listening to your shit.

same being acts and conduct unbecoming an officer and gentlemen.

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

Specification: In that First Lieutenant Maurice A. Robbins, Junior, 4010th Army Air Forces Base Unit (Area Command), McClellan Field, California, did, at Sacramento, California on or about 8 May 1944, wrongfully and unlawfully prepare and mail, by United States mail, to Mrs. Betty Phillips, Sacramento, California, an obscene letter in words as follows, to-wit:

Dearest Betty-

Its just to bad that our meeting had to be so short but you listen to me for a few minuets. I've been a gentleman ever since we met. Now you can't tell me that you've been a lady as you may think. Ever since we moved into that trap of yours you've been very masty to my wife, charged me for a lot of damnd noncense, and on Sunday, a day of rest and my only day you had to trot your fat ass over to the house and yell at the top of your voice all day.

As for your other two damn keys, I don't give a good God damn if you never replace them. When we moved into that chicken coop you gave us two keys, one for the front and other for the rear. My wife carried the front door kay & I had to trot around back because that was the only key I had. You told us yourself that youkw would have other keys made because the party ahead of us had not left them. You charged us for cleaning the apartment and then cleaned it when you got damn good and ready.

Another thing is that you expect your tenants to pay for damages done to the furniture and house. Listen you canivaling Jew, have you ever heard of the word deteriation? Well it means that after a certain length of time and use that material will fall apart unless taken care of. And I'll bet you odds that you've never put more than pennies into repairing that dump.

(The remainder of the letter, as set forth in this Specification, being identical with that portion set forth in the Specification of Charge I) such acts and conduct being of a nature to bring discredit upon the military service.

He pleaded not guilty to and was found guilty of all the Specifications and Charges. No evidence of previous conviction was introduced at the trial. He was sentenced to be dismissed from 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:

Sometime in May 1944 the accused, who, with his wife, had lived in an apartment located at 913 24th Street, Sacramento, California, moved out. Mrs. Betty Phillips, who took care of these apartments for the owner, went to the apartment on the same day they left and upon taking an inventory of the personal property noticed that two keys and two spoons were missing (R. 6, 7). She thereupon had Mr. Lawrence Askell, the owner of the apartment building, typewrite a letter for her to send to the accused in which she invited attention to the missing keys and spoons and requested that they be returned (R. 7, 8, 9). She read the typewritten letter, signed it in her own name and was present when Mr. Askell deposited the envelope, in which it was enclosed, in the mail box. The envelope had been addressed to the accused at an address which appeared upon a card which the accused had left in the mail box at the apartment (R. 8, 9, 13, 14).

Sometime later Mrs. Phillips received a typewritten letter in her mail box which, although it was not signed, she knew had been sent by the accused because of the context of the letter and because she was familiar with his handwriting and recognized it in the handwritten address on the envelope in which the letter was enclosed (R. 10, 13, 14). This letter was received in evidence as Prosecution Exhibit A (R. 18, 19).

Lieutenant Colonel Louis A. Love, Inspector General's Department, had occasion to officially question the accused with regard to this letter subsequent to its receipt by Mrs. Phillips. After proper warning of his rights, the accused was shown the letter and, after examination, he replied "Yes, I wrote and mailed that letter" (R. 15-17).

First Lieutenant Raymond G. Willie, 4127th Army Air Forces Base Unit, Base Statistical Officer at McClellan Field, California, who was the investigating officer in this case, also had an interview with the accused. The accused was again properly warned of his rights and, after being shown the letter and asked whether he had ever seen it, he replied "Yes". When asked whether he had written it the accused answered:

"Yes, I wrote it on the typewriter". To the question whether he had ever seen the envelope attached and addressed to "Mrs. Betty Phillips, 1811 Q Street" he said "Yes, I deposited it in an envelope and deposited it in the mail in Sacramento" (R. 20-22).

4. For the defense, First Lieutenant Howard M. Rowe, Area Classification Officer of the Sacramento Air Service Command and as such, the custodian of the classification records of officers stationed at McClellan Field, California, produced the accused's official classification form and it was admitted in evidence (R. 23; Def. Ex. 1).

The accused, having been informed of his rights, elected to make an unsworn statement, as follows:

> "The reason -- seeing I am accused of writing a letter which I have seen and the language and contents of the letter are very vulgar but at the time this letter was written and the reason back of the letter -- the reason for it being written -- I -- well more or less -- was in a state of being forced to tell some woman my opinion of her. In other words, for six months I lived as a tenant under Mrs. Betty Phillips, and during that period of time, I have had nothing but unpleasant associations with Mrs. Phillips. Over this period of time I have never said a word to her or requested that she stop some of her actions, such as going through the house when I was not present nor my wife was there. Sunday mornings, the only day of rest, she would insist upon coming downstairs, which is the garage under the apartment, with her helpers and more or less drag lumber back and forth across the floor. At times when she found out I was not going to be home, she would go over and visit my wife and irritate her. It has been known from the past from other tenants she has tried to and has brought other tenants up before the courts for misdemeanors, things any human being would pass over like I did some of her actions. It might be a question at this time of my conduct. All I can say is my conduct has never been questioned before. It has been proven I did write this letter, it is a bad letter. I am not in the habit of using such language.
>
> "Another thing is, gentlemen, that it has been done and I can promise in the future, no matter what the decision of the court is, that no such thing like this will ever be brought out in the future. You more or less learn by your mistakes. Make a mistake and learn by what you do. That is all" (R. 24).

5. Little comment is required upon the sufficiency of the record of trial in this case to support the findings.

Not only was ample independent proof adduced by the prosecution to prove the writing and the mailing, by the accused, of the letter set forth in the Specifications, but the accused, in two extra-judicial

statements, confessed that he had done so.

The letter, which is set out in full in the Specification of Charge II, speaks for itself. It is too disgusting and obscene to bear repetition. Although the trial judge advocate, in an abundance of caution, offered to produce proof of its obscenity, the president of the court, with commendable judgment, relieved him of that responsibility on the ground that such matter would be judicially noticed. The accused in his unsworn statement at the trial admitted that the language of the letter was "very vulgar" and then, later, conceded that it was proved that he did write the offensive missive and that it was "a bad letter".

Further discussion is wholly unnecessary. The record discloses proof of every allegation of the Specifications and is legally sufficient to support each of the findings.

There is no duplication of Charges. The 95th Article of War includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman (par. 151, M.C.M. 1928). The acts complained of were not only of such a nature as to bring discredit upon the military service but, at the same time, were clearly and grossly "unbecoming an officer and a gentleman" within the meaning attributed to that phrase when used in charging an offense under Article of War 95.

6. Records of the War Department disclose that the accused was born in New York State and is 22 years of age. He completed 12 grades of public school training, graduating from high school. From November 1941 to January 1942 he was employed as an engineering draftsman. On 13 January 1942 he enlisted and in June made application for attendance at the Air Corps Administrative Officer Candidate School. He was accepted and after completion of the course of study was commissioned a second lieutenant, Army of the United States, on 24 July 1943 at Miami, Florida and on the same day was assigned to duty with the Sacramento Air Service Command, Sacramento, California. On 8 March 1944 he was promoted to First Lieutenant. From December 1939 to March 1941 he had been a seaman, 2nd class, in the United States Naval Reserve.

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

William H. Gamble, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John P. Anderson, Judge Advocate.

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 First Lieutenant Maurice A. Robbins, Jr. (0-581138), 4010th Army Air Forces Base Unit (Area Command).

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

3. Inclosed are a draft of a letter for your signature, transmitting the record 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. sig. of S/W.
3 - Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 530, 26 Sep 1944)

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

SPJGV
CM 260939

1 SEP 1944

UNITED STATES v. Second Lieutenant JOHN R. HICKEY (0-1184069), Field Artillery.	FOURTH ARMY Trial by G.C.M., convened at Camp Polk, Louisiana, 21 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: In that Second Lieutenant John R. Hickey, 14th Headquarters and Headquarters Detachment, Special Troops, Fourth Army, then of 974th Field Artillery Battalion, did, at Camp Polk, Louisiana, on or about 12 February 1944, with intent to deceive the Camp Polk Post Exchange, its agents, employees and representatives, wrongfully represent to the said Camp Polk Post Exchange, its agents, employees and representatives, that twenty-six (26) watches purchased by him from the said Camp Polk Post Exchange were for delivery to enlisted men who had military need for such watches, which representations were known by the said Second Lieutenant John R. Hickey, to be untrue in that the said Second Lieutenant John R. Hickey intended at the time of making such representations to sell a number of the said watches to civilians for profit.

Specification 2: In that Second Lieutenant John R. Hickey, * * *, did, on or about 12 February 1944 at Leesville, Louisiana, wrongfully sell to S. K. Army Store, a civilian concern, twelve watches at a price of thirty-five dollars each, which watches Second Lieutenant John R. Hickey had previously purchased from Camp Polk Post Exchange, Camp Polk, Louisiana, for a price of twenty-five dollars each.

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

Specification 1: In that Second Lieutenant John R. Hickey, * * *, did, at Camp Polk, Louisiana, on or about 12 February 1944, with intent to deceive the Camp Polk Post Exchange, its agents, employees and representatives, wrongfully represent to the said Camp Polk Post Exchange, its agents, employees and representatives, that twenty-six (26) watches purchased by him from the said Camp Polk Post Exchange were for delivery to enlisted men who had military need for such watches, which representations were known by the said Second Lieutenant John R. Hickey to be untrue in that the said Second Lieutenant John R. Hickey intended at the time of making such representations to sell a number of the said watches to civilians for profit.

Specification 2: In that Second Lieutenant John R. Hickey, * * *, did, on or about 12 February 1944 at Leesville, Louisiana, wrongfully sell to S.K. Army Store, a civilian concern, twelve watches at a price of thirty-five dollars each, which watches Second Lieutenant John R. Hickey had previously purchased from Camp Polk Post Exchange, Camp Polk, Louisiana, for a price of twenty-five dollars each.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

While in Leesville, Louisiana during March 1944 in connection with an investigation of a robbery of the Post Exchange at Camp Polk, Louisiana, Mr. James Austin Campbell, Jr., manager of the exchange, discovered a Gruen wrist watch in the S & K Army Store in Leesville (R. 6, 7) which he recognized as having been sold by the Post Exchange

at Camp Polk. This type of watch is allocated by the Army Exchange Service in New York for sale only to Army personnel. Under a directive from the Army Exchange Service this type of watch is sold to military personnel only upon the presentation of a certificate from the commanding officer that the prospective purchaser needs a watch in the performance of his military duties. Returning to Camp Polk witness checked the sale records pertaining to the sale of watches and found twelve certificates signed by "John R. Harley, 2d Lt. F.A., 975 FA Bn" certifying that various military personnel needed a watch for military purposes. One certificate also showed that Lieutenant Harley needed a watch for himself. Thirteen watches were sold on the basis of these certificates (R. 14). Without objection the twelve certificates were received in evidence as Exhibit 1 (R. 13). Searching further fourteen more certificates for the purchase of watches by military personnel were found which were apparently in the same handwriting as those signed by Lieutenant Harley. Thirteen of these certificates were signed by "Capt. E. C. Lang, BC C Btry. 974 FA Bn", and one was signed "Lt. John R. Hickey, 2d Lt., FA, 974th FA Bn Camp Polk La". Without objection these fourteen certificates were received in evidence (R. 15; Ex. 2). Fourteen watches were sold on the basis of these certificates (R. 16).

A Gruen wrist watch with tan band marked for identification Exhibit 3 was shown witness and he stated that he would say it was one of the watches handled by the Post Exchange (R. 16).

William Silverman, operator of the S & K Army Store in Leesville, Louisiana, testified that on or about 12 February 1944 the accused came to his store and offered to sell him some Gruen watches. In response to an inquiry as to how he obtained the watches accused stated he had connections with jewelers in New York before coming into the Army and obtained the watches through them. Silverman thereupon purchased twelve of the watches from accused at $35 each, the purchase price totaling $420, which was paid by check in that amount dated 12 February 1944 drawn on the Vernon Bank, Leesville, Louisiana (R. 21-24; Ex. 4). On being shown the watch marked for identification Exhibit 3 Silverman stated that it was one of the watches he purchased from accused on 12 February. The watch was thereupon without objection received in evidence (R. 25; Ex. 3).

It was stipulated that if N. L. Fisher, cashier of the Vernon Bank, Leesville, Louisiana were present he would testify that on or

about 11 February 1944 he cashed a check in amount of $420 payable to Lieutenant John R. Hickey, drawn on the account of S & K Army Store by William Silverman. Prior to cashing the check he determined the identity of Lieutenant Hickey by reference to his picture and signature on his officers' identification card (R. 29; Ex. 5).

It was stipulated that if Captain Lemuel T. Holley, Jr. were present he would testify he was the investigating officer in this case and as such obtained a written signed statement from the accused after full and complete warning as to his rights in the premises (R. 30; Ex. 6). The accused in his statement admits selling twelve watches for $35 each to the S & K Army Store on or about 12 February 1944, receiving therefor a check for $420 which he personally cashed at the Vernon Bank. He secured some of the watches on certificates that he executed by signing without permission the name of 2d Lt., John R. Harley, 975th F.A. Bn. thereto. He paid the Post Exchange $25 each for the watches thus secured. Accused also admitted that in the same manner he had obtained several other watches from the Post Exchange, Camp Polk, Louisiana, by signing the name of "C. E. Lang, Capt., B.C. C Btry 974th F.A. Bn." without securing the permission of Captain Lang to so sign his name. In the majority of the cases the enlisted men named on the certificates did not receive the watches, but they were used by accused for his own personal gain (Ex. 7).

The court was requested to take judicial notice of AR 210-65, paragraph 13d (1), which was read to the court at its request and is as follows:

> "The resale by military or civilian personnel of merchandise purchased in an Army exchange is prohibited" (R. 43).

4. For the defense:

Major Isaac B. Krentzman, Jr. testified he was S-3 of 14th Headquarters, Fourth Army, and that accused had been attached on special duty with that section since about the middle of June 1944. He would rate his military efficiency as excellent (R. 28).

A copy of accused's Officer's Qualification Card, Form 66-1, showing accused's manner of performance rated as Satisfactory, Very Satisfactory and Excellent was received in evidence without objection (R. 42; Ex. A).

The accused after having his rights as a witness explained elected to testify under oath. He admitted executing the certificates and obtaining the watches, and stated that at the time he made the certificates that Captain Lang whose name was signed to thirteen of the certificates was overseas, and that he knows of no such person as Lieutenant Harley, which name he signed to another thirteen of the certificates (R. 37, 38). At the time he made the certificates he does not know whether he intended to give the watches to the enlisted men whose names appear on the certificates as purchaser as he was under the influence of liquor (R. 38). He had been assigned to a new organization just as his was being shipped overseas and the resulting disappointment caused him to drink in an effort to forget. Liquor has an ill effect on him, causing him to do peculiar things. Either he wants to buy everything he can find, or he wants to give everything away (R. 33). Having bought the watches he decided thereafter to sell them as he needed money to get to his new station (R. 34).

5. The evidence shows that accused executed false and fraudulent certificates showing that certain enlisted personnel needed watches in the performance of their military duties, and on the basis of such certificates he obtained a large number of watches from the Post Exchange, Camp Polk, Louisiana. These watches were later sold by accused to jewelers in Leesville, Louisiana at considerable profit to himself.

6. War Department records show that accused is 24 years of age and a high school graduate. His principal occupations in civilian life were those of automobile mechanic and telephone repairman. He entered military service 21 July 1942, and after completing Officer Candidate School, Field Artillery School, Fort Sill, Oklahoma was appointed second lieutenant, Army of the United States, on 22 July 1943.

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

Thomas N. Tapp, Judge Advocate.

Robert B. Hanover, Judge Advocate.

Robert E. Trevethan, Judge Advocate.

SPJGV
CM 260939

1st Ind.

War Department, J.A.G.O., 11 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 R. Hickey (0-1184069), Field Artillery.

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

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. 559, 14 Oct 1944)

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

SPJGN
CM 260940

25 AUG 1944

UNITED STATES	)	FOURTH ARMY
	)	
v.	)	Trial by G.C.M. convened at
	)	Camp McCain, Mississippi, 11
Private JOSEPH ELLERBEE, SR.	)	July 1944. Dishonorable dis-
(33753027), 4017th Quarter-	)	charge and confinement for
master Truck Company.	)	life. Penitentiary.

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, Judge Advocates

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

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

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

Specification: In that Private Joseph Ellerbee, Sr., 4017th Quartermaster Truck Company, did, at or near Ackerman, Choctaw County, Mississippi, on or about 2 June 1944 forcibly and feloniously against her will, have carnal knowledge of Mrs. Donzell Lampkin, Ackerman, Mississippi.

CHARGE II: Violation of the 93rd Article of War. (Disapproved by the reviewing authority).

Specification: (Disapproved by the reviewing authority).

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 for the term of his natural life. The reviewing authority disapproved the findings of guilty of Charge II and its Specification, 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 shows that on 2 June 1944 the accused's organization was in bivouac about eight miles from the town of Ackerman, Mississippi. At about 1100 o'clock the accused, the negro driver of a Medical Detachment truck, was ordered to obtain water for the Battalion Aid Station and he departed in the truck ostensibly upon such mission but did not return in time to take part in a practice convoy that afternoon. A map of the vicinity showing the roads and the various material locations thereon was introduced into evidence. The truck driven by the accused, unlike the other trucks, had the top on (R. 8-13, 13-18; Pros. Exs. A-B).

About 1630 o'clock the accused drove into the yard of Eva Edwards' home, which he entered asking for a drink of water. Because of the disapproval of the findings of guilty of Charge II and its Specification, it is important only to note that during his brief stay there of about 15 to 20 minutes he molested this negro woman and that she definitely identified him and his truck the next morning and likewise at the trial, having reported the occurrence to the sheriff by 1700 o'clock on 2 June 1944. Within a few minutes after leaving the Edwards' home, the accused drove his truck into the driveway of the Lampkin's home which was about one and one-half miles down the road. Donzell Lampkin, a 24 year old negress, was there with four of her five children who ranged in age from 38 days to five years. Her oldest child, aged eight, was with her husband in a field about three-fourths of a mile away. After asking for and receiving some water for his truck, the accused, who appeared to have been drinking, asked for some whiskey or beer and was told that none was available. After inquiring where her husband was, the accused asked her whether she wanted "to make two or three hundred dollars right quick", thereby plainly suggesting intercourse with her. She refused and went out the back door of her home where she called for her husband and told her children to accompany her to him. The accused then exclaimed, "I am going to have some of your goddam ass or kill you one" and seized her as she was attempting to run away. He stopped her screams by choking her and dragged her, fighting, kicking and resisting to the utmost of her power, into the brush some 150 feet away where he threw her upon the grass under a peach tree and accomplished penetration despite her continued resistance. He desisted only after she told him that her youngest child was only a few days old. He forced her to show him the baby, which was 38 days old, and then drove off after saying "Excuse me, I wouldn't have done it if I had

known it". He had been at her house about 20 minutes and after his departure, the prosecutrix hastened to her husband in the field and reported the episode. Her husband, Isiah Lampkin, testified that his wife met him in the field "about five twenty" and told him that she had been "raped". whereupon, after noticing "some tracks" of an Army car in front of his house, he then caught a ride into Ackerman where he reported the occurrence to the sheriff about 1800 o'clock. The prosecutrix definitely identified the accused and his truck the next morning and at the trial (R. 22-40, 41-65, 65-73).

The sheriff, Mr. F. B. Bruce, verified the times of the reports to him of the two occurrences; he had examined the "truck tracks" in the two yards; and he had been present the next morning when both women had identified the accused and his truck which had been previously described by them as having its top on. The identification had taken place as the convoy passed the two women at separate stations (R. 73-83; Pros. Ex. E).

4. The accused, after explanation of his rights as a witness, elected to testify. He denied ever having seen the Edwards and Lampkin women until they identified him on the morning of 3 June 1944 and offered an alibi for his activities on the afternoon of 2 June 1944. According to his testimony he had gone into the town of Ackerman at about 1100 o'clock and had attempted to buy some sugar but, being without a ration coupon, he had been unable to do so until another negro soldier, subsequently discharged, had given him a coupon. After purchasing the sugar he and the other soldier had encountered the two "Triplett girls" whom he had met the preceding night. The other soldier walked with them to their home and the accused drove the truck there, parking it behind their house. They had bought a pint of whiskey from a civilian and during their stay there of about an hour drank part of it at the Triplett home before they, the accused, the other soldier and the two Triplett girls (Mattie Lee and Minnie Lee) walked over to "Cripple Bill's" place which was about one-half mile away. There they drank the rest of the whiskey and then "Cripple Bill" took them for a ride into the woods. The ride occupied about 25 minutes each way and they remained in the woods for about two hours during which time the accused and Minnie Lee Triplett separated from the others and engaged in two acts of intercourse. Upon returning to "Cripple Bill's" the two Triplett girls went to their home and the accused went to a nearby restaurant, to purchase some "smokes". After leaving the restaurant, he had gone by another house where he had talked for about an hour to two other girls whom he had also met the preceding night before he returned to the Triplett home. There he asked for Minnie Lee but found that she had gone to the hairdressers and so at about five o'clock he got into his truck and returned to camp where he arrived about "a quarter after five". The other soldier left with him in the

truck and got off just across the nearby railroad tracks before the truck reached and proceeded along the main highway which passed through Ackerman on the way back to the bivouac area. Upon arrival at the camp he had reported to Sergeant Earl R. Kittredge who had told him it was about "a quarter after five" and he had taken about 25 minutes for the return trip. On cross-examination he identified a slip of paper bearing Minnie Lee Triplett's name and address which he said that she had given to him and also a letter which he had written from the stockade to her asking that she, her sister and the other soldier immediately interview the sheriff and tell him that he, the accused, had spent the entire afternoon of 2 June 1944 with them. The letter had not been mailed as it had been intercepted for censoring at the stockade under a practice that was well known to the accused. Since it contained some inconsistent statements about where they had parted company, it was admitted over objection of the defense for impeachment purposes only. For the same purpose a sworn statement of the accused was also admitted. The statement was substantially to the same effect as his testimony except that in it the accused stated that they had returned to "Cripple Bill's" from the woods at about 1500 o'clock, that he had left the Triplett's home for camp at about "4:20" o'clock and that he had arrived at the camp about "a quarter to five" (R. 84-110, 133; Pros. Exs. F-H).

Minnie Lee Triplett corroborated the accused's testimony in its entirety, testifying that she had been with the accused from about 1130 o'clock to about 1700 o'clock when she had gone to the hairdressers and that she had twice engaged in intercourse with the accused while they were in the woods. Her mother, likewise, testified about the accused's appearance at her home about noon on 2 June 1944 and that his truck had remained there until a few minutes after she had heard the "five o'clock whistle" blow. Sergeant Kittredge testified that the accused had reported to him about "5:10" according to his watch which was about 20 to 25 minutes slow (R. 110-114, 114-117, 118-122).

5. In rebuttal the prosecution adduced the testimony of E. V. Hemphill, the recently discharged negro soldier, who had accompanied the accused to the Triplett home, to "Cripple Bill's" and on the trip into the woods. His testimony while corroborating the accused concerning their meeting, the purchase of the sugar, and the interlude with the two Triplett girls differed radically concerning the time of the accused's departure and the route taken by him. He denied riding on the truck with the accused to a point across the railroad tracks and stated that he had left the Tripletts at about 1500 o'clock and had walked to a bridge on the main highway which was south of both the town of Ackerman and the driveway into the Triplett home. While on the bridge he observed the accused at about 1600 o'clock drive his truck into the main

highway and proceed toward Ackerman where he was forced to turn around because of a passing convoy and return along the main highway across the bridge where he, Hemphill, was sitting. It was along this highway and a road connecting with it, that the Edwards and Lampkin houses were located. Upon cross-examination his previous sworn statement was introduced in an effort to show prior inconsistent statements. In the statement he had the convoy going in another direction but the material times were substantially in accordance with his testimony which he insisted was true regardless of what the statement related because he was unable to read (R. 124-132; Def. Ex. 1).

6. The Specification, Charge I, alleges that the accused "did, at or near Ackerman, Choctaw County, Mississippi, on or about 2 June 1944 forcibly and feloniously, against her will, have carnal knowledge of Mrs. Donzell Lampkin". The offense charged is that of rape which is violative of Article of War 92 and concerning which the following excerpts from the Manual for Courts-Martial are applicable and controlling:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> * * *
>
> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
>
> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact, consent" (MCM, 1928, par. 149b).

The evidence, when measured by the foregoing applicable principles, is fully competent to establish every element of the offense charged. The testimony of the prosecutrix, Donzell Lampkin is clear and convincing as is also her identification of the accused and that of Eva Edwards whose testimony corroborates that of Donzell Lampkin in that it places the accused in the vicinity of the scene of the criminal assault between 1600 and 1700 o'clock on 2 June 1944. Both of them promptly reported the incidents at about 1700 and 1800 o'clock respectively which is consonant with the testimony of Hemphill concerning the time of the accused's departure from the Triplett home and the route taken by him and the testimony of Sergeant Kittredge about the true time of the accused's return to camp. The prosecutrix, Donzell Lampkin, testified to a complete act of intercourse occurring between her and the accused without her consent and over her strenuous

protests after her resistance, which was to the utmost of her power in her debilitated and weakened condition from shortly previous childbirth, had been overcome by the savage attack of the accused. The court, acting within its appropriate province as judges of the credibility of the witnesses and the weight to be given their testimony, rejected the testimony of the accused, Minnie Lee Triplett and her mother. According to the accused's prior sworn statement he left the Triplett home shortly after 4 o'clock and not at or after 5 o'clock as he testified. The witness Hemphill testified that the accused's departure was at about 4 o'clock and that the accused went along the route upon which the Edwards and Lampkin homes were located. Sergeant Kittredge's testimony is that he returned to camp about 5:30 o'clock. Such testimony was believed by the court and provided ample time for the accused's activities as related by Eva Edwards and Donzell Lampkin whose testimony provides an adequate basis for the court's findings of guilty of Charge I and its Specification beyond a reasonable doubt.

7. The accused is about 33 years of age. He was inducted at Fort Myer, Virginia, on 31 January 1944. His record shows no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. A sentence either of death or imprisonment for life is mandatory upon a conviction of rape in violation of Article of War 92.

(On Leave), Judge Advocate.

Charles S. Ryker, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

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

SPJGV
CM 261002

31 AUG 1944

UNITED STATES	92D INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, 12 and 14 July 1944. Forfeiture of fifty dollars ($50.00) per month for six (6) months.
Second Lieutenant ARTHUR O. SPADY (0-1301701), Infantry.	

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

1. The record of trial in the case of the above-named officer having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, 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 (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification: In that 2nd Lieutenant ARTHUR O. SPADY, 365th Infantry, did, on or about 13 March, 1944, absent, without proper authority, himself from his duties as umpire, 3rd Battalion, 371st Infantry and did remain absent without proper authority until on or about 14 March 1944.

The accused pleaded not guilty to all Charges and Specifications, was found not guilty of Charge I and its two Specifications and guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to forfeit $100 per month for six months. The reviewing authority approved the sentence, remitted so much thereof as exceeds forfeiture of $50 per month for six months, and ordered the sentence into execution. The proceedings were published in General Court-Martial Orders No. 151, Headquarters 92nd Infantry Division, 3 August 1944.

3. The prosecution introduced the deposition of Major Clyde E. Stauder, Jr. in evidence demonstrating that he had known accused since February 1944 when he reported for umpire duty at Louisiana Maneuver Area. At least during the period from 11 March 1944 to 15 March 1944, Major Stauder was Chief Umpire, Control Section, Director Headquarters at this maneuver area, and the accused was a company umpire under his direct control. Sometime during the period from 11 March 1944 to 15 March 1944, Major Stauder received a call from the military police substation, Leesville, Louisiana, requesting him to appear so that certain officers, one of whom was the accused, might be released to his custody and returned to duty. The remainder of the facts contained in Major Stauder's deposition are set forth by interrogatories and answers as follows:

> "Sixth interrogatory: If the accused were absent without authority did you personally ascertain if any one else with authority had given the accused authority for said absence?
>
> "Answer: The accused was absent without authority and upon questioning of his direct superior, Lt. Cruickshanks, he had not been granted a pass. As per policy Director Headquarters I was the only officer authorized during tactical days to grant passes or emergency leaves, and had given no pass or leave to Lt. Spady.
>
> "Seventh interrogatory: If accused were absent at any time while under your control, did you give permission for same?
>
> "Answer: No."

4. The defense offered evidence to prove that Major Stauder was in charge of broad phases of the work of the umpires at Louisiana Maneuver Area and conducted all critiques attended by the umpires, but that when accused first reported for umpire duty he reported to a Major Patterson who was present daily in the field during maneuvers and who

was accused's immediate superior (R. 12, 13). Whenever tactical exercises were in progress the umpires were required to have a pass from the battalion commander or the regimental umpire to visit Leesville, Louisiana. At other times the umpires were free to visit Leesville without possessing a pass and were accustomed so to do (R. 11, 12).

5. At the request of the court evidence was introduced that, according to the record of the fifth phase of the sixth maneuver of the 92d Infantry Division held in Louisiana, maneuvers were in a tactical phase on 13 March 1944 (R. 15, 16).

6. Accused was found guilty of Charge II and its Specification alleging that on or about 13 March 1944 he absented himself without proper authority from his duties as umpire until on or about 14 March 1944. The evidence demonstrates that sometime during the period from 11 March to 15 March 1944 accused was released by the military police at Leesville, Louisiana, in the custody of Major Stauder and returned to duty. Accused had no specific authority from Major Stauder to be absent from duty. However, such permission was only required if accused were absent on 13 March, when the maneuvers were in a tactical phase. It was not required that accused obtain any permission to be absent on 11 and 12 March. Thus, the only time accused could have been absent without authority would have been on 13 March. There is no proof that his absence occurred on that day. Proof of an absence sometime between 11 March and 15 March does not support a finding that it occurred on 13 March.

Furthermore, there is not a scintilla of evidence in the record that, at the time accused was in Leesville, Louisiana, he was absent from his duties as umpire. There is no evidence that his absence occurred during duty hours.

For the foregoing reasons 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 N. Tabby, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert E. Trewhitt, Judge Advocate.

SPJGV
CM 261002

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) is the record of trial in the case of Second Lieutenant Arthur O. Spady (0-1301701), Infantry, together with the foregoing opinion of the Board of Review.

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

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

Myron C. Cramer

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

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

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 489, 9 Sep 1944)

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

SPJGN
CM 261029

16 AUG 1944

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Army Air Base, Bluethenthal
Second Lieutenant ALBERT W.	)	Field, Wilmington, North Caro-
HILL (0-716008), Air Corps.	)	lina, 26 July 1944. Dismissal.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Albert W. Hill, E Trainee Section, 124th Army Air Forces Base Unit (Fighter), did, without proper leave absent himself from his station at Army Air Base, Bluethenthal Field, Wilmington, North Carolina, from about 5 July 1944, to about 7 July 1944.

He pleaded guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service and to forfeit all

pay and allowances due or to become due. The reviewing authority approved the sentence, recommended that it be suspended and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, consists of an authenticated extract copy of his organization's morning report which was admitted into evidence. This document shows his absence without leave as alleged from 0600 o'clock on 5 July 1944 until 0600 o'clock on 7 July 1944 (R. 7; Ex. 1).

4. The accused, after explanation of his rights as a witness, elected to make a sworn statement. He had left his station on the afternoon of 5 July 1944, [which date is patently erroneous as he had previously stated it was Tuesday which was 4 July 1944], and had gone to the nearby town (Wilmington, North Carolina) where he began drinking with some friends. After going to a night club he rented a room in the Cape Fear Hotel where he contined his drinking and became so drunk that he remembers nothing thereafter except purchasing more whiskey from a bell boy until about 2200 o'clock on the night of 6 July 1944 when he returned to the base. He retired without noticing a note pinned to his bed directing him to report to his superior officer which he did at about 0800 o'clock on 7 July 1944. He professed temperate drinking habits as a rule but had been admonished by the military police on one occasion because of intoxication (R. 7-13; Ex. 2).

5. The Specification of the Charge alleges that the accused without proper leave absented himself from his named station from about 6 July 1944 to about 7 July 1944. The elements of the offense of absence without leave and the proof required for conviction thereof, according to applicable authority, are as follows:

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

The accused's plea of guilty admits all the elements of the offense which is likewise fully established by the documentary evidence presented by the prosecution. Furthermore, the accused's sworn testimony shows that he deliberately absented himself without authority in order to go on a two-day drinking spree. All of the evidence and the accused's plea of guilty, therefore, establish his guilt, as alleged, beyond a reasonable doubt and amply support the court's findings of guilty of

the Charge and its Specification.

6. The accused is about 24 years old. The records of the Office of The Adjutant General show that he has had enlisted service from 1 February 1943 until 12 March 1944 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date.

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

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 261029

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 Albert W. Hill (0-716008), 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. Based on the unanimous recommendation of the court for clemency the reviewing authority after approving the sentence recommends that execution of the sentence be suspended. I concur and recommend that the sentence be confirmed but suspended during good behavior.

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 486, 9 Sep 1944)

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

SPJGQ
CM 261031

18 AUG 1944

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Langley Field, Virginia, 19 July 1944. Dismissal.
Second Lieutenant IRVING BRASLOWSKY (0-712488), Air Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Irving Braslowsky, Air Corps, Section E, 111th Army Air Forces Base Unit, having been advised that he was at his last station and might, at any time, be ordered for overseas shipment, did, without proper leave, absent himself from his station at Langley Field, Virginia, from about 24 June 1944 to about 2 July 1944.

Upon motion of defense counsel the court struck out of the Specification the words "having been advised that he was at his last station and might, at any time, be ordered for overseas shipment". The accused pleaded guilty to and was found guilty of the Charge and the Specification as amended. No evidence of any previous conviction was introduced at the trial. He was sentenced to be dismissed the service of the United States, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for a period of 1½ years. The reviewing authority approved the sentence, remitted the forfeitures and confinement imposed, recommended that the sentence to dismissal be suspended, and forwarded the record of trial for action under Article of War 48.

3. The pertinent evidence for the prosecution shows that accused at the time of the occurrence hereinafter related was a Second Lieutenant in the military service of the United States, member of Section E, 111th Army Air Forces Base Unit stationed at Langley Field, Va.(R. 8, 11). The amended morning report of that organization as evidenced by a certified extract copy thereof admitted in evidence without objection (R. 9-10, Pros. Ex. 1 and 2), shows that the accused was absent without leave from his organization from 1900 24 June 1944 to 1500 2 July 1944.

4. For the defense 2nd Lt. Ira J. Block, a member of the same organization as the accused, testified that he had known the accused since October 1943; that he had gone through advance navigation school and replacement training with him as a roommate; that accused did not smoke or drink; that he had been an "above-average" student; and that he was the "nicest fellow" that he had known in the Army (R. 14-16).

Mrs. Ruth M. Braslowsky, to whom accused had been married for four months, testified that she and the accused had been living together in Newport News, Virginia, until 24 June 1944. In the preceding April she had packed and sent all of the accused's winter clothing to her home in New York. He had requested her to go home and get them, but she had refused to go alone. She cried and had a tantrum and the accused, after an unsuccessful attempt to obtain a leave, finally gave in to her and on 24 June 1944, accompanied her to her parents' home in New York. There she persuaded him to stay for a few days because she did not want to return to Newport News. They arrived in New York on Sunday (25 June) and stayed until Tuesday (27 June), when they returned to Richmond, Virginia. At Richmond, "it started all over again", and they argued for several days before he finally decided that he would return to Langley Field, even if she did not accompany him (R. 16, 17, 18).

Having been advised of his rights, the accused elected to be sworn as a witness in his own behalf. He testified that he had enlisted in the Army when he was 19 years of age. He believed that he was a good navigator and wanted to go overseas. On 24 June 1944, after he had made several unsuccessful attempts to get a three-day pass, he went home with his wife to pick up his clothes. He knew that there would not be time to have them sent by mail and his wife, who had been waiting for four hours in the Post Exchange while he attempted to get leave, was angry and refused to go home without him. Finally, he went with her to avoid further argument, thinking that he would be back in time. They left the field about 1700 (Saturday, 24 June 1944) and he had intended to return Monday morning (26 June 1944), but his wife wanted to stay another day and they did not leave New York until Tuesday (27 June 1944). They had another argument on the train, and in view of the fact that he was already absent without leave, and, since he did not want to leave his wife while they were "on the outs", he saw ho harm in spending another

day or so trying to make up. He attempted to make up with her while they stayed at Richmond, but finally decided that he could not stay any longer and told her that he was returning to Langley Field (R. 23, 24, 25).

5. The evidence introduced by the prosecution and the legal confession of the accused evidenced by his plea of guilty established that the accused did, as charged, absent himself from his station at Langley Field, Virginia without proper leave from about 24 June 1944 to about 2 July 1944. No further discussion of the testimony or evidence is deemed necessary.

6. Attached to the record was a recommendation for clemency, to the extent of remitting the sentence of confinement, signed by nine of the eleven members of the court. There was also attached pleas of clemency of two fellow officers and the defense counsel. The reviewing authority "in view of the recommendation of the court for clemency", recommended that the execution of the sentence to dismissal be suspended.

7. The records of the War Department show the accused to be 21 years of age, having been born of Russian parents in Newark, New Jersey, on 28 February 1923, He attended and graduated from high school. He was also a student in Engineering for one year at New York University. He enlisted in the service 28 September 1941. On 26 February 1944, having satisfactorily completed the prescribed course of instruction in Air Corps Navigation, he was commissioned a second lieutenant in the Air Corps. His permanent home address is Bradley Beach, New Jersey.

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 of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61.

William H. Gaunbrell, Judge Advocate.

Herbert B. Fredesen, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

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

1. Herewith transmitted are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Irving Braslowsky (0-712488), Air Corps, 111th Army Air Forces Base Unit, Langley Field, Virginia.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. In view of the recommendation of the court for clemency and the recommendation of the reviewing authority that the sentence to dismissal be suspended, I recommend that the sentence be confirmed but 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 above recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 514, 26 Sep 1944)

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

3. The prosecution introduced competent evidence to prove that on 23 May 1944 accused [illegible] from Fort Bragg, North Carolina, [illegible] orders assigning him to Army Ground Forces Replacement [illegible] George G. Meade, Maryland, where he was to report [illegible] Pros. Ex. [illegible] new station [illegible] was attached to the 1st Replacement Regiment (Infantry). He failed to join his new organization [illegible] ordered and did not join it until [illegible] 1944 [illegible]

4. The defense introduced evidence [illegible] entered into by the prosecution, defense and the accused [illegible] that accused was a member of the [illegible] in South Dakota. Accused and his wife [illegible] early 1944 after [illegible] relations with some person other than accused [illegible] white woman, and thereafter [illegible] child of which accused was not the father. Accused spent several days [illegible] the Pine Ridge Indian Reservation in June 1944 and on 9 June 1944 he sent a telegram from Rushville, Nebraska, [illegible] his new station stating: "Am on my way delay unavoidable" (R. 19, 20; Def. Exs. 1, 2).

After accused's rights had been fully explained to him he elected to take the stand and give sworn testimony [illegible] He told of his birth on the Pine Ridge Indian Reservation, of his early freedom as an Indian youngster [illegible] when he was corralled to attend the reservation school, of the severe punishment meted out to violators of the school's regulations, of his completion of the high school course and his brief study of architectural engineering. In 1935 and 1936 he participated in the Citizens Military Training program, attending camp both summers. In 1940 he enlisted in the Enlisted Reserves and was one of the original founders of a State Guard unit established on the reservation in 1941. In 1942 he was called to active service (R. 11-15).

Accused told of his marriage on the reservation in 1937 and of his three children presently aged 6, 4 and 2 years. In May 1943 he visited his wife and children after obtaining his commission in the Army. In September 1943 his wife wrote him she wished a divorce and refused to explain the reason for her request. In January 1944 while on leave he visited his family and was informed his wife was pregnant as a result of her relations with a construction worker. Apparently

in February 1944 a divorce was obtained in an Indian court. Although he married a white woman soon thereafter, he brooded over the disgrace he considered his first wife had brought upon him. Accused visited the reservation in June 1944 after leaving Fort Bragg for Fort Meade, attempted unsuccessfully to obtain custody of his children, discovered his first wife had given birth to an illegitimate child and then started vengefully in pursuit of her paramour travelling to Minneapolis, Chicago and Detroit. Accused stated he finally came to his senses in Detroit and thereafter proceeded to Fort Meade (R. 15-19).

The defense also introduced a qualified expert on anthropology who testified that from his research into the Indian character and psychology, particularly that of the Pine Ridge Indians, he had become convinced that the Sioux were still hostile and bitter toward the white man to whom the Indian attributed his present unsatisfactory situation of being something less than a white man yet being forced to absorb the white man's customs and abide by his regulations. As the result of their frustration complex these Indians developed a self-restraint and a stoical reserve to conceal their feelings. However, such self-repression could not be practiced continuously and their pent up emotions were subject to explosion if touched off by a final, unbearable insult. He stated that under tribal law a matter of adultery would be settled violently between the families involved. He admitted the prowess and courage of the Sioux as warriors. He further observed that if an Indian discovered his wife had been unfaithful with a white man his tribal heritage with its ancient lore might well flood his mind with a desire for vengeance and explode his controlled emotions. For an Indian to obtain a commission in the United States Army was undoubtedly a high honor in the eyes of the tribe and its loss would be a definite disgrace. This expert admitted that the Indian marries and divorces easily under tribal custom, particularly in a tribe socially demoralized to the extent true of accused's tribe, but that divorce would not assuage the Indian's desire for personal revenge upon the individual responsible for any disruption of his domestic affairs (R. 21-28).

He was further of the opinion that a Sioux whose emotions would burst bounds under stress of the events here present could probably not be safely entrusted with a position calling for a high degree of personal responsibility if permitted to remain in his Indian society but that once separated from it and moving only in the white man's society such an individual would act and react as would a white man (R. 28, 29).

Accused received a rating of excellent for the manner of performance of his duties from June 8, 1943 to December 31, 1943, a rating of very satisfactory from then until April 23, 1944 and a rating of satisfactory thereafter until June 8, 1944 (Def. Ex. 3).

5. The evidence fully establishes that accused, a Sioux Indian, absented himself without leave from his organization from 10 June 1944 until 15 July 1944. Apparently, from accused's testimony, his absence occurred when, in the throes of an emotional storm resulting from the birth of an illegitimate child to his Indian wife whom he had divorced because of her intimacy with a white man, he set forth upon a mission, not inconsistent with the temperament and custom of the Sioux Indian, to avenge the insult perpetrated upon him. The evidence fully sustains the findings of guilty of the Specification and the Charge.

6. The accused is about 28 years of age. He was a member of the Enlisted Reserve Corps from July 1940 to October 1942, entered upon active military duty on 10 October 1942 and on 26 May 1943 was commissioned a second lieutenant. In civilian life he worked as a motion picture camera operator for some 8 years and also engaged in civil engineering.

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 and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 61.

Thomas N. Tarbey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 261037

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 Lloyd W. Eaglebull (0-1320024), 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 absence without leave from 10 June 1944 to 15 July 1944, in violation of Article of War 61. He was sentenced to dismissal. The accused is a Sioux Indian. By 2nd Indorsement from Headquarters Army Ground Forces Replacement Depot No. 1, Fort Meade, Maryland, there was received on 16 August 1944, copy of a warrant for the arrest of accused together with correspondence indicating that on 16 June 1944, during accused's unauthorized absence and while drunk he committed an assault and battery upon Verle A. Harding, the operator of a liquor store in White Clay, Nebraska, and damaged certain of his store fixtures when Harding refused to sell accused beer. By letter dated 18 August 1944 from the same organization at Fort Meade, Maryland, it appears that on the night of 16 August 1944 accused, in the company of an enlisted man, also a Sioux Indian, was drunk and disorderly in Laurel, Maryland. They entered an apartment occupied by a Mrs. Mallonee and her daughter and after being ordered therefrom created a disturbance sufficient to arouse the occupants of the apartment house. 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

6 Incls.
1 - Record of trial.
2 - Ltr fr Verle A Harding dated 27 Jun 44 w/incl.
3 - Ltr fr Verle A Harding dated 3 Aug 44.
4 - Ltr fr AGFRD No. 1, dated 18 Aug 44.
5 - Dft ltr for sig S/W.
6 - Form of action.

(Sentence confirmed. G.C.M.O. 518, 26 Sep 1944)

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

SPJGN
CM 261042

5 SEP 1944

UNITED STATES	)	THIRTEENTH AIR FORCE
v.	)	Trial by G.C.M., convened at A.P.O. #719, 11 May 1944. Dismissal, total forfeitures, and confinement at hard labor for one (1) year. Disciplinary Barracks.
First Lieutenant ROBERT W. RUSSELL (0-1102945), Company C, 810th Engineer Aviation Battalion.	)	

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 93d Article of War.

Specification: In that First Lieutenant Robert W. Russell, 810th Engineer Aviation Battalion, did, at APO 709, from about 6 October 1943 to about 27 December 1943, feloniously embezzle by fraudulently converting to his own use, the sum of $318.60, property of the Exchange Fund of the 810th Engineer Aviation Battalion, entrusted to him by the Commanding Officer, 810th Engineer Aviation Battalion.

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

Specification 1: In that First Lieutenant Robert W. Russell, 810th Engineer Aviation Battalion, did, at APO 709, from about 3 January 1944 to about 6 January 1944, attempt to embezzle by converting to his own use the sum of $243.20, the property of the 810th Engineer Aviation Battalion, entrusted to him by the Commanding Officer, 810th Engineer Aviation Battalion, in that he sold beer in excess of the

established retail price and only charged himself with the proceeds of sales at the established retail price.

Specification 2: In that First Lieutenant Robert W. Russell, 810th Engineer Aviation Battalion, did, at APO 502 and at APO 709, from about 22 May 1943 to about 14 January 1944, grossly neglect his duties as Exchange Officer, 810th Engineer Aviation Battalion, in consequence of which he lost the sum of $1474.05, property of the Exchange Fund, 810th Engineer Aviation Battalion.

Specification 3: In that First Lieutenant Robert W. Russell, 810th Engineer Aviation Battalion, did, at APO 502 and at APO 709, from about 22 May 1943 to about 14 January 1944, grossly neglect his duties as Exchange Officer, 810th Engineer Aviation Battalion, in that he failed to require cash receipts to be turned over to him daily, failed to supervise the purchase and receipt of merchandise by the exchange, failed to require the exchange steward to prepare a daily report of sales, and failed utterly to supervise the retail activities of the exchange.

The accused pleaded not guilty to all Charges and Specifications and was found guilty of Specification 2 of Charge II, "except the words 'the sum of $1474.05', substituting therefor the words 'a sum in excess of $1000.00,'" and guilty of all other Charges and Specifications as alleged. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Commanding General, South Pacific Area, confirmed the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, withheld execution of the sentence in accord with the provision of Article of War 50½, and forwarded the record of trial to The Assistant Judge Advocate General, Melbourne, Victoria, Australia. Before final action under Article of War 50½ could be taken the confirming power vested in the Commanding General, South Pacific Area, was terminated. The Assistant Judge Advocate General accordingly forwarded the record of trial to this office for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was a platoon leader of Company C, 810th Engineer Aviation Battalion, and "a member of the special court-martial" (R. 14, 24, 54, 81). By Special Order No. 34 he was on 19 April 1943 appointed Post Exchange Officer in "addition to his other duties" (R. 6; Pros. Ex. 1). The

Battalion was then stationed at APO 502, but, "at the end of the month of May", it was moved to APO 709. None of the stock of merchandise at APO 502 was taken to the new station (R. 37).

At APO 709 the Post Exchange was housed in a pyramidal tent sixteen feet square. Purchases were made at a window cut in one of the sides. Behind it and at a distance safely beyond the reach of pilferers was a counter on which the various articles offered for sale were displayed. All unopened cases and cartons of merchandise of the Exchange were stored in the tent. Additional space was used only on one occasion (R. 23, 150).

The actual operation of the Exchange was entrusted by the accused to Corporal George W. Dillard, Private First Class James A. McMichael, and Private First Class Dee Goosby (R. 38, 71, 100, 114). Dillard, who bore the title of Post Exchange Steward, had the responsibility of making all purchases at the Island Wholesale Exchange, of supervising the sales, and of turning the proceeds over to the accused (R. 71). McMichael and Goosby were Dillard's assistants. They accompanied him on his trips by truck to the Wholesale Exchange, checked the incoming merchandise, kept the Post Exchange clean, and waited on customers (R. 100, 114). The accused was present on the first two or three purchasing expeditions to the Wholesale Exchange and at the "check in" of the merchandise then hauled back to the Post Exchange (R. 71, 100). Thereafter he never again gave his personal attention to the replenishment of the Post Exchange stock. Instead a mimeographed form was prepared stating that "I authorize Corporal Dillard to make any purchases he deems necessary". Both the accused's and Dillard's signature were subscribed thereto. An executed copy of the form was left at the Wholesale Exchange with each purchase (Pros. Ex. 33, p. 3). No maximum as to the amount of merchandise to be acquired on each trip was fixed by the accused. Dillard was authorized to buy as much as the Wholesale Exchange would sell to him, the only limit imposed upon him being "the strength of the outfit" (R. 72).

Allegedly because of the pressure of his other duties the accused was never present at the checking in of merchandise after his initial two or three trips to the Wholesale Exchange. He never complained to the Exchange Council or to the Commanding Officer of the Battalion, nor did he ask to be relieved of his position as Exchange Officer (Pros. Ex. 33, p. 3). About two or three times a week he would visit the Post Exchange. He was rarely present at closing time (R. 73, 101).

All purchases from the Wholesale Exchange were made on credit (Pros. Ex. 33, p. 3). Immediately after the unloading of the truck, Dillard would bring the invoices covering the day's delivery to the accused, who would be waiting to receive them at his quarters (R. 72, 81-82). The matured bills of the Post Exchange were always paid by Dillard, but the accused determined which of them should be satisfied, prepared the appropriate voucher form, and supplied the necessary funds (R. 73, 81, 87).

The money used was derived either from the operations of the Post Exchange or from the sale of beer to the companies comprising the Battalion (R. 16, 21, 28, 36, 63, 66, 74). Some beer was available to individual purchasers at the Post Exchange, but the greater portion of it was distributed directly to the companies (R. 30-31, 78-79, 101, 115). These latter transactions and particularly the collections incident thereto were handled exclusively by the accused (R. 16, 21, 28, 63, 66, 79).

Dillard usually turned over the proceeds of the Post Exchange to the accused every three or four days. Sometimes Dillard delayed as long as a week (R. 74). When the Post Exchange was first opened, he had been required to file daily reports. The accused soon decided that he would prepare these himself and directed that Dillard simply note the total of each day's sales on "a slip" (R. 84, 87, 96-97). On this rudimentary record would be noted all of the cash receipts with the exception of $15.00 to $20.00 in silver retained for change (R. 75, 84-85). No receipt was given to Dillard for the money turned in by him (R. 75). On the other hand the accused had no assurance that the sums received by him accurately reflected the operations of the Post Exchange. He "accepted . . . Dillard's word for it as having been the amount of sales" (Pros. Ex. 33, p. 4). At the end of each month Dillard would be required by the accused to sign formal daily sales slips for every day of business. Dillard would comply without then knowing whether the amounts of the sales were correctly represented (R. 76). As a matter of fact the figures were frequently "adjusted" upon the direction of Captain Ralph H. Sudekum, the president of the Exchange Council. Despite a permissible leeway either by way of overage or shortage not exceeding 1%, he insisted that the monthly statements of the Post Exchange balance out perfectly. Whenever slight shortages or discrepancies were discovered the accused would be ordered to make up the difference out of his own pocket. Since the increased cash resulting from the payment of the surcharge resulted in an unbalanced account, he would correct the condition by "adjusting" "daily sales" (R. 47-48, 57-58, 60).

The prices of merchandise offered by the Post Exchange were required by the Exchange Council to be the same as those listed in the invoices issued by the Island Exchange. Dillard normally complied with the established procedure but deviated from it upon instructions from the accused. In Dillard's own words, "I would go by the prices on the invoices, unless I was ordered to change them" (R. 55-56, 73; Pros. Ex. 33, p.5). No price list was publicly posted by him for examination by customers, nor were the individual articles marked or tagged. A price list in his own handwriting was, however, kept on the counter "in the back of the Exchange" for the use of his assistants (R. 38, 52-53, 57, 73, 77, 100-101, 114, 116-118, 120). Changes directed by the accused were not noted on this private document (R. 118).

All of the deviations from the prices set out in the invoices were increases. During the period between 15 September 1943 to 14 January 1944 the accused ordered increases in the prices of "a host of items", including candy, cigars, soap, mirrors, handkerchiefs, and shave sticks (R. 73, 77-78, 95, 102, 115-118, 130). More important than any other one of these markups, so far as the volume of excess return was concerned, was that on beer. The authorized selling price for American beer was ten cents per unit and for Australian beer fifteen cents per quart bottle. Under the accused's management these charges were increased to fifteen cents and twenty-five cents respectively. Between 4 October and 27 December 1943 direct sales of beer by the accused solely to company funds, as distinguished from individual patrons of the Post Exchange, resulted in unauthorized excess receipts of $318.60 (R. 16-19, 25-28, 35-37, 42, 79, 102, 115, 122-129, 146-147; Pros. Ex. 27). No part of this sum was reflected on the records for which he was responsible (R. 136).

Sales of beer over the counter of the Post Exchange to individual purchasers produced a probable excess return of another $421.50 (R. 129-130, 134). The overcharges made in pursuance to the accused's instructions on other items sold by the Exchange have been estimated at $409.40 (R. 130-134). None of the excess proceeds collected were entered on the books of the Post Exchange (R. 134-135).

In October of 1943 Dillard was told by the accused "that we were over and the money that we were over he was going to save to cover if we had any losses" (R. 79). This was a misrepresentation, for, despite the over-charges there was never any surplus (Pros. Ex. 33, p. 25). On the contrary subsequent to the slight discrepancies already mentioned several substantial shortages developed. At the end of November 1943, "when records were submitted to the Island Post Exchange to be audited", a deficiency of $68.65 was discovered. The Exchange Council met and recommended that the accused pay the sum out of his own funds. He subsequently informed Captain Sudekum that he had complied (R. 39-40, 49-50). Toward the "last of December" he spoke to Dillard for the first time about the matter. After this conversation, Dillard looked through an envelope in which he kept money, forms, and invoices and found an invoice in the sum of $500 which he had previously overlooked. He immediately delivered it to the accused. Its addition to the other liabilities of the Exchange revealed a considerable shortage (R. 41-42, 88-89). An audit of the Post Exchange's accounts was ordered. When completed, it showed that the gross profits which should have been realized by the Exchange between 22 May 1943 and 14 January 1944 from normal sales at prices fixed by the Wholesale Exchange was $1230.64. The gross profit actually reported was $713.39 or $517.25 less than the amount which should have been collected. This deficiency, coupled with the excess charges for Exchange items of $421.50 and $409.40, indicated a total shortage of $1348.15 (R. 140). This was exclusive of the overcharge amounting to $318.60 accruing from beer sales direct to company funds.

Before the audit was undertaken the accused on 3 January 1944 sold another 4464 units of American beer to company funds at fifteen cents per unit. The unauthorized return over and above the established price aggregated $243.20 (R. 147-148; Pros. Ex. 28). Some 1020 of these units were purchased by Company A which was under the command of Captain Sudekum (R. 34, 42; Pros. Ex. 28). Upon learning of the transaction, he immediately obtained a refund of five cents per bottle, or a total of $51.00, for his organization. A new voucher was prepared showing the sale to Company A to have been at a price of ten cents per unit (R. 43, 64, 66-67, 69-70, 148). In the course of a conversation with Captain Sudekum the accused stated that his purpose in fixing the price at fifteen cents on 3 January 1944 was "to make up the shortage" brought to light in December by Dillard (R . 42). At the pre-trial investigation he admitted that:

> "I did raise the prices on beer in January and retained the overcharge to help pay for the losses I was going to have to make up" (Pros. Ex. 33, p. 32).

The overcharges collected from the other companies were set aside with a view to their repayment. According to Captain Sudekum, "I had the extra nickel per bottle placed in an envelope for each company, to be refunded to the company funds" (R. 42). In connection with these reimbursements no new vouchers were executed (R. 147-149; Pros. Ex. 28).

The accused was unable to offer any definite explanation for the lack of an overage which should have resulted from the excess prices charged (Pros. Ex. 33, p. 16). At the pre-trial examination he testified as follows:

> "Q. In spite of these overcharges that came about through increased prices over the selling price taken into the merchandise accountability, your merchandise accountability statement each month balanced out to zero, can you account for that?
>
> "A. Just as I explained in the first of this investigation that we found that we were a few dollars short and I would make up the discrepancies from my pocket to satisfy the Council.
>
> "Q. Did you feel at any time that inasmuch as you had to make up shortages, that you were entitled to any overages?
>
> "A. Yes, I wondered about that" (Pros. Ex. 33, p. 25).

He volunteered the information that Dillard and McMichael gambled (Pros. Ex. 33, p. 28).

At the trial Dee Goosby, whose net pay every month as a Private First Class was $57.12, admitted upon cross examination that in December of 1943 and in January of 1944 he had sent money orders in the respective sums of $150.00 and $200.00 to his home in the states (R. 105, 112). These sums were not derived from any form of gambling. When pressed to account for their source, he stated that he had purchased cigars from a Marine at $10.00 a box and had resold them to his fellow soldiers at the price of "3 for a dollar" (R. 106). Others "throughout the company" were engaged in the same business (R. 120). The same cigars were sold by the Post Exchange for ten cents each, but the quantity which the individual soldier was permitted to purchase was limited to three. The "only time [Dee Goosby] would sell cigars to men in [his] company was when cigars were out of the PX" (R. 106-112). He denied ever having taken any of the merchandise in the Post Exchange (R. 112).

4. After being apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. The only other witness called by the defense was Second Lieutenant Seymour Bobins. He had been appointed to succeed the accused as Exchange Officer on 26 December 1943, but, upon learning of the shortage which had been discovered that month, refused to undertake his designated duties (R. 158). Around 29 December 1943 the two men had a conversation. Bobins suggested that:

> "inasmuch as [the accused] was short in his accounts that we could make it up — that he could make it up— if we added a price to the beer. I figured adding 5¢ to the beer. At that time I believe he had about a hundred cases of beer for issue, and I figured that would be a way of making up about $120.00" (R. 159).

Since they themselves lacked the authority to carry this scheme into execution, Bobins added that the approval of Lieutenant Colonel Cranmer, the Commanding Officer, should be solicited (R. 150). Subsequently the accused represented "that he went up to see Colonel Cranmer". The increase in the price of beer was Bobins' "brain child" and he was "sorry" (R. 160).

The accused testified at great length. Except for the lunch hour he was absent from the company area and on duty as platoon leader from 7:00 a.m. to 5:15 p.m. If he rushed, he would be in time for the evening meal, which was served at 5:45 p.m. The Post Exchange was open between 11:00 a.m. and 12:30 p.m. and between 4:30 p.m. and 6:00 p.m. (R. 161-162). Since he was always with his platoon, the accused was never in the Exchange "during an entire period of operation" but he had been present "possibly two or maybe three times a week" (R. 162, 188).

He permitted Dillard to make all of the necessary purchases in pursuance to AR 210-65 which authorized Exchange Managers to perform that function (R. 163). Any changes made in the price list were without his knowledge (R. 165). The testimony to the contrary was "not accurate" (R. 188). He believed the proper charge for American beer to be fifteen cents and for Australian beer twenty-five cents per unit. Not until January of 1944 did he learn that American beer should have been sold for ten cents per unit (R. 168-169, 181). Unitl then he had relied without question upon the price he had received "from Corporal Dillard verbally" (R. 165, 180-182).

There had never been an overage in his monthly reports but there had always been at least slight shortages (R. 166-167, 173-174, 176). Although he had been compelled to make these up out of his own pocket, he had not attached any particular significance to them because he "knew the president of the council was wrong in requiring" reimbursement from him (R. 182).

Upon his appointment as Exchange Officer he had been instructed with respect to the forms to be used in reporting the operations of the Exchange (R. 169). He had chosen to follow a procedure of his own. He had no way of checking to ascertain whether the amounts turned in by Dillard constituted the total receipts (R. 164). The daily sales reports prepared by the accused were carefully examined by Dillard. They accounted for all of the proceeds of the Exchange (R. 167, 171). The report for the last day of the month was an exception. The accused explained that:

> "In the event a shortage occurred in the Exchange during the period of a month, or--as in some instances--a few days longer than a month, the president of the council felt that I was solely responsible to make up any shortage that existed. He wanted his Merchandise Accountability to balance out to zero. By so being, and having been so demanded, I was obligated to put in that money to make up the difference of the Exchange so that the account would balance out to zero" (R. 172).

Another exception was revealed upon cross-examination as follows:

> "Q. I hand you Prosecution Exhibit '30', representing one of those slips which Corporal Dillard turned in to you, and call your attention to the fact that to the right of each daily sales amount--which are written in ink--there are certain penciled notations.
>
> "A. That's right.
>
> "Q. Can you identify in whose handwriting those penciled notations are made?

"A. Mine

"Q. And can you explain why those changes were made?

"A. The changes were made for the simple reason that it is not at all normal for a period of time—say 7 days—to sell merchandise and have all of the cash accounted for coming out to the even dollar, and had I submitted the report in that condition there would have been a kick back on it.

"Q. Then, in view of any change which you made, would you still say that your daily sales slips spoke the truth?

"A. In view of this change?

"Q. That's correct.

"A. Well, the changes were verified by Corporal Dillard, and I can say that I still maintain they speak the truth inasmuch as he knew where the money was" (R. 176).

The accused had seen no impropriety in preparing records, which were inaccurate, for the signature of an enlisted man (R. 185).

The accused recalled his conversation with Lieutenant Bobins. The accused had attempted to contact Lieutenant Colonel Cranmer but had not succeeded. All of the excess charges collected had gone into the Post Exchange Fund but were later deducted from it and set aside in accordance with the directions of the Exchange Council (R. 168). None of the other overcharges had been converted by the accused to his own use. They had all been deposited in the Post Exchange fund (R. 179).

The accused has attempted to cover his shortages by depositing $1302.20 with Lieutenant Colonel Cranmer. Of this sum $192.20 represented the excess charges accruing from the sale of beer on 3 January 1944 and set aside for refunding by order of the Exchange Council. The balance represents the accused's own money or money borrowed by him (R. 168, 190).

5. The Specification of Charge I alleges that the accused did, "from about 6 October 1943 to about 27 December 1943, feloniously embezzle by fraudulently converting to his own use, the sum of $318.60, property of the Exchange Fund of the 810th Engineer Aviation Battalion, entrusted to him by the Commanding Officer, 810th Engineer Aviation Battalion". This was set forth as a violation of Article of War 93.

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come" (MCM, 1928, par. 149h). By virtue of his appointment as Post Exchange Officer the accused became charged with the care and control of all assets of the Post Exchange. He was primarily responsible for their safekeeping and preservation, and he was under a duty to account for them immediately upon demand by lawful authority.

All sales of beer to company funds were made by him personally and by no one else. He alone was familiar with the details of the transactions, and all of the proceeds came into his hands. Between 6 October and 27 December 1943 he used his position of trust and confidence to impose and collect excess prices totaling $318.60 from the company funds. This sum was not entered upon the records of the Post Exchange or in any of the monthly statements prepared by him, nor was it accounted for in any other way. Although the product of his fraudulent scheme, it was an asset of the Post Exchange, at least until claimed by its rightful owners. The accused had no right, title, or interest of any kind or nature in or to it.

His failure to reveal its collection or to account for it is indicative of a fraudulent and deceitful purpose. Winthrop, Military Law and Precedents, 2nd Edition, p. 705, well states,

> "The fact of the fraudulent conversion in embezzlement may be evidenced . . . by the rendering of a false return or account in which the receipt of the money alleged to have been embezzled, is omitted to be acknowledged, or in which a fictitious balance is made to appear . . ."

Both of these symptoms of guilt characterize the accused's conduct. If as he contends, he did not know the correct price of American beer until January of 1944, why did he not show the entire price actually collected on the books of the Post Exchange? His concealment of the excess clearly bespeaks an intent to embezzle.

The repayment of the overcharge does not obliterate the offense. To quote Dig. Op. JAG, 1912-1940, sec. 451 (17),

> "An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweights any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting. The return of the amount of the fund post litem motam is of no probative value, except as an admission that he was responsible for it. It does not tend either to negative or to excuse the offense charged. CM 123492 (1918)".

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NAVY DEPARTMENT

The allegation in the Specification that the sum in question was intrusted to the accused by "the Commanding Officer, 810th Engineer Aviation Battalion" is not supported by the evidence. The variance, however, is of minor significance, and the words may and should be treated as surplusage. The same problem has been disposed of as follows in Dig. Op. JAG, 1922-1940, sec. 451 (16):

> "There was no proof that the company fund had been entrusted to the accused 'by the regimental commander, Three hundred and eleventh Infantry', as alleged in the specification, Charge I. This, however, is immaterial, inasmuch as the accused, by virtue of his office as company commander, is entrusted with the company funds, and if the quoted words are eliminated it still leaves the specification properly alleging the offense of embezzlement of the company fund by accused, and the record is sufficient. CM 133226 (1919)".

The record is legally sufficient beyond a reasonable doubt to support the findings of guilty of the Specification of Charge I and Charge I.

6. Specification 1 of Charge II alleges that the accused did "from about 3 January 1944 to about 6 January 1944, attempt to embezzle by converting to his own use the sum of $243.20, the property of the 810th Engineer Aviation Battalion, entrusted to him by the Commanding Officer, 810th Engineer Aviation Battalion, in that he sold beer in excess of the established retail price and only charged himself with the proceeds of sales at the established retail price". This offense was laid under Article of War 96.

Whether in pursuance to Lieutenant Bobins' suggestion for obviating the existing shortages or in continuation of the previous practice of overcharging, the accused on 3 January 1944 sold 4464 units of American beer to company funds at a price which was excessive to the extent of $243.20. Of this sum $51.00 was refunded to Captain Sudekum's company and the balance was turned over by the accused to Lieutenant Colonel Cranmer for eventual distribution to the remaining companies.

The accused's collection of this overcharge was marked by the same fraudulent and deceitful motives as in the instances covered by the Specification of Charge I. As noted in that connection, restitution of embezzled monies does not exonerate the offender. The application of this basic principle would warrant a conviction for the embezzlement of the $243.20. The Specification, however, alleges only an attempt to embezzle.

Although an attempt to embezzle is not expressly designated as an offense under Article of War 93, or any other Article of War, it clearly involves a disorder or neglect to the prejudice of good order and mili-

02474

tary discipline within the purview of Article of War 96 which, historically, covers all "sins of commission or omission" not elsewhere made punishable: See Winthrop, Military Law and Precedents, 2nd Edition, pp. 722-733. The conduct of the accused in charging and collecting the excess sum of $243.20 clearly, therefore, constitutes an offense in violation of that Article.

The omission of the words "feloniously" and "fraudulently" from the Specification is not a material error. "Embezzle" is a word of art in which the connotation of fraud and felony is inherent. The record is legally sufficient to sustain the findings of guilty of Specification 1 of Charge II.

7. Specification 2 of Charge II alleges that the accused did "from about 22 May 1943 to about 14 January 1944, grossly neglect his duties as Exchange Officer, in consequence of which he lost the sum of $1474.05, property of the Exchange Fund, 810th Engineer Aviation Battalion". Specification 3 of Charge II alleges that he did during the same period "grossly neglect his duties as Exchange Officer in that he failed to require cash receipts to be turned over to him daily, failed to supervise the purchase and receipt of merchandise by the exchange, failed to require the exchange steward to prepare a daily report of sales, and failed utterly to supervise the retail activities of the exchange". Both acts were laid under Article of War 96.

The administration of the Post Exchange by the accused was haphazard, illegal, and in defiance of established custom and usage. The forms with which he was supplied upon his appointment as Post Exchange Officer were discarded by him. Others more adaptable to his schemes of personal enrichment were substituted in their place. A corporal and two enlisted men were entrusted with duties which should have been performed personally by the accused. The accounting system which Army Regulation 210-64 required all Post Exchanges to maintain was changed and manipulated to meet his nefarious purposes. The sales proceeds which should have been collected by him at the close of each day's business were allowed by him to remain in the hands of his steward.

All in all, the accused displayed a callous indifference to the welfare of the Post Exchange and an overzealous interest in his own personal and illegal gain at the expense of others. His neglects and his machinations combined to produce a total estimated shortage of $1348.15. The court properly found him guilty of being responsible for the loss of "a sum in excess of $1000.00" instead of the larger amount set forth in Specification 2 of Charge II.

While Goosby may possibly have converted some of the Post Exchange's assets, the accused cannot escape responsibility for his own acts of negligence and fraud by attempting to divert suspicion and

blame to one of his assistants. He was under repeated notice that the affairs of the Exchange were being loosely run, and he took no corrective action. He cannot now be permitted to complain.

8. The accused is about 27 years old. The records of the War Department show that he has been a Scout Master, a YMCA swimming instructor, and the assistant manager of the Lakeside Hotel Corporation; that he had enlisted service from 25 March 1941 to 18 August 1942; that he was commissioned a second lieutenant on 19 August 1942 and promoted to first lieutenant on 15 February 1943; that he has been on active duty as an officer since 19 August 1942.

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 and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93 or Article of War 96.

Abner E. Lefscourt, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 261042

1st Ind.

War Department, J.A.G.O., 20 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 First Lieutenant Robert W. Russell (O-1102945), Company C, 810th Engineer Aviation Battalion.

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

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 577, 21 Oct 1944)

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

SPJGQ
CM 261047

31 AUG 1944

UNITED STATES	)	86TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Livingston, Louisiana, 27 July 1944. Dishonorable discharge, total forfeitures and confinement for 15 years. Penitentiary.
	)	
Private JAMES C. DeANGELO (33547239), Company A, 311th Engineer Combat Battalion.	)	

HOLDING by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

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

2. The record of trial is legally sufficient to support the findings of guilty of Charges I and III and their Specifications, and the sentence as approved by the reviewing authority. The only question requiring consideration is whether it is legally sufficient to support the finding of guilty of Specification 1 of Charge II as a violation of Article of War 93.

3. Specification 1 of Charge II alleges, as a violation of Article of War 93, that the accused forged a military furlough. Specification 2 of this Charge was withdrawn by the convening authority before the trial. Notwithstanding that Title 18, Sec. 132, U.S.C. 1940 Ed., makes it an offense to "falsely make, forge, counterfeit, alter, or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States", it is the opinion of the Board of Review that a military furlough is not such an instrument as can properly be the subject matter of forgery within the contemplation of Article of War 93. It is readily apparent from the definition and discussion of the offense contained in paragraph 149j, M.C.M. 1928, that the offense contemplated by this Article of War is forgery as known at common law. A military furlough is not such an instrument as "might operate to the prejudice of another", nor, if genuine, would it "apparently impose a legal liability on another or change his legal liability to his prejudice" (par. 149j, M.C.M. 1928). The Specification fails to allege an offense in violation of Article of War 93 but does state an offense in violation of Article of War 96. The offense alleged is not only to the prejudice of good order and military discipline but is also in violation of the provision of the United States Code above referred to. It is apparent that the accused has improvidently and through mistake entered

a plea of guilty to Charge II. Despite his plea of guilty, the record of trial is legally insufficient to sustain the finding of guilty of this Charge. It is legally sufficient, however, to sustain the finding of guilty of Specification 1 of Charge II as a violation of Article of War 96.

4. Forgery of the furlough constitutes a violation of Title 18, Sec. 132, U.S.C., 1940 Ed., as above pointed out, and the offenses alleged in Specifications 1, 3 and 5 of Charge III constitute violations of Title 18, Sec. 317, U.S.C. 1940 Ed. The penalty provided for a violation of each of these code provisions is a fine of not more than $2000 or imprisonment for not more than five years, or both. Since the acts of which the accused has been found guilty in the instances indicated are recognized as offenses of a civil nature and so punishable by confinement for more than one year by statutes of the United States, and the confinement which has been assessed exceeds one year, a Federal penitentiary is properly designated as the place of confinement (A.W. 42).

5. For the reasons stated above the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 1 of Charge II as a violation of Article of War 93, but legally sufficient to support the finding of guilty of the Specification as a violation of Article of War 96, legally sufficient to support the findings of guilty of Charges I and III and the Specfications thereof, and legally sufficient to support the sentence.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., SEP 5 1944 - To the Commanding General, 86th Infantry Division, Camp Livingston, Louisiana.

1. In the case of Private James C. DeAngelo (33547239), Company A, 311th Engineer Combat Battalion, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of Specification 1 of Charge II be approved as involves a finding of guilty of the Specification as a violation of Article of War 96. Upon compliance with the foregoing recommendation you will have authority to order the execution of the sentence.

2. It is recommended that a new action be executed designating the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and omitting any reference to the United States Disciplinary Barracks.

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 261047).

Myron C. Cramer

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

1 Incl.
Record of trial

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

SPJGQ
CM 261062

18 SEP 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Morris Field, Charlotte, North Carolina, 17 July 1944. Dismissal.
	)	
First Lieutenant FLOYD W. SMITH (0-797922), Air Corps.	)	

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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 Specification:

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Floyd W. Smith, Section T, 346th AAF Base Unit (RTU F), Harris Neck Army Air Field, Townsend, Georgia, did, on or about 3 June 1944, at Municipal Airport, Petersburg, Virginia, wrongfully violate paragraph 16 a (1) (d), AAF Regulation 60-16, dated 6 March 1944 by flying a military airplane at an altitude less than 500 feet above the ground.

He pleaded not guilty to the Charge and Specifications thereof. He was found not guilty of Specification 1 and guilty of Specification 2 and of the Charge. No evidence of any previous conviction was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The court's attention was directed to Par. 16a (1)(d), Sec. II,

Army Air Force Regulation 60-16 which read as follows: "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. 4).

A copy of Operations Orders No. 125, Sec. T, 346th AAF Base Unit RTU, Harris Neck, Georgia, dated 3 June 1944 was introduced in evidence without objection (R. 4, Pros. Ex. 1). It showed that the accused and Captain Duncan C. Myers were on 3 June 1944 ordered on a navigation training flight from Harris Neck, Georgia, to Washington, D. C. and return.

The prosecution called as a witness Mr. George L. Kemp, Chief Airport Traffic Controller, Petersburg Municipal Airport, Petersburg, Virginia, who testified that about 1830, 3 June 1944, two P-40 Army planes landed at the field where he was employed. One was operated by Captain Myers, the other by the accused. They made the landings because of trouble to the motor of the plane piloted by the accused. After the necessary repairs had been made he was in the operations tower at a height of about 20 feet and observed the two planes take off to continue on their journey to Richmond. He could not tell which plane was flown by the accused. One was well in the air when the other took off. The first one to take off made a normal turn and was starting on a downward lag when it headed back and dived toward the field. It came across the field reaching a minimum altitude of about 20 to 30 feet. When it reached a point about 300 feet in front of the tower it pulled up into a climbing turn. Almost immediately thereafter the other plane came down and flew across the field at an altitude of 15 to 20 feet. He testified that he held the red light on the first plane when he was unable to make radio contact until he pulled up and did the same as to the second plane (R. 5-6). They did not fly in formation until both were "headed for Richmond" (R. 9).

AM 2nd Class W. K. Hambrick, U. S. Navy, a witness for the prosecution, testified that he was working "on the line" at the Petersburg Municipal Airport on 3 June 1944 and saw the two P-40 Army planes land and later take off. Immediately thereafter one and then the other plane returned and flew across the field at an altitude of 25 to 50 feet (R. 10-11).

4. The accused having been advised regarding his rights to testify in his own behalf elected to testify under oath (R. 17). He related that he enlisted in January 1942, graduated from flying school 16 February 1943, and after various assignments at training fields was sent to Harris Neck as an instructor. He had 964 hours and 55 minutes flying time to his credit and 600 or 700 hours of formation time. In accordance with his orders he took off on 3 June 1944 from Harris Neck on the first leg of their flight to Richmond, Virginia. He was to act as leader for this leg. As they approached Petersburg, Virginia, he developed motor trouble. Captain Myers took the lead and ordered him to land there. They both landed and his motor was repaired. He stayed with his ship most of the time. Captain Myers told him that he had signed the clearance for both of them and that they would fly to Richmond with Captain Myers as flight leader. While

making the repairs the mechanics asked him if he would "buzz" the field and he said he would not because he might be court-martialed if he did. His motor started first and Captain Myers signalled for him to go ahead. He received the green light from the tower so he took off. After he was 300 or 400 feet in the air Captain Myers took off. The accused flew to the left and then to the right to pick up Captain Myers and get in formation behind him. When he got about 750 feet from Captain Myers' plane he observed it go down toward the field. He followed it down and followed it across the field and finally after both planes had again reached an altitude of about 1000 feet he caught up to him and took his place in formation 10 feet behind him. This occurred when they were 3000 feet from the boundary of the field. He had always been taught and in turn taught others to always fly in formation and not to break it. On take-offs pilots should get in formation within 30 seconds. He never intended to buzz the field and flew low only in an effort to get in formation. The captain was the flight leader and his military superior. He admitted that they flew well under 500 feet. He was familiar with the AAF Regulations (R. 19-22).

Under questioning by the court he stated that he acted automatically as he had been taught to do and was closing up formation as fast as he could to Captain Myers' plane but the captain did not give him a chance to do so until they both finally cleared the field (R. 24).

It was stipulated that if Captain Myers were present he would testify that he gave permission by hand signal to accused to take off first, that he signed the clearance and was ranking officer, and that he made the first pass at the field (R. 24).

It was also stipulated that if Major Dana E. Noel, Commanding Officer, Section T, 346th AAF Base Unit (RTU F), Harris Neck Army Air Field, were present he would testify that the accused was an excellent instructor pilot; that because of his value as an instructor he had not been released for overseas duty requested by the accused; and that if accused was at the time of the alleged violation attempting to join with Captain Myers in formation, he would not be violating any flying regulations but would be complying with instructions given to fighter pilots during their training (R. 24-25).

5. The Specification of the Charge of which the accused was found guilty avers in substance that he wrongfully violated paragraph 16 a (1)(d) AAF Regulation 60-16 of 6 March 1944 by flying a military airplane at an altitude less than 500 feet above the ground. It was clearly shown by the prosecution and admitted by the accused that he did fly a military airplane at the time and place averred at an altitude less than 500 feet above the ground. His excuse, or defense, for so doing is that he was following instructions to get into formation as quickly as possible with the lead plane and in doing so he followed his superior officer and lead plane for that purpose. It was conceded that Captain Myers after he had taken off returned and "buzzed" the field by flying across it at a low altitude. It was clearly established that accused properly took off first and that

it was his duty under the circumstances promptly to get in formation, which would be in a position behind the plane of Captain Myers. The only evidence of record on the subject is the opinion of the Commanding Officer of the accused's base that if the accused flew below an altitude of 500 feet in an attempt to get in formation as he claimed, then he would not be violating any flying regulations but would be complying with instructions given him. AAF Regulation 60-16 does not disclose an exception of this nature to its prohibition against flying at an altitude less than 500 feet unless it can be considered as falling within the phrase "except during take-off". In the opinion of the Board of Review the exception related covers only the actual take-off of the plane and does not contemplate an immediate return to the field to "buzz" it as a part of a take-off. It was shown that both planes had taken off and cleared the field. The maneuver that followed could not reasonably be considered a part of the take-off. The opinion of the Commanding Officer of the field where the accused was stationed would have been as a matter of law inadmissible in evidence had any objection been made to it. It was clearly a conclusion of law, the determination of which was solely within the province of the court. The court in the exercise of that right either did not believe the accused was motivated by his desire to get into formation when he "buzzed" the field or that if he was so motivated, nevertheless, he did violate the regulation and that he had no right to fly low in order to get into formation.

The Board of Review is of the opinion that a violation of the clear prohibition against flying at an altitude under 500 feet above the ground may not legally be defended by a showing that the accused flew within 25 or 50 feet of the surface of an air field in an effort to get in formation. Such an excuse may be used in mitigation of the offense but not as a legal defense. For the reasons stated the record of trial is deemed legally sufficient to support the findings of guilty. A violation of the AAF Regulations is a violation of Article of War 96 in that it constitutes a disorder or neglect prejudicial to good order and military discipline.

6. War Department records show the accused to be 21-7/12 years of age. After graduation from high school he was employed as a grocery store clerk for two months and as an aircraft fitter from May 1941 to May 1942. He became an aviation cadet in May 1942 and after pursuing the prescribed course of the Army Air Forces Southeast Training Center, Maxwell Field, Alabama, was commissioned a second lieutenant and assigned to active duty at Spence Field, Moultrie, Georgia. On 2 December 1943 he was promoted to first lieutenant. He is unmarried.

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

William H. Fauntroll, Judge Advocate.

Herbert J. Frederick, Judge Advocate.

John R. Anderson, 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 First Lieutenant Floyd W. Smith (0-797922), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a forfeiture of pay in the amount of $75 per month for a period of nine (9) months, and that the sentence as thus commuted be carried into execution.

3. Consideration has been given to the attached memorandum from General H. H. Arnold, Commanding General of the United States Army Air Forces, dated 3 October 1944. He recommends that the sentence of dismissal be commuted to forfeiture of pay in the amount of $75 per month for nine (9) months. I concur in that recommendation.

4. Consideration has also been given to the attached letters from Senator C. Wayland Brooks to The Adjutant General, dated 25 July 1944, from Senator Scott W. Lucas to The Judge Advocate General, dated 25 July 1944, from Senator C. Wayland Brooks to The Judge Advocate General, dated 15 August 1944, and to their respective inclosures, and to a letter from Mr. and Mrs. Clarence H. Smith, Bismarck, Illinois, addressed to the President, dated 18 August 1944.

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

Myron C. Cramer

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

8 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Memo. fr. Gen. Arnold.
Incl.5-Ltr. fr. Sen. Brooks, 7/25.
Incl.6-Ltr. fr. Sen. Lucas, 7/25.
Incl.7-Ltr. fr. Sen. Brooks, 8/15.
Incl.8-Ltr. fr. Mr. and Mrs. Smith, 8/18.

(Sentence confirmed but commuted to forfeiture of $75 per month for nine months. G.C.M.O. 617, 11 Nov 1944)

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

SPJGQ
CM 261063

28 SEP 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Morris Field, Charlotte, North
Captain DUNCAN C. MYERS	)	Carolina, 17 July 1944. Dis-
(0-790703), Air Corps.	)	missal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Captain Duncan C. Myers, Section T, 346th AAF Base Unit (PTU F), Harris Neck Army Air Field, Townsend, Georgia, did, on or about 3 June 1944, at Municipal Airport, Petersburg, Virginia, wrongfully violate paragraph 16 a (1) (d), AAF Regulation 60-16, dated 6 March 1944, by flying a military airplane at an altitude less than 500 feet above the ground.

He pleaded not guilty to the Charge and Specification 1 thereof. He did not plead to Specification 2. He was found not guilty of Specification 1 and guilty of Specification 2 and of the Charge. No evidence was introduced of any previous conviction. 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 showed that on 3 June 1944, about 1830, two P-40 Army planes landed at the Petersburg, Virginia airport. They were piloted, respectively, by the accused and a lieutenant. The ship operated by the lieutenant was having engine trouble and landed for

that reason. George L. Kemp, the Traffic Controller at that airport testified that he was in the control tower which consisted of a wooden structure built on top of a platform supported by four trees 20 feet in height and observed the two planes take off. He could not tell which of the two planes was piloted by the accused. The first one that took off made the usual left turn around the field and after reaching an altitude of about 1000 feet west of the tower dove toward the airport and came down to about 20 to 30 feet from the ground and then when opposite the tower (200 to 300 feet away) pulled up in a climbing turn to the left. The other plane then dived on the airport from the northwest from a slightly higher altitude and crossed the field about 400 to 500 feet from the tower at an altitude of 15 or 20 feet (R. 9, 10, 11). The airport is a Municipal Airport used by the U.S. Navy. It is about six or seven miles outside of Petersburg in the country. There was no other traffic there at the time either on the field or in the air (R. 15,16).

AM 2nd Class W. K. Hambrick, U. S. Navy, testified that he was on the field when the two P-40s landed and saw them take off. The first one circled wide and then came back and "buzzed the field" by coming down and across it at an altitude of between 25 and 50 feet. The other did the same thing. He could not tell which was first or which was second (R. 19, 23).

Without objection a copy of the Operations Orders No. 125 of Sec. T, 246th AAF Base Unit RTU, Harris Neck, Georgia, dated 3 June 1944 was introduced in evidence (R. 6, Pros. Ex. 1). It showed that accused and 1st Lt. Floyd W. Smith were ordered on a navigation training flight from Harris Neck, Georgia, to Washington, D. C. and return.

The court's attention was directed to Par. 16a (1)(d) Section II Army Air Force Regulation 60-16 which provides,

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

4. For the defense there was introduced in evidence an excerpt from a statement of Lt. Col. R. C. Bagby, Commanding, Harris Neck, which read that "the character of service of Captain Duncan C. Myers is excellent" (R. 25).

Mr. Walter D. Shelley, an uncle of the accused, testified that he had known the accused since he was a baby and that he "has been an unusual high type boy" (R. 36).

The accused, having been advised by the court of his rights, elected to testify in his own behalf. Lieutenant Smith took off in his plane first. The accused followed and when he reached an altitude of about 1000 feet to the west of the field he "rolled over and turned back across the field" (R. 26). He gave as his reason that the personnel on the field had dis-

cussed the merits of the plane and requested him to come back and say goodbye to them over the field. He was told that this was routine procedure. Because of the sluggishness of his ship when it reached the altitude of 1000 feet he decided to go back across the field as that was the easiest thing to do, so he turned and crossed the field. When he reached the middle of the field he saw the tower's red light and he immediately pulled up in a steep chandelle. The plane could have easily gone up to 1500 feet so that he in no way endangered any property even if his motor had failed (R. 27).

He had spent 20 months in New Guinea where low flying is done every day on every field that he operated from for the purpose of clearing. "You clear by buzzing" (R. 29). He was sent to New Guinea immediately after his graduation so that he had never flown in the United States except in training (R. 30). He returned to the States in March 1944 (R. 34). He had heard about the regulation against low flying but had not read it (R. 31). He made the pass at the field as a farewell courtesy to the men there (R. 33). He did not say how low he flew other than to say that Mr. Kemp's description "could be wrong" (R. 31).

It was also shown that accused while in the New Guinea area completed 228 combat missions, was credited with the destruction of four enemy aircraft and was awarded the Silver Star, the Distinguished Flying Cross and two Clusters, the Air Medal and four Clusters, and two Presidential Citations (R. 30, Def. Ex. B).

5. The Specification of which the accused was found guilty avers in substance that he did on 3 June 1944 at Petersburg, Georgia, wrongfully violate paragraph 16a (1)(d) AAF Regulation 60-16 dated 6 March 1944 by flying a military airplane at an altitude less than 500 feet above the ground. The evidence introduced by the prosecution and in substance admitted by the accused shows that he did at the time and place averred "buzz" the field by diving down from an altitude of 1000 feet after clearing the field and making a pass at an altitude estimated at from 20 to 50 feet which, being considerably less than 500 feet, constituted a clear violation of the regulation cited. The accused admitted that he made the pass at the field. He gave as his only reason that he was accustomed to this method of clearing a field in New Guinea where he had been flying for 20 months and did it as an act of courtesy to the personnel on the field. Such an explanation does not constitute a defense to the charge. It is acceptable only in mitigation of the punishment to be imposed. It is therefore clear that the record is legally sufficient to support the findings of guilty of Specification 2 and of the Charge. One who violates the Army Air Force Regulations in the manner set forth in turn violates Article of War 96. Such a violation is a disorder or neglect prejudicial to good order and military discipline.

6. War Department records show accused to be 25-1/3 years of age having been born in Indiana, 5 April 1919. He graduated from high school in 1936 and for 1½ years attended Duke University. For four years

thereafter he was employed as a photographer. His permanent home address is Bradenton, Florida. On 18 November 1941 he enlisted as an Air Cadet and upon successfully completing his course of training was commissioned a second lieutenant, Air Corps on 3 July 1942. He served as a fighter pilot in the Southwest Pacific Area and was awarded the Distinguished Flying Cross with Oak Leaf Cluster, and the Air Medal with two Oak Leaf Clusters. On 27 June 1943 he was promoted to first lieutenant and on 14 January 1944 to captain. (A letter from the operations officer, under whom Captain Myers served in New Guinea, attached to the record of trial, lists the decorations awarded to Captain Myers as follows: Distinguished Flying Cross with two Oak Leaf Clusters; Silver Star and Air Medal with four Oak Leaf Clusters.)

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

William A. Gaudell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, 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 Captain Duncan C. Myers (0-790703), 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. I recommend that the sentence be confirmed but, in view of the excellent past record of the accused, his combat service and the decorations awarded him therefor, I further recommend that it be commuted to a forfeiture of pay in the amount of $105 per month for a period of nine (9) months, and that the sentence as thus commuted be carried into execution.

3. Consideration has been given to the attached memorandum from General H. H. Arnold, Commanding General of the United States Army Air Forces, dated 3 October 1944. He recommends that the sentence of dismissal be commuted to a forfeiture of pay in the amount of $105 a month for nine months. I concur in that recommendation.

4. Consideration has also been given to the attached letters from Senator Claude Pepper to The Judge Advocate General, dated 19 August and 31 August 1944 respectively, to letters from Guthrie, Pierce and Blakeney, attorneys-at-law, Charlotte, North Carolina, dated 24 August and 5 September 1944 respectively, and to the brief filed by these attorneys in behalf of the accused.

5. 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.

9 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of action
4 - Memo. fr. Gen. H.H. Arnold dated 3 October 1944
5 - Ltr. fr. Senator Pepper dated 19 August 1944
6 - Ltr. fr. Senator Pepper dated 31 August 1944
7 - Ltr. fr. Guthrie, Pierce and Blakeney, dated 24 August 1944.
8 - Ltr. fr. Guthrie, Pierce and Blakeney, dated 5 September 1944.
9 - Brief in behalf of accused by Guthrie, Pierce and Blakeney.

(Sentence confirmed but commuted to forfeiture of $105 per month for nine months. G.C.M.O. 597, 28 Oct. 1944)

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

SPJGV
CM 261079

28 AUG 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Gowen Field, Boise, Idaho, 17 July 1944. Dismissal and total forfeitures.
Second Lieutenant HENRY MORRIS (0-731527), 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 Charges and Specifications:

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

Specification: In that Second Lieutenant Henry Morris, Air Corps, 212th Army Air Forces Base Unit, Section H, did, at Ogden, Utah, on or about 7 March 1944, agree and conspire with First Lieutenant Daniel B. Sullivan, 212th Army Air Forces Base Unit, Section F, to defraud the United States by aiding the said First Lieutenant Daniel B. Sullivan to prepare and present for payment to Colonel W. I. Moore, Finance Officer, at Ogden, Utah, an officer of the United States Army duly authorized to approve and pay such claims, a false and fraudulent claim against the United States in the amount of $1155.70 for rental and subsistence allowances for dependent mother for the period between the dates of 1 March 1943 and 29 February 1944, which claim was false and

fraudulent in that the mother of the said Lieutenant Daniel B. Sullivan was not in fact his lawful dependent, and the contribution of First Lieutenant Daniel B. Sullivan was not in fact the chief support of his mother during said period, and which claim was then known by the said Second Lieutenant Henry Morris to be false and fraudulent.

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

Specification: In that Second Lieutenant Henry Morris, * * *, did conduct himself in a manner unbecoming an officer and a gentleman in that he did, at Ogden, Utah, on or about 7 March 1944, solicit and accept from First Lieutenant Daniel B. Sullivan, 212th Army Air Forces Base Unit, Section F, the sum of $400 lawful money of the United States for assisting the said First Lieutenant Daniel B. Sullivan to prepare and present for payment a claim against the United States of America for increased allowances for the said Lieutenant Daniel B. Sullivan's dependent mother.

The accused pleaded not guilty to and was found guilty of each of the Charges and Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for two years. 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 is substantially as follows:

The accused and First Lieutenant Daniel B. Sullivan, Air Corps, were patients in Bushnell General Hospital during the latter part of February 1944, and in the course of their conversation they discussed the amount of pay and allowances they were each receiving. Accused stated to Lieutenant Sullivan that he (accused) was receiving allowances for a dependent mother, and that Sullivan was likewise entitled to collect the dependency allowance for his mother. Sullivan then told accused that he was making an allotment of $125 per month, that his father was regularly employed and earning a good salary, which was adequate for his mother's support, and that he (Sullivan) was not the chief support of his mother and was not required to support her. Accused told Sullivan that there were some regulations which permitted him to collect this money, regardless of whether he was his mother's chief support. Accused mentioned certain

regulations to Sullivan, which he had not heard about, and offered to assist in preparing the vouchers providing Sullivan would give accused a "certain percentage" of the amount collected. Sullivan agreed to the proposal and accused accordingly prepared or had prepared a pay and allowance voucher, War Department Form No. 336-Revised, for $1155.70 representing subsistence and rental allowance for the period from 1 March 1943 to 29 February 1944 (Ex. 1), to which was attached a certificate that Sullivan was due these allowances as a single officer with dependents; that his mother was dependent upon him for her chief support; that her reasonable living expenses were $100 to $120 per month; that he had contributed to her support from 1 March 1943 to 29 February 1944 an aggregate sum of $1380, and that her total income from all sources did not exceed $40 per month (Ex. 1). Accused took the voucher and certificate to Sullivan and told him to sign them. Sullivan did so without reading them. He had not furnished accused with any needed information for preparing the voucher except his mother's name and address plus the fact that he was making an allotment of $125 per month. After signing the voucher and certificate accused drove Sullivan to Ogden, Utah where Sullivan presented the voucher to the finance officer and received the sum of $1155.70. From this sum and while en route back to the hospital from Ogden, Sullivan, pursuant to their prior agreement, paid to accused $400, for his assistance in collecting the claim. Thereafter when an investigation was commenced, Sullivan repaid the total sum of $1155.70 to the finance officer. At the time of trial accused had not repaid the $400 to Sullivan, but had signified his intentions of doing so.

The testimony of Mary M. Sullivan and Benjamin T. Sullivan, mother and father respectively of Lieutenant Sullivan, taken by deposition upon written interrogatories (Exs. 3, 4) shows that Mrs. Sullivan was not in any way dependent upon her son for support; that her husband earned between $200 and $250 per month as a locomotive engineer and contributed in excess of $40 per month to her support during the period of 1 March 1943 to 29 February 1944. Mrs. Sullivan had received $125 per month from her son Lieutenant Sullivan during this same period; part of which was deposited in a bank under a joint account in her name and that of her son, and the remainder invested in war bonds, of which she and Lieutenant Sullivan were co-owners.

4. For the defense:

The only evidence for the defense was the accused's testimony, given under oath after his rights as a witness had been explained, and was substantially as follows: When accused first discussed the matter

of allowances with Lieutenant Sullivan he asked if he was contributing to his mother's support and received an affirmative answer that he had an allotment to her of $100 per month. Accused advised Sullivan that he should be receiving the dependency allowances, just as he was. Sullivan did not know how to go about collecting it, and accused volunteered to have the voucher prepared. Sullivan gave accused the necessary information such as his mother's address and the amount of his monthly allotment to her. Accused in turn had a technical sergeant on duty in the finance office at Bushnell General Hospital make out the voucher on the typewriter, and brought it back to Sullivan for his signature. After reading it over Sullivan signed it. Accused was under the impression that Sullivan fully understood the matter and that he was entitled to the allowances on the basis of being in the same circumstances as himself. Sullivan had told him that his father was making "good money" and was contributing to his mother's support, but did not state the amount of the contribution. He took it for granted that Lieutenant Sullivan's monthly allotment was her chief support because of the large amount.

Accused denied the existence of any agreement between him and Sullivan as to the amount he was to receive, but admitted that it was agreed that he should receive a part of the money collected. He admitted receiving $400 and expressed a willingness to repay it. He did not know why he accepted the money for the rendition of such slight services in having this voucher prepared, except that he needed the money. He believed Lieutenant Sullivan was legally entitled to the allowance and would not have been a party to the transaction if he had realized that the claim was based on untrue statements. He now realizes that by accepting $400 from a fellow officer under such circumstances constituted conduct unbecoming an officer.

5. In support of Charge I and its Specification the evidence is clear that accused conspired with Lieutenant Sullivan to defraud the United States, took the initiative by encouraging him to file a claim for dependency allowance covering the period from 1 March 1943 to 29 February 1944 and prepared or had prepared for him the voucher and necessary supporting certificate of dependency for such claim, all with the knowledge that Lieutenant Sullivan was not contributing to the support of his mother, and that his mother was not dependent upon him for her chief support.

In support of Charge II and its Specification the evidence is likewise clear that accused received $400 of the money ($1155.70) paid upon this voucher to Lieutenant Sullivan by the finance officer at

Ogden, Utah, and that the $400 so paid represented accused's portion or percentage of the sum collected which had been mutually agreed upon prior to filing the claim. Despite accused's contention that he thought the statements in Lieutenant Sullivan's voucher and supporting dependency certificate were true, the evidence leads unerringly to the inference that he was fully aware of their falsity, and that accused's prime objective in assisting Sullivan to perfect the claim was to obtain an unconscionable portion of the money for himself.

6. Attached to the record of trial is a letter from accused's commanding officer, Captain William A. Loudermilk, in which he requests clemency because of accused's attitude and proficiency as an instructor bombardier. There is also attached to the record four other letters signed by Lieutenant Colonel Charles R. Keller, Jr., Air Corps, Major Robert E. Yount, Air Corps, Colonel Elmer E. Hall, USMC and Captain William L. Lavens, Air Corps, attesting to accused's good character, personal habits, leadership and athletic ability.

7. War Department records show that accused is 23 years of age and a high school graduate. In civil life he was employed as a gas station attendant and junior aircraft mechanic. He served as an enlisted man in the U. S. Marine Corps from 8 June 1939 to 1 May 1941. Enlisted as aviation cadet, U. S. Army, 9 March 1942, and upon completion of a bombardier course at Kirtland Field, Albuquerque, New Mexico, was appointed second lieutenant, Air-Reserve, 10 October 1942, and ordered to active duty.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th Article of War and is mandatory upon conviction of a violation of the 95th Article of War.

Thomas H. Tappey, Judge Advocate.

Robert B. Hanover, Judge Advocate.

Robert C. Trowbridge, Judge Advocate.

SPJGV
CM 261079

1st Ind.

War Department, J.A.G.O., 2 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 Henry Morris (0-731527), 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, although in my opinion inadequate, be confirmed and carried into execution.

3. Consideration has been given to the attached letter from the office of Senator W. Lee O'Daniel inclosing a letter from accused in which he requests clemency.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Ltr from Senator W. Lee O'Daniel's office w/incl.
Incl.3-Dft ltr for sig S/W.
Incl.4-Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 528, 26 Sep 1944)

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

SPJGN
CM 261106

		18 AUG 1944
UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 15 July 1944. Dismissal and total forfeitures.
Second Lieutenant WILLIAM L. HUTH (0-757105), Air Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant WILLIAM L. HUTH, First Detachment, 301st Army Air Force Base Unit (R), Plant Park, Tampa, Florida, did, without proper leave, absent himself from his organization at Plant Park, Tampa, Florida, from about 4 February 1944 to about 7 May 1944.

He pleaded guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's

plea of guilty, the effect of which was explained to him and which was not improvidently entered, shows by agreed stipulation that "the accused went AWOL on the 4th day of February, 1944, while en route to join his organization at Plant Park, Tampa, Florida, having been assigned there by Special Orders Number 20, Paragraph 20, Headquarters Eighteenth Replacement Wing, Salt Lake City, Utah". His return to military control on 7 May 1944 at Jefferson Barracks, Missouri, was shown by an authenticated copy of the morning report of Casual Detachment No. 1, Prisoners 1787th SCU Station Complement, Jefferson Barracks, Missouri, which was admitted into evidence without objection (R. 6; Pros. Ex. A).

4. The accused, after explanation of his rights as a witness, elected to make a sworn statement. He related his previous military service, admitted his absence without leave for which he offered no excuse but gave as his reason therefor a protracted effort on his part during the period of his absence to cause his wife to become pregnant as suggested to her by a physician in order to prevent her premature menopause. It was stipulated that his wife's physician would testify that he had given such advice. He also testified that he had twice purchased railway tickets for his return during the time in question which indicated his intention to return. The expired tickets were admitted into evidence. He further testified that he had intended to return on the day after he had been apprehended even if his wife had not become pregnant by that time (R. 7-15; Def. Ex. 1-2).

An enlisted guard and the officer in charge of the detention barracks where the accused had been confined prior to trial both attested to the accused's general good behavior and conduct while in confinement awaiting trial (R. 16-19).

5. The Specification alleges that the accused without proper leave absented himself from his organization at a named place from about 4 February 1944 to about 7 May 1944. The elements of the alleged offense, which is violative of Article of War 61, 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 accused's plea of guilty admits all of the elements of the

offense of absence without leave as alleged which is likewise fully established by the stipulated and documentary evidence presented by the prosecution. Furthermore, the accused's sworn testimony shows that his absence of over three months was deliberate and wholly without excuse. His reason therefor, while laudable, falls wholly short of any defense to the offense shown and any benefit he receives therefrom of necessity must be by way of mitigation. All of the evidence and the accused's plea of guilty, therefore, establish his guilt of the offense, as alleged, beyond a reasonable doubt and amply support the court's findings of guilty of the Charge and its Specification.

6. The accused is about 24 years old. The records of the Office of the Adjutant General show that he has had prior enlisted service from November 1941 until 1 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.

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

Abner E. Lipscomb, Judge Advocate.

Edward S. Sykes, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 261106

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 William L. Huth (O-757105), 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 but that the forfeitures be remitted and that the sentence as thus modified be ordered executed.

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

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

3 Incls.
Incl1- Record of trial
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 540, 30 Sep 1944)

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

SPJGV
CM 261107

18 SEP 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Columbia Army Air Base, Columbia, South Carolina, 10 July 1944. Dismissal and total forfeitures.
First Lieutenant JACK I. DuBOFF (0-486048), Ordnance Department.	)	

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 94th Article of War.

Specification 1: In that First Lieutenant Jack I. DuBoff, 329th AAF Base Unit, Section A, Columbia Army Air Base, Columbia, South Carolina, did, at Columbia Army Air Base, Columbia, South Carolina, on or about 29 April 1944, feloniously take, steal and carry away 3 panels of automobile glass of the value of $18.30, property of the U. S., furnished and intended for the military service thereof.

Specifications 2 and 3: (Withdrawn by direction of appointing authority).

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

Specification 6: In that First Lieutenant Jack I. DuBoff, * * *, on or during the month of April 1944, did, at Columbia Army Air Base, Columbia, South Carolina,

feloniously take, steal and carry away one (1) Firestone 6:00X16, 6 ply, tire, serial No. FT218492, of the value of about $6.39, property of the United States, furnished and intended for the military service thereof.

Specification 7: In that First Lieutenant Jack I. DuBoff, * * *, on or during the month of April 1944, did, at Columbia Army Air Base, Columbia, South Carolina, feloniously take, steal and carry away one (1) Goodyear 6:00X16 tire, serial No. U97Y8765, in the value of about $6.39, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to the Charge and all Specifications. He was found guilty of the Charge and Specifications 1, 6 and 7 thereof and not guilty of Specifications 4 and 5. No evidence of prior convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence relevant to Specifications 4 and 5 of which accused was found not guilty will not be discussed except as it may pertain to those Specifications under which there were findings of guilty.

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

a. Specification 1:

About the middle of April 1944, accused, who was in charge of the Ordnance base repair shop, Columbia Army Air Base, Columbia, South Carolina, requested Sergeant James R. Butler, parts man in the shop, to make patterns for glass to be cut for the windshield and door windows of accused's automobile (R. 7, 12, 13). Sergeant Butler made the patterns and delivered them to accused (R. 13). During the latter part of April 1944 Private First Class Ferrell D. Horton, parts clerk in the base repair shop, received a written order signed by accused which authorized the procurement from the Ordnance Service Command Shop at Fort Jackson, South Carolina of automobile glass cut according to pattern. About four days later Private Horton received the glass from Fort Jackson, notified accused of its receipt, and was instructed by accused to hide the glass "either in the parts bin or on top of one of the bins" (R. 6; Exs. A, B). Private Horton did not obey accused's instructions. The glass was placed on top of a desk in the base repair shop where it remained for three or four days until accused informed Sergeant Butler that it was in the parts

room. The sergeant then used the glass to install two windshields and one rear door window in accused's automobile (R. 10, 13). It was stipulated by the prosecution, defense counsel and accused that the value of these three panels of glass was $18.30 (R. 27).

b. Specifications 6 and 7:

In the latter part of April the accused's automobile was seized by the Assistant Provost Marshal, Columbia Army Air Base. A Firestone tire, size 600 x 16, serial number FT218492 was removed from the left rear wheel, and a Goodyear tire, size 600 x 16, serial number U97Y8765 was taken from the rear compartment (R. 24, 25).

At the tire warehouse, Ordnance Branch, Fort Jackson, only Government tires are received from using organizations, and minor repairs are made. In case of major repairs, recapping, etc. the tires are sent to one of three contractors for such work. When returned from the contractors in serviceable condition the tires are reissued to various organizations. When the tires are sent to a contractor they are listed on a tally sheet (R. 30). The prosecution sought to elicit testimony from these tally sheets pertaining to a tire bearing the serial number FT218492 (tire described in Specification 6). The defense objected on the ground that it had not been shown that these records had been made by the witness testifying therefrom. The law member overruled the objection stating:

> "He [the witness] has testified that this is a record that he is familiar with as being in his office."

Defense counsel asked if he might be heard on the question, to which the law member replied:

> "You can take an exception. This is all subject to review" (R. 30).

The witness was then permitted to testify that the tally sheets showed that a tire with the serial number FT218492 was sent by the warehouse to a contractor 11 January 1944, and a tire with serial number U97Y8765 was sent out on 30 May 1944. There was also a number assigned each tire when it is sent out, written on the tires in yellow chalk, and the numbers 47 and 115 were respectively assigned these two tires. The number 115 on the Goodyear tire represents that number appearing on the records covering this tire (R. 31, 34). Over objection of the defense the tally sheet records pertaining to the two above-mentioned tires were received in evidence (R. 34; Exs. C, D).

The witness who testified as to the contents of the tally sheets had not inspected these records after they had been prepared to see if they were correct, and had not made any of the entries on the tally sheets, nor did he have personal knowledge of their correctness. These records were not kept pursuant to any Army regulation, but were a convenient method designed in his office to keep account of the tires handled by the warehouse (R. 35).

None of the tires listed on accused's application for a gasoline ration book filed on 28 August 1943 bore the same serial numbers as the two tires described in Specifications 6 and 7 (R. 40; Pros. Ex. E). Furthermore, no record was kept of the serial numbers of any tires received at the base motor repair shop at Columbia Army Air Base (R. 41).

5. For the defense:

Major Joseph F. Harps, Base Ordnance Officer, Columbia Army Air Base, testified that accused had been under his supervision for approximately one and a half years. He would rate him excellent as an officer, and his reputation for honesty and integrity is excellent (R. 43). On examination by the court this witness said that since there is no distinguishing mark on military tires it would be possible for civilian tires to be processed through the Fort Jackson warehouse (R. 47), though if the civilian tire were discovered it would not be sent. To the best of his knowledge only Government tires are sent to Fort Jackson (R. 48).

It was stipulated that if Captain Joe H. Dawson, William P. Espy, professor of mechanical engineering, University of Illinois, Major Antonio Soto, Captain Gerald J. Glasspiegel and Colonel Harry L. Burman were present they would testify that accused's reputation for honesty and integrity in military and civilian life was excellent (R. 48-50). Major George A. Ferguson, Jr. and First Lieutenant Leon W. Bevans testified to the same effect (R. 51, 56). Lieutenant Bevans, who is property officer in the Ordnance Section, Columbia Army Air Base, further testified that he had made a semi-annual inventory and property check of the shop while accused was shop officer and found only normal minor discrepancies (R. 51). He has never received any complaint from any organization that tires have not been replaced (R. 52).

The accused after having his rights as a witness explained elected to testify under oath. He stated he had obtained the glass from Fort Jackson because it was difficult to obtain commercially. He

signed a shop order for the glass, and there was no attempt to cover up the transaction. He contemplated dropping the stock record by a statement of charges against himself. The glass was installed in his car at about 1100 and on the same day he was arrested at about 1500, and did not have an opportunity to make a payment. The glass was in parts section for three days before it was installed (R. 58, 59).

On cross-examination he admitted that he "seemed to recall" that a statement of charges must show that property had been lost or destroyed through his own fault or negligence, but he does not handle a lot of property and thought he could handle the matter by a statement of charges, or by payment to the finance officer (R. 60).

6. Legally competent evidence shows that in the month of April 1944 accused, as officer in charge of the Ordnance Shop, Columbia Army Air Base, South Carolina, procured three panels of automobile glass, valued at $18.30 from the Ordnance Service Command Shop at Fort Jackson, South Carolina and had a sergeant working under his supervision install this glass in his personal automobile. Accused sought to justify his appropriation of Government property by asserting he intended to pay for the glass by signing a statement of charges. The record does not lend credence to accused's contention. The evidence supports the finding of guilty of Specification 1.

In support of Specifications 6 and 7 of the Charge, the prosecution proved that accused was found in possession of two particular tires which were in use on his automobile and thereafter introduced in evidence, over the objection of defense counsel, two tally sheets kept by the tire warehouse, Ordnance Branch, Fort Jackson, which, if they were competent evidence, established the Government's ownership of these two tires.

It is a general rule that documents are not admissible in evidence inasmuch as they are hearsay as to the facts stated in them (MCM, 1928, par. 117a). However, many exceptions to this general rule have been engrafted upon it. One such exception is that entries in books of account are admissible in evidence where such books are proven to have been kept in the regular course of business and the entrant is dead, insane, out of the jurisdiction of the court or otherwise unavailable to testify (MCM, 1928, par. 118a). However, the entrant must be called personally to testify if available. Accordingly, such records are competent evidence only after it has been proven that the entrant is unavailable. This fact was not proven in the instant case.

Moreover, a reading of paragraph 118a supra indicates that it has application only to books of account in the strict sense of the term, i.e. ledgers, daybooks and other similar books in which accounts are recorded. It is thus extremely doubtful that the "books of account" rule would justify the admission in evidence of these tally sheets.

The tally sheets were not official records kept under mandate or regulation of the War Department. They were, however, used as a convenient business method established and followed in this warehouse to keep account of all tires passing through the warehouse during the course of business. Hence, they were records kept in the usual course of business at this warehouse. In civil courts, records kept in the usual course of business have by statute been made generally admissible in evidence, as an exception to the hearsay rule. This is true not only in many state courts but also in the federal courts. The pertinent federal statute is couched in the following language, viz:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind." (28 USC 695, 49 Stat. 1561).

This statute by its terms has application in "any court of the United States and in any court established by Act of Congress." It is extremely doubtful that courts-martial, administratively appointed as they are, fall within either of the two classifications set forth in the statute (see SPJGJ/250.46, 26 May 1942, 1 Bull. JAG 158). However, a clear channel has been cut by the Articles of War and the Manual for Courts-Martial through which this statute flows into the body of evidential rules applicable in courts-martial.

It is provided by Article of War 38 that the President may by regulations prescribe the procedure and modes of proof in courts-martial which regulations shall so far as practicable apply the rules of evidence

generally recognized in the trial of criminal cases in the district courts of the United States. In paragraph 111 of the Manual for Courts-Martial, 1928, the President exercised this authority and specifically provided that: "So far as not otherwise prescribed in this manual or by act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States will be applied by courts-martial". There is no prohibition in the Manual which prevents application of this rule of evidence in trials by courts-martial. Neither has Congress prescribed, either in the statute itself or elsewhere, that it shall not apply to courts-martial. The failure of Congress specifically to include courts-martial within the tenor of the act is not a proscription against its application in such proceedings. Congress merely respected the authority it had delegated to the President and permitted him to determine if he wished to incorporate it in the body of evidential rules applicable in such courts. By paragraph 111 of the Manual he did so incorporate it. Thus, the federal statute covering entries made in the regular course of business is a rule of evidence having application in trials by court-martial. The tally sheets offered in evidence in this case to establish Government ownership of the tires clearly fell within the statute and were admissible in evidence by virtue thereof.

In arriving at this conclusion we are not unmindful of the full content of the opinion in SPJGJ/250.46, cited supra. In the first place it was there determined that this statute applied only to writings and records made in the regular course of business and did not pertain to "the official records referred to in paragraph 117, Manual for Courts Martial." We need not here examine that proposition to determine if there is an ever existent repugnance between entries made in the regular course of business and official records kept under the direction of the War Department and those required by Army regulations. It is sufficient to observe that the tally sheets here under consideration were not "official records". They were not kept pursuant to Army regulations or any other requirement of the War Department. They were a part of a system locally adopted by a particular warehouse to assist it in recording the flow of tires as they passed through in the usual course of its business. They were simply records of the regular business done by that warehouse, kept in a similar manner.

It is also stated in the opinion cited above that to apply the federal rule relative to entries made in the regular course of business would involve an implied repeal of so much of Article of War 38 as

authorizes the President to prescribe the modes of proof in cases before courts-martial. The purport of this objection is that Congress, having given such authority to the President, would not have acted in derogation of that authority and intended this statute to apply to courts-martial without so stating in express terms. The fallacy of this proposition arises from the failure to appreciate that, by the terms of paragraph 111 of the Manual, the President himself in the exercise of his constitutional authority has added this rule of evidence to the body of military law.

The accused gave no explanation to justify his possession of these tires. His unauthorized possession of them, coupled with use thereof on his private automobile, is sufficient to support the court's conclusion that the tires were feloniously acquired by accused as alleged (Dig. Op. JAG, 1912-40, sec. 451 (37)). The evidence sustains the findings of guilty of Specifications 6 and 7 of the Charge.

The action of the law member in refusing to hear the complete argument of defense counsel on his objection to the admissibility of the tally sheets should not be passed unobserved. In foreclosing such argument, the law member informed defense counsel, "You can take an exception. This is all subject to review" (R. 30). Any ruling by a law member "should be preceded by any necessary inquiry into the pertinent facts and law" (MCM, 1928, par. 51g). Though it is desirable that trials be handled expeditiously, it is vital that accused be afforded full opportunity to present both the facts and the law pertinent to his case. The fact that higher authority is empowered to disapprove findings and sentences for material errors committed during trial in nowise relieves the law member of his duty to exercise the full measure of his abilities to insure the correctness of his rulings.

7. War Department records show that accused is 24 years of age. He graduated from the University of Illinois with the degree of B.S. in mechanical engineering. Upon completion of the ROTC course at the University of Illinois he was appointed second lieutenant, Ordnance Reserve, 31 July 1942 and ordered to active duty on that date. He was promoted to first lieutenant, Army of the United States, 24 January 1944.

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 and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94.

Thomas N. Jaffy, Judge Advocate.

Sick in Hospital, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGV
CM 261107

1st Ind.

War Department, J.A.G.O., 29 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 First Lieutenant Jack I. DuBoff (0-486048), Ordnance Department.

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

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 612, 9 Nov 1944)

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

SPJGQ
CM 261111

6 SEP 1944

UNITED STATES	)	CHARLESTON PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Charleston, South Carolina, 7 August 1944. Dishonorable discharge, total forfeitures and confinement for ten (10) years. Disciplinary Barracks.
	)	
Private HAROLD E. KUYKENDALL (34268808), Detachment Station Complement, Charleston Port of Embarkation, Charleston, South Carolina.	)	

HOLDING by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates

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

2. The record of trial is legally sufficient to support the findings of guilty of Charge I, and Specification 2 thereof, Charge II and its Specification, and the sentence as approved by the reviewing authority. The only question requiring consideration is whether it is legally sufficient to support the finding of guilty of Specification 1 of Charge I.

3. Specification 1 of Charge I is in the customary form and alleges that the accused deserted the service of the United States at Charleston Port of Embarkation, Charleston, South Carolina, on or about 2 June 1944 and remained absent in desertion until he was apprehended at Marietta, Georgia, on or about 7 June 1944. The accused pleaded not guilty. In its finding the court substituted Acworth, Georgia, in lieu of Marietta, Georgia, as the place of apprehension. The evidence of record touching this Specification is substantially as follows: At the time it is alleged he deserted, the accused was assigned to duty with the Charleston Port of Embarkation Replacement Pool (R. 9). He failed to answer roll call on the morning of 2 June 1944 (R. 9), whereupon Staff Sergeant Victor Leader made search but failed to find him (R. 9-10). Captain James W. Davis, Commanding Officer of the Charleston Port of Embarkation Replacement Pool, also made an unsuccessful effort to locate the accused on 2 June 1944 (R. 7). He testified that the latter was absent without leave and was so entered on the morning report of the CPE Replacement Pool (R. 7). A duly authenticated copy of the morning report of this organization, listing the accused as AWOL on 2 June 1944, was introduced in evidence without objection (R. 9, Ex. B). Captain Davis next saw the accused on or

about 7 June 1944 when he was returned to his station under guard (R. 7). In a voluntary pre-trial statement, made to the officer who investigated this case, the accused admitted that he was apprehended by civil authorities at Acworth, Georgia (R. 11). He was wearing military coveralls at the time (R. 11). He further represented to the investigating officer that his wife was "running around" with other men and he had gone home to see about his child who had suffered a head injury (R. 11-21). The accused made an unsworn statement through defense counsel at the trial (R. 12). It was represented that the mother of accused wrote him that his baby had suffered an injury. Its head was "split" and he went home to see how seriously it was injured. The baby was with its mother but she and the accused were having marital troubles and he felt that she was too busy "running around" to take proper care of the baby. He intended to return to his organization and had no intention of deserting the service.

The only facts or circumstances established by the evidence of record upon which to predicate a finding of an intent to desert are that the accused was absent without leave for a period of five days and that this absence was terminated by apprehension at a distance of approximately 250 or 300 miles from his proper station. These facts, unattended by anything else, are not deemed legally sufficient to warrant the conclusion that accused intended to remain away from his organization and station permanently, particularly in view of the fact that he made explanation of his absence and assigned as a reason therefor grounds which, if true, were calculated to create in him a strong urge to visit his home when he did. The only fair inference to be drawn from the meager evidence is that he was either at or near his home when apprehended. Allowing a reasonable time for travel and considering the short period of time he was absent before he was apprehended, the facts proved are not necessarily inconsistent with an intention to return to military control. The evidence of record is legally insufficient to support the finding of guilty of desertion under Article of War 58 but is legally sufficient to support a finding of guilty of the lesser included offense of absence without leave in violation of Article of War 61.

4. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 1 of Charge I but legally sufficient to support a finding of guilty under this Specification of the lesser included offense of absence without leave in violation of Article of War 61, and legally sufficient to support all of the remaining findings and the sentence.

William A. Gaulbrelle, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

SEP 23 1944

War Department, J.A.G.O., - To the Commanding General, Charleston Port of Embarkation, Charleston, South Carolina.

1. In the case of Private Harold E. Kuykendall (34268808), Detachment Station Complement, Charleston Port of Embarkation, Charleston, South Carolina, I concur in the foregoing holding of the Board of Review and for the reasons stated therein recommend that only so much of the finding of guilty of Specification 1 of Charge I be approved as involves a finding of guilty under this Specification of the lesser included offense of absence without leave in violation of Article of War 61. Upon compliance with this recommendation, and under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

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

(CM 261111).

Myron C. Cramer

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

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

SPJGV
CM 261112

19 SEP 1944

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER CAMP FANNIN, TEXAS
v.	
Private JAMES O. ALLEN (34803482), Company C, 68th Training Battalion, 14th Training Regiment.	Trial by G.C.M., convened at Camp Fannin, Texas, 21 July 1944. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

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

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

Specification 1: In that Private James O. Allen, Company "D", Fifty-ninth Training Battalion, Twelfth Training Regiment, did, without proper leave, absent himself from his organization at Camp Fannin, Texas, from about 24 March 1944, to about 5 April 1944.

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

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

Specification: In that Private James O. Allen, * * *, then a member of Company "A", Sixty-fifth Training Battalion,

Fourteenth Training Regiment, having been duly placed in confinement in Camp Stockade, Camp Fannin, Texas, on or about 8 January 1944, did, at Camp Fannin, Texas, on or about 24 March 1944, escape from said confinement before he was set at liberty by proper authority.

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

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

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

Specification: In that Private James O. Allen, * * *, did, at Camp Fannin, Texas, on or about 24 April 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Chattanooga, Tennessee, on or about 17 May 1944.

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

Specification: In that Private James O. Allen, Company "C", Sixty-eighth Training Battalion, Fourteenth Training Regiment, did, at Camp Fannin, Texas, on or about 26 June 1944, desert the service of the United States and did remain absent in desertion until he was returned to military control at Camp Joseph T. Robinson, Arkansas, on or about 1 July 1944.

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

Specification: In that Private James O. Allen, Company "C", Sixth-eighth Training Battalion, Fourteenth Training Regiment, having been duly placed in confinement in the Camp Stockade, Camp Fannin, Texas, on or about 10 January 1944, did at Camp Fannin, Texas, on or about 26 June 1944, escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to all Charges and Specifications and was found guilty of Specification 1 of Charge I except the words "to about 5 April 1944", of the excepted words not guilty, guilty of the Additional Charge and its Specification except the words "and did remain absent in desertion until he was apprehended at Chattanooga, Tennessee on or about

17 May 1944", of the excepted words not guilty, and guilty of all other Charges and Specifications. Evidence of four previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge I and of Charge III and its Specification, approved the sentence, reduced the period of confinement to ten 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 50½.

3. The record of trial is legally sufficient to support all findings of guilty, except the findings of guilty of the Additional Charge and its Specification, and legally sufficient to support the sentence as approved by the reviewing authority.

Under the Specification of the Additional Charge evidence was introduced to demonstrate that accused's absence commenced on 24 April 1944 initiated by an escape from confinement (R. 12; Pros. Ex. 5). By its finding of guilty of this Specification, with exceptions, the court determined only that accused deserted on 24 April 1944. It found no date of termination of the absence nor did it find in what manner it was terminated.

Although a court may infer that an accused intended to desert the service if he escaped from confinement or was under charges at the time he absented himself (MCM, 1928, par. 130b), such an inference cannot properly be drawn unless it is a reasonable inference consistent with the evidence and the record of trial in its entirety. Under the findings of the court in this case accused's absence could have been terminated within an hour by his surrender at the place from which he escaped. If such were the facts, it would be unreasonable and unwarranted to infer therefrom that accused intended to desert. In a previous opinion of the Board of Review (CM 221491, Peloquin, 13 BR 175) it was held that no intent to desert could reasonably be inferred from facts showing that an accused obtained freedom from confinement by artifice and thereafter absented himself for fifteen hours before he was apprehended at a point approximately fifty miles away. In the instant case it is the opinion of the Board of Review that the findings of guilty of the Additional Charge and its Specification are not sustained, because no reasonable, justifiable inference that accused intended to desert could be drawn from the solitary finding that the accused's absence commenced on a particular day, initiated by an escape from confinement.

4. The Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Additional Charge and its Specification, and legally sufficient to support the findings of guilty of all other Charges and Specifications and the sentence as approved by the reviewing authority.

Thomas N. Jaffe, Judge Advocate.

Sick in Hospital, Judge Advocate.

Robert E. Truitchen, Judge Advocate.

SPJGV
CM 261112

1st Ind.
SEP 19 1944

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

To: Commanding General, Infantry Replacement Training Center, Camp Fannin, Texas.

1. In the case of Private James O. Allen (34803482), Company C, 68th Training Battalion, 14th Training Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the Additional Charge and its Specification, and legally sufficient to support the findings of guilty of all other Charges and Specifications and the sentence as approved by the reviewing authority, which holding is hereby approved. Upon disapproval of the findings of guilty of the Additional Charge and its Specification you will have authority to order the execution of the sentence.

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

(CM 261112).

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.

SPJGN
CM 261138

UNITED STATES	)	1 SEP 1944 92ND INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 13 and 15 July 1944. Dismissal, total forfeitures and confinement for five (5) years. Disciplinary Barracks.
Second Lieutenant OSBORNE B. JONES (0-1013227), 365th Infantry.	)	

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

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

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

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

Specification: In that Second Lieutenant OSBORNE B. JONES, Company C, Three Hundred Sixty Fifth Infantry, was, at Fort Worth, Texas, on or about 12 February, 1944, in a public place, to wit, Colored Waiting Room, Texas and Pacific Railway Station, drunk and disorderly.

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

Specification 1: In that Second Lieutenant OSBORNE B. JONES, Company C, Three Hundred Sixty Fifth Infantry, did, at Fort Worth, Texas, on or about 12 February, 1944, unlawfully carry a concealed weapon, viz, one home-made knife.

Specification 2: In that Second Lieutenant OSBORNE B. JONES, Company C, Three Hundred Sixty Fifth Infantry, did, at Fort Worth, Texas on or about 12 February, 1944, wrongfully appear in a public place, to wit, Colored Waiting Room, Texas and Pacific Railroad Station, without proper uniform.

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

Specification: In that Second Lieutenant Osborne B. Jones, 365th Infantry, having been detailed to serve as officer to guard the 365th Infantry Warehouse in Merryville, Louisiana, from about 4 April to about 5 April 1944, did, in Merryville, Louisiana, on or about 4 April 1944, wrongfully leave his post before being properly relieved.

2nd ADDITIONAL CHARGES:

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

Specification: In that Second Lieutenant Osborne B. Jones, 365th Infantry, did, at Fort Huachuca, Arizona, on or about July 2, 1944, feloniously embezzle by fraudulently converting to his own use money of the value of four hundred fifty dollars and thirty-two cents ($450.32), the property of the United States Government, entrusted to him by 1st Lieutenant Theophilus A. Logan for return to the Finance Office, 92d Infantry Division.

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

Specification: In that Second Lieutenant Osborne B. Jones, 365th Infantry, having received a lawful command from Captain John E. Horton, 365th Infantry, his superior officer, to "Dismount" from a jeep, did, at Fort Huachuca, Arizona, on or about July 2, 1944, willfully disobey the same.

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

Specification 1: In that Second Lieutenant Osborne B. Jones, 365th Infantry, did, at Fort Huachuca, Arizona, on or about July 2, 1944, wrongfully take and use one 1/4-ton weapons carrier, property of the United States.

Specification 2: In that Second Lieutenant Osborne B. Jones,

365th Infantry, did, at Fort Huachuca, Arizona, on or about July 2, 1944, wrongfully fraternize with enlisted men, thereby seriously compromising his position as an officer, such association being not in accordance with the customs of the service.

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 such place as the reviewing authority might direct for seventy-five years. The reviewing authority approved the sentence but reduced the period of confinement to five 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 48.

3. The evidence for the prosecution shows that at about 0245 o'clock on 12 February 1944 the accused was found wandering around the colored waiting room of the Texas and Pacific Railroad Company's station in Fort Worth, Texas. He was clad only in his underwear and was obviously highly intoxicated. He refused to produce his identification and was "sarcastic" with the employees of the railroad and the two military police, all of whom eventually prevailed upon him to put on his clothes before he was taken to the police station. It was found that he was carrying a concealed weapon in the form of a knife which had been fashioned from a factory made blade and an empty .50 calibre machine gun shell for a handle (R. 23-24; Pros. Exs. A-D).

Last spring the accused's organization was in the Louisiana Maneuver Area. About 1330 o'clock on 4 April 1944 the accused reported to the Division's Provost Marshal as directed by his organization's adjutant for the purpose of receiving instructions for serving as an officer guard of the 365th Infantry Warehouse at Merryville, Louisiana. He was directed to report at the warehouse with his bedding at 1600 o'clock and to remain there until relieved the next morning by another officer. He was seen at the warehouse by the Provost Marshal at about 2030 o'clock that evening but when the Provost Marshal again visited the warehouse at about 2400 o'clock the accused had departed and it became necessary for the military police to guard the warehouse until the next morning when the relieving officer appeared. At about 1600 o'clock on 5 April 1944, the Provost Marshal located the accused in the back room of the "M.P. Headquarters" which was occupied by the State Highway Police at a town some 40 miles distant where he had been incarcerated at about 0030 o'clock that morning (R. 11-19, 19-23).

By summer the division had returned to Fort Huachuca, Arizo and there on Sunday morning, 2 July 1944, First Lieutenant Theophilu

Logan, the accused's company commander, delivered to the accused a money bag containing $450.32 and the pay roll upon which there were several errors. The accused, who was the witnessing officer for the payroll, was directed to deliver the bag and its contents to the Finance Officer by 1300 o'clock. Instead of doing so the accused accompanied by several enlisted men drove in a company jeep to the home of Sergeant William Richardson arriving there about noon. The accused's wife had formerly rented a room from the Richardsons. The accused stated that he had about $900 in the money bag and that he had to turn it in by 0800 o'clock Monday. After some discussion the accused and the sergeant counted the money and found that it amounted to between $400 and $500 and it, at the sergeant's suggestion, was secreted for safe keeping. There was some drinking going on but there is no evidence that the accused participated therein or otherwise improperly conducted himself. He was in and out of the house several times during the afternoon and evening. On one of these occasions at about 1800 o'clock the accused was driving the jeep in which were four enlisted men at about 60 miles per hour when he was stopped by Major (then Captain) John E. Horton who was accompanied by Captain Paul M. Moore. According to these two officers, the accused recognized them and Major Horton ordered the occupants of the jeep to dismount. The enlisted men obeyed and were directed to proceed to their organization's area. The accused refused to comply with the order, became argumentative and refused to permit Major Horton to take charge of the jeep. No inquiry was made concerning the accused's authority to use the jeep and there is no testimony relative thereto whatsoever (R. 24-31, 31-37, 37-38, 61-66, 67-71).

At about 2030 o'clock the accused reappeared at Sergeant Richardson's, was given the payroll money by the sergeant and promptly departed. He was thereafter seen in the game room of the officers' club playing poker while intoxicated with about $300 or $400 in money on the table before him. During the game he gave several officers money and checks to keep for him. At about 2330 o'clock he went to his room much the worse for drink and began to retire. His company commander had theretofore found the payroll and the money bag with only $37.44 in it in the accused's room and as soon as he could locate the accused interrogated him about the balance. The accused told him not to worry and that Lieutenant Virgil R. Chandler had about $2000 of his, the accused's, money. Lieutenant Chandler, however, produced only two checks and some currency, totaling $85. Another officer produced about $220 which accused had left with him. The accused produced $45 in cash and his pay check of $70.25. The resultant shortage of $104.98 was furnished by Lieutenant Logan, the company commander, who returned the full sum of $450.32 to the finance office. The accused's wife had delivered $104.98 to Lieutenant Logan before the trial. The finance office had closed at 1200 o'clock on 2 July 1944 (R. 38-58, 58-61, 63, 73-74).

4. The accused, after explanation of his rights as a witness, elected to remain silent and the defense offered no evidence (R. 72-73).

5. The Specification, Charge I, alleges that the accused in the colored waiting room of a railway station in Forth Worth, Texas, a public place, on 12 February 1944 was drunk and disorderly. The Specification is laid under Article of War 95. Specifications 1 and 2, Charge II, respectively allege that at the same time and place he unlawfully carried a concealed weapon, a homemade knife, and wrongfully appeared without proper uniform. These two Specifications are laid under Article of War 96. It is manifest that gross drunkenness and disorderly conduct in a public place is ungentlemanly and therefore violative of Article of War 95. It is equally manifest that carrying concealed weapons and appearing in a public place without proper uniform is conduct of a nature to bring discredit upon the military service (MCM, 1928, paragraphs 151, 152b).

The testimony of the railroad's employees and the military policemen conclusively shows that the accused was heavily intoxicated on the alleged date in the public waiting room of a railway station in a large city and was wandering around in his underwear. Such conduct shows gross drunkenness and wearing such garb is clearly disorderly and disgraceful conduct. Since he had no uniform on at all he certainly was without proper uniform and, after he had been required to dress, the concealed weapon, a homemade knife, was found upon him. The evidence, therefore, shows his guilt of the offenses, as alleged, beyond a reasonable doubt and amply supports the court's findings of guilty of Charge I and its Specification and Charge II and both Specifications thereunder.

6. The Specification, Additional Charge, alleges that the accused at a designated time and place after having been detailed to serve as officer guard of a warehouse for a specified time wrongfully left his post before being properly relieved. "Disobedience of standing orders" is violative of the 96th Article of War (MCM, 1928, par. 152a).

The prosecution's evidence shows that the accused was detailed to serve as officer guard at a specified warehouse for a specified time, i.e. until relieved. Such detail amounted to a standing order for its duration. The evidence, further, shows that the accused undertook the performance of the duty and then left the warehouse for another town about 40 miles away before he was properly relieved. Such conduct is unquestionably prejudicial to good order and military discipline. The evidence, therefore, establishes the accused's commission of the offense as alleged and fully warrants the court's findings of guilty of the Additional Charge and its Specification.

7. The Specification, Charge I of the Second Additional Charges, alleges that on 2 July 1944 the accused at Fort Huachuca, Arizona, feloniously embezzled "by fraudulently converting to his own use money of the value of" $450.32, "the property of the United States Government, intrusted to him by First Lieutenant Theophilis A. Logan for return to the Finance Office, 92d Infantry Division". The offense alleged is that of embezzlement which is violative of Article of War 93 and which is defined as "the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U. S., 160 U. S. 268)" (MCM, 1928, par. 149h).

The prosecution's evidence shows that on the morning of 2 July 1944 the accused, the witnessing officer, was intrusted with a money bag containing $450.32 in cash and a payroll, which required correction, for the sole purpose of delivering it to the Division's Finance Office by a specified time. Heedless of his trust the accused became intoxicated and used all but $37.44 (the amount found in the money bag) to back up his hands in a poker game because it was shown that he had about $300 or $400 in currency, stacked before him at the game and was unable to account when required and requested to do so. The use of the money in the poker game constituted a fraudulent conversion which was not obliterated by eventual restitution of the converted funds. The evidence, therefore, beyond a reasonable doubt shows the accused's guilt of the embezzlement as alleged in the sum of $412.88 instead of the sum of $450.32 and amply supports the court's findings of guilty of Charge I, Second Additional Charges and its Specification excepting therefrom the words "four hundred fifty dollars and thirty-two cents ($450.32)" and substituting therefor the words "four hundred twelve dollars and eighty-eight cents ($412.88)".

8. The Specification, Charge II of the Second Additional Charges, alleges that the accused after having received a lawful command from his named superior officer to "dismount" from a jeep at a designated time and place willfully disobeyed such order. Willful disobedience is defined as the disobedience of a military order of a superior officer who is authorized to give it so as to manifest an intentional defiance of authority and is violative of Article of War 64 (MCM, 1928, par. 134b).

The undisputed testimony of two officers shows that the accused was operating a jeep at an excessive rate of speed when his superior officer stopped him, that the accused was given the order to dismount which he not only deliberately refused to obey but that he waxed argumentative and belligerent toward the officer giving the order. It was the officer's duty under the circumstances to see that the jeep was operated properly and safely. The evidence, therefore, establishes the accused's guilt of the offense as alleged beyond

a reasonable doubt and fully warrants the court's findings of guilty of Charge II, Second Additional Charges, and the Specification thereunder.

9. Specifications 1 and 2, Charge III of the Second Additional Charges, respectively allege that on 2 July 1944 the accused wrongfully took and used one 1/4 ton weapons carrier, property of the United States and that on the same date he wrongfully fraternized with enlisted men, thereby seriously compromising his position as an officer, such association being not in accordance with the customs of the service. Since the record is absolutely silent concerning whether the accused was or was not authorized to use the jeep and contains no substantial evidence whatsoever of his wrongful fraternization with enlisted men, the findings of guilty of the Charge and its two Specifications are without support in the evidence and should be disapproved.

10. The accused is about 24 years old. The records of the Office of The Adjutant General show that he has had enlisted service from 20 December 1941 until 30 October 1942 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date. He graduated from high school in 1936 and thereafter attended college for two years. Thereafter and until his induction into the service he was employed as a clerk at a "CCC" camp, as a waiter in a cocktail lounge and as a hotel bell boy at undisclosed rates of pay.

11. The court was legally constituted. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge III, Second Additional Charges, and the two Specifications thereunder; legally sufficient to support the findings of guilty of all other Charges and Specifications, excepting from the Specification of Charge I, Second Additional Charges, the words "four hundred fifty dollars and thirty-two cents ($450.32)" and substituting therefor the words "four hundred twelve dollars and eighty-eight cents ($412.88)"; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of Articles of War 64, 93 or 96 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.

(156)

SPJGN
CM 261138

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 Osborne B. Jones (0-1013227), 365th 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 wrongfully taking and using a Government vehicle and of wrongfully fraternizing with enlisted men (Specs. 1 & 2, Chg. III, 2nd Add. Charges), legally sufficient to support only so much of the finding of guilty of the Specification alleging the embezzlement of $450.32 as involves the embezzlement of $412.88 (the Spec. Chg. I, 2nd Add. Charges), legally sufficient to support all other findings and the sentence, and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed. G.C.M.O. 560, 14 Oct 1944)

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

SPJGQ
CM 261181

- 8 SEP 1944

U N I T E D S T A T E S	)	MIDDLETOWN AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Bolling Field, District of Columbia, 19 July 1944. Dishonorable discharge, total forfeitures and confinement at hard labor for five (5) years. Federal Reformatory.
Privates HOWARD T. PAYNE (34391286) and LESTER L. DURST (13082335), 1st Army Air Forces Base Unit, "A" Squadron, Bolling Field, District of Columbia.	)	

HOLDING by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates

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

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

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

Specification: In that Private Lester L. Durst (then Private First Class), 1st Army Air Forces Base Unit, "A" Squadron, Bolling Field, District of Columbia and Private Howard T. Payne, 1st Army Air Forces Base Unit, "A" Squadron, Bolling Field, District of Columbia, acting jointly and in pursuance of a common intent to commit a felony, to wit, robbery, did, at 31st Street and Pennsylvania Avenue, Southeast, Washington, District of Columbia on or about 11:30 p.m., 26 June 1944 commit an assault upon one Ralph S. Weimer by wilfully and feloniously striking him, the said Ralph S. Weimer, on or about the head with a dangerous instrumentality, to wit, a rock.

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

Specification: In that Private Lester L. Durst (then Private First Class), 1st Army Air Forces Base Unit, "A" Squadron, Bolling Field, District of Columbia and Private Howard T. Payne, 1st Army Air Forces Base Unit, "A"

Squadron, Bolling Field, District of Columbia, acting jointly, and in pursuance of a common intent, did, at 31st Street and Pennsylvania Avenue, Southeast, Washington, District of Columbia, on or about 11:30 p.m., 26 June 1944, without the consent of the owner, wrongfully take and carry away a certain Airport Cab No. 10-DC-18-654, the property of the Airport Transport, Inc. in possession of one Ralph S. Weimer, and of a value of about Five Hundred Dollars ($500.00).

They pleaded not guilty to and were found guilty of all of the Charges and Specifications. Evidence was introduced as to Payne of a previous conviction by a Summary Court for absence without leave for 19 days in violation of Article of War 61. No evidence of any previous conviction was introduced as to Durst. They were each 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 5 years. The reviewing authority approved the sentence, designated the Federal Reformatory at Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence introduced by the prosecution clearly showed that the accused on the night of 26 June 1944, while in the military service, in Washington, D. C., while acting jointly, assaulted one Ralph S. Weimer, a taxi-cab driver, by striking him on the head with a rock while he was driving the accused in a cab. After the driver was forced out of the cab, the accused drove the cab away. It was shown to be the property of Airport Transport Inc. and worth about $500. Both accused voluntarily signed confessions to the commission of the offenses (Pros. Exs. F and H).

4. Both of the accused testified on their own behalf and claimed that they were intoxicated at the time of the alleged occurrence and that their conduct was due to their intoxicated condition. They denied that there was any plan to rob the taxi driver and claimed that they did not voluntarily sign the confessions but did so under duress and without proper advice as to their rights. Several witnesses testified as to their previous good military record and character.

5. The record shows that Major George J. Edwards, who was appointed and acted as Law Member of the court that tried and convicted the accused, was the Acting Judge Advocate at Bolling Field and as such, previous to trial, had read the papers pertaining to the charges preferred against the accused, including statements alleged to have been made by the accused and discussed them with the Trial Judge Advocate who at that time was also his assistant, in order to see that the charges were brought under the proper article of war and that the specifications alleged offenses. All statements made by the accused were confessions of the commission of the offenses and therefore Major Edwards must have read the confessions of the accused. He was challenged for cause by defense counsel but

averred under oath that he had formed no positive opinion as to the innocence or guilt of the accused and had expressed no opinion concerning the same (R. 7). The court refused to sustain the challenge (R. 7).

6. The record further shows that a four-paged typewritten document containing a summary of the "facts" and the law applicable thereto prepared by the Trial Judge Advocate was placed before the court by the Trial Judge Advocate prior to trial and "scanned" by the President of the court before evidence was introduced (R. 38). This was done without the knowledge or consent of defense counsel and without opportunity to rebut its contents. The summary of the "facts" contained in the document was a statement of facts which if believed showed conclusive proof of the guilt of the accused. This document lay on the table during the trial in front of and available to the court.

7. In the opinion of the Board of Review the court erred in refusing to sustain the challenge for cause of its Law Member. Among the grounds for challenge for cause listed in MCM, par. 58e, page 45 are:

> "Ninth: Any other facts indicating that he should not sit as a member in the interest of having the trial . . . free from substantial doubt as to legality, fairness, and impartiality".

It is the opinion of the Board that Major Edwards should have been excused from the court upon the motion of Defense Counsel notwithstanding his contention that he had formed no opinion. In order properly to pass upon the correctness of the charges and specifications it was necessary for him to make a careful study of the facts of the case as contended by the prosecution. He admitted that he read the stenographic statements of the accused which in the record appear to be confessions of guilt. His mind, on the issue of guilt or innocence, could not help but be prejudiced against the accused and even if it was not, the facts were such as to create a substantial doubt to that effect. It follows that the trial was not free from substantial doubt as to impartiality.

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 the accused (MCM, par. 58f, page 46).

In our opinion the error was fatal as it did affect the substantial rights of the accused so as to entitle them to a rehearing.

In view of the foregoing holding it is not necessary to pass upon the action of the Trial Judge Advocate in submitting to a member of the court, without defense counsel's knowledge or consent, a "brief" or document, not in evidence and which contained a statement of facts concerning the accused which, if true, would conclusively show their guilt.

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 or the sentence.

William H. Dambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 23 SEP 1944 - To the Commanding General, Middletown Air Service Command, Olmsted Field, Middletown, Pennsylvania.

1. In the case of Privates Howard T. Payne (34391286) and Lester L. Durst (13082335), 1st Army Air Forces Base Unit, "A" Squadron, Bolling Field, District of Columbia, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentences as to each accused be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentences in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

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 261181).

Myron C. Cramer

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

1 Incl.
Record of trial

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

SPJGV
CM 261242

4 SEP 1944

UNITED STATES	10TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Gordon, Georgia, 4 August 1944. Dishonorable discharge and confinement for ten (10) years. Federal Reformatory, Chillicothe, Ohio.
First Sergeant LEON WILLIS (18029553), 3978th Quartermaster Truck Company.	

HOLDING by the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

2. The accused was charged with and found guilty of (a) absence without leave for three days (Ch. I, Spec.), in violation of Article of War 61, (b) embezzlement of $33.80, forgery of $20 post office money order, forgery of $30 post office money order, and embezzlement of the proceeds of a $25 draft (Specs. 1, 2, 3, 4, Ch. II), in violation of Article of War 93. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and Charge II and Specification 1 thereof and the sentence as approved by the reviewing authority.

The only question requiring consideration is the legality of the findings as to Specifications 2, 3 and 4 of Charge II. Each of these three Specifications alleges an offense in violation of the 93rd Article of War.

In support of Specifications 2, 3 and 4 of Charge II there was introduced in evidence the sworn written statement of accused made to the investigating officer (Ex. 3), in which he confessed that he committed the offenses charged in these Specifications. The officer to whom the confession was made testified on direct examination that he warned accused of his rights at the time the confession was made. However, on cross-examination of this witness by defense counsel the following questions and answers appear in the record:

"Q. Why did you go to see Sergeant Willis to get this confession from him?
"A. Because I thought it would make the preparation of the case much more easier.

* * *

"Q. Was Sergeant Willis reminded of his rights?
"A. I explained his rights to him and told him that it would be better for him to sign a confession.

* * *

"Q. Did you say that it would be a lot easier on him?
"A. I said that it would be a lot easier on all of us" (R. 34).

Obviously a confession obtained under such circumstances was not freely and voluntarily given without hope of reward or fear of punishment, was not competent evidence, and was erroneously admitted. The evidence, aliunde the confession of accused, offered in support of these three Specifications is wholly insufficient to sustain the findings of guilty.

4. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 2, 3 and 4 of Charge II, legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 1 thereof, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years in a place other than a penitentiary or Federal reformatory.

Thomas N. Tapp, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevithan, Judge Advocate.

SPJGV
CM 261242

1st Ind.

War Department, J.A.G.O., SEP 23 1944 - To the Commanding General, 10th Armored Division, Camp Gordon, Georgia.

1. In the case of First Sergeant Leon Willis (18029553), 3978th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 2, 3 and 4 of Charge II, legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 1 thereof, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years in a place other than a penitentiary or Federal reformatory, which holding is hereby approved. Upon disapproval of the findings of guilty of Specifications 2, 3 and 4 of Charge II, and designation of a place of confinement other than a penitentiary or Federal reformatory, you will have authority to order the execution of the sentence. However, in view of the fact that under the findings as approved by the Board of Review, the accused is guilty of absence without leave for three days and embezzling $33.80, it is recommended that the period of confinement be reduced to five years.

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

(CM 261242).

Myron C. Cramer

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

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

SPJGQ
CM 261268

25 AUG 1944

UNITED STATES	EASTERN SIGNAL CORPS TRAINING CENTER
v.	Trial by G.C.M., convened at Fort Monmouth, New Jersey, 3 August 1944. Dismissal.
First Lieutenant RALPH L. EDEN (0-1635830), Signal Corps.	

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

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

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

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

Specification: In that First Lieutenant Ralph L. Eden, 848th Signal Training Battalion on duty with Company B, 3170th Signal Service Battalion, Eastern Signal Corps Unit Training Center, Camp Edison, did, without proper leave absent himself from his station at Camp Edison, Fort Monmouth, New Jersey from about 20 July 1944 to about 1400 22 July 1944.

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

Specification: (Finding of not guilty.)

He pleaded not guilty to the Charges and their respective Specifications. He was found not guilty of Charge II and its Specification and guilty of Charge I and its Specification. There was introduced in evidence a previous conviction on 4 July 1944 by a general court-martial for absence without leave from 9 June 1944 to 17 June 1944 for which he was sentenced to forfeit $75 of his pay per month for six months and to be publicly reprimanded. He was sentenced in the instant case to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was, during the occurrence complained of, in the military service as a first lieutenant and a member of Company B, 3170th Signal Service Battalion, stationed at Camp Edison, Fort Monmouth, New Jersey. At 8:00 a.m. 20 July 1944 a message was received by telephone at the headquarters of that organization purporting to come from the accused to the effect that he was at the infirmary receiving medical treatment. Accused failed to appear at his appointed place of duty during the morning and a diligent search through the camp, including the infirmary, failed to locate him all that day, that night and the following day (R. 6d, 6e, 6g). The morning report of accused's organization for July 1944 pertaining to the accused was introduced in evidence without objection. It showed accused "duty to AWOL 0715" on 20 July 1944 and "AWOL to arrest in qrs. 1400" on 22 July 1944 (R. 6a, 6b, Ex. P-1).

It was stipulated that in view of other evidence the morning report for 20 July 1944 should have read 1100 instead of 0715 (R. 6d, 6e).

No one in authority had given or granted the accused permission to be absent from duty at any time during 20, 21, or 22 July 1944 (Ex. P-2).

As a result of information received, the accused's company commander went to Asbury Park, New Jersey and there, at 1400 22 July 1944, apprehended the accused who was approaching one of the theaters dressed in uniform but suffering from a "hangover" (R. 6i, 6j, 6p, 6q).

4. Having been advised of his rights as a witness, the accused elected to submit, through defense counsel, an unsworn statement (R. 6ii). It was substantially as follows: He enlisted 12 November 1940 and after serving 22 months as an enlisted man was commissioned as second lieutenant upon graduating from OCS on 11 September 1942. He was sent overseas on 1 November 1942 and served in India until 23 December 1942, then in Suez for three months when he was promoted to first lieutenant. He was attached to the British Eighth Army as Wire Officer and served with it through North Africa, Sicily and Italy. In October 1943 he met a French girl in Cairo and a month later discovered he had contracted syphilis. He was hospitalized until January 1944, served in Eritrea and returned to Fort Monmouth, New Jersey. He was supposed to receive treatment twice a week for his disease but because of its embarrassing nature accused did not disclose his ailment. It has preyed on his mind and resulted in his present and past difficulties. When he was convicted of absence without leave in early July he did not disclose his condition. Upon advice of counsel the matter has been disclosed at this trial (R. 6jj, 6kk).

5. It was clearly shown by competent evidence for the prosecution and not denied by the accused that he was absent without leave from his

organization and station from 1100 20 July 1944 until 1400 22 July 1944 as averred in the Specification of Charge I.

6. War Department records show the accused to be 33 years of age, having been born in Athens, Georgia, 29 May 1911. He graduated from high school in 1928. He studied journalism at the University of Georgia for two years. During 1931 and 1932 he was employed as a bookkeeper and pay clerk in a cotton mill, and from 1934 to 1940 as a reporter and rewriter. On 12 November 1940 he enlisted in the Signal Corps and served as company clerk until he attended OCS at Fort Monmouth, New Jersey from which he graduated and on 12 September 1942 was commissioned second lieutenant, Signal Corps, Army of the United States. On 19 May 1943 he was promoted to first lieutenant.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61.

William H. Crawbrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

SPJGQ
CM 261268

1st Ind.

War Department, J.A.G.O., 4 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 First Lieutenant Ralph L. Eden (O-1635830), Signal Corps.

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

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

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

(Sentence confirmed. G.C.M.O. 553, 13 Oct 1944)

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

SPJGV
CM 261285

31 AUG 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Army Air Base, Sioux City, Iowa, 20 July 1944. Dismissal.
Second Lieutenant JOHN R. KELLY (0-754964), 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. Upon a rehearing of this case ordered by the appointing authority 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 John R. Kelly, Training Section I, 224th Combat Crew Training School, did, at Sioux City, Iowa, on or about 22 March 1944, with intent to defraud, wrongfully and unlawfully make and utter to Toller Drug Company, Sioux City, Iowa, a certain check dated 22 March 1944, in the amount of Twenty Five Dollars ($25.00), drawn on Farmers State Bank, Marcus, Iowa, and by means thereof did fraudulently obtain cash in the amount of Twenty Five Dollars ($25.00), he the said Second Lieutenant John R. Kelly, then well knowing that he did not have and not intending that he should have sufficient funds in the Farmers State Bank, Marcus, Iowa, for the payment of said check.

Specification 2: Same allegations as Specification 1 except check dated, made and uttered on 25 March 1944, to the

Boulevard Food Store, Sioux City, Iowa in the amount of $20.

Specification 3: Same allegations as Specification 1 except check dated, made and uttered on 25 March 1944, to the Officers' Club and Mess, Army Air Base, Sioux City, Iowa, in the amount of $25.

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

Specification 5: (Finding of guilty disapproved by reviewing authority).

Specification 6: Same allegations as Specification 1 except check dated, made and uttered on 20 April 1944 to Lyons Drug Company, Clinton, Iowa, in the amount of $20.

Specification 7: Same allegations as Specification 1 except check dated, made and uttered on 22 April 1944, to Ray Carpenter Gas Station, Clinton, Iowa, in the amount of $25.

Specification 8: Same allegations as Specification 1 except check dated, made and uttered on 24 April 1944 to Peters and Holm Tavern, Clinton, Iowa, in the amount of $15.

Specification 9: Same allegations as Specification 1 except check dated, made and uttered on 25 April 1944 to Iowa State Bank, Clinton, Iowa, in the amount of $30.

Specification 10: Same allegations as Specification 1 except check dated, made and uttered on 4 May 1944, in the amount of $10.

Specification 11: Same allegations as Specification 1 except check dated, made and uttered on 6 May 1944, to Pin-Up Tap, Sioux City, Iowa, in the amount of $25.

Specification 12: Same allegations as Specification 1 except check dated, made and uttered on 15 May 1944, to Phillip Weiner and Hamburger Shop, Sioux City, Iowa, in the amount of $10.

Specification 13: (Nolle prosequi entered by direction of appointing authority).

CHARGE II: Violation of the 61st Article of War. (Finding of guilty disapproved by reviewing authority).

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

The accused pleaded guilty to Specifications 1-12 inclusive, of Charge . and to Charge I, not guilty to Charge II and its Specification, and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specifications 4 and 5 of Charge I and of the Specification of Charge II and Charge II, approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. For the prosecution it was stipulated by it, the defense and the accused that if L. P. Fitzgerald of Marcus, Iowa, were present he would testify that he was assistant cashier of Farmers State Bank, Marcus, Iowa, that he had charge of the records of this institution, that he had personal knowledge that accused made allotments of $50 per month to this bank to be credited to his account and that on the following dates the following deposits were made to accused's account (R. 29, 30; Pros. Ex. 12):

Date	Identification of Deposit	Amount
4 March 1944	Allotment check	$50
3 April 1944	Allotment check	$50
20 April 1944	Deposit by M.J. Kelly	$5
3 May 1944	Allotment check	$50

The accused's voluntary confession made to the investigating officer, First Lieutenant James M. Pasch, after his rights had been fully explained to him, was admitted in evidence without objection by the defense (R. 13; Pros. Ex. 4). In it accused admitted that he had made the twelve checks set forth in Specifications 1 to 12 inclusive. He had opened a bank account in the Farmers State Bank, Marcus, Iowa, in December 1943, and his first allotment check of $50 was deposited there in January 1944. He had never received a bank statement or canceled checks from the bank, never kept a record of the checks he issued against his account and, accordingly, had no accurate knowledge of the balance in his account from time to time. It was accused's "present intention to repay the creditors on all outstanding checks as listed" in these Specifications (Pros. Ex. 4).

Lieutenant Pasch identified six checks (Pros. Exs. 6, 7, 8, 9, 10, 11) as checks which accused admitted he had written. These six checks are referred to in Specifications 1, 4, 5, 10, 11, 12, of Charge I. The accused told Lieutenant Pasch that he did not know where the other six checks described in Specifications 2, 3, 6, 7, 8, 9 of Charge I were but he believed he had destroyed them. He also stated that he had made restitution of all these twelve checks (R. 18-20).

In April 1944 he was interviewed for about a half an hour by Major Russell B. Hanford, chief of professional services at the station hospital who concluded that accused was not suffering from medical or psychiatric disease (R. 21, 22, 26). However, Major Hanford admitted he did not possess the requisite professional qualifications to warrant his making a psychiatric diagnosis and that the sole basis for his psychiatric opinion was that accused "did not react mentally in an abnormal way to the situation in which he found himself" (R. 23.) He was of the opinion that accused knew the difference between right and wrong and was sane at the time of the interview (R. 26).

4. For the defense it was stipulated by the prosecution, the defense and the accused that all of these twelve checks had been redeemed (R. 30, 31). The defense also introduced the record of the Proceedings of a Disposition Board, Schick General Hospital, Clinton, Iowa, which convened on 24 April 1944, to examine accused (R. 31; Def. Ex. A). The Board's diagnosis of accused's condition was "Psychoneurosis, hysteria, moderate, recovered, manifested by discouragement, mild depression and an hysterical twilight reaction with indifference, apathy, loss of sense of time and responsibility for a period of seven days" (Def. Ex. A). The board found that during accused's unauthorized absence, charged as an offense under Charge II and its Specification, he "was in a mental state in which he could not be considered mentally responsible sufficiently to be able to act on the knowledge of difference of right and wrong" although he was not insane (Def. Ex. A).

5. The prosecution reopened its case after the defense had concluded and offered in evidence, with the consent of the defense, a communication sent by first indorsement from the registrar of the Schick General Hospital which contained an extract from a psychiatric consultation (R. 33; Pros. Ex. 13). The pertinent portion of this extract states that accused brooded over his separation from his combat unit, over being grounded and over his frustrated wedding plans, and thereafter became discouraged, depressed and involved in financial

troubles until his problems were sufficient

> "* * * to precipitate an hysterical twilight episode lasting about seven days * * * This patient during his period of AWOL was not psychotic, fundamentally could have been considered to have known the difference between right and wrong but because of his hysterical twilight reaction was unable to act upon such knowledge.
>
> "Therefore, it can be concluded that as regards the charges of failure to pay bills and write checks without sufficient funds, he was sane, mentally responsible for his acts, knew the difference between right and wrong. However, for the period in which he was AWOL although he was not insane, he was in a mental state in which he could not be considered mentally responsible sufficiently to be able to act upon the knowledge of the difference between right and wrong" (Pros. Ex. 13).

6. The reviewing authority disapproved the court's findings of guilty of Specifications 4 and 5 of Charge I and of Charge II and its Specification apparently because of the psychiatric opinion referred to above. To Specifications 1, 2, 3, 6, 7, 8, 9, 10, 11, 12 accused had pleaded guilty. The prosecution introduced in evidence accused's statement admitting that he wrote all of the checks covered by these Specifications without knowing what his bank balance was at any time and without making any effort to find out or to keep any amount thereof. There is other evidence that, over the period of time these checks were issued, accused deposited a total of $155 in his bank account. The total amount of the checks covered by the twelve Specifications was $240. The total amount of the ten checks covered by the Specifications of which accused was found guilty as sustained by the reviewing authority was $205.

The pleas of guilty are sufficient in the absence of any evidence by the prosecution to justify the findings of guilty. The accused's confession is consistent with his pleas of guilty and indicates that these pleas were not entered improvidently or through lack of understanding of their meaning and effect.

7. Accused is about 27 years of age. He graduated from high school and pursued a course of study in philosophy for two years at Trinity College. In civilian life he was a drugstore clerk. He enlisted in the military service on 10 January 1943 and was commissioned a second

lieutenant on 11 September 1943. On 30 June 1944 accused submitted his resignation for the good of the service after having been informed that the institution of reclassification proceedings was being contemplated because of his demonstrated misconduct and undesirable habits and traits of character. His resignation has not been forwarded for action because of these court-martial proceedings. He had previously been relieved as a combat crew member by his commanding officer because of inefficiency and instability of character.

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 N. Jaffe, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trewhitt, Judge Advocate.

SPJGV
CM 261285

1st Ind.

War Department, J.A.G.O., 12 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 Second Lieutenant John R. Kelly (0-754964), Air Corps.

2. Although accused pleaded guilty to, and was found guilty of Specifications 1 to 12 inclusive of Charge I, and Charge I, the reviewing authority disapproved the findings of guilty of Specifications 4 and 5 thereof. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. The accused was found guilty of fraudulently cashing ten worthless checks aggregating $205 in amount. He submitted his resignation for the good of the service on 30 June 1944, while reclassification proceedings against him were being contemplated because of misconduct and undesirable habits and traits of character. His resignation was not forwarded through channels by Headquarters Second Air Force because of these court-martial proceedings. He had previously been relieved as a combat crew member because of inefficiency and instability of character. 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. 561, 14 Oct 1944)

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

SPJGK
CM 261341

-8 SEP 1944

UNITED STATES	92ND INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, 5 August 1944. Dishonorable discharge and confinement for ten (10) years. Federal Reformatory.
Private EDGAR WALLACE (36164384), 92nd Quartermaster Company, Fort Huachuca, Arizona.	

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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Edgar Wallace, 92nd Quartermaster Company, for the purpose of obtaining the approval and allowance of a claim for a family allowance on behalf of Judy Wallace against the United States by presenting, through his commanding officer, to the Chief, Allowance and Allotment Branch, Adjutant General's Office, an officer of the United States then duly authorized to approve and allow such claims, did, at Papago Park, Phoenix, Arizona, on or about 2 October 1942, make and use a certain writing, to-wit: an Application for Family Allowances, more particularly described as W.D., A.G.O. Form No. 625, which said writing as he, the said Private Edgar Wallace, then knew contained a statement to the effect that Judy Wallace was his wife, and that he and said Judy Wallace were married on 14 September 1942 in Yuma, Arizona, which statement was false and fraudulent in that the said Judy Wallace was not and never had been his wife, and this statement was then known by the said Private Edgar Wallace to be false and fraudulent.

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

Specification 1: In that Private Edgar Wallace, 92nd Quartermaster Company, did, at Papago Park, Phoenix, Arizona, on or about 2 October 1942, in an Application for Family Allowances, more

particularly described as W.D., A.G.O. Form No. 625, make under oath a statement in substance as follows, to-wit: that Judy Wallace was his wife and that he married her on 14 September 1942 in Yuma, Arizona, which statement was false and he did not then believe it to be true.

Specification 2: In that Private Edgar Wallace, 92nd Quartermaster Company, did, at Papago Park, Phoenix, Arizona, on or about 2 October 1942, in a claim for a family allowance on behalf of Judy Wallace, in an Application for Family Allowances, more particularly described as W.D., A.G.O. Form No. 625, a document required by the Servicemen's Dependents Allowance Act of 1942, Public Law 625, 77th Congress, in the making of such claim, willfully and unlawfully make a statement to the effect that the said Judy Wallace was his wife and that they were married on 14 September 1942 in Yuma, Arizona, which statement was a material fact and was then known by the said Private Edgar Wallace to be false, in that the said Judy Wallace was not and never had been his wife, said statement being statutory perjury in violation of section 117 of the Servicemen's Dependents Allowance Act of 1942, Public Law 625, 77th Congress.

Specification 3: In that Private Edgar Wallace, 92nd Quartermaster Company, did, at Papago Park, Phoenix, Arizona, on or about 28 November 1942, in an affidavit, willfully and unlawfully make under oath a statement to the effect that he had never participated in either the civil or religious marriage rites with Jacqueline E. Jones of Detroit, Michigan, which statement was false and was then known by the said Private Edgar Wallace to be false.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specifications. He was found guilty of all Charges and Specifications. Evidence of two previous convictions, one for wrongfully operating Government Vehicle, excessive speed, (sic) in violation of Article of War 83, and the other for absence without leave for fifty-seven days in violation of Article of War 61, was introduced. Accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory at El Reno, "California" as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The facts are undisputed. On 2 October 1942 accused made an application on W.D., A.G.O. Form No. 625, for family allowances under the Servicemen's Dependents Allowance Act of 1942, naming therein as his wife one Judy Wallace, to whom, he stated in the application, he was married at

Yuma, Arizona, on 14 September 1942. This application, duly signed by accused, was sworn to before Captain Kenneth J. Smith, Summary Court Officer, on 2 October 1942 (Pros. Ex. 4). While accused had actually married the designated dependent, whose real name was Julia Ann, on the date given by him (Pros. Ex. 3, R. 9), this marriage was a bigamous one, as on 21 June 1941, at Toledo, Ohio, accused had married one Jacqueline Jones. This prior marriage had not been dissolved by divorce, annulment or death, and on 2 October 1942 and at all times subsequent thereto Jacqueline Jones Wallace was accused's lawful wife (Pros. Exs. 1 and 2, R. 15 and 16). On 28 November 1942 accused, for some reason or purpose not explained by any witness or established by any offering, executed an affidavit before a Summary Court Officer, in which he declared that he had never been married to "Jacquiline E. Jones, of Detroit, Michigan" (Pros. Ex. 5).

Testifying in his own behalf after an explanation of his rights, accused expressed an absolute lack of recollection of any incident which happened at Yuma, Arizona, in September or October 1942 (R. 11, 15). He did not remember the name of Judy Wallace until it was mentioned to him by the investigating officer, Lieutenant Colonel Horne (R. 12), nor did he recall having signed an application for a Class "F" deduction for her (R. 14). Accused attributed his inability to remember things to a slight fracture of the skull, suffered in a wreck.

4. While accused's statements as a witness indicated that he should not have pleaded guilty to Charge I and its Specification, the record so clearly establishes the commission of the offense therein charged that the substantial rights of the accused were not injuriously affected by the failure of the president to explain or to have the law member explain to the accused the significance and consequences of his prior plea.

5. The Specification of Charge I and Specifications 1 and 2 of Charge II charge the commission of three separate offenses that are in actuality aspects of the same act, each being based essentially on the execution of the application for a family allowance by accused, with knowledge on the part of accused that statements therein were false. Every element to support a conviction of Specification 2 of Charge II had to be established to warrant a finding of guilty of Charge I and its Specification. Similarly, to justify a finding of guilty of Charge I and its Specification, it was necessary to prove every element of the offense charged in Specification 1 of Charge II, except the administration of an oahh to accused. It is apparent that Specification 2 of Charge II is, in effect, a duplication of an offense included in the Specification of Charge I. To a great extent, Specification 2 of Charge II, which charges statutory perjury, is likewise a duplication of Specification 1 of Charge II, which charges false swearing, the principal differences being that in Specification 1 there is an allegation that the application was sworn to, which does not appear in Specification 2, and that in

Specification 2 the statement is described as "Material". In short, the effect of the two Specifications of Charge II is to charge accused first with having knowingly made a false statement in the application under oath, and, secondly, with having knowingly made the same false statement in the same application, without having sworn to it.

The Board does not feel that it is required to set aside the findings of guilty of Specifications 1 and 2 of Charge II, but is of the opinion that the record of trial is legally sufficient to support only a sentence with reference to the most important aspect of the act on which these two Specifications and the Specification of Charge I are based, namely, the violation of Article of War 94. This is in accordance with the interpretation uniformly placed on paragraph 80a of the Manual for Courts-Martial in numerous holdings of the Boards of Review (CM 209952, Berry, 9 B.R. 155, 192731, Guth, 2 B.R. 35, CM 231710, Bearden, et al., 18 B.R. 277, CM 241597, Bull. JAG, Jan. 1944, p. 10, and Dig. Ops. JAG 1912-1940, sec. 428(5)). The maximum punishment imposable for such a violation is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years (MCM, 1928, par. 104c, p. 100).

6. The finding of guilty of Specification 3 of Charge II is based solely upon a photostatic copy of an affidavit executed by accused on 28 November 1942, which contains false statements. This affidavit is connected neither in the Specification nor by the proof with any claim, court proceeding or transaction of any kind whatsoever; nor is there any allegation or proof of any facts which authorized the summary court officer, whose signature appears on the affidavit, to administer an oath to the accused in connection with its execution, inasmuch as it is neither alleged nor proved that the oath was administered for the purpose of the administration of military justice or for other purposes of military administration. As far as the record is concerned, therefore, there was an absolute absence of authority on the part of the Summary Court Officer to administer the oath on 28 November 1942 (A.W. 114, prior to amendment by Public Law 800, 77th Congress, 14 December 1942). It is apparent that the proof does not establish the offense of perjury, statutory perjury or false swearing. The Board is of the opinion, however, that a false declaration by a person subject to military law that he is not lawfully married to a designated individual, made in the form of an affidavit before a Summary Court Officer, with knowledge by the affiant of the falsity of his statement, is an act which brings discredit upon the military service and as such is punishable under Article of War 96. The punishment to be imposed should be governed by the most closely related offense, that of making a false official report or statement, for which the maximum confinement in the case of a soldier, other than a noncommissioned officer, is one month (CM 160143, Smith; MCM 1928, par. 104c, page 100).

7. In the action taken by the reviewing authority the United States Reformatory, designated as the place of confinement, is inadvertently described as being located in El Reno, California, instead of El Reno, Oklahoma.

8. The charge sheet shows that accused is 20½ years of age, had no prior service, and was inducted on 12 December 1941, at Fort Custer, Michigan.

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of all Charges and Specifications, and, since the findings as to Charge I and its Specification, and Specifications 1 and 2 of Charge II relate to what are merely different aspects of one act, legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for five (5) years and one (1) month. Confinement in a penitentiary is authorized by Article of War 42 for the offense of knowingly making false or fraudulent statements in order to obtain approval and allowance of a claim against the United States, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Title 18, Section 80, United States Code.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 SEP 1944 - To the Secretary of War.

1. In the case of Private Edgar Wallace (36164384), 92nd Quartermaster Company, Fort Huachuca, Arizona, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications, and, since the findings as to Charge I and its Specification, and Specifications 1 and 2 of Charge II relate to what are merely different aspects of one act, legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for five (5) years and one (1) month.

2. I concur in the holding of the Board of Review and for the reasons stated therein recommend that so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years and one month be vacated, and that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement.

3. This case is submitted for the action of the Secretary of War in order to avoid the delay which would be involved in transmitting the approved holding overseas for the action of the reviewing authority.

4. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made should such action meet with your approval.

Myron C. Cramer

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

2 Incls.
Incl. 1 - Record of trial
w/op. Bd. of Rev.
Incl.2- Form of action.

(Findings approved but sentence vacated in part in accordance with recommendation of The Judge Advocate General, by order of the Secretary of War. G.C.M.O. 513, 26 Sep 1944)

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

SPJGN
CM 261351

11 SEP 1944

UNITED STATES	)	SIXTH AIR FORCE
v.	)	Trial by G.C.M., convened at Albrook Field, Canal Zone, 10-11 July 1944. Dismissal, total forfeitures and confinement for fifteen (15) years.
First Lieutenant WILLIAM M. KOOB (0-664322), Air Corps.	)	

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

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

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

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

Specification: In that First Lieutenant William M. Koob, Air Corps, 29th Bombardment Squadron (Heavy) did, at Howard Field, Fort Kobbe, Canal Zone, on or about 13 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Mary Jane Nickeson.

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

Specification: In that First Lieutenant William M. Koob, Air Corps, 29th Bombardment Squadron (Heavy) did, at Howard Field, Fort Kobbe, Canal Zone, on or about 13 June 1944, with intent to commit a felony, viz, rape, commit an assault upon Mary Jane Nickeson, by willfully and feloniously laying his hands upon, grabbing, dragging, gagging, strangling, pinioning and fondling her, the said Mary Jane Nickeson.

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 at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved only so much of the sentence as provides for dismissal from the service, total forfeitures and confinement at hard labor for 15 years and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that at about 10:00 o'clock on the night of 12 June 1944 the accused telephoned the quarters of Misses Louise G. Badgis, Elizabeth V. Vallor, and Mary Jane Nickeson, hereinafter called the prosecutrix, located at Howard Field, Canal Zone, and invited them to have a drink (R. 9, 43, 44, 80, 81). The accused called for them about 30 minutes later when he appeared to be sober and was introduced to the prosecutrix (R. 10, 11, 83, 85, 123). Miss Vallor decided to remain at her quarters and the other two girls accompanied the accused in a jeep to the quarters of Lieutenant Colonel Harvey Hogan (R. 12, 85). Here the accused had two drinks and performed some parlor tricks while the prosecutrix and Miss Badgis were having only one drink (R. 14, 85, 87, 88). The prosecutrix desiring to go home, left with the accused in the jeep about midnight (R. 15, 89).

Upon leaving in the jeep, the accused placed his arm around the prosecutrix whereupon she objected and requested that she be taken home, but after some conversation they decided to drive by the accused's quarters without stopping after which the accused agreed to take her home (R. 90, 91). The accused's quarters were occupied and they drove on with the accused giving a scenic description of the post as they drove along while the prosecutrix continued to protest that they were driving away from her quarters and to reiterate her request that she be taken home (R. 92, 93). After driving past the guardhouse and a bus stop, the accused turned off the road, parked the jeep and turned off the motor and lights (R. 94, 95, Ex. A). The accused then attempted to kiss the prosecutrix and in doing so forced her head under the steering wheel and at the same time placed his hand upon her genitals under her dress, telling her to take her pants off (R. 96, 97). She refused and he pulled her pubic hair until the tears came to her eyes (R. 97). When she threatened to scream, he throttled her and she bit his finger, whereupon he bit her forehead and choked her with both hands (R. 97, 122). She promised to remove her pants if he let her out of the jeep. Upon alighting, however, she fled toward the highway screaming but the accused overtook her, grabbed her hair and threw her to the ground where she cut her lip as he was preventing her outcrys (R. 98, 115,117, 121). With her lip bleeding and her skirt ripped at the waist, he induced her to return to the jeep upon his promise to take her home, but instead he commenced his actions all over and she, upon observing the lights of an apparently approaching car, screamed and jumped out again with the accused again overtaking her, throwing her to the ground and placing his fingers in her mouth to prevent her screams until the car had gone (R. 99, 100, 115). The accused then remarked "Jesus Christ, you aren't worth the God-damned trouble!", pulled her into the jeep, still holding her arms and mouth and again promised to take her home (R. 100, 101, 115).

Returning toward the post, the accused at the bus stop turned upon a side road and the prosecutrix jumped from the jeep while it was still in motion (R. 101, 117). He caught her dress, and she was dragged along the road for a short distance before she broke his grasp and ran toward the highway, holding her clothes about her and again screaming (R. 101, 102, 113, 114, 117, 119). Again she was caught by the accused who throttled her and carried her back to the jeep, threatening her with

death if she repeated that performance. This was at about 12:30 a.m. and, after placing her in the jeep, the accused turned and, as though he were talking to someone, said that it was all right (R. 102, 103). The prosecutrix at this time observed something "white" which she took to be a shirt and again screamed, whereupon the accused again throttled her and threatened to kill her (R. 103, 104). The prosecutrix' shoulders, arm and leg were hurting and she again requested that he take her home, but instead he unbuttoned his trousers and told her to take off her pants (R. 103). Re-entering the jeep he requested her to shift the gears and drove further down the road, away from the post, before parking again near a white building (R. 105, 106). At this point the prosecutrix told him that he could have "it" if he would take her home and that she had things there to take care of both of them, which statements she asserted were solely for the purpose of inducing him to take her home (R. 105, 119, 122). Again he requested her to remove her pants and again she refused (R. 107). He moved the right hand front seat forward, placed himself in the back of the jeep and again unbuttoned his trousers (R. 107). He placed her upon the floor of the jeep in a "catercornered" position and, while lying almost on top of her, he started to tear off her pants notwithstanding the pain in her shoulders, arm and leg and the bites of numerous mosquitoes (R. 107, 108, 115, 119). He placed his fingers in her vagina and "played" with her (R. 108). Her strength was exhausted and for that reason and her fear of dire injury if she fought him off again, she ceased her resistance and at his request inserted his penis in her vagina and he thereupon had intercourse with her (R. 109, 212).

The act completed, the accused drove back to her quarters, remarking that he had been a fool, and upon parking in front of her quarters he asked her to talk with him for a few minutes and to kiss him goodnight which she did in order to prevent a recurrence of his actions (R. 111, 120). It was about 1:00 a.m. when she, holding her skirt around her, entered her residence, locked the door, ran upstairs and reported the episode to her roommate, Miss Vallor (R. 45, 58, 112).

According to the latter, the prosecutrix had scratches and bruises on her right arm and leg, her forehead had red marks, her lip was bleeding and badly swollen, her face dirty and her hair disheveled, she was in pain, her clothes were torn, and she asked that a physician be called (R. 46, 47, 51, 52, 53, 56, 60, 61, 62, 72, 76). The physician arrived about 1:30 a.m. and found the prosecutrix in a distraught condition, evidencing fear of the accused's return and of the possibility of her pregnancy (R. 62, 67, 69). Physical examination corroborated her condition as outlined above and that she had recently been penetrated (R. 62-64). A guard was then placed at her quarters (R. 69-70).

Other witnesses testified that about 12:30 a.m. two screams were heard emanating from the vicinity where the jeep had first been parked where the vehicle was also observed (R. 20-23, 32-42). Likewise, at such time and place a passing sailor had heard a woman's pleading voice, more or less mumbling, begging that she be allowed to leave the vehicle (R. 23-24).

4. The evidence for the defense shows that, according to the testimony of several officers, the accused was an excellent flight navigator, who would be difficult to replace, and that his reputation for clean, honest and law-abiding living was excellent (R. 127-128, 133-140). According to other witnesses, the prosecutrix' reputation for chastity was bad as she was "more or less a pushover" and two officers testified about intimate relations with her on the "first date". (R. 129, 144, 205). The Corporal of the Guard, who had been stationed at the guardhouse near which the jeep had parked, had heard no screams or anything unusual (R. 126).

The accused, after explanation of his rights as a witness, elected to testify. He related his prior service and substantiated the prosecutrix' testimony of what took place until the jeep was first parked near the guardhouse (R. 147-158, Ex. A). After parking, he placed his arm around her, kissed her and placed one hand over her genitals outside her dress (R. 158, 192). He was prevented from kissing her again as she turned her head and he then placed one hand upon her genitals under her skirt and continued rubbing (R. 158, 180, 192). She asked "Do you have a rubber?" and it appeared that he would be able to have intercourse with her, and he asked her to remove her pants (R. 158, 193). He looked in his wallet for a rubber but found none, so he again placed his hand upon her genitals without any protest from her, but she then said "You don't have one, do you?" (R. 159). Receiving no reply, she asked to go home and pushed his hand away, but he caught her pubic hair (R. 159, 180). He again requested her to remove her pants but she said that she couldn't do "it" in the jeep (R. 159, 160, 181). Dismounting from the jeep, she without screaming suddenly ran toward the highway, but he overtook her and inadvertently caught her by the hair as she slipped and fell when she didn't scream but loudly said "Oh" (R. 160, 181, 182, 201). He was greatly surprised at her "pulling such a silly trick" of trying to run away and led her back to the jeep, protesting again her desire to go home (R. 161, 182, 183). They drove off in the jeep, and he noticed that she had her head outside as if she wished to vomit so he swung sharply to the left upon another side road so that she could do so without undue embarrassment (R. 162, 183). She appeared to be thrown from the jeep and fell to the pavement with her dress caught both by him and a bracket on the car (R. 163, 164, 184). He stopped the car as quickly as possible and rushed to her assistance because he feared that she was seriously hurt, but she again ran from him and he had to run "as fast as I could" to catch her (R. 164, 165, 185, 201). He caught her by the arm and she fell to the ground screaming (R. 165, 185). Thinking she was hysterical from the fall, he placed his hand over her mouth, knelt beside her and talked to her during which conversation without addressing anyone he looked over his shoulder and said "That's all right; there's nothing wrong over here." (R. 165, 166, 167, 185, 186). When she screamed again, he bodily carried her to the jeep and that at such time she was not upset in the least, but was merely complaining about the scratches and bruises she had received in the fall from the jeep (R. 167, 194, 197). Leaving this parking place, he asked her to shift the gears in order to give her something to do and was proceeding to her quarters when she said that if he had taken her home, she had things there to take care of both of them and "Hell! A girl in this area has to know how to take care of

herself." (R. 168, 169, 194, 201). From such remarks, he assumed that intercourse was "available", and so he drove off the road and again parked (R. 169). He asked her to get into the back of the jeep and she without force willingly complied (R. 170, 188). He then unbuttoned his trousers, lay beside her, and was trying to remove her pants when she said "Hell! You're tearing them--I'll get them off". She then pulled her pants down and he manually manipulated her vagina preparatory to intercourse (R. 170, 171, 188, 189, 190). At this time, he did not have an erection and so she manipulated his penis until it became erect whereupon at his request that she insert it into her vagina and his assurance that he would withdraw prior to ejaculation, she slid herself down into position, inserted his penis into her vagina, and they engaged in a very short act of normal intercourse, during which he had an emission before withdrawing as agreed (R. 172, 173, 198). She was angry because he had not withdrawn prior to his emission and he was worried about whether she was injured in the fall from the jeep and disgusted with himself (R. 173, 174, 175). Arriving at her quarters, they talked for several minutes; she kissed him good night and she, uninjured and undisheveled, unhurriedly entered her home (R. 175-179). The only time he had mentioned the word "kill" was when she fell from the jeep and he had then said "if that happens again, you are liable to kill yourself" (R. 179). The actual intercourse had been without a particle of resistance on her part, but with her utmost cooperation (R. 202, 203). He is about 6 feet in height and weighs about 175 pounds (R. 193).

5. The prosecutrix was recalled as a witness for the court. She gave her weight as 129 pounds and her height as 5 feet 3½ inches (R. 206). The accused had his hands upon her when she got into the back of the jeep, and his penis was not erect when she inserted it into her vagina, but became so afterwards. While admitting the accused's assurance that he would withdraw prior to ejaculation, she at no time consented to the act and ceased her resistance and obeyed his directions at last only because of her fear of him as "he had no intention of letting me go" (R. 207-212).

6. The Specification, Charge I, alleges that the accused at a designated time and place "forcibly and feloniously, against her will", had carnal knowledge of Mary Jane Nickeson. The offense alleged is that of rape which is violative of Article of War 92 and is defined as follows:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge whether emission occurs or not.
>
> * * *
>
> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact, consent" (M.C.M., 1928, par. 149b).

The foregoing recitation of the evidence inescapably impels the conclusion that the accused raped the prosecutrix as alleged. Over her repeated entreaties to desist, over her repeated pleas that he take her home, over her fierce resistance, sustained to the point of futility, and over her repeated attempts to evade his advances by flight, the accused persisted in his design, which he ultimately accomplished. His manifested and admitted acts evidence a tenacity of purpose wholly inconsistent with any other purpose than that of sexual gratification on the occasion in any event. The testimony of the two principals is remarkably in agreement upon almost all of the events of the evening with the main divergence occurring upon the question of prosecutrix' consent immediately before the ultimate consummation of the admitted act of intercourse. Although the prosecutrix was required to offer sustained resistance, the evidence is persuasively and abundantly to the effect that she did so. The following authorities are peculiarly applicable:

"The victim of the rape did not expressly testify that she resisted accused to the extent of her ability, that her resistance was overcome by force or prevented by fear, or that she did not consent to the intercourse. The circumstances to which she testified, however, fully justify the inference that she did not in fact consent, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. Such being the facts, rape was committed" (C.M. 227809 (1942) Bull. JAG, Vol. 1, p. 363, Sec.450,(9)).

"Although reluctant consent negatives the offense of rape, there is no such consent where the victim ceases resistance under fear of death or other great harm" (C.M. 236612, (1943) 23 B.R. 67).

"The extent and character of her resistance required of a woman to establish her lack of consent depend upon the circumstances and relative strength of the parties." (C.M. 236801 (1943) Id., p. 129).

The court saw and heard the witnesses. The court is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. The testimony of the prosecutrix, who the court elected to believe, under the afore-cited authorities, shows that she resisted to the extent required by law and that no actual consent was

ever given by her to the act of intercourse. The decision of the court on such question upon all the evidence reflected by the record cannot lawfully be disturbed. The evidence for the prosecution, therefore, beyond a reasonable doubt, establishes the accused's guilt of the offense as alleged and fully warrants the court's findings of guilty of Charge I and its Specification.

7. The Specification, Charge II, alleges that the accused on the same occasion with intent to commit a felony, viz, rape, committed an assault upon Mary Jack Nickeson, "by willfully and feloniously laying his hands upon, grasping, dragging, gagging, strangling, pinioning and fondling her". The offense alleged is that of assault with intent to commit rape which is violative of Article of War 93 and "in which the overt act amounts to an assault upon the woman intended to be ravished." (M.C.M., 1928, par. 149b). The intent of the man to overcome any resistance by force, actual or constructive, and penetrate the woman's person, must exist and concur with the assault (Id.).

The evidence conclusively shows that the accused firmly intended to accomplish intercourse with the prosecutrix and that he grimly adhered to his resolution. Rebuffs, entreaties, outcrys, and attempted flights did not deter him, but seem rather to have strengthened his purpose. The prosecutrix' testimony strongly and the accused's own testimony in effect convict him of laying his hands upon, grasping, dragging, gagging, strangling, pinioning, and fondling the prosecutrix with the one and only intent of ultimately accomplishing the sexual act at any event. These acts preceded and were disassociated from the ultimate rape because there was a definite break or interlude between them during which the accused appeared to have relented and to have been engaged in driving his victim home. The record, consequently, reflects the commission of two separate and distinct offenses for which, however, punishment was assessed only for the graver. The evidence, therefore, beyond a reasonable doubt warrants the court's findings of guilty of Charge II and its Specification.

8. The accused is about 25 years of age. The War Department records show that he has had enlisted service from 17 December 1941 until 5 September 1942, when he was commissioned a second lieutenant upon completion of Officers' Candidate School, that he has since been promoted to first lieutenand, and that he has had active duty as an officer since 5 September 1942. On 26 September 1943, he was awarded the Air Medal for meritorious achievement while participating in long range patrol flights over the Pacific and Caribbean approaches to the Panama Canal as a navigator of an aircraft. He graduated from high school at Ludington, Michigan, and attended Marquette and Illinois Universities for one year each. From 1938 to 1940 he was employed by the Illinois Central Railroad Company as a "stock-checker" and in 1941 by the Wisconsin Steel Works as a "by products" man at undisclosed salaries.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence and to warrant confirmation thereof.

Abner E. Lipscomb, Judge Advocate.

Lekarus S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 261351

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 First Lieutenant William M. Koob (0-664322), 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 and ordered executed and that an 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 to the President for his action and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence approved, but confinement reduced to ten years. G.C.M.O. 671, 22 Dec 1944)

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

(195)

SPJGQ
CM 261357

18 SEP 1944

UNITED STATES v. Second Lieutenant HOWARD E. STITTSWORTH (0-766760), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Marana, Arizona, 13 July 1944. Dismissal, total forfeitures and confinement for thirty (30) years. Penitentiary.

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

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

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

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

Specification: In that Second Lieutenant Howard E. Stittsworth, A.C., 4th Training Group, 3028th Army Air Forces Base Unit, did, near Wittman, Arizona, on or about 22June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Earl W. Nepple, a human being, by striking him with an AT-6 Army airplane piloted by the said Second Lieutenant Howard E. Stittsworth.

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

Specification: In that 2nd Lt. Howard E. Stittsworth, AC, 4th Training Group, 3028th AAF Base Unit, Luke Field, Arizona, did, near Wittman, Arizona, on or about 22 June 1944, wrongfully pilot an AT-6 Army airplane at an altitude of about 6 feet above the ground in violation of Par. 16, AAF Regulation 60-16, as a result of which said airplane struck an automobile being operated by one Earl W. Nepple, causing the death of the said Earl W. Nepple.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural

life. The reviewing authority approved the sentence, remitted the period of confinement in excess of thirty years, 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 48.

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

Army Air Forces Regulation No. 60-16, Par. 16 prohibits military personnel from flying military planes at an altitude less than 500 feet above the ground except during take-off and landing (R. 11, 108, Pros. Ex. 11).

Training Regulations 06-3 of Luke Field, Arizona, required that all auxiliary fields scheduled for use during night flying be inspected before darkness by an officer landing at the field to ascertain, by close visual inspection, that all runways and approaches are clear of obstacles or hazards to night flying operations (R. 11, Pros. Ex. 1).

On 22 June 1944 accused was in the military service of the United States, being a second lieutenant, Air Corps, and a member and an instructor of the 14th Squadron, Group 4, stationed at Luke Field, Arizona (R. 16-17).

That evening about 7:30 p.m. accused, together with five other officers, was assigned the mission of inspecting the three auxiliary fields to Luke Field prior to night flying. These fields will be designated as Field 1, Field 2 and Field 3. The six officers were assigned three AT-6 planes (single motored training planes) which hold two persons, each in separate cockpits, and have a cruising speed of 150 miles per hour. The accused paired off with 2nd Lt. D. C. Fundingsland. He occupied the front cockpit as pilot of plane X-231. Field 1 is five miles directly north of Luke Field; Field 2 lies about 5 miles northwest of Field 1 and adjacent to a railroad and a parallelling highway known as US 89 that runs in a northwest-southeast direction; Field 3 is about 6 miles west and one mile north of Field 2 (R. 19, Pros. Ex. 2) and in order to reach it from Field 2 one must cross US 89 (R. 20). Field 2 consists of three runways laid out in the form of a triangle and one runway perpendicular to the base of the triangle. The runway forming the base is parallel to US 89 (Pros. Ex. 3). It has been the custom, although contrary to the regulation, for the officers in making inspections to "drag" the runways (i.e., fly low over them), instead of landing and taxiing along them (R. 21).

The three planes containing the six officers took off from Luke Field at about 8:00 p.m. and a three ship element in close formation was formed with Lt. J. R. Swanson piloting the lead plane. Lt. Swanson noticed that the wheels of the plane flown by the accused had not been fully retracted and were not in their housings. He called accused's attention to this by hand signals. Accused then throttled back, dropped behind and below to check his wheels. He lowered and raised them twice but they would not fully retract. He then rejoined

the formation. Lieutenant Swanson through his microphone told accused to return to Luke Field because of his wheels. Whether accused could hear the order he (Swanson) could not say (R. 37). Almost simultaneously accused's plane veered toward Lieutenant Swanson's and Lieutenant Swanson broke the formation and turned right to avoid accused's plane. This occurred over Field 1 and at the same time the third plane peeled off on Lieutenant Swanson's right wing and landed at Field 1. Accused's plane pulled off to the left and flew low over Field 2 and across one of the runways. Lieutenant Swanson did not see accused's plane stop at Field 2 but saw it continue on in the direction of U.S. 89, in a course which if continued would have taken it across US 89 (R. 40). He lost sight of it then because he himself made a climbing turn to the right and crossed US 89. As he did so he observed an automobile drive off the highway on to the desert at a 45 degree angle in a southerly direction. He himself proceeded to Field 3 and landed. Before the initial take off of the three planes the pilots had not arranged among themselves who among them should inspect Field 1 or Field 2 or Field 3 (R. 24-31). US 89 is the main Arizona north-south artery. It is also used in driving east and west between Los Angeles and El Paso (R. 33). When Lieutenant Swanson returned to Luke Field 8:30 he observed the left wing of accused's plane was damaged. He told accused about seeing the automobile leave the highway but accused said he had not struck an automobile (R. 32).

Accused's plane was equipped with a switch which if turned and if in proper condition should automatically raise and lower its landing gear. If this failed to function there was a hand operated hydraulic pump in the left front of the cockpit which when manipulated should retract the wheels. A pilot cannot see his own landing gear so there was an indicator in the cockpit that showed their position. One looking at this indicator cannot at the same time see outside of the plane (R. 38). If a pilot leaned forward to feel the indicator, which would be necessary in order to reach it, the shifting of the weight would cause the plane to lose "a little" altitude but not enough to register on the altimeter (R. 39).

Corporal H. L. Waugh was at Field 2 shortly after 8:00 p.m., 22 June 1944 to place hoods over the lights. He had parked a truck on the field and observed a trainer plane with two men in it cross the field, in front of and over the truck - about 12 or 15 feet from it - and continue on over the desert veering to the left. It was still daylight. Thinking that the reason for the plane dipping so close was a signal not to open the field that night he telephoned the sergeant who told him to proceed with putting the hoods on the lights (R. 44-45).

Second Lieutenant D. C. Fundingsland flew in the same plane piloted by accused. He was in the rear cockpit (R. 47). The plane took off at about 8:05 p.m. and flew low over the northeast - southwest runway of Field 2. In doing so it passed within 10 or 25 feet of a truck parked on the eastern part of that runway (R. 49). The plane then circled in a climbing turn and came back along the north-south runway fairly close to the ground but did not land. It then made a

right hand turn off the end of the runway and headed in the general direction of Field 3 at an altitude of about 10 feet and followed a northwesterly direction "down the highway". As they left Field 2 Lieutenant Fundingsland spoke over the interphone to the effect that he "did not like" the manner in which accused was flying. He had no way of knowing whether accused heard him or not. The plane continued along the highway for approximately one minute (R. 53) until its left wing struck an object. It then made a large circle to the south and returned to Luke Field. He observed that the end of the left wing was missing and tried to find out from accused over the phone what it was that he had hit. Accused shook his head indicating that either he could not hear or that he did not know. They landed about 8:40 p.m. (R. 51-52). Lieutenant Fundingsland was aware of the difficulty accused was having with the landing gear. He "gathered" this from the hand signals of one of the occupants of the other planes and not by any radio communication. He observed accused's left shoulder "bobbing up and down" indicating that he was manipulating the hydraulic hand pump (R. 53-54). He did not see any automobiles on the highway nor did he see the object struck by the wing of the plane. When he again asked accused after they landed what it was that he had struck, accused said he did not know (R. 55). The plane was travelling at the rate of approximately 150 miles per hour at the time it flew along US 89 (R. 56). Accused was working on the hand pump off and on from the time he was informed about his wheels failing to retract until the time of the accident (R. 56-57). Lieutenant Fundingsland's visibility outside of the plane was limited because of the instrument panel, superstructure of the plane and the pilot sitting in front. The pilot has a better visibility except that the area under the nose of the plane in front is limited. He could not tell how far ahead the visibility is obstructed (R. 57).

Mr. Daniel Stewart was driving southeast by US 89 about 8:20 p.m., 22 June 1944 and observed a plane about 2000 feet ahead within a few feet of the road coming toward him. He pulled his car over to the edge of the road and "ducked" down. In a few seconds the plane passed the car. He didn't see the plane pass the car because he had ducked down but it seemed "ready to clip" his car. As it came along the highway the plane was moving up and down between one to six feet above the road with its wheels practically in the middle of the road. There was another automobile about 200 or 300 feet in back of Stewart's car. He turned around to see what the plane was going to do and saw the other car go off the road entirely and the plane rise "straight up". He did not see the plane strike the other automobile (R. 59). Mr. Stewart therefore continued on his way. He could not tell whether the pilot of the plane saw him or not, nor whether the wheels of the plane were entirely or partially down (R. 63).

Mr. S. W. King was a passenger seated in the rear seat of a Chrysler Sedan driven by Mr. Earl W. Nepple. Mrs. Nepple was seated

in the front seat on the right side of the driver. The car was proceeding southeasterly along US 89, at a speed of about 35 miles per hour. He observed a plane coming in the opposite direction on the highway and said, "There is a plane". Mr. Nepple said, "My God", and swerved the car to the right. In a matter of a few seconds from the time he first saw the plane the plane struck the car. The car continued on into the desert away from the road until Mrs. Nepple put on the brakes. As a result of the collision Mr. Nepple was decapitated (R. 64-67). Mr. King saw the wheels of the plane but could not say whether they were all the way down or partially so (R. 68); nor was he able to say how far ahead of the car the plane was when he first saw it (R. 69). He did not observe any variation in the direction or in the altitude of the plane. He never saw it after the collision (R. 72). Mrs. Nepple corroborated Mr. King in that, at the time and place indicated, she saw a plane come "up the road right on the highway with the wheels down" and strike the automobile driven by her husband who turned the car to the right. His foot "froze" on the accelerator and she had to stop the car out in the desert. Her husband was killed in the accident (R. 75).

Dr. M. E. Fulk on the evening of 22 June 1944 examined the body of Mr. Nepple and pronounced him dead. Death was caused by a blow or multiple blows (R. 77).

Deputy Sheriff W. O. Ruth arrived at the scene of the accident about 9:40 p.m. that evening. He examined the Nepple car and found Mr. Nepple's decapitated body in it and several pieces of the tip of a wing of an airplane. Twenty-one photographs of the car, its contents, the plane and the scene of the accident were admitted in evidence without objection (Pros. Ex. 4). The photographs of the automobile show that the tip of the wing of the plane apparently struck the windshield of the automobile in front of the driver's side on the left and, after passing through it and Mr. Nepple's head, was then sheared off by the upright posts of the car supporting its roof. There was included in the exhibit a photograph of the rear window of the car taken from the rear exterior. This was shown the witness who called the attention of the court to the "white space on the glass" as "brain splatters". The photograph served no other purpose and was examined by the court (R. 82-83). The photographs of the scene of the accident show a flat, straight, hard-surfaced (oiled gravel) road running through the desert. Paralleling it on the south side was a wire fence 100 feet away and a line of telegraph poles 350 yards away. On the north it was parallelled by a railroad and a line of telegraph poles about 75 yards away (R. 85, 95). The width of the paved portion of the road was 28 feet (R. 85). On the surface of the north side of the roadway, estimated to be about 60 to 85 feet east of the estimated point of impact, there were eight marks indicating that the propeller of the plane had struck the highway (R. 86, 94). The tip of the left wing, to the extent of approximately three feet, was ripped off and the blades of the propeller were bent at their tips to the extent of 5/8 to 3/4 of an inch (R. 90). The propeller marks on the road surface and the damage to the plane are shown in the photographs.

First Lieutenant S. W. Stark, Accident Investigating Officer at Luke Field, examined the damaged plane that night and asked accused what he had struck. Accused said he did not know but admitted that he had been "buzzing" or flying low (R. 92) and that it occurred somewhere between the auxiliary fields in the vicinity of US 89 (R. 93). Lieutenant Stark visited the scene of the accident later and found it to be about four miles from Field 2 and 3½ miles from Field 3 (R. 93-94). The blade marks on the road indicated that the plane was descending when its blades hit and then raised again (R. 94). The white line indicating the center of the road was to the left of the marks (R. 97). In his 18 to 20 years of experience as a flyer he had never known of a pilot deliberately and purposely flying a plane so that the propellers would strike the ground (R. 98). The pieces of plane found in the automobile came from the plane piloted by the accused (R. 101).

After accused had returned to Luke Field he made an accident report to the effect that "Left wing tip, outer wing and aileron damaged checking auxiliary field". When his attention was directed to the damaged propeller he said to the sergeant who informed him of the damage to put it down on the report. The sergeant added "Prop tips also damaged" (Pros. Ex. 10, R. 103, 104). Between 8:30 and 9:00 o'clock that evening accused sought out and reported to Lieutenant James K. Beckett that he had had an accident in which he had damaged a wing tip and aileron; that he had hit something while passing from Field 2 to Field 3 but did not know what it was that he had hit; that he was pulling up at the time and his left wing was down and struck something (R. 107). He also stated that Lieutenant Swanson had said he thought he saw an automobile go off the road but he denied that he "buzzed" any automobile, or that he hit any automobile, and claimed that he did not see any automobile (R. 108).

4. The members of the court were permitted to view a plane of the exact type involved in the above described accident set up in a level flying position and to enter the plane to observe visibility from the front cockpit (R. 109). Defense counsel directed the court's attention to the fact that it was not admitted that the plane was in the same position as the plane operated by the accused at the time of the alleged accident (R. 110). Lieutenant Stark, who had arranged for the exhibition of the plane was recalled and explained the position of the plane and varying visibility depending upon speed and banking of the plane (R. 114).

It was shown that the weather was clear and the wind calm at the time of the occurrence (Pros. Ex. 12).

5. For the defense Mrs. Dorothy West testified that about 10:30 p.m., 22 June 1944, accused, a stranger to her, was given a lift in her car. He had not been in the car long until he said to the girl who was seated next to him in the rear:

"'If you feel my knees trembling don't be concerned for I just had an accident' * * *. His plane hit a telephone pole or a cactus and damaged the wing of his plane * * * that it took off about two feet of the end of the wing * * * he seemed to be very regretful about the damage to the plane. * * * 'I will be court-martialed I am sure and my penalty will probably start at one hundred dollars a month for eighteen months'."

The accused having been advised of his rights elected to testify under oath in his own behalf (R. 122). He testified that he was reared in Kansas, was 21 years of age and married. He enlisted in the Army in January, 1941 and rose to the rank of staff sergeant. He became an aviation cadet in April 1943 and after completing his training as such was commissioned second lieutenant, 8 February 1944. He then attended Central Instructor's School at Randolph Field and on 23 March 1944 was assigned to Luke Field as an instructor. His military record was clear of any charges, punishment or admonitions. On 22 June he was assigned the mission to inspect the three auxiliary fields. He took off about 8:00 p.m. and joined formation with the other two planes. On the way to Field 1 he learned, by motions of the others, that his wheels had not retracted so he left formation and tried to get the wheels up by the hand pump but they would not come all of the way up. He rejoined formation and when the other ships peeled off he peeled off to Field 2. He flew down the runway there from north to south and made a right turn in the general direction of Field 3. He did not land because he saw another plane behind and to the right that looked as if it was going to land at Field 2 so he intended to go on to Field 3 which was five or six miles away. He was flying at approximately 150 miles per hour and because of the short distance decided to stay down at the same altitude which he judged was 25 to 30 feet. He was still trying to get his wheels up by means of the hand pump. On his way from the one field to the other in the vicinity of US 89 he struck something which only slightly jarred the plane but did not cause it to swerve. He automatically pulled up to gain altitude. He then noticed that part of his left wing was gone so he flew back to Luke Field (R. 124-125, 128, 140). During the flight he received no messages of any kind on the radio or phone (R. 126). In fact, the radio was "out of commission" (R. 133) so far as receiving was concerned (R. 134). He did not know what it was that he had hit so he entered the damage in the accident report without further explanation than "checking auxiliary field" (R. 126). He did not know the deceased Earl W. Nepple, nor any of his family, and had no intention of injuring him or anyone else (R. 126).

On cross examination he stated that he had been stationed at Luke Field, when an enlisted man, for a year and a half as a mechanic (R. 133) but was not familiar with US 89 nor with its traffic and had never been at Field 2 or Field 3 as an enlisted man. After he had

become a pilot he had passed over them. At the time of the accident he did not know that he was or had been travelling over US 89 (R. 129). His eyesight was good (R. 130). He was feeling well and in full possession of his faculties (R. 145). The sun had not blinded him but, at the time, he was flying in the vicinity of US 89 at an altitude which he thought was 50 feet, he was working the hand pump in an effort to get his landing gear up and his eyes and attention were focused on the indicator in the cockpit of the plane 80 per cent of the time (R. 130, 133, 141, 145). At the time of the impact he was looking at the landing gear indicator (R. 146). He admitted that he was "buzzing" which he understood to mean flying below 500 feet (R. 131). His plane was travelling at a speed of 250 feet per second (R. 131). His experience in flying amounted to approximately 400 hours (R. 135) and about 1000 landings (R. 136).

6. With reference to Charge II and its Specification in which it is averred that the accused did at the time and place indicated wrongfully violate Army Air Forces Regulations by piloting an Army airplane at an altitude less than 500 feet, the evidence for the prosecution and the admissions of the accused clearly establish that the accused did pilot an Army plane at the time and place averred at such a low altitude as to strike an automobile on the ground. Such an altitude was well under the prescribed 500 feet and it necessarily follows that the accused did violate the regulation and in doing so did also violate the 96th Article of War in that such conduct on the accused's part was prejudicial to good order and military discipline. The record is therefore legally sufficient to support the findings of guilty of this Charge and its Specification.

With reference to Charge I and its Specification, which in substance charges the accused with the murder of Earl W. Nepple by airplane, it was clearly established that the accused did at the time and place averred therein kill, or cause the death of, Earl W. Nepple by striking him with the airplane which he, the accused, was piloting. The issue to be determined is whether the accused is legally guilty of murder and, if not, whether he is legally guilty of a lesser offense embraced within that of which he stands convicted.

The court has found accused guilty of the Specification which avers that the accused killed the deceased "with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation".

Murder is defined as "the unlawful killing of a human being with malice aforethought". "Unlawful" means without legal justification or excuse. (par. 148a, M.C.M. 1928, p. 162).

The accused's act of causing Nepple's death was certainly without legal justification or excuse, so the issue narrows down to the question whether this unlawful homicide was committed with malice aforethought. An element of the crime charged and one which the prosecution must prove beyond any reasonable doubt is that the killing was with malice aforethought (M.C.M. 1928, par. 148a, p. 164).

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

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: (1) 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); (2) knowledge that the act which caused 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; (3) intent to commit a felony." (par. 148a, p. 163-4, M.C.M. 1928) (Numerals supplied)

As to (1) the prosecution does not contend nor does the evidence show that the accused intended to cause the death of, or grievously harm the deceased or anyone else. It would be unreasonable to infer that the accused intentionally struck the automobile in which the deceased was riding, or that he did so with the intent to injure or kill any of its occupants. To deliberately run an airplane at a speed of 150 miles per hour into a standing or moving automobile would ordinarily be suicidal to the pilot of the plane and for that reason alone it would not be a fair or reasonable deduction from a collision of that nature to conclude that the pilot intended to strike the automobile. As to (3) the accused clearly was not at the time engaged in the commission of a felony. Therefore, in order to be sustained as murder, the case must fall within the remaining class (2) described as "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", etc. Such is the apparent contention of the prosecution - that the accused flew the plane along the highway at such an altitude and speed that he must necessarily have known that he would strike any automobile that might travel on the highway at that point and moment and injure its occupants and that such an act was so reckless that malice may be inferred from it toward any person riding in any automobile thus struck. Were such facts proven beyond a reasonable doubt? Do such facts constitute malice aforethought?

The point is a novel one as this is the first case of "murder by airplane" that can be found. Among the records of The Judge Advocate

General it is the first conviction for murder wherein death was caused by the operation of any vehicle.

The evidence presented by the prosecution and not contradicted by the accused is that the latter flew the plane at a speed of about 150 miles per hour along a highway for a distance estimated by one witness of 2000 feet and by another 2½ miles and so close to the surface that when he met two automobiles coming in the opposite direction his left wing (14 feet long) passed over the first one but struck the second one. The propeller of the plane touched the road surface after passing the first car and before striking the second showing that the plane dipped in between. The marks of the blades on the road surface showed that he was travelling in a straight path along the highway and on his right side of it.

The accused testified that he had trouble with the retraction of his landing gear and that while flying along the course of the highway between the two airfields at what he believed was an altitude of 20 or 30 feet his attention was diverted and his visibility obstructed by his attempts to raise the wheels by means of a hand pump. That the wheels were not fully retracted was corroborated by others. Neither the accused nor his companion, riding in the plane behind him, saw any automobile traffic on the highway.

Whether the accused's behavior on this occasion, resulting as it did in such disastrous consequences, constituted murder rests upon the application of the definition of malice aforethought, as above given, to the facts thus shown for every other element of murder is admittedly disclosed beyond any reasonable doubt.

At common law whether under a set of given facts the crime committed was murder or involuntary manslaughter depended upon the intent of the accused. One time-worn example used was that of the rider of a fractious horse who willfully rode him among a crowd of persons and death ensued to one in the crowd from the viciousness of the animal. It was held to be murder if the rider intended harm, but only manslaughter if he did not. Another old example was where one threw a stone or shot an arrow over a building or wall knowing that people were passing along the street on the other side. If he intended to hurt someone or anyone and homicide resulted he was guilty of murder, otherwise it was manslaughter (Wharton's Criminal Law Vol. I, Sec. 444 and 479). These tests are helpful in determining those cases which fall in class (1) above, because the test is the presence or absence of intent to kill or do bodily harm. The Manual has described another and different class of case under (2) which does not require specific intent to injure or kill, but requires only a knowledge on the part of the accused that the act which he was performing probably would cause death or grievous injury to someone.

If he knew that by flying a plane along U.S. 89 he probably would cause the death of or do grievous bodily harm to any person who might be properly using the highway, then his conviction of murder can be sustained as fitting the description of malice aforethought which we have designated as (2) above. We must bear in mind always that in our efforts to solve this problem this fact of knowledge on the part of the accused must be proved beyond any reasonable doubt, because the Manual of Court-Martial which provided the above description of malice aforethought also provided that malice aforethought is one of the elements of the crime of murder which must be proved beyond any reasonable doubt (M.C.M., par. 148a, page 164).

The evidence is convincing that the accused deliberately used U.S. Highway 89 as his path of flight from Field 2 to or toward Field 3 and that in doing so he maintained the very low altitude he had reached when he skimmed over Field 2. Whether he did so as an experiment or for the purpose of performing a daring feat or to demonstrate his skill as a flyer or to frighten motorists or with some other thought in mind lies in the realm of conjecture. Had he observed vehicular traffic upon the highway at a time when he was aware of flying at an altitude so low that collision with it was probable and had he then continued willfully on his course, a resultant homicide would be deemed to have been perpetrated with malice aforethought. But the accused testified that he observed no traffic upon the highway and that he thought that he was flying at an altitude of 20 to 30 feet from the ground. Likewise, his companion testified that he observed no traffic upon the highway. Moreover, if the accused did anticipate striking an automobile with his plane, he would necessarily have contemplated a disastrous collision in which not only occupants of the automobile might be killed but he and his companion as well, because any person of average mentality would believe that the natural and probable result of such a collision would be grievous injury, if not death, to any person involved therein. Under all of the circumstances, it seems highly doubtful, therefore, that the accused ever thought it probable that his plane would strike an automobile.

A search for a precedent fails to reveal any clear-cut case wherein an operator of a plane, boat, or even a motor car was charged with common law murder and the conviction was sustained. There are some few cases in which a verdict of murder under state statutes have been sustained against a drunken driver operating a motor vehicle and causing death (Maxon v. State, 21 AIR 1504; State v. Trott, 42 AIR 1114); but the vast majority of such cases, and other cases of operators of motor vehicles, airplanes and boats, rose to no higher grade of homicide than manslaughter. Automobiles: Story v. U.S. (16 Fed (2d) 342, 53 AIR 246); State v. Goeta (76 Atl 1000); Pippin v. State (97 So. 615). Boats: The Henry Clay (1 Parker's Crim. Reports 659; 2 Edmunds Select Cases 34N (N.Y.)). Airplanes: People v. Crossan (87 Cal. App. 5, 261 Pac. 531).

True it is that in the cases cited (except "The Henry Clay", supra), and in all of the other cases examined, the defendants were indicted for manslaughter only. The acts or conduct of the defendants were apparently just as reprehensible. This would indicate that the prosecuting authorities did not believe the facts would either warrant indictments for murder or sustain convictions thereunder. The same condition exists in military justice. All cases of record similar to the one under discussion were prosecuted as involuntary manslaughter; (CM 233196, Bell, 19 BR 365; CM 202359 Turner, 6 BR 87; CM 218240 Howard, 12 BR 17). In The Henry Clay, supra, the issue was squarely met. There the defendants were indicted for murder but the court ruled the evidence would only sustain manslaughter.

Even in those cases where the defendant adopted and used a dangerous method of frightening another or of playing practical jokes upon others, the convictions have been manslaughter. Thus in Letner v. State, 299 S.W. 1049 (defendant indicted for murder), and in State v. Hardie 47 Iowa 647, 29 Am. Rep. 496, the defendants fired weapons at others playfully and with the intention of frightening them but resulting in the deaths of the latter. The offenses were held to be manslaughter. For cases of practical jokes see note page 701 of Wharton's Criminal Law, Vol. I.

Murder is considered one of the most serious of crimes and has always been associated with the thought of an accused with a wicked and depraved heart and mind. No degrees of murder permitting lesser punishments are provided for in the Articles of War, such as Congress did provide for in the U.S. and the D.C. Codes (18 U.S.C. 452, 22 D.C.C. 2401). For that reason the description or definition of the term murder, and each of its elements, contained in the Manual should be strictly construed in favor of the one accused of murder, particularly, where the intent to kill or do bodily harm is lacking and the most strict proof should be required to establish guilt.

Applying the reasoning and the principles of these cases it seems more logical to hold that the actions of the accused in this case cannot be murder except by the stretch of judicial pronouncement to a point beyond which the courts have heretofore been reluctant to proceed.

However, irrespective of the weight of these decisions and reverting to the discussion of the element of malice aforethought as it is defined in the Manual for Courts-Martial as herein above set forth, the crime of murder has not been established. The possibility of killing or grievously injuring another was undoubtedly present under the circumstances surrounding the accused's tragic flight and this he must be held to have known. But we are not permitted to deal with a possibility but must find an established, known probability. It cannot be said that the evidence shows beyond any reasonable doubt that the accused knew or had reason to believe, that he would probably cause death or grievous injury to anyone by his acts under all the circumstances of the situation confronting him at the time of the homicide and the Board is, therefore, of the opinion that the record is not legally sufficient to support the findings of guilty of murder in violation of Article

of War 92.

It is, therefore, necessary to proceed with the further inquiry as to whether the accused is guilty of an offense less than, but included within, that with which he is charged.

Manslaughter is defined as unlawful homicide without malice aforethought and may be either voluntary or involuntary. Voluntary manslaughter is confined to those cases where the act causing the death is committed in the heat of sudden passion caused by provocation and therefore plays no part in the instant case. Involuntary manslaughter, however, is defined in M.C.M. 1928, par. 149a, p. 165 as "homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act".

> "In involuntary manslaughter in the commission of an unlawful act, the unlawful act must be evil in itself by reason of its inherent nature and not by an act which is wrong only because it is forbidden by a statute or orders. Thus the driving of an automobile in slight excess of a speed limit duly fixed, but not recklessly, is not the kind of unlawful act contemplated, but voluntarily engaging in an affray is such an act. To use an immoderate amount of force in suppressing a mutiny is an unlawful act, and if death is caused thereby the one using such force is guilty of manslaughter at least.
>
> "Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to assertain, that it would not be discharged; carelessly leaving poisons or dangerous drugs where they may endanger life."

Certainly it must be conceded that the acts of the accused were culpably negligent and that, therefore, without unnecessary discussion of the matter, the homicide committed was manslaughter within the meaning of the definition of that offense even though the acts of the accused in flying along a highway to an exceedingly low altitude was lawful. In the usual acceptation of the term it cannot be said that the accused's acts were "lawful" for it has been decided herein that he did violate the Army Air Forces safety regulations. The Manual for Courts-Martial, however, states that "the unlawful act must be evil in itself by reason of its inherent nature and not an act which is wrong only because it is forbidden by statute or orders". It is, therefore, necessary to determine whether the acts of the accused were "lawful" within the meaning to be attributed to that term in the principle laid down in the Manual.

The evidence shows that the deceased's automobile, at the time it came into collision with the plane operated by the accused, was proceeding in a lawful manner along US Highway 89. The highway is a public highway, maintained for motor and other vehicular traffic along its surface. The deceased was driving on his side of the highway. In driving thus upon a public highway he was obviously within his lawful rights. Was the accused within his lawful rights in flying his plane in such a manner as to come into collision with the automobile thus driven? Clearly not. A plane approaching in an opposite direction from an automobile lawfully moving along a highway has no more right to fly in the path of the automobile in such way as to collide with it than another motor vehicle approaching from the opposite direction has to move into the path of the automobile. In each case the unlawful character of the intrusion is obvious.

It follows, therefore, that the homicide in this case is involuntary manslaughter unintentionally caused in the commission of an unlawful act not amounting to a felony.

For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of murder as a violation of Article of War 92, but is legally sufficient to support the findings of guilty of the lesser included offense of involuntary manslaughter in violation of Article of War 93.

7. War Department records show the accused to be 21 years of age, born in Topeka, Kansas on 24 November 1922, a high school graduate, and married. His present permanent address is Wakefield, Kansas. He enlisted in the service in January 1941 and served as an enlisted man, reaching the grade of staff sergeant. On 15 April 1943 he was appointed Air Cadet and after successfully completing his training as a pilot he was commissioned second lieutenant, 8 February 1944.

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification, but for the reasons stated is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding that the accused did, at the time and place alleged, willfully, feloniously, and unlawfully kill Earl W. Nepple, by striking him with an AT-6 Army Airplane in violation of Article of War 93 and legally sufficient to support the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 93 or Article of War 96.

William A. Gamble, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, 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 Howard E. Stittsworth (0-766760), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification (murder) as involves findings of guilty of involuntary manslaughter in violation of Article of War 93, legally sufficient to support Charge II and its Specification (low flying) and the sentence and to warrant confirmation of the sentence. For the reasons stated in the opinion of the Board of Review, I recommend that only so much of the findings of guilty of Charge I and its Specification be approved as involves a finding of guilty of involuntary manslaughter, at the time and place and upon the person alleged, in violation of Article of War 93, that the sentence be confirmed, but, in view of the reduction of the grade of the offense from murder to involuntary manslaughter, that the confinement be reduced to three years, and that the sentence as thus modified be carried into execution. I also recommend that the place of confinement be changed to the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

3. Consideration has been given to the attached memorandum dated 21 September 1944 from General H. H. Arnold, Commanding General of the United States Army Air Forces. He recommends that so much of the sentence to confinement at hard labor as exceeds three years be remitted. I concur in that recommendation.

4. Consideration has also been given to the following documents forwarded to this office and attached to the record of trial, requesting clemency in behalf of the accused.

a. Seventy-three letters from various individuals addressed to the President of the United States and Mrs. Roosevelt.

b. Six petitions addressed to the President from residents of California, Arizona and Kansas.

c. Thirteen letters from various individuals addressed to Members of Congress and officials of the War Department.

5. 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.

7 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of action
4 - Memo. fr. Gen. H. H. Arnold, dated 21 Sept. 1944
5 - 73 ltrs. addressed to the President and Mrs. Roosevelt
6 - 6 petitions addressed to the President
7 - 13 ltrs. addressed to Members of Congress and officials of the War Department

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(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. 632, 24 Nov 1944)

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

SPJGV
CM 261378

8 SEP 1944

UNITED STATES	ALASKAN DEPARTMENT
v.	Trial by G.C.M., convened at Fort Mears, Alaska, 17 July 1944. Dismissal and total forfeitures.
First Lieutenant DARREL M. MAYER (0-387767), 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 Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that First Lieutenant Darrel M Mayer, Company A, Two Hundred Fifth Infantry Battalion (Separate) at Morris Cove, Unalaska, Alaska, on or about 28 May 1944, was found drunk while on duty as Commanding Officer, Company A, Two Hundred Fifth Infantry Battalion (Separate).

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be 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 is substantially as follows:

From 24 May to 30 May 1944 accused was commanding officer of Company A, 205th Infantry Battalion (Sep.) (R. 4, 5; Exs. 1, 2). At

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this time Company A was an outpost on the northern edge of an island, its mission being security of the Dutch Harbor defenses. It was not on an alert, but on a routine status at this period. Its officers were permitted to leave the area provided one officer was on duty at all times (R. 5).

On Sunday, 28 May 1944, First Lieutenant Robert D. Manley went to accused's quarters at Morris Cove for the purpose of meeting accused and another officer and then to proceed to the Navy Club for dinner. The other officer did not arrive. Manley arrived at accused's quarters about around 1400 in the afternoon. He found accused sitting in a chair with his head resting on the back and a book in his lap. He noticed a partially filled glass and an empty bottle on the table. Accused appeared as if he had been asleep but was not drunk (R. 9). Witness had a drink with accused and saw accused drink the remaining wine in the glass and one other glass of wine (R. 10). Witness accompanied accused to supper at about 1730 and at this time accused was drunk (R. 9). Part of the time he would stagger and on the way back to accused's quarters from the mess hall accused either fell down or fell to his knees (R. 10). On direct examination this witness said that in his opinion accused could not at this time have made full use of his physical and mental faculties (R. 10); on cross-examination he stated that he did not know whether accused could have responded properly in an emergency (R. 11); and on redirect examination testified that accused could not have walked or run 100 yards unassisted.

First Lieutenant Frank Magill, Jr., testified that he was next senior in command in Company A to accused. Only functional duties such as KP and latrine duties were performed by Company A on Sundays. He saw accused on 28 May in his room at about 1400 and again when he came to the mess hall. Accused was "lax" and staring when he saw him in his room, was staggering at the mess hall, and in the opinion of the witness accused was drunk both times he saw him. At no time on 28 May did accused turn over the command of the company to him (R. 14).

Second Lieutenant Sidney R. Ottman saw accused in the mess hall and he was unable to take off his jacket or sit down. Accused called Lieutenant Ottman back as he was leaving the mess hall and asked him if he had given him notes on the infantry school, meaning the company commanders' meeting the day before. He repeated questions again and again (R. 18). Accused was drunk in the opinion of this witness (R. 17).

Second Lieutenant George H. Fowler testified that he was battalion duty officer, but not company duty officer on 28 May. The company duty officer does not take over the company command by virtue of his duties (R. 22).

The officers' mess orderly on duty on 28 May testified that he smelled liquor on accused's breath when he came to the mess hall about 1750, that accused cursed at the table, and in the opinion of the witness was drunk (R. 21). As accused was walking away from the mess hall he was observed by Sergeant Vasalie D. Gabor to be staggering, and was supported by another officer (R. 23) and at about this time Sergeant Alfred M. Hess and Private First Class Horace M. Chatham saw accused fall and another officer had to help him get up (R. 24).

4. For the defense:

The accused after having his rights as a witness explained elected to testify under oath. He testified that on 28 May he spent the morning from about 9 o'clock in his quarters reading. He had one drink of wine. After dinner he returned to his quarters and took a nap. Lieutenant Duvall came in and he spoke to him, and then he resumed his reading in a morris chair. He fell asleep again and was awakened when Lieutenant Manley came in. They sat in his quarters until they went to the mess hall for supper. Accused had only a glass and a half of wine, out of a cheese glass, during this period. He and Lieutenant Manley were "razzing" each other and talking loudly, but only in horseplay. He was stiff from exercise, but otherwise was all right mentally and physically and in case of an emergency he could have handled the situation (R. 27). Sunday was a day of rest, and other than the duty officer, the other officers were off duty. Lieutenant Ottman was duty officer, but accused was senior officer in the area and was in command in case of emergency (R. 29).

Accused said he did fall on the way from the mess hall, but it was because of his stiffness from exercise and not because he was under the influence of liquor (R. 29).

5. A good deal of testimony was introduced to show that some officer other than accused was duty officer on the Sunday in question, 28 May 1944. It was permissible for any officer to leave the area as long as one officer remained on duty. Accused was not the officer designated for such duty. However, the evidence is conclusive that accused was senior in command of Company A, and was physically present in the company area the entire day, and that in case of emergency he would assume command and be responsible for measures to meet such emergency. Company A was engaged as outpost guard securing the defenses of

Dutch Harbor, but was on a routine rather than an alert status. Paragraph 145 of the Manual for Courts-Martial, 1928, provides that "The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty". The Board of Review is of the opinion that accused was on a duty status as commanding officer of Company A on the day in question and that the sole question presented is whether the accused was or was not drunk at the time. The Board of Review is of the further opinion that the court was amply justified on the basis of the evidence introduced in finding that accused was guilty of being drunk as charged.

6. Seven of the eight members of the court and the assistant trial judge advocate trying this case have joined in a letter urging clemency for the accused because the post at which the offense occurred "is in a Class A category, according to A.D. Ltr 17 Nov 1943 amended by AD Radio 050152Z (March 1944)" and also because of accused's qualifications and past good record of service.

7. War Department records show that accused is 29 years of age. He was an enlisted member of the National Guard from 1 September 1931 to 7 January 1932; from 6 August 1932 to 12 February 1940, when he was appointed second lieutenant, National Guard of the United States in the Army of the United States. He was promoted to first lieutenant 12 July 1941. Accused is a graduate of Bethel College, Newton, Kansas, and in civilian life was employed as teacher and athletic coach, Englewood High School, Englewood, Kansas, which positions he had held from 1939 until his entry on active military duty.

8. 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 and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 85.

Thomas N. Tabby, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 261378

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 First Lieutenant Darrel M. Mayer (0-387767), 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. 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 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

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

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

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 569, 16 Oct 1944)

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

SPJGN
CM 261379

8 SEP 1944

UNITED STATES v. Second Lieutenant HARRY L. MALLARD (O-1309378), Company D, 208th Infantry Battalion (Separate).	ALASKAN DEPARTMENT Trial by G.C.M., convened at Fort Richardson, Alaska, 17 July 1944. Dismissal.

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Harry L. Mallard, Two Hundred Eighth Infantry Battalion (Separate), then on special duty with the Special Service Office, Headquarters Fort Richardson, Alaska, did, at Fort Richardson, on or about 27 May 1944, wrongfully drink intoxicating liquor while on duty as travel director in charge of United Service Organizations - Camp Shows Incorporated Troupe Number Two Hundred Twenty-Seven.

Specification 2: In that Second Lieutenant Harry L. Mallard, Two Hundred Eighth Infantry Battalion (Separate), then on special duty with the Special Service Office, Headquarters Fort Richardson, Alaska, did, at Fort Richardson, on or about 6 June 1944, in a statement made under oath to First Lieutenant, now Captain, Edward H. Powell, Post Inspector and Summary Court, during an official investigation being made by the said Lieutenant Powell concerning certain occurrences during the performance of United Service Organizations - Camp Shows Incorporated Troupe Number

Two Hundred Twenty-Seven at the One Hundred Thirty-First Signal Radio Intelligence Company, in response to the question "Did you take any intoxicating liquor out to the Signal Area with you?", reply "I did not", which statement he did not then believe to be true.

Specification 3: In that Second Lieutenant Harry L. Mallard, Two Hundred Eighth Infantry Battalion (Separate), then on special duty with the Special Service Office, Headquarters Fort Richardson, Alaska, did, at Fort Richardson, on or about 6 June 1944, in a statement made under oath to First Lieutenant, now Captain, Edward H. Powell, Post Inspector and Summary Court, during an official investigation being made by the said Lieutenant Powell concerning certain occurrences during the performance of United Service Organizations - Camp Shows Incorporated Troupe Number Two Hundred Twenty-Seven at the One Hundred Thirty-First Signal Radio Intelligence Company, in response to the question "Did you drink any intoxicating liquor out there?", reply "No", which statement he did not then believe to be true.

Specification 4: In that Second Lieutenant Harry L. Mallard, Two Hundred Eighth Infantry Battalion (Separate), then on special duty with the Special Service Office, Headquarters Fort Richardson, Alaska, did, at Fort Richardson, on or about 6 June 1944, in a statement made under oath to First Lieutenant, now Captain, Edward H. Powell, Post Inspector and Summary Court, during an official investigation being made by the said Lieutenant Powell concerning certain occurrences during the performance of United Service Organizations - Camp Shows Incorporated Troupe Number Two Hundred Twenty-Seven at the One Hundred Thirty-First Signal Radio Intelligence Company, in response to the question "Did you have any drinks from that gin bottle out at the One Hundred Thirty-First?", reply "I don't know of any gin bottle being out there", which statement he did not then believe to be true.

The accused pleaded not guilty to and was found guilty of the Charge and all Specifications thereunder. 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 two years. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence originally adduced by the prosecution shows that the accused was an Infantry officer assigned to Special Service duties at the Post, Fort Richardson, Alaska (R. 32; Pros. Ex. 1). In May of 1944 he was in charge of Camp Shows, Incorporated United Service Organizations Troupe Number 227 (R. 9, 18, 30). He and its male members often drank together "after the shows at night". They consumed both beer and whiskey (Pros. Ex. 1).

The troupe was scheduled to perform at "Dispersal Cantonment Eight" on 27 May 1944 (R. 10, 18). First Lieutenant Charles W. Brown, the Commanding Officer of the 131st Signal Radio Intelligence Company, the organization assigned to that area, sent Second Lieutenant William P. Sheahan to escort the entertainers from their quarters to the mess hall in which their show was to be presented (R. 9, 18). Upon arriving at the building in which their apartments were located, Lieutenant Sheahan was met at the door by the accused and was introduced by him first to the female members and then to the male members of the troupe. As they were all about to leave, Lieutenant Sheahan noticed that the accused was holding a "recently opened" bottle of gin, about "two-thirds full". An argument ensued in which Lieutenant Sheahan insisted that the liquor not be introduced into his company area because "we had enough trouble with the enlisted men" (R. 9, 15, 17). The accused proved recalcitrant, maintaining that "he was running the U.S.O. show" and that "he would bring the bottle out if he saw fit". Mr. Samuel Specter, the master of ceremonies, finally intervened and represented that "he would take care of the situation". Having received this assurance, Lieutenant Sheahan terminated the discussion and departed with the troupe (R. 9-10).

After they reached the cantonment area but before "the show started", the accused said to Lieutenant Sheahan, "Let's have a drink". Lieutenant Sheahan asked whether his instructions concerning the bottle had been disregarded. The accused replied in the affirmative. The two men walked to the command car in which the accused had been conveyed. He opened the glove compartment, extracted the bottle of gin from it, and offered Sheahan a drink. Sheahan "had had a little experience with people who have been drinking". He had learned that if "a man is insistent on a person taking a drink, if you do not care to take a drink he will feel insulted and it will tend to lead to arguments". He accordingly raised the bottle to his lips and "tipped it up", but did not swallow any of its contents. He detected an odor which was definitely and distinctly that of gin. Having pretended to partake of the proffered hospitality, he requested that the bottle be left in the car and that it not be brought into the mess hall (R. 10, 11, 16, 21). It was restored to its resting place, and he never saw it again (R. 11). Although he reported its presence to Lieutenant Brown, no action was taken because of the belief that it would not be removed from the car (R. 15).

The accused had in the meantime introduced the show. When he had completed this task, he seated himself on a bench beside Lieutenants Sheahan and Brown for about twenty minutes (R. 13, 19). At the end of the period he left the mess hall and walked to the car (R. 28). Withdrawing the bottle, he "drank from it while standing on the ground" (R. 21). He replaced the bottle and reentered the mess hall. Within a short while he made another trip to the car. This time he returned to the building with the gin. Seating himself in the kitchen, which was partitioned off with blankets from the rest of the mess hall for the duration of the performance, he proceeded to drink one-half of the bottle's contents in the presence of Technician Fourth Grade Ellsworth C. Seavey, a cook who was on night duty (R. 13, 21-22). The bottle was labeled "Gin". In Seavey's opinion the consumption of so large a quantity of liquor by the accused "seemed to make a change in him". "His face was flushed and his eyes seemed kind of foggy like" (R. 23). His breath "smelled of alcohol" (R. 22). Sheahan believed that the accused "was under the influence of liquor" (R. 12). Brown noticed nothing unusual about the accused other than his "manner of his speech [which was a little bit louder than usual] and a slight bit of swaying on his feet" (R. 19).

Throughout the evening, two pitchers of ice water were available in the kitchen. One was in full view, and the other was partly concealed (R. 23).

In pursuance to the orders of General Downs, the Post Commander, an official investigation was conducted on 6 June 1944 by Captain Edward H. Powell, the Post Inspector, for the purpose of determining whether the accused had been guilty of any misconduct while in charge of Troupe Number 227. After being fully instructed as to his rights under Article of War 24, the accused testified, among other things, as follows:

"Q. Did you take any intoxicating liquor out to the Signal Area with you?

"A. I did not.

* * * * *

"Q. Did you have any intoxicating beverage out at the 131st?

"A. I did not.

"Q. Did you drink any intoxicating liquor out there?

"A. No.

* * * * *

"Q. Did you have any drinks from that gin bottle out at the 131st?

"A. I don't know of any gin bottle being out there" (R. 30-32; Pros. Ex. 1).

4. After his rights as a witness had been fully explained to him, the accused elected to remain silent. All three male members of U.S.O. Troupe Number 227 and Captain Orman J. Smith, the Post Special Services Officer, took the stand for the defense. The last named witness testified only that he had met the accused at a special party "between 11:30 and midnight" on 27 May 1944 sometime after the end of the regular U.S.O. performance that evening, and that there "was no appearance [of intoxication] whatsoever" (R. 48-49).

Mr. Kirk Hart, whose stage name is Ralph Kirk, was a member of the Troupe. He had not seen the accused hold a gin bottle in his hand or drink any intoxicating liquor at the apartment prior to leaving for the performance of 27 May 1944 (R. 34, 36). He had observed a bottle but "couldn't really swear it was a gin bottle". He explained its purpose as follows:

> "We play that whole show. We open the show and play all of the way through. We have just a few minutes to make our change. My partner is not a young fellow and he takes a little drink of water before he goes on to the stage in order to do his act. The show runs about an hour or more. We like to have a sip of water. The show plays some 'rec' halls that have no running water. When we came up the highway, we used to carry a canteen with water in it. Once in a while I would take a sip of it. But the bottle, he took two drinks and I took one but I couldn't swear it was a gin bottle. It was a white bottle and I merely just took a small swallow to wet my throat. It wasn't gin."

The accused had been "very efficient" in his dealings with the Troupe. At the party on the night of 27 May 1944 "he introduced [the] whole show * * *. He was right up in his usual efficient manner" (R. 35). Mr. Hart had no personal knowledge of what "went on backstage" at the scheduled performance. He was in his own dressing room (R. 37).

Mr. George L. Stalzer, another member of the Troupe, stated that he "insisted on my manager always leaving water for me when I work. I work hard with the accordian strapped on my chest. About twice during the show I get about five minutes rest". That night, the water was in "a tall white 'Fifth' or quart bottle". He had taken two drinks out of it. "It was water". If it had been gin he "never would have drank any of it". Nor would he ever drink ice water. "It is bad for the throat" (R. 38-39). As a U.S.O. officer, the accused was "one of the finest" (R. 40). Stalzer had seen him drink a beer at the apartment but nothing more prior to the party. At the performance Stalzer had his "hands full" and didn't "pay much attention" to the accused (R. 40-41).

Mr. Samuel Specter, the third male member of the Troupe, considered the accused "one of the most efficient men I have met" and "a very likeable person" (R. 42). His version of the content and purpose of the bottle was as follows:

> "It was very customary for the two men who accompanied the show, while I pulled a few gags during the intermission to have a little drink of water. Occasionally in many of the places we played there was no water available and I saw to it that I picked up any bottle on the premises and filled it with water and brought it with me. That particular night I filled a bottle and put it in the compartment of one of the vehicles. I went in when we got to the show and when Mr. Stalzer wanted water, I said, 'Certainly', and went out in the car and brought it in for him."

He was "quite positive" that he had personally removed the bottle from the compartment, but he had no knowledge of what became of it after he brought it to the dressing room (R. 44). No drinking of any intoxicating liquor was witnessed by him at the apartment on the night of 27 May 1944 (R. 43). As to whether there was gin in the apartment that night, his reply was "I can't say" (R. 45).

5. After the evidence summarized above had been presented, and after the Trial Judge Advocate and counsel for the defense had delivered their final arguments, the court was closed. There are two somewhat divergent versions of what then occurred. The record relates that:

> "While the court was still in closed session, the President of the Court called the Trial Judge Advocate and the Defense Counsel before the court. The accused and the reporter were not present. The President stated that the court was unable to reach a decision in the case because of lack of evidence. The President further stated that the court was 'about equally divided'. The Trial Judge Advocate then stated that if the court had voted on the guilt or innocense of the accused and the vote was equally divided, that the accused should be acquitted. The President and the court ignored this statement. The Defense Counsel then stated, 'If it is more evidence that you want, then why don't you vote on this?' The President stated that he 'did not consider this necessary'. Each member of the court was asked individually by the president if he wanted more evidence and each indicated an affirmative assent. The trial judge advocate was asked if he could produce more evidence. The trial judge advocate stated that there were further witnesses he could produce and that he would call them if the court desired. The defense counsel without having consulted with the accused stated that he had no objection if he were afforded an opportunity to cross-examine each witness and to make an argument on the additional evidence. The President announced that the court would call

upon the trial judge advocate for more evidence in the case. The trial judge advocate and the defense counsel, in the presence of each other, withdrew."

The President of the court, the Trial Judge Advocate and the Defense Counsel have all asserted in writing that this "is, in substance and effect, a correct account of all that took place" (Statement dated 28 July 1944).

The accused in a written argument attached to the record as Defense Exhibit A contends that:

"LIEUTENANT ELMER B. BENEDICT, my assistant defense counsel, and I were present when the defense counsel returned from the closed courtroom, and when my defense counsel told me what took place in the courtroom. The statements which he made at that time contrasted to those which appear in this record as a true record of what took place in the closed session, lead me to believe that my defense counsel has been subjected to undue pressure, and because of his apparent submission to this pressure on this point, I also believe that more might have taken place in the closed session than I was informed of by my defense counsel and I therefore feel that my rights to a fair and regular trial were seriously prejudiced by that irregularity in procedure. The gist of the statements made to me by my defense counsel immediately after his return to me after being present in closed session with the court follows:

"I was told that the court had informed the trial judge advocate and the defense counsel that it was in a deadlock and stood at a tie vote, four to four, and could not decide upon a verdict to acquit me as they were unable to arrive at a majority vote therefor. I was also told that as a majority of the court could not vote for acquittal after an hour had passed that they now requested the testimony of more witnesses. I was also told that my defense counsel had agreed to this procedure without consultation with me. I was also told by my defense counsel that what he told me was in the strictest confidence and should not then be divulged or he would get into trouble and I was led to believe that everything would be all right if I went along. Inasmuch as I had no suspicion that the proceedings were irregular and that my defense counsel was acting under the influence of the court, I assented.

* * * * *

"I believe that if the statement made by the court to the trial judge advocate and my defense counsel as to how it stood as to the findings, in words to the effect that 2/3's of the court not concurring in findings of guilty, were reported in the

record in its proper place, the subsequent proceedings would clearly appear to have been improper and would be declared void because by its announcement, I was in effect acquitted of the charge and specifications as the announcement was equivalent to an announcement of the findings of the court."

In an affidavit dated 22 July 1944, Lieutenant Benedict has substantially corroborated these allegations. He represents that:

"We then left to interview the three women and as we rode in Capt. POPE'S vehicle, Capt POPE told us that while in the courtroom, he had been informed that the court had taken three votes as to the guilt of the accused. He had been informed, further, that each of these votes had resulted in a four to four count. The court then considered the vote dead - locked and called the TJA and Defense Council to request other witnesses. Capt POPE said also that the Court did not know that a tie vote amounted to acquittal".

6. In compliance with the court's directions the Trial Judge Advocate offered four additional witnesses for the prosecution. Three of them were the female members of the Troupe, and the fourth was an enlisted man assigned to the 131st Signal Radio Intelligence Company.

All three women were agreed that the accused was intoxicated on the night of 27 May 1944 (R. 53, 56, 58-59). Miss Josephine Lola Maffie described him as "nasty drunk" (R. 53). She remembered that he had been imbibing in "our apartment, underneath the apartment, next door, all around the house" (R. 52). Both she and Miss Nell Deacon witnessed the argument between him and Lieutenant Sheahan concerning the bottle of liquor. The accused had said: "I am running the show and I will do whatever I want" (R. 52). "I am running this show and without me the acts won't go on" (R. 56). Mr. Specter had not taken any water with him that night and "never did" (R. 53, 57, 59-60). The accused had personally carried the bottle to the car (R. 52-53).

Miss Maffie and Miss Audrey Allen saw the accused drink out of a bottle at the mess hall during the performance (R. 53, 59). Both believed the liquor to have been a "dark" color such as "brown or amber" (R. 53-54). The bottle itself was a large one (R. 54, 60).

Before the party the accused was "so bad off" that his attendance did not seem likely. To sober him the male members of the troupe "dunked his head in water at the house and ran him around the courtyard" (R. 54, 57). This radical treatment effected only a slight improvement (R. 54).

Technician Fifth Grade Melvin J. DeNoble, a cook on the staff of the 131st Radio Intelligence Company, "dropped in for some coffee" during the performance. He saw the accused drinking out of a bottle. The accused was under the influence of liquor and "talked with a little stutter" (R. 62).

7. Upon being recalled as a witness for the defense Mr. George L. Stalzer merely amplified his previous explanation for insisting upon a private supply of water. He furnished the music for the entire show which lasted approximately an hour and a half, and "naturally" he became "very dry". He would not drink liquor during a performance, and he could not "stand" ice water because it froze the membrane in his throat and larnyx. The reason that he always had water brought was stated by him as follows:

> "We played a half dozen mess halls that had been abandoned. They were only used for the show. Since they were not being used, the water had been shut off. Several times I had been caught without a drink of water and I choked" (R. 65-66).

8. Specification 1 of the Charge alleges that the accused did "on or about 27 May 1944, wrongfully drink intoxicating liquor while on duty * * *." This violation was laid under Article of War 96.

That the accused drank out of a bottle at the mess hall on the night of 27 May 1944 is attested to by four eye witnesses. A fifth witness, Lieutenant Sheahan, who was afforded the opportunity of sampling the contents, recognized the distinct and unmistakable odor of gin. In the light of his experience the testimony that the bottle held only water was properly discounted by the court. If water was in fact supplied for the use of Mr. Kirk and Mr. Stalzer, it did not come in the same container as the one from which the scent of gin was wafted to Sheahan's nose. Although Prosecution's Exhibit 1 tends to establish that the female members of Troupe Number 227 had reason to be prejudiced against the accused, the testimony of Seavey and DeNoble cannot be attacked on similar grounds. The record is sufficient beyond a reasonable doubt to support the finding of guilty of wrongfully drinking intoxicating liquor while on duty.

9. Specifications 2, 3, and 4 of the Charge allege that on 6 June 1944 the accused "in a statement made under oath to First Lieutenant, now Captain, Edward H. Powell, Post Inspector and Summary Court officer, during an official investigation" did in response to certain questions make replies which "he did not then believe to be true". This offense was set forth as a violation of Article of War 96.

The accused in his answers to the questions of Captain Powell denied that he had taken any intoxicating liquor to the "Signal Area" or that he had done any drinking "out there", and represented that he had

no knowledge "of any gin bottle being out there". The same evidence which sustains Specification 1 conclusively proves the falsity of these statements. Since they were made in the course of an investigation, they were "patently made with intent to deceive" (II Bull. JAG, November 1943, p. 467, sec. 454 (49)).

10. Concerning the action taken by the court after both sides had initially rested, the accused has in his written argument made two closely related attacks upon the findings of guilty. In substance they are:

a. That after three tie votes the court failed to acquit only because it erroneously believed that such a verdict required a majority vote to be valid.

b. That the admission of a voting deadlock to the Trial Judge Advocate and the Defense Counsel was an announcement in open court, tantamount to an acquittal, and that all subsequent proceedings were consequently void.

The record itself does not conclusively establish that an actual vote was taken, and the division of opinion among the members of the court may well have arisen in the course of a preliminary informal discussion. The allegation that three tie ballots were cast is contained in various documents which were never introduced as exhibits and which were attached to the record only after trial. Assuming in the interest of justice that these are all properly before this Board, the arguments of the defense must be denied. Until findings are formally announced in open court they are of no force whatsoever. The court, prior to reopening, may still change a finding of guilty to not guilty, or vice versa, or, what is more common, may, after a vote of acquittal of the offense charged, enter a finding of guilty of a lesser included offense. The balloting of the members may change many times in closed session, and no vote has any operative effect or has any validity except the one upon which the announced findings are actually predicated.

The information supplied to the Trial Judge Advocate and to the Defense Counsel in closed session was not an announcement in open court because none of the court's members intended it as such. None of them regarded the four-to-four vote as final. As the record reports, each of them "was asked individually by the president if he wanted more evidence and each indicated an affirmative answer". Their power and authority to require additional witnesses is expressly confirmed by paragraph 75 of the Manual for Courts-Martial, 1928, which reads as follows:

"The court is not obliged to content itself with the evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court

may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence."

The action of the court in admitting the Trial Judge Advocate and the Defense Counsel to a closed session was irregular; but the error, being merely procedural, did not prejudice the substantial rights of the accused. As was said in Dig. Op. JAG, 1912-1914, sec. 387, "the presence of the judge advocate at the closed session of the court was erroneous, in view of the inhibition contained in A.W. 30, but the announcement and explanation of the president of the court may be taken into consideration and on examination of the entire proceedings in connection therewith shows that the substantial rights of the accused were not injuriously affected."

11. The accused is about 35 years old. The record of the War Department shows that he had two years of high school education in Stockton, California; that he was employed as a printer for thirteen years; that he had enlisted service in the California National Guard for three years and in the Army from 8 August 1932 to 16 November 1934 and again from 9 February 1941 to 26 January 1943; that he was commissioned a second lieutenant on 27 January 1943; and that since the last date he has been on active duty as an officer.

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

Abner E. Lipscomb, Judge Advocate.

Charles S. Lyons, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 261379

1st Ind.

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

21 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 Harry L. Mallard (0-1309378), Company D, 208th Infantry Battalion (Separate).

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.

3. Consideration has been given to a letter addressed to the President from Mr. Samuel Spector, who testified as a witness for the defense at the trial.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Form of action.
Incl 4 - Ltr. fr. Mr. Spector.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 574, 21 Oct 1944)

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

SPJGQ
CM 261405

-1 SEP 1944

UNITED STATES v. Second Lieutenant LEWIS J. BAILEY (0-863228), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Army Air Forces Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada, 17 July 1944. Dismissal, total forfeitures and confinement for five (5) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that 2nd Lieutenant Lewis J. Bailey, did, at Army Air Forces Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada, on or about 21 March 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Sacramento, California, on 19 June 1944.

He pleaded not guilty of the Charge and the Specification but guilty of absence without leave in violation of the 61st Article of War. He was found guilty of the Specification and the Charge. No evidence of any previous conviction was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five (5) years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

Supplementing the accused's plea of guilty to having been absent without leave from the Army Air Forces Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada, from 21 March 1944 until he was apprehended at Sacramento, California, on 19 June 1944, the prosecution introduced in evidence, without objection, a certified extract copy of the morning report of accused's organization for 21 March 1944, showing accused "dy to AWOL" (R. 6-7; Pros. Ex. 1), and a written stipulation, signed by the prosecution, the defense and the accused, setting out that the accused was apprehended by the military police at the Sacramento Hotel, Sacramento, California, on 19 June 1944 and returned to military control (R. 7; Pros. Ex. 2). The prosecution also introduced in evidence, without objection, a written stipulation, signed by the prosecution, the defense and the accused, wherein it is stated that if Staff Sergeant Robert A. Yarber, SCU, 4906th Military Police Unit, Sacramento, California, were called as a witness in this case he would testify, among other things, that he apprehended the accused at the Sacramento Hotel, Sacramento, California, on 19 June 1944; that upon asking the accused whether he was Lieutenant Bailey, the latter replied that he was "Lt. John R. Bailey from Hamilton Field, California"; that, upon taking the accused to the military police station and requesting him to write his name and serial number, the accused wrote his name as "2nd Lt. John R. Bailey" and gave a serial number other than his own; and that, upon further questioning later by Captain Robert S. McCallum of the military police, the accused admitted his true identity.

4. Evidence for the defense:

At the request of the defense, the prosecution agreed to a stipulation on the record that the accused was in proper military uniform when he was apprehended in the Sacramento Hotel, Sacramento, California, on 19 June 1944 (R. 8).

After being advised of his rights as a witness, the accused elected to testify under oath in his own behalf. He is now twenty years of age. He enlisted in the Army when he was eighteen, took basic training at Fort Lewis, Washington and Fort Kearns, Utah, took mechanical training at Sheppard Field, Texas, where he was "elected the mechanic of the month", and was commissioned a temporary second lieutenant upon graduation from the Army Air Forces Technical School at Yale University on 5 July 1943. Shortly thereafter he was assigned to duty at the Army Air Forces Gunnery School at Las Vegas, Nevada, There he met a girl, in the El Cortez Bar, whom he married ten days later, on 4 August 1943. His wife's demands for living expenses were large, and in an effort to meet them he went deeply into debt, borrowing from a bank and from various people around his post. He soon learned that his wife was going out with other men, and they separated about the middle of September 1943. They were divorced in December 1943, his wife's father paying the expenses of the proceeding (R. 8-10).

Prior to entering the Army the accused had always lived at home. He never cared for girls and never went out with girls. He never drank and he never gambled. After coming to Las Vegas, and at about the time he was married, he began drinking and gambling. His object in gambling was to acquire money to pay his debts (R. 9-10).

About 10 March 1944, the accused went on a cross-country to Pendleton, Oregon, returning to Las Vegas about 15 March 1944. Upon his return the Adjutant told the accused that he had been AWOL. The possibility of charges being preferred against him on account of this AWOL worried the accused greatly. He was also worried about his debts, which at the time amounted to $700 or $800. For the purpose of getting away to think his troubles over and in the hope of being able to raise some money, he purchased a round trip ticket from Las Vegas to Los Angeles and left his post for the latter city on 21 March 1944. From the time he went to Los Angeles until the time of his apprehension 90 days later in Sacramento, on 19 June 1944, he did not do "much of anything". Several times he decided to turn himself in to the military authorities, but each time when he appraoched an MP station with the intention of turning himself in he "got scared" and his nerve failed him. When he left for Los Angeles he took no clothes with him other than the clothes he wore. He was in uniform all of the time that he was away, wearing the same clothes that he had on when he left, except for one shirt which he bought (R. 10, 11, 12).

On cross-examination the accused stated that when he left his post for Los Angeles he had approximately $5 in cash and that he financed himself during his 90 days' absence by issuing "bad checks" (R. 13, 14). He did considerable traveling, going to San Diego, San Francisco, Reno, Nevada, and other places up and down the Pacific Coast. He visited and occupied BOQ accommodations at several different Army fields - at least three (R. 14). When apprehended in Sacramento, California, he gave his name as "John R. Bailey" and gave a serial number other than his own (Pros. Ex. 3). It was not until he was required by the military police to write his name on a slip of paper and his signature was compared with that on a "bad check" given by him at March Field that he admitted his true identity (R. 17-18).

Captain Charles L. Trowbridge, a witness for the defense, testified that as Officer of the Day at accused's station on 30 March 1944 he was required to go to the BOQ and search accused's room. He found the room "neat and clean", and that it contained "about one-third of the average wardrobe of an officer that was there" (R. 18, 19).

Captain Allen A. Welkind, a witness for the defense, was qualified as an expert psychiatrist. He testified that he had made an examination of the accused and found that the accused had never "developed to the adult stage in his personality", that he was "shy", "immature" and "emotionally unstable", and that "when difficulties would arise, because of his previous sheltered existence, he wasn't able to cope with those difficulties" (R. 19, 20). On cross examination, however, the witness

stated that in his opinion the accused is sane, is able to tell right from wrong and is able to adhere to the right (R. 19, 22).

5. The accused having pleaded guilty to being absent without leave from 21 March 1944, until he was apprehended in Sacremento, California, on 19 June 1944, and having admitted the same facts in his testimony on the witness stand, all of which facts are also fully established by the evidence introduced by the prosecution, the only issue remaining in the case is the question whether the accused "intended, at the time of absenting himself or at some time during his absence, to remain away permanently" from his station (M.C.M., 1928, par. 130).

The evidence that the accused did have such intent, either at the time he absented himself or at some time during his absence, is overwhelming. His prolonged absence of 90 days is unexplained. At the time of his departure he faced the probability of disciplinary action for the AWOL, of which he had just been advised by the Adjutant. He was apprehended by the military police at a point 450 miles from his proper station. When apprehended he denied his true identity. He had incurred a large number of debts, aggregating $700 or $800, at his own post. While absent he financed himself by issuing worthless checks, a course of action which he must have known would embroil him in a court-martial proceeding in case he ever returned. He visited many Army fields and installations and thus had many opportunities of turning himself over to military authorities, but failed to do so. Each of these circumstances is strongly persuasive that the accused intended permanently to absent himself from his station (M.C.M., 1928, par. 130). Taken together they compel the conclusion that he intended permanently to absent himself from his station. The Board of Review is of the opinion, therefore, that the competent and legal evidence of record establishes, beyond a reasonable doubt, accused's guilt of the Specification and the Charge.

6. The records of the War Department show accused to be twenty (20) years of age. He was born and reared in Portland, Oregon. He graduated from high school, but did not attend college. In civil life he was a store clerk for United Airlines, Inc. for six months and a welding machine operator for Oregon Ship Corporation for two months. He enlisted in the Army 15 November 1942, and upon graduation from the Army Air Forces Technical School, at Yale University, was commissioned a second lieutenant 5 July 1943. From that time he has been assigned to the Army Air Forces Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada.

7. The court was legally constituted and had jurisdiction of 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. The sentence imposed by the court is authorized upon a conviction of a violation of Article of War 58.

William H. Bamberger, Judge Advocate.

Herbert P. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.C., 27 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 Lewis J. Bailey (0-863228), 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. 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 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 the attached letters from the accused's mother, Mrs. Lewis H. Bailey, dated 1 August 1944, and 18 August 1944, respectively, the first being addressed to the President and the second to The Adjutant General.

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 into effect the above recommendation, should such recommendation meet with approval.

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

5 Incls.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Ltr. from Mrs. Lewis H. Bailey, dated 1 August 1944.
4 - Ltr. from Mrs. Lewis H. Bailey, dated 18 August 1944
5 - Form of action

(Sentence confirmed but confinement reduced to three years. G.C.M.O. 611, 9 Nov 1944)

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

SPJGV
CM 261432

9 SEP 1944

UNITED STATES v. Second Lieutenant ARTHUR F. CORCORAN, Jr. (0-1014879), Cavalry	13th ARMORED DIVISION Trial by G.C.M., convened at Camp Bowie, Texas, 30 June and 24 July 1944. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

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

Specification 2: (Nolle prosequi entered by direction of appointing authority).

Specification 3: (Withdrawn by the prosecution after arraignment at the direction of the appointing authority (R. 26)).

Specification 4: (Nolle prosequi entered by direction of appointing authority).

Specification 5: In that Second Lieutenant Arthur F. Corcoran, Junior, Company "F", 93rd Cavalry Reconnaissance Squadron (Mechanized), being indebted to Captain Joseph M. Wolfe, in the sum of $20.00 since on or about 15 September 1943, did, at Camp Beale, California and Camp Bowie, Texas, from that date dishonorably fail and neglect to pay said debt.

Specification 6: (Nolle prosequi entered by direction of appointing authority).

Specification 7: (Finding of not guilty).

Specification 8: In that Second Lieutenant Arthur F. Corcoran, Junior, Company "F", 93rd Cavalry Reconnaissance Squadron (Mechanized), did, at Tahoe National Forrest, California, on or about 8 July 1943, borrow money in the sum of $15.00 from Sgt. Marion J. Hamner, then Staff Sergeant Marion J. Hamner, Headquarters, Headquarters and Service Troop, 93rd Cavalry Reconnaissance Squadron (Mechanized), this to the prejudice of good order and discipline in the military service.

Specification 9: (Nolle prosequi entered by direction of appointing authority).

Specification 10: (Finding of not guilty).

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

Specification 1: In that Second Lieutenant Arthur F. Corcoran, Jr., Company "F", 93rd Cavalry Reconnaissance Squadron (Mechanized), did at Fort Worth, Texas, on or about 20 January 1944, wrongfully and unlawfully make and utter to the First National Bank, Fort Worth, Texas, a certain check in words and figures as follows, to wit:

Form 183 THE FIRST NATIONAL BANK OF FORT WORTH 37-1

FORT WORTH, TEXAS January 20 1944

NO. 15

Pay to the order of THE FIRST NATIONAL BANK. Fort Worth, Texas $ 10.00

Ten and ——————————————— 00/100 DOLLARS

~~with exchange~~

TO Bank of America

Grass Valley, California

Betty Corcoran

0-1014879

by Lt. A. F. Corcoran, Jr.

Camp Bowie 93 Cav. Rcn. Sq.

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and by means thereof, did fraudulently obtain from the First National Bank,

ten dollars ($10.00) in cash, he, the said Second Lieutenant Arthur F. Corcoran, Jr., then well knowing that he did not have sufficient funds in the Grass Valley Branch Bank of America, for the payment of said check.

Specification 2: (Nolle prosequi entered by direction of appointing authority).

Specification 3: In that Second Lieutenant Arthur F. Corcoran, Junior, 93rd Cavalry Reconnaissance Squadron, did, at Camp Bowie, Texas, during the month of February 1944, borrow from Private Sye M. Malins (then Sergeant, Headquarters, Headquarters and Service Troop, 93rd Cavalry Reconnaissance Squadron), the sum of twenty dollars ($20.00), this to the prejudice of good order and military discipline.

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

Specification: In that Second Lieutenant Arthur F. Corcoran, Junior, Troop "F", 93d Cavalry Reconnaissance Squadron, having been restricted to the limits of his squadron area, did, at Camp Bowie, Texas, on or about 3 May 1944, break said restriction by going to the warehouse area, Camp Bowie, Texas.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1 of the Charge except the words "and not intending that he should have," of the excepted words not guilty, guilty of Specifications 5 and 8 of the Charge and of the Charge, guilty of Specifications 1 and 3 of Additional Charge I and of Additional Charge I, guilty of the Specification of Additional Charge II and of Additional Charge II, and not guilty of Specifications 7 and 10 of the Charge. No evidence of prior convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 1 of the Charge, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence pertaining to Specification 1 of the Charge, (finding of guilty disapproved by the Reviewing Authority), and Specifications 7 and 10 of the Charge, (findings of not guilty) will not be discussed except as it may pertain to the Specifications under which there were approved findings of guilty.

4. The evidence for the prosecution in support of those Specifications under which there were approved findings of guilty is substantially as follows:

a. Specification 5 of the Charge.

On 30 September 1943 accused told Captain Joseph M. Wolfe he was in difficulties and wished to borrow $20. Captain Wolfe loaned the accused $20 and received a check from the accused in that amount postdated 10 October 1943. On 15 October Captain Wolfe cashed this check (R. 18), after first telephoning accused to ask him if it would be honored and receiving an affirmative reply (R. 22). About 20 October 1943 the Post Exchange called Captain Wolfe relative to this check which had been returned by the bank, and he redeemed it. He then told accused the check had been returned, and accused requested that he hold it for awhile, stating that he would repay the money obtained. About two months later, accused made a $5 payment on the debt owed Captain Wolfe, made a second payment of $5 about one month later, and a third payment of $5 about two or three weeks before trial. The remaining balance of $5 was still unpaid at the time of this trial (R. 21).

b. Specification 8 of the Charge and Specification 3, Additional Charge I.

In July 1943 the 93rd Cavalry was on field exercises near Lake Tahoe, California. While riding on a truck with Private, then Staff Sergeant, Marion J. Hamner, near Truckee, California, accused indicated that he would like to purchase some articles for other officers, but was without funds (R. 39). Hamner offered to loan accused $15, and although accused at first stated he preferred not to accept the loan he eventually did accept it (R. 40), and promised to repay Hamner on accused's next payday which was 1 August 1943 (R. 36). Accused paid Hamner $5 on his next payday, repaid an additional $5 in the latter part of August 1943, but did not pay the remaining $5 due on the loan until December 1943 (R. 36), following a request by Hamner for payment (R. 40).

On 17 February 1944 accused borrowed $20 from Corporal Sye M. Malins, promising to repay Malins on 21 February. This loan was repaid on 3 March 1944 by a check which was duly honored (Ex. B, Twelfth Interrogatory).

c. Specification 1, Additional Charge I.

In this Specification accused was charged with wrongfully making and uttering to the First National Bank of Fort Worth, Texas, a certain check dated 20 January 1944 in amount of $10, drawn on the Bank of America, Grass Valley, California, and by means thereof fraudulently obtaining from the First National Bank of Fort Worth, Texas, $10 in cash. Mr. E. J. Lister, Assistant Manager, Bank of America, Grass Valley Branch, testified by deposition that this check was presented to his bank for payment, which was refused because the balance in the account on which this check was drawn was $1.24 at the time the check was presented (Ex. D). No evidence was presented showing that this check was ever cashed by the First National Bank of Fort Worth, Texas, or that the accused ever negotiated it and obtained any money or other value on it from any source. In other words, proof that accused negotiated this instrument is absolutely lacking.

d. Specification, Additional Charge II.

Lieutenant Colonel Marshall W. Frame, Commanding Officer, 93rd Cavalry Reconnaissance Squadron, testified that on 6 April 1944 he verbally restricted accused, pending the investigation of court-martial charges, to the squadron area, which included the field house and theater (R. 61). The reason for restricting accused rather than placing him in arrest was to enable accused to remain on troop duty status (R. 64) and permission to leave the area of restriction was implied where departure was necessary in the performance of duties (R. 64). In the early part of May, accused went to the station hospital for a physical examination. It was neither necessary nor practicable for accused in going from the squadron area to the hospital to go past the warehouse area, which was located in an opposite direction. Accused had not been authorized at this time to visit any portion of the division area other than the station hospital (R. 63).

On 3 May 1944 Major Walter Greenwood, Jr., observed the accused driving his automobile near the Post Exchange which was outside the squadron area, apparently returning from the neighborhood of the cold storage warehouse (R. 67). Major Greenwood immediately reported this fact to the Squadron headquarters (R. 68).

5. For the defense.

First Lieutenant George F. Stradtmann requested accused to drive him to the station hospital on 3 May 1944 for a POM examination. "Lieutenant Manley" went with them. On the way back from the hospital, accused stopped at division headquarters to see his then defense counsel, Captain Daly. Returning to the squadron area after this conference, Lieutenant Manley asked accused to stop while he obtained a case of beer. Lieutenant Stradtmann himself had been restricted to the squadron area but it was understood that he could leave the area on official business (R. 71, 72). Pursuant to Lt. Manley's request they drove to the warehouse area so that he might obtain the desired beer. The distance was "about half a mile between the three points," i.e., between the squadron area, division headquarters and the hospital.(R. 73).

6. Competent evidence offered in support of Specification 5 of the Charge shows that the accused borrowed $20 from Captain Wolfe, 30 September 1943, giving him a check postdated 10 October 1943 in payment of the loan. This check was cashed by Captain Wolfe on 15 October and thereafter dishonored by the drawee bank. Accused requested Captain Wolfe to hold the check and promised he would redeem it. About two months later he paid $5 of the debt, and made two subsequent payments of $5 each, the last payment being made two or three weeks before his trial. A balance of $5 is still due and unpaid. The conduct of accused in failing fully to repay this loan over a period of eight months without any justifiable excuse is conduct prohibited by Article of War 96. The evidence sustains the findings of guilty of this offense.

Competent evidence offered in support of Specification 8 of the Charge and Specification 3 of Additional Charge I shows that in July 1943 accused borrowed $15 from Sergeant Hamner, promising to repay this amount his next payday. He paid this debt in $5 installments, the last payment being made in December 1943. On 17 February 1944 accused borrowed $20 from Corporal Sye M. Malins, promising to pay the loan on 21 February 1944. This debt was paid by accused on 3 March 1944. It is well settled that borrowing money from enlisted men, at least in the absence of extenuating circumstances not present here, is a violation of Article of War 96. The evidence sustains the findings of guilty of these two offenses.

The evidence offered in support of Specification 1 of Additional Charge I does not sustain the findings of guilty of that offense. There is no evidence in the record that accused negotiated the check and obtained any value for it, either fraudulently or otherwise, from the First National Bank of Fort Worth, Texas, or from any other source. Accordingly, there is no proof of one of the essential elements of the offense alleged, i.e., that accused fraudulently obtained $10 on this check.

The evidence offered under the Specification of Additional Charge II shows that on 6 April 1944 accused was restricted to his squadron area by his commanding officer, pending investigation of court-martial charges. He breached this restriction on 3 May 1944 by driving Lieutenant Manley to the cold storage warehouse area. In instances where it is not deemed necessary to place personnel in arrest or confinement, it may nevertheless be desirable to impose some restraint pending investigation of charges. In such cases, a commanding officer may impose administrative restriction and breach of such restriction may be properly charged as a violation of Article of War 96 (2 Bull. JAG 426, SPJGJ 1943/15606, 5 Oct 1943.) The evidence sustains the findings of guilty of this offense.

7. War Department records show that accused is 25 years of age and a high school graduate. He is married and the father of one child. In civil life he worked as a patrolman for the New York City Police Department, and as a private detective. Accused entered military service 14 September 1940. He was promoted to corporal 1 August 1941. After completing the prescribed course of Officer Candidate School, The Armored Force School, Fort Knox, Kentucky, he was appointed second lieutenant, Army of the United States on 2 January 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 insufficient to support the finding of guilty of Specification 1 of Additional Charge I, but legally sufficient to support the findings of guilty of the remaining Charges and Specifications as approved by the reviewing authority and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jeffrey, Judge Advocate

Robert B. Harwood, Judge Advocate

Robert E. Trimble, Judge Advocate

SPJGV
CM 261432

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 Arthur F. Corcoran, Jr. (0-1014879), Cavalry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1 of Additional Charge I, but legally sufficient to support the findings of guilty of the remaining Charges and Specifications as approved by the reviewing authority and legally sufficient 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

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

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

(Finding of guilty of Specification 1, Additional Charge I, disapproved. Sentence confirmed. G.C.M.O. 601, 3 Nov 1944)

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

SPJGN
CM 261435

14 SEP 1944

UNITED STATES	SIXTH SERVICE COMMAND
v.	Trial by G.C.M., convened at Fort Sheridan, Illinois, 14-15 July 1944. Dismissal.
First Lieutenant ALFRED G. ALLEN (O-521936), Medical Corps.	

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

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1. The Board of Review has examined the record of trial in the case of the officer 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 First Lieutenant Alfred G. Allen, Medical Corps, did at Chicago, Illinois, on or about 12 June 1944, with intent to do him bodily harm, commit an assault upon Nicholas W. Kartheiser, by willfully and feloniously striking the said Nicholas W. Kartheiser on the face and on the body with his fist, and by throwing a dangerous thing, to-wit, a telephone instrument, at the said Nicholas W. Kartheiser.

Specification 2: (Finding of not guilty).

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

Specification: In that First Lieutenant Alfred G. Allen, Medical Corps, was, at Chicago, Illinois, on or about 12 June 1944, drunk and disorderly in uniform in a public place, to-wit: the Stevens Hotel.

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 2 of Charge I, but guilty of all other Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, but recommended that it be commuted to a reprimand and a forfeiture of pay of $50.00 per month for twelve months, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that Mr. Nicholas W. Kartheiser, who had for twenty-five years been employed by an attorney as an investigator, was hired on 2 December 1943 as a house officer by the Stevens Hotel of Chicago, Illinois (R. 56). His duty hours on 12 June 1944 were from midnight to 8:00 a.m. (R. 7-8). He was then fifty-four years old and weighed about one hundred eighty-four pounds (R. 51).

One of his prescribed tasks was to awaken guests, who, after leaving instructions to be called at a designated hour in the morning, failed to respond to the telephone. In such cases he would open the door of the appropriate room with his emergency key and arouse the occupant from his slumber. At about 4:15 a.m. on 12 June 1944 Mr. Kartheiser was on his way to perform this service in Room 2447-A (R. 9). As he reached "the second cross-over" on the twenty-fourth floor of the hotel, he heard someone "pounding on a door" (R. 10). Upon tracing this noise to its source, he found the accused standing before Room 2426-A (R. 10, 21, 22, 26). The accused was dressed in the trousers and shirt of an Army Officer but wore no blouse (R. 84). Although Kartheiser was under the impression that the insignia of the Medical Corps and a first lieutenant's bar were attached to the collar of the shirt, other testimony establishes that neither indication of rank was present (R. 22-23, 66-67, 84, 107).

Because of a confusing numbering system adopted by the hotel, the spectacle of lost guests wandering about the corridors was not uncommon, but rapping on doors was not one of the means of orientation normally resorted to by them (R. 20-21, 48). Approaching the accused, Mr. Kartheiser introduced himself as the house officer and inquired whether he could be of any assistance and whether the accused "lived there." To the last question the reply was in the affirmative (R. 10, 23-24, 26). At that moment the door opened and a gentleman appeared at the threshold. Kartheiser immediately also asked him whether the accused "lived there." The gentleman answered "No." To the further query as to whether he knew the accused, he said "I do not." Kartheiser offered his apology and the occupant being "very congenial" accepted it and closed his door (R. 11, 24, 26).

Kartheiser inquired whether the accused was registered at the hotel. The accused said that he was and produced a key to Room 2415-A as proof (R. 11-12, 25, 27). There was a "very peculiar stare in his eyes," and

his breath smelled of liquor. He was considered to be "under the influence of liquor" by Kartheiser (R. 11-12, 14, 25, 34, 49, 52-53). This opinion was based in large part upon the accused's knocking on the wrong door at 4:30 a.m. (R. 53).

Kartheiser's next remark was, "Well, come on, I will help you to your room. It will be a pleasure to get you where you belong" (R. 12, 27-28). He started toward 2415-A with the accused "right alongside" of him (R. 28). Until they reached the corner just twenty paces from their destination the accused was agreeable and cooperative (R. 28). Either before starting out or at some point en route Kartheiser had commented that, "4:00 o'clock in the morning was not a very nice time to be about rapping on people's doors and that [the accused] would get in trouble." As they rounded the corner, the accused suddenly became hostile and said, "Well, who in the hell is going to give me any trouble?" Kartheiser countered with a threat, declaring that "It is very easily handled. All I do is raise the receiver and the military people will be here to take care of you... I am not interested in any trouble with you" (R. 12, 27, 32). The accused lagged behind Kartheiser during the last few steps to 2415-A (R. 28). As they walked along, Kartheiser said, "I will help you into your room now and everything will be all right. . ." The accused inquired "Do I have to go to bed?" To this question Kartheiser answered, "You can go into your room or get out of this public corridor, and don't disturb these people here because they are objecting" (R. 29). At the door Kartheiser stopped, waiting for the accused to enter (R. 12, 29). The accused remained outside. Kartheiser remarked, "Here is your room now, you better go in and go to bed and forget about it" (R. 12, 32). The accused said "No, No," and did not budge (R. 32). Realizing "that it was going to be a mess of trouble," Kartheiser "decided that the next best thing to do was to let the military authorities handle their own" (R. 29, 31).

He headed toward the telephone on the floor clerk's desk located at a distance of some sixty-one paces from 2415-A (R. 12-13, 33). The accused followed. He "weaved and was unsteady of foot" and conducted himself in "a very threatening manner" (R. 13, 50, 55). He abused Kartheiser and complained that, "It is a fine thing around here when a fellow can't, after he pays his rent here, that he can't roam around the hotel here." Kartheiser replied that, "this is not an hour of the morning to be roaming around, and you should realize that" (R. 13).

Upon reaching the desk he picked up the telephone, which was of the "cradle" variety, and said, "Call me the MP's." Having delivered this laconic message to the operator who was "very skillful" and who knew from his "expression what is wanted," he "hung up" (R. 13, 36-37). At that instant the accused gave him a violent "whack" on the shoulder and pushed him aside. Seizing the telephone, the accused backed away from the desk

and snapped the connecting cords loose from their terminals inside a box on the wall (R. 14, 38, 48, 50, 51). The two men were then about four paces apart (R. 39). After pausing momentarily to wrap the cords round the telephone, the accused threw it at Kartheiser who "evaded it" (R. 14, 39). The missile missed its objective by six or eight inches (R. 14).

The accused lunged forward, "his right arm set to strike" (R. 14-15). Kartheiser side-stepped and punched him on the left side of the jaw. The combined force of the blow and his own momentum hurled the accused against the desk. He "hit [the] side of his head . . . and lit on the floor." Rising to his feet almost instantly, he again advanced in a threatening manner. Kartheiser struck him a second blow, this one with the left hand, and "knocked him over against the settee." The accused "picked himself up . . ., came over. . . and from that time on it was quite a rough-and-tumble fight." He was bleeding profusely. There was blood on his face, on his shirt, on the carpet and on Kartheiser's clothes (R. 42). Despite the accused's wound, Kartheiser soon began "to get hell" and among other souvenirs of battle was presented with a pair of black eyes (R. 15-16, 41-44).

During the early stages of the fight, William F. Ader, Jr., one of the elevator operators, received a call "to go up to the twenty-fourth floor." When he arrived there, he saw the accused and Kartheiser on the floor. Both were "very bloody," "quite exhausted," and "barely struggling." (R. 59, 68, 70). Kartheiser called out to Ader and requested that the other house officer, who was in the drug store, be summoned (R. 16, 45-46, 60, 68). Ader "was sort of dumfounded and . . . just stood there, gaping" (R. 46, 68). Recovering from his amazement in about a minute, he proceeded to perform his errand.

He returned shortly with three bellmen. Others had already preceded them. The combatants had been separated, and the accused was swearing at Kartheiser (R. 46, 61, 70-73). After a brief stay, Ader descended to the lobby (R. 61, 72).

When the first rescue contingent under the leadership of Aaron Walker, the night elevator starter, reached the twenty-fourth floor, they found Kartheiser and the accused "standing looking at each other" (R. 78-79, 82). The two men exchanged some additional words and moved closer to one another (R. 72, 79-80). Fists flew and Kartheiser went down. Although advised by Walker to stay down, he "tried to get up but fell" (R. 80). He had been knocked unconscious and was in "a rather helpless condition" (R. 16, 43). He was removed to a washroom on the fourth floor and revived (R. 16, 44, 80).

In the meantime about fifteen minutes after he had brought the three bellmen up, Ader made another trip to the twenty-fourth floor. Kartheiser and his rescue party were gone. Only the accused and an unidentified civilian remained (R. 74). The civilian had his back to the elevator and

was pleading with the accused, saying "Be calm, don't get excited; I am not here to fight with you" (R. 62). After delivering these words of peace, the civilian backed into the elevator. The accused "charged in after him" and prevented the doors from being closed (R. 62-63, 75). For a few seconds he faced the civilian who had stationed himself in a corner of the elevator. Turning around toward Ader, who again "just stood there sort of dumfounded," the accused for no apparent reason seized him by the throat, choked, and finally shoved and "sort of threw" him against the desk (R. 63, 76-77). To ease his fall, Ader put out his left arm. The impact broke it in two places (R. 64-65). Ader fled to the twenty-third floor, but finding the door locked there, returned to the twenty-fourth floor. Observing the accused arguing with some bellmen, he entered the elevator and descended to the main lobby (R. 64, 65, 76). The following afternoon his arm was set (R. 65). At the time of the assault upon him he was eighteen and a half years old and weighed ninety pounds (R. 58, 67).

Having recovered somewhat from the effect of his beating, Kartheiser sent Walker up to the twenty-fourth floor to watch the accused (R. 88). Walker went up in a service car and stationed himself behind a door in the service building. Peeping from this vantage point, he saw the accused talking to a doctor who lived in room 2415 (R. 80, 81, 87). The accused "seemed to be threatening the doctor," and Walker could hear "a little pushing, a little slapping going on" (R. 81). After a while the accused seemed to be mollified and entered the doctor's room (R. 81, 88, 90). Walker put in a second call for the Military Police but forthwith returned to his post behind the service building door (R. 89). He was soon joined by Joseph Fischer, a steamfitter employed by the Stevens Hotel (R. 92-93, 101). In about fifteen minutes, Walker saw the doctor and his wife but not the accused leave the room. The couple seemed to be frightened and hastened down one flight of stairs (R. 81, 89, 91). Unlike Walker, Fischer saw the accused follow the doctor and his wife (R. 94, 101).

The messages which had been sent brought a "radio squad" of military police led by a Corporal Conlin. They were followed within a short period by First Lieutenant Norton C. Conklin, the Officer of the Day. He was immediately escorted to the accused's room and told, "The trouble is in here, sir" (R. 103). Inside he found the accused and a Lieutenant Mary Kelsey (R. 103, 108). The shoulders of the accused and the neck of his shirt were saturated with blood, "still wet." He was engaged in a futile attempt to remove his necktie which was "blood-soaked" (R. 104). Lieutenant Conklin had finally to cut it off (R. 107, 110). The accused "peered" at him "several times with a squinting look and addressed" him as "Captain." Lieutenant Conklin was wearing the single bar indicative of his true rank (R. 104). The odor of alcohol emanated from the accused, and he weaved slightly as he walked (R. 107, 110, 112). Upon Conklin's order he undressed and took a shower. He "came out looking like a new man" (R. 107-108). A cut about an inch long at the base of his head was then clearly visible (R. 113). All of the blood on the carpet of the corridor and on Kartheiser came from this wound (R. 114).

After the accused had been placed in arrest, he remarked to Kartheiser who had returned to the twenty-fourth floor: "Well, have you got enough or do you want some more?" (R. 18). When Fischer walked by, the accused "grabbed" him by the overall and asked him where he was going (R. 99).

Everyone of the witnesses for the prosecution was convinced that the accused was drunk (R. 11-12, 26, 49-50, 52, 55, 66, 69-70, 82-83, 87, 98-99, 106-107, 112). Ader had seen at least fifteen cases of drunkenness during the two days of his employment at the Stevens Hotel, and the others had observed hundreds and even thousands (R. 56, 65, 82, 98, 106). Kartheiser admitted, however, that his opinion "might possibly" have been different had he known that the accused was attempting to conceal the presence of a lady in his room (R. 34).

4. The accused, after being fully apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. He had obtained an M.D. degree from the College of Medicine at the University of Cincinnati in 1942 and had served his interneship at Christ Hospital and the Children's Hospital in Cincinnati, Ohio (R. 117-118). On 3 July 1943 he was commissioned a first lieutenant in the Medical Corps. Upon completion of a six week course at Carlisle Barracks, Pennsylvania, he served at Jefferson Barracks, Missouri, for seven months (R. 118). At the end of that period he was transferred to the Station Hospital at the Air Field in Sioux Falls, South Dakota (R. 119).

In pursuance to orders he delivered a patient from that post to the Schick General Hospital at Clinton, Iowa, the morning of 11 June 1944. Having been granted twenty-four hours "to turn around in" before returning to the Air Field, he called Lieutenant (now Captain) Richard Woolery, another Medical Officer, in Chicago and Lieutenant Mary Kelsey, an Army nurse, in Moline, Illinois, and arranged to meet both of them in Chicago later that afternoon and evening respectively (R. 120, 123, 139). Woolery was "a particularly good friend" with whom the accused had roomed at Jefferson Barracks (R. 120). Lieutenant Kelsey was assigned to the Station Hospital at Sioux Falls but was on leave at her home in Moline (R. 123).

The accused met Lieutenant Woolery in room 2507-A at the Stevens Hotel and was introduced to a Mr. Robert Schaefer (R. 121). In the course of the afternoon, the accused obtained room 2415-A for himself. At approximately 6:30 p.m. he had dinner with Lieutenant Woolery and Schaefer and consumed two drinks containing an ounce and a half of whiskey each (R. 123, 142). At the completion of the meal, the accused went to the LaSalle Street Station to meet Lieutenant Kelsey's train which was due at 8:30 p.m. It did not, however, arrive until 9:15 or 9:20 p.m. (R. 124). When the accused and Lieutenant Kelsey reached the Stevens Hotel, they found "a great many people" at the reservation windows. Rather than wait, the accused surrendered his room to Lieutenant Kelsey and arranged to share Lieutenant Woolery's room that night (R. 125, 127).

When Lieutenant Kelsey had "cleaned up" and "changed her clothes," the accused accompanied her to the LePetite Cafe in the Palmer House where they met Lieutenant Woolery and Mr. Schaefer. The accused did not have any drinks but the others did. He was too tired, having been on duty as Officer of the Day from 8:00 a.m. on 9 June to 8:00 a.m. on 10 June 1944 and having had only four hours sleep on the train from Sioux Falls to Clinton during the night of 10-11 June 1944 (R. 125, 135-136, 138-139, 141). From the Le Petite Cafe the party went to the Bamboo Room in the Sherman Hotel. While viewing the floor show, the accused had one mixed whisky drink (R. 126, 143). After a short stay, the party again moved, this time to "a place called Gibby's." Their visit at this establishment lasted from shortly after midnight to about 1:30 a.m. During that period the accused had two more mixed whisky drinks (R. 126-143).

The party returned to the Stevens and went upstairs to room 2415-A to have a "nightcap" (R. 127, 163). Because of the lateness of the hour, no one finished the drink served (R. 127). Leaving Lieutenant Kelsey in sole possession of room 2415-A, the three men adjourned to room 2507-A. Mr. Schaefer went to bed immediately, but the accused and Lieutenant Woolery spent the next two hours talking and consuming two more mixed drinks each (R. 127-128, 143-145).

At about 4:00 a.m. they discovered that they "were out of cigarettes." The accused remembered that he had some in his blouse which he had left in room 2415-A (R. 128, 145-146). He decided to retrieve both the blouse and the cigarettes and walked down one flight of stairs to the twenty-fourth floor. Becoming confused by the peculiar numbering system, he went to the wrong side of the building. In the hope of obtaining some help he rapped on the door of a room into which he thought he had seen a man enter (R. 128, 147-148, 160). "Very shortly after . . . somebody came up and took [the accused] by the arm and said: 'What business have you got knocking on doors in the middle of the night waking people up?'" (R. 128-130). The question was asked by Kartheiser. The accused "was not intoxicated" but, when he was also asked "Is this your room?" he believed that "it was none of [Kartheiser's] business," and that he "was simply interfering" (R. 130-131, 147). Annoyed, the accused replied "Yes . . ." (R. 130-131, 147-148).

After the occupant of the room had answered the knock and had withdrawn, Kartheiser said "You got no business going around knocking on people's doors in the middle of the night. Are you a guest here?" The accused discovered that he had the key to 2415-A in his pocket and displayed it (R. 131). Kartheiser said: "Well, come along, I will show you where that room is." The accused made no further comment until the corridor in which 2415-A was located was reached. He then declared, "I can find it now, never mind." Kartheiser replied, "Oh, no, I will show you the room." Considerable "bickering" ensued over the issue (R. 132). In the accused's own words,

"I knew that Miss Kelsey was in that room. I knew that anyone coming in the room with me and finding her there, probably to the best of my knowledge, in bed, it would look as a very compromising situation, and I did not want anybody to know, naturally, I thought, because it was something that if it were explained it would not be believed" (R. 132, 157).

When the accused persisted in his refusal to enter the room, Kartheiser threatened to call the "MP's," and walked toward the telephone. The accused "decided I did not want the MP's coming there and finding the same situation which I wanted him not to discover" (R. 133). When Kartheiser carried his threat into execution, the accused jerked the telephone away and snapped the cord. He definitely did not throw the instrument but merely dropped it to the floor and pointing at Kartheiser, "repeated very emphatically that he had gone just far enough, to attend to his own business . . ." (R. 134, 151). As the accused uttered these words, he was struck in the face and knocked against the desk (R. 134-135).

From the moment he suffered the blow to his head until his arrival at the Military Police depot after his arrest, he recalled nothing distinctly. He had only "a hazy and fragmentary recollection of strife and anger after that time, but nothing [was] clear, no people [were] clear" (R. 135, 152, 154, 166, 168). The gash in his head was "not serious" but it "dazed" him (R. 161-162). In his opinion as a medical man it would "not necessarily" result in a weakened physical condition (R. 153). The bleeding continued all that day and was oozing for a week thereafter (R. 163-164).

The accused did not believe that the seven and a half drinks consumed by him were sufficient to cause intoxication, primarily because the "period covered was a long time with a full meal in between." He had probably had as much to drink before at various parties (R. 166).

His account of the events of the night and morning of 11-12 June 1944 prior to the encounter with Kartheiser was corroborated in all substantial respects by Captain Richard H. Woolery. In the Captain's opinion, intoxication was always indicated by "staggering, or incoherent speech or something along those lines" (R. 174). Measured by this standard, the accused was not drunk (R. 173). In a letter to a Major Hoffman dated 26 June 1944, the Captain had stated that five or ten minutes after the unfinished nightcap in room 2415-A, the accused "came to my room, and we had a few more drinks." Upon interrogation, the Captain defined "a few" as meaning "two" in this case (R. 176).

In answer to a long hypothetical question Captain Nathan Zolt, a "certified specialist in psychiatry," testified that based upon the "assumed facts" the "blow on the head could produce such a state of clouding of consciousness and impairment of reasoning and judgment, and removing the inhibitory

part of the intellect to such an extent" as to induce the behavior of the accused toward Kartheiser. As between intoxication and the blow, the latter was the "more probable" cause (R. 186, 200). Both might produce similar symptoms (R. 187, 202).

Upon cross-examination, Captain Zolt admitted that he had not examined the accused and that his opinion was based entirely upon the facts stated by Defense Counsel. Captain Zolt's opinion would have been modified had he known of the accused's weaving and the "glassy condition" of his eyes prior to the altercation (R. 188-189, 194, 200). That information might have led to a conclusion of intoxication (R. 189). Knocking on a stranger's hotel door at 4:00 a.m. was regarded by Captain Zolt as conduct "within normal limits" (R. 191). The tearing of the telephone wires from the wall was explainable as the product of anger rather than alcohol (R. 192).

Mr. Erastus S. Allen, the accused's father, testified that during "all my experience with my son I have always felt that he was a diffident boy, inclined not to fight. I never heard of his having had any kind of fight, or even a strong argument with anyone." The accused had never been known to drink to excess. His veracity was beyond question. A certified transcript of his scholastic record in medical school showed an average grade over a four year period of 86.5 (R. 209-210).

Both sides stipulated that if certain other witnesses were called for the defense they would testify that the accused is courteous, cooperative, loyal, dilligent, quiet, studious, considerate, and charming; that the character of his work as a medical officer is excellent; that his record as an interne was also excellent, and that his duties were performed in a most satisfactory manner; that his reputation in the community was good; and that his average grade in medical school in all subjects was 86.5 (R. 212-215).

5. Specification 1 of Charge I alleges that the accused did, "on or about 12 June 1944, with intent to do him bodily harm commit an assault upon Nicholas W. Kartheiser, by willfully and feloniously striking the said Nicholas Kartheiser on the face and on the body with his fist, and by throwing a dangerous thing, to wit, a telephone instrument at the said Nicholas Kartheiser." This was set forth as a violation of Article of War 93.

Mr. Kartheiser was in the proper performance of his duties on the night of 12 June 1944. His manner and his speech may have been brusque, impolite, and in a sense even offensive, but his lack of finesse and diplomacy did not excuse retaliation in the form of physical violence. The world is full of ill-behaved people, and one of the burdens of a gentleman is to endure them.

That the accused desired to prevent an embarrassing situation from coming to light perhaps explains his conduct, but does not exculpate him. Private, selfish reasons provide the motivating factors behind every intentional offense. To give them any weight as extenuating circumstances would be to nullify our criminal law.

Although Kartheiser's testimony contains a number of minor discrepancies, it definitely establishes that the throwing of the telephone at him by the accused initiated hostilities. Although the possibility exists that Mr. Kartheiser could have avoided the struggle which followed, his reaction was a perfectly natural one. Since the accused was the aggressor, all subsequent blows delivered by him were as wrongful and unlawful as his hurling of the telephone, even though some of them may have been in repayment of Mr. Kartheiser's well-aimed punches.

The accused's animus was demonstrated by his persistence in continuing the struggle until Kartheiser had been rendered unconscious. The final bit of evidence was the defiant remark to Kartheiser: "Well, have you got enough, or do you want some more?" The intent to do bodily harm may also be inferred from the use of the telephone as a missile. If it had reached its mark, it might well have produced a serious injury. As used, it was clearly a dangerous weapon.

The accused's assault was an unwarranted interference with the performance of Kartheiser's duties. Since it was not induced by any legally recognizable provocation or motive, the record amply supports the finding of guilty. The evidence adduced by the defense in the attempt to prove that the accused was not intoxicated conclusively disposes of the possibility that he was so drunk as to be incapable of forming a specific intent.

6. The Specification of Charge II alleges that the accused was "on or about 12 June 1944, drunk and disorderly in uniform in a public place, to wit, the Stevens Hotel." This offense was laid under Article of War 95.

The accused's conduct was wild and erratic. In the words of Ader, he "was not carrying on like a normal person" (R. 66). An attempt has been made to trace his eccentric actions to the blow on his head. When one, however, considers that prior to the infliction of the wound he had been drinking, that his eyes were glazed, and that he "weaved" in his walk, one must conclude that alcohol, and not Mr. Kartheiser's fists, was the cause. The accused's lack of sleep may have accelerated and intensified the effect and potency of the liquor which he consumed, but there is ample foundation for the suspicion that his "few" drinks in Lieutenant Woolery's room numbered more than two. In any event, the accused should have known his own capacity and must be held responsible for the consequences of his excessive drinking.

His assault upon Kartheiser, his violent treatment of Ader, his threatening demeanor toward the doctor and his wife, his agitated attitude toward the civilian who backed into Ader's elevator, and his seizure of Fischer's overalls all reveal a frenzied and unreasoning mind. The only plausible explanation is over-indulgence in alcohol.

These various acts were all breaches of the peace and per se disorderly Since a hotel corridor is a public place: CM 259933, and since the accused was dressed in a uniform, all of the allegations of the Specification have been proved beyond a reasonable doubt.

7. The accused is about 28 years old. The records of the War Department show that he received a Bachelor of Arts degree from the University of Cincinnati in 1938 and the degree of Doctor of Medicine from the same school in 1942; that he served his interneship at Christ College, Cincinnati, Ohio, from June 1942 to June 1943; that he was commissioned a first lieutenant in the Medical Corps on 15 May 1943; and that he reported for active duty on 4 July 1943 and has been continuously in the service since that date 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 93 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.

(254)

1st Ind.

War Department, J.A.G.O., 21 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 First Lieutenant Alfred G. Allen (0-521936), Medical Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. In accordance with the recommendation of the reviewing authority, I recommend that the sentence be confirmed but commuted to a reprimand and a forfeiture of $50 of his pay per month for twelve months and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for twelve months. G.C.M.O. 566, 16 Oct 1944)

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

SPJGQ
CM 261439

- 7 SEP 1944

UNITED STATES	)	HAWAIIAN DEPARTMENT
v.	)	Trial by G.C.M., convened at APO 958, 28 June and 3 August 1944. Death by hanging.
Private SYLVESTER SMITH (34278037), 292d Port Company, 504th Port Battalion.	)	

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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Sylvester Smith, 292d Port Company, 504th Port Battalion, APO 455 (formerly assigned to the 539th Port Company), did, at Honolulu, Territory of Hawaii, on or about 9 May 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Samuel Leone Pakuai, Junior, a human being, by stabbing him with a knife.

He pleaded not guilty to and, all members of the court present at the time the vote was taken concurring in the finding, was found guilty of the Specification and the Charge. No evidence of previous conviction was introduced at the trial. He was sentenced to be hanged by the neck until dead. On 22 July 1944 the reviewing authority returned the record of trial for reconsideration of the sentence adjudged by the court and on 3 August 1944 the court was reconvened for the purpose indicated and adhered to its former action and upheld the sentence as originally imposed. The reviewing authority approved the sentence, recommended commutation of the sentence to life imprisonment 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 was at all times referred to herein, in the military service of the United States and a member of the 539th Port Company. On 22 May 1944 he was transferred to the 292d Port Company (R. 13, 20).

On 9 May 1944 the accused, accompanied by Private Edward Jamison of the 539th Port Company, with whom he had spent the night in the Victory Hotel, Honolulu, T.H., made a round of sundry drinking establishments after they had breakfasted at 8 or 9 o'clock a.m. They first visited a place called "Sad Sam's" (R. 21) where they had about four mixed drinks (R. 22). At about noon they went to "Two Jacks" and from there to "The Tiger Inn" arriving there at about 2 or 2:30 o'clock p.m. "The Tiger Inn" is a small cafe accomodating 16 persons at four tables and 18 persons on stools ranged along the bar (Pros. Ex. G) so that when the patronage is excessive it becomes necessary to stand in line to gain admission (R. 22, 38, 59). The order and decorum of the Inn was in the hands of a "bouncer" named Abraham Kealohapauole (Abe) (R. 23, 56) and on this day Samuel Pakuai (Sam), a friend of Abe's was also present sitting at the bar (R. 36, 61).

When the accused and Jamison arrived they were first in line and shortly thereafter Abe beckoned to the accused to come in and he entered, taking the only vacant seat at the first table inside the door. Jamison was still outside by the door (R. 22). Jamison saw the accused order and receive a drink and noticed that he showed the waitress a ring which he was wearing and allowed her to try it on (R. 23, 35). The accused then gave the ring to the waitress who put it on and went behind the counter (R. 30) where she then placed it on a shelf (R. 35). She did not return the ring to the accused but gave it to somebody who called for it on the next day. (R. 37).

Jamison, who was still in line outside had to go to the toilet so he requested permission to go inside for the purpose and was followed to the toilet in the rear by the accused (R. 23). When they returned to the front of the bar after a few minutes the accused's seat had been taken though he had not finished his drink. Jamison was about to go out and take his place in line when an argument ensued between Abe, the "bouncer", and the accused (R. 24).

By this time a crowd had gathered in front of the cafe (R. 32) and numerous persons witnessed what happened thereafter. According to Abe, he told the accused after he returned from the toilet to leave and again take his place in the line outside. This the accused refused to do and insisted that Jamison, who was outside, should be allowed to come in. Thereupon Abe put his hands on the back of the accused and pushed him out of the door (R. 59). As Abe turned to go back into the cafe someone called his attention to the fact that the accused had a knife in his hand and, turning again, he saw the accused holding an open knife in

his hand, above his head. He told him to put the knife back but the accused made no answer and kept moving his arm up and down causing Abe to back up toward the door of the cafe. At this point Samuel Pakuai, the deceased, came on the scene. He had been standing by a window of the cafe and when he saw Abe "was troubled with Smith (the accused) he tried to come in there and give (him) a hand" (R. 60, 61). The accused was at this time standing by a lamp post on the edge of the sidewalk and Abe was between him and the cafe, about three feet from the accused (R. 59, 61). The deceased approached from Abe's left side and, using both of his hands, tried to grab the accused's hand, but he failed and accused's right arm came down and "landed right above Sammy's heart". Sam had not hit the accused but merely tried to grab the knife (R. 62). After having struck Sam the accused ran across to the opposite side of the street with Abe chasing him. Just as he reached the other side he turned around and faced Abe who then called another "bouncer" by the name of Miller, "a colored boy", who grabbed the accused's two arms from behind. Abe tried to get the knife away from the accused but was unable to do so. A military policeman then came up, took the knife away from the accused and handcuffed him (R. 63). Abe then found Sam, the deceased, lying in the street with a wound over his heart (R. 64).

Seaman 1/c Charles Duke and Seaman 1/c Marvine Rock members of the 95th Naval Construction Battalion, were standing in line at the entrance to the Tiger Inn at about 2:30 p.m. on 9 May 1944 (R. 38, 46). They saw the accused and "another colored fellow" standing on the sidewalk, about 4 or 5 feet from the door to the Inn (R. 39, 47, 48). The accused was arguing with Abe, the "floor manager" of the Inn, trying to gain admission. Abe said the accused should get in line and the accused insisted that he had a seat inside and he was going in to get it. As the accused started in the door Abe pushed him back. The accused again had words with Abe and advanced toward him. At this point Samuel Pakuai, the deceased, stepped in between Abe and the accused pushing the accused backward toward a car parked at the curb (R. 40, 41, 48). They "sort of wrestled" (R. 41, 44) and suddenly the witnesses saw the accused raise his right arm holding a knife in his right hand and bring it down stabbing Sam (R. 41, 45). Duke did not see Sam strike the accused and he saw the accused strike Sam only once. The accused then backed into the street and Sam staggered against the car and fell in the street as he tried to follow him (R. 42, 50.

Conrad Hofmeister, a civilian, business man of Honolulu, had parked his car immediately in front of the Tiger Inn on 9 May 1944 at about 2:50 p.m. At this time while sitting in his car he noticed two negro boys one of whom was the accused, embroiled in an argument with the deceased who was asking them to move along (R. 67-69). Abe was standing in the doorway to the Inn (R. 72). The accused, then standing quite close to the deceased, put his hand into his pocket, withdrew an open knife and started walking toward the deceased (R. 69). The deceased walked toward accused telling him to put the knife away. Instead, the accused, twice struck the deceased (R. 70, 72, 74). The deceased staggered forward toward the car spattering blood upon the door and the accused backed off still holding the knife in his raised hand, then turned and ran diagonally

across the street. When Hofmeister next looked at the deceased he was lying in the street (R. 70, 71). The witness had not seen the deceased strike the accused at any time (R. 72).

Jamison, the accused's companion, said there was an argument between Abe and the accused inside the cafe which was continued on the outside after Abe had pushed the accused out of the cafe (R. 24, 25). The accused insisted upon going back to finish his drink and get his ring. Just then the deceased appeared and "it seemed like Abe left it up to this other fellow". As the accused made another effort to go in the deceased struck the accused in the face with his fist (R. 25, 26, 31). Then as the deceased again moved toward the accused in an angry manner the accused put his hand in his pocket, withdrew a knife, took a step forward, and hit the deceased once on the chest (R. 26, 27, 31). The deceased then jumped back and Abe advanced on the accused who was backing across the street with the knife in his hand (R. 27). On the opposite side someone "locked arms" with the accused just as the military police arrived (R. 28).

Roland K. Miller, a civilian employee in the Pearl Harbor Navy Yard, was working as a doorman at the Riverside Cafe (opposite the Tiger Inn) on the afternoon of 9 May 1944. He was at the door of the cafe at the time the accused backed across the street toward him holding a knife, and when Abe told him to grab him he seized the accused, pinning both his arms down (R. 78, 79). Although the accused struggled he held him until the arrival of military policemen (R. 26, 80, 81). The accused had almost broken loose from Miller when one of the military policemen came to his assistance and helped to hold him (R. 77), and the accused was not disarmed until another military policeman came up and, by strangling the accused, made him drop the knife (R. 77, 81).

At about 4 p.m. on 9 May 1944 the accused was given a sobriety test by Major Joseph Kuncl, Jr., Medical Corps, at the Station Hospital. A blood alcohol analysis showed 1.5 milligrams of alcohol per cc of blood but from this and the physical reactions of the accused Major Kuncl was of the opinion that the accused was sober (R. 85, 86).

On 9 May at 1700 the accused made a statement in the presence of T/5 Alvin E. Schwartz, of the Army Port and Service Command, Private Irwin A. Seibel, Criminal Investigator's Section of the Provost Marshal's office and Detectives Neil A. Donahue and Clarence Honan, both of the Hawaiian Police Department (R. 87, 89, 91, 94). After proper warning as to his rights the accused admitted being in a cafe in the afternoon of 9 May 1944 with his companion, Jamison. During an argument with a doorman they were evicted but the dispute continued on the outside. The accused insisted upon returned to the inside of the cafe to finish his beer and to obtain a ring he had given to a waitress and the doorman refused to permit him to do so. At this point the deceased came out of the door of the cafe and asked the accused if he wanted "to make something of it" to which the accused replied "no" and again requested that the woman bring him his ring. Thereupon the deceased hit the accused who then drew a knife out of his pocket, opened it and stabbed the de-

ceased once. After doing so, he crossed the street still holding the knife exposed until he was apprehended by the military police and the knife was taken from him. When asked "What was your reason for stabbing this man", he answered: "My reason for stabbing, because he hit me first". This statement, after another proper warning as to his rights was signed by the accused and sworn to before Captain Wade H. Heaton, C.M.P. on 10 May 1944 (R. 95; Pros. Ex. K).

At about 3 p.m. on 9 May 1944 an ambulance driver of the Honolulu City and County Emergency Hospital took the deceased from the spot where he found him lying in the street to the hospital and delivered him to Dr. Richard K. Chun, Assistant City and County physician at the hospital (R. 7, 8). Dr. Chun made an immediate examination of the deceased and found him dead. There were two significant wounds upon the body. One was in the front of the left chest just beneath the collar bone. It measured 9 cm. in length and 3½ cm. in width. On the left lateral chest, between the seventh and eighth ribs at a point marked by a line running from the front of the armpit was another wound 7½ cm. in length and 2 cm. in width. The wounds were gaping and the edges thereof were sharp. The first wound entered the chest cavity and severed the first rib on the left side. The surface of the upper lobe of the left lung was nicked and the left carotid artery was severed a short distance from the aorta. He found about 800 cc of blood in the left chest cavity and the left lung was completely collapsed. The cause of death was given as extensive hemorrhage in the left chest cavity due to the severance of the carotid artery and also the collapse of the left lung (R. 8-12). Dr. Chun performed an autopsy and the report and the death certificate were admitted in evidence (R. 11; Pros. Exs. A, B).

On 9 May 1944, at some time after 3 p.m. certain photographs were taken and these were admitted in evidence as Prosecution Exhibits C (the deceased), H (Tiger Inn and Street) and I (automobile) (R. 15-19). Two maps or diagrams, one of the street on which Tiger Inn is located and one of the interior of Tiger Inn were admitted in evidence (R. 14; Pros. Exs. F, G).

4. The accused, having been advised of his rights to testify, make an unsworn statement or remain silent, elected to remain silent.

5. There is overwhelming proof by the prosecution that the accused did, on 9 May 1944, strike Samuel Pakuai, the deceased, with an open knife inflicting wounds sufficiently grievous to cause his death within a short time thereafter. Numerous witnesses are in accord on this fact including Jamison, the companion of the accused, and the accused himself admitted assaulting the deceased in the manner and at the time and place alleged.

It is not contended by the defense, either by the nature of the evidence adduced or in argument to the court, that the blows were delivered

in self-defense, nor could such a defense be successfully maintained in the light of all the evidence. Even though there had been a quarrel between the accused and the deceased during which the deceased advanced upon the accused and gave him cause to fear great bodily harm or death at his hands, he cannot be heard to justify his resort to the necessity of killing his assailant unless he had retreated as far as he could safely go.

The rule that to excuse a killing on the ground of self defense upon a sudden affray, the killing must have been believed on reasonable grounds by the person doing the killing to be imminent and necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them (par. 148a, MCM 1928) is qualified by the important principle that, before the assaulted person may take life in defense of his own he must have retreated as far as he safely can. This common law doctrine requires that a person, when attacked by another by whatever means, except when in his own home, must give ground, or, as it is often stated "retreat to the wall", if practicable, before taking the life of his assailant. So long as a safe avenue is open to him he must take that means of escape. "The wall" is presumed to be reached whenever retreat cannot be further continued without probable death and when the only apparent means of escape is to attack the pursuer, though it need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death. (Wharton's Criminal Law, 12th Edition, Sec. 616; CM 237641 Brackins, 24 B.R. 71).

In this case there was no showing of any circumstances from which the right to slay in self defense may be justified. The accused was armed with an open knife and although one witness (his companion, Jamison) testified that the deceased had first struck the accused no witness saw the deceased armed with any weapon of any kind. Granting that the deceased made further advances toward the accused in an angry manner, he was then unarmed and could occasion no fear of death or great bodily harm to any reasonable person standing in the accused's place. Had the accused been unarmed the worst that could reasonably have been feared was mutual combat. But, being armed with a knife, the accused had the advantage and in such a situation could not conceivably have been imperilled so as to justify the killing of his assailant without retreating as far as he could safely go without resorting to the homicide. The quarrel was in the open street and the evidence shows clear avenues of escape in three directions. Instead of retreating, however, the record discloses that the accused advanced and struck the fatal blow.

It was, however, earnestly contended that the offense committed by the accused is manslaughter and not murder and to resolve this matter requires an examination of the law and of all the testimony regarding the facts and circumstances surrounding the accused and the deceased at or shortly prior to the homicide.

According to the Manual for Courts-Martial murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. A homicide done in the proper performance of a legal duty is justifiable and 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, is excusable (Par. 148a, MCM 1928). Certainly the homicide in the instant case was not legally justifiable and it has been shown above that it was not legally excusable.

The question then remaining is the determination of whether the element of malice aforethought is present for if not, the crime is manslaughter only (par. 149, MCM 1928).

Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word aforethought does not mean that the malice must exist for any particular time before the 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; (1) 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); or (2) knowledge that the act which causes death will probably cause the death or a 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 . . .(par. 148a, MCM 1928).

As above stated, when the element of malice aforethought is missing the offense can be of no higher grade than manslaughter and manslaughter is either voluntary or involuntary. Where the act causing the death is committed in the heat of sudden passion caused by provocation it is voluntary. When, however, a homicide is unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law, it is deemed involuntary (par. 149a, MCM 1928).

Obviously, there is nothing in this case which requires inquiry into whether, if the offense was manslaughter, it was of an involuntary character. The crime is either murder or voluntary manslaughter depending upon the malice or lack of malice which distinguishes the two. The law does, however, recognize the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not, in such a case, punish him as severely as if he were guilty of a deliberate homicide.

In voluntary manslaughter 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 excuse for killing or doing bodily harm. The killing may be manslaughter only, even if intentional, but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists. Assault and battery inflicting actual bodily harm is one instance of adequate provocation and if the person so assaulted kills the offender in a heat of a sudden passion caused by the act, manslaughter only has been committed (par. 149r, MCM 1928).

Briefly summarizing the uncontradicted facts which are clearly established by the evidence it appears that the accused and his companion, Jamison, visited a small drinking establishment in the early afternoon of 9 May 1944. The capacity of the cafe in proportion to its patronage required that persons seeking admission were often obliged to stand in line outside and await their turn. Such was the situation at the time when the homicide occurred. To regulate the flow of traffic the establishment employed a bouncer by the name of Abe. The accused had gained admission and had obtained a seat where he was drinking beer when Jamison, who was still in line on the outside, asked permission to go in to visit the toilet. Meanwhile the accused had given a ring to one of the waitresses who took it behind the bar and placed it on a shelf. As Jamison went through the cafe to the toilet the accused left his seat and followed him and as he did so some other patron took his seat. When they returned after a few minutes Abe informed them they would have to go out and again stand in line to gain admission. An argument ensued during which Abe pushed the accused through the door to the sidewalk outside and they were followed by Jamison. A groupof patrons standing in line on the sidewalk and a merchant of the city who was sitting in his car parked by the curb immediately in front of the cafe entrance witnessed what happened subsequently. The accused continued to protest his eviction explaining that he wanted to return and finish his beer and regain possession of the ring he had given to the waitress. Abe persisted in making them get into the line in order to return. At this point the deceased, a friend of Abe's, came forward and intervened between the accused and Abe. While some of the unbiased and disinterested witnesses saw the deceased lay hands on the accused, Jamison, the accused's companion, said that the deceased struck the accused with his fist and as the accused reeled back to the auto parked at the curb, advanced upon him with arms hanging down but with fists doubled. It is undisputed that the deceased was unarmed and had nothing in his hands. There is evidence that the deceased, when he entered the dispute, asked the accused whether he wanted "to make anything of it". The weight of the evidence shows that, as the accused was backing upon the sidewalk after being shoved out of the door by Abe, and just as the deceased intervened, the accused reached into his pocket, withdrew a knife, opened it, and raised it in a threatening manner; that Abe and the deceased urged him to put the knife away, and that as the deceased moved forward, the accused advanced upon him and struck the fatal blows. After doing so the accused backed slowly into the street,

still wielding the knife, then turned and crossed to the opposite side where he was soon forcibly disarmed by military police. The deceased followed the accused into the street where he fell. Though removed shortly thereafter he died before reaching the hospital.

Upon these facts rests the determination of the degree of the homicide of which the accused is admittedly guilty.

If the provocation induced by the dispute between the deceased and the accused, was adequate to arouse an uncontrollable passion in a reasonable man the crime is manslaughter. Little is shown in the evidence from which it can be said that there was an argument between the deceased and the accused. The disagreement lay between Abe, the official doorman at the cafe, and the accused and had continued for some time. Abe had forcibly shoved the accused out of the door and was apparently cautioning the accused to put down his knife when the deceased, a gratuitous intervenor, came to Abe's assistance and advanced toward the accused presumably to disarm him. There were no words between them other than the question whether the accused wished to "make anything" of the deceased's interference. The deceased was unarmed and all who witnessed the affair, except Jamison, testified that he did not strike the accused. This was not an instance of mutual combat, and no opprobrious words, epithets or gestures were directed against the accused. Even though it were admitted that the deceased had laid restraining hands upon the accused, the evidence is clear that no blows were struck or threatened until the fatal stab was inflicted.

Under such circumstances the court was fully warranted in finding that there was not such adequate provocation of the accused as could have given rise to an uncontrollable passion in the heat of which he stabbed the deceased.

"In any case where the provocation . . . is not excessive, as where . . . the person is assailed but not seriously . . . the law will in general hold the killing to be not manslaughter but murder" (Winthrop, Military Law and Precedents, 2nd ed., rev., p. 675).

Reverting again to the consideration of that element which distinguishes murder from manslaughter, malice is presumed from the use of a deadly weapon (par, 112, MCM 1928), and a deadly weapon is any instrument which, according to the manner in which it is used, is calculated or likely to produce death or great bodily harm.

There can be no question that the knife with which the homicide was committed in this case was a deadly weapon when viewed in the light of the manner in which it was used, the nature of the wounds inflicted, and the consequences thereof. Since the use of the word "aforethought" does not mean that the malice must exist for any particular time before the 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.

While malice aforethought may exist when the act is unpremeditated, the facts and circumstances of this case leave little room for doubt that there was premeditation. While backing away from the scene of the argument and at a time when no one threatened him with any danger the accused reached in his pocket, withdrew a knife, opened it and brandished it in a menacing manner. This is sufficient evidence of premeditation. It therefore follows that the offense was committed with malice aforethought which presumption is amply supported by the nature of the weapon, the use to which it was put and the fatality of the wounds resulting from such use. In the light of all the evidence, including the accused's voluntary written statement, all of the essential elements of murder are clearly and convincingly established.

6. Upon receipt of the record of trial the reviewing authority returned it to the President of the court on 27 July 1944 for reconsideration of the sentence of the court. This action was justified under the policy outlined in letter, War Department, Office of The Judge Advocate General, dated 12 April 1943, Subject: "Action on sentences requiring confirmation under Article of War 48", which provides in part:

> "It is, accordingly, suggested that a reviewing authority confronted with a sentence to death or dismissal which he deems too severe and unwarranted consider the advisability of returning the record of trial to the court for reconsideration in revision proceedings within the limitations prescribed by Article of War 40, and in accordance with paragraph 87b, page 75 of the Manual for Courts-Martial, 1928."

On 3 August 1944 the court reconvened pursuant to the instructions of the reviewing authority. All the members of the court, and the personnel of the prosecution who were present at the close of the previous session in this case were present and were reminded that they were still under oath. The trial judge advocate read to the court the indorsement of the reviewing authority returning the record and directing the reconvening. The record discloses that at such reconvened session the following proceedings were had:

> "The court upon convening in executive session, taking into consideration letter from the Department Commander, Headquarters Hawaiian Department, dated 22 July 1944, and letter from Office of The Judge Advocate General, Army Service Forces, Washington, dated April 12, 1943, SPJGJ 1943/4957, has reconsidered the sentence adjudged by this court on 28 June 1944.
>
> "This court upon secret, written ballot, all members present at the time the vote was taken concurring, upholds its original sentence, to wit:
>
> "To be hanged by the neck until dead."

7. In his action, the reviewing authority recommends that the confirming authority commute the sentence to life imprisonment.

8. The accused was 30 years and 5 months of age at the time of the commission of the offense. He was inducted on 28 May 1942 at Quitman, Mississippi and has had 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 and to warrant confirmation of the sentence. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

SPJGQ
CM 261439

1st Ind.

War Department, J.A.G.O., 29 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 Private Sylvester Smith (34278037), 292d Port Company, 504th Port Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. The reviewing authority recommends that the sentence be confirmed but commuted to life imprisonment. I concur in his recommendation, and 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 the term of accused's natural life. I further recommend that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 630, 21 Nov 1944)

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

SPJGQ
CM 261505

18 SEP 1944

UNITED STATES v. First Lieutenant ZERA W. ALLEN (O-565618), Air Corps.	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Greenville Army Air Field, Greenville, Mississippi, 30 June 1944. Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant Zera W. Allen, Air Corps, AAF Pilot School (Basic), Greenville Army Air Field, Greenville, Mississippi, did, at AAF Pilot School (Basic), Greenville Army Air Field, Greenville, Mississippi, on or about 26 March 1944 feloniously take, steal, and carry away ten gallons of gasoline, of the value of about $1.05, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Zera W. Allen, Air Corps, AAF Pilot School (Basic), Greenville Army Air Field, Greenville, Mississippi, did, at Cleveland, Mississippi, on or about 19 December 1943, knowingly and willfully apply to his own use and benefit one automobile tire of the value of about $10.73, 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 First Lieutenant Zera W. Allen, Air Corps, AAF Pilot School (Basic), Greenville Army Air Field, Greenville, Mississippi, did, at AAF Pilot School (Basic), Greenville Army Air Field, Greenville, Mississippi, on or about 15 February 1944, wrongfully permit Benjamin G. Gresham and Joe Rae Allen, who were then civilian employees of the United States under the superivision of said First Lieutenant Zera W. Allen, Air Corps, to work on the repair of the personal automobile of said First Lieutenant Zera W. Allen, Air Corps, at times when said civilian employees were on duty and for which they were paid by the United States.

He pleaded not guilty to and was found guilty of all the Charges and Specifications. No evidence of previous conviction was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Charge I, Specification 1:

The accused was Supply Officer at the sub-depot, Greenville Army Air Base, Greenville, Mississippi (R. 20, 22).

On 26 March 1944 Berty Owens McCool, a civilian, was on duty at the pump house of the aircraft filling station at said depot (R. 10, 12). Both commercial and aircraft gas were kept in the pump house (R. 10). McCool testified that at 10 o'clock a.m. the accused went to the pump, took a five-gallon, red, G.I. can and filled it with gas (R. 10, 13). Officers were authorized to obtain gas by presenting a Form 81 or a slip signed by "Major Jones" (R. 11, 12), but on this occasion, although McCool had the keys to the pump, the accused helped himself, the pump being unlocked, and McCool did not require him to show any authorization to get gas (R. 10, 13, 14, 16), because, as Supply Officer, McCool "imagined" he had authority to sign Form 81 (R. 20). The accused then took the can "toward the warehouse" in which his office was located without having made any statement regarding the gasoline (R. 13). At about 1:30 p.m. McCool, on order from the accused, took five gallons of 87 octane gas "to the warehouse" and without any conversation with the accused regarding it, left it there (R. 11, 13, 15, 18). McCool did not know what the accused did with this gasoline (R. 19). McCool was then interrogated as follows:

Q. "At anytime that day did you see Lt. Allen again?"
A. "No, sir. I don't think I did. I wouldn't swear that I did. ."
Q. "Did you see Lt. Allen around his car?"
A. "Yes, Sir, I saw him when he left."

Q. "What kind of a car was that?"

A. "A 1937 Chevrolet."

Q. "What was he doing around his car?"

A. "I saw him when it looked like he might be pouring some gas in it."

Q. "What did he have it in?"

A. "A red can."

Q. "Is that the same type of can he got the commercial gas in?"

A. "Yes, sir." (R. 12)

On cross examination the witness stated that he saw the accused pour gasoline into the automobile "a little while before he left" which he estimated to be approximately 3:30 p.m. (R. 14). He also admitted that he had assisted the accused to pour at least some of the gasoline which the accused had taken at the pump into "a truck" (R. 15) from the same can which the accused had carried to the warehouse; that the accused filled the can again "when he went to leave," and that he had no idea how much of the original contents of the can the accused poured into the truck but thought it was "about 1 gallon" (R. 16).

McCool admitted making a sworn statement (R. 16; Ex. A), but acknowledged that there were errors in it, particularly the portions stating that he had carried the first can to the warehouse; that there had been no conversation between him and the accused; and that he then saw the accused pour gas into the car at two o'clock p.m. after which he returned for the octane gas (R. 17). When asked: "Do you tell the court that he poured the gas into his car?", he answered "No, Sir." (R. 17); and "I don't know. That could have been changed. I couldn't swear to what happened after the can was gone. I was working. That is something that I couldn't swear to. The can could have been changed. That is a pretty hard question;" also: "No, I don't know it as a fact" (R. 18).

He then testified that the only thing he knew about the matter was that the accused got some gas on 26 March 1944; that he was present when the accused poured some of that gas into a truck. Later in the day he saw the accused pour something out of a five gallon can into an automobile, after which the accused came over and directed him to get 5 gallons of high octane gas, which he did, delivering it to the warehouse although he had no knowledge of what the accused did with it (R. 18, 19).

Mrs. Estelle Turley, supervisor of Air Corps supply at the accused's station, was on duty at the gasoline house on 26 March 1944 and while working she got up, looked out of the window at about 10 or 10:30

o'clock a.m., and saw the accused fill "a red gas can" at the gasoline pump in the presence of McCool (R. 22).

Charge I, Specification 2:

On 19 December 1943, Robert R. Reid, a civilian, senior storekeeper, acting as warehouse supervisor on the sub-depot supply warehouse at Greenville Army Air Field, was on duty there in charge of a unit of the Air Corps Supply (R. 23). At about 8:00 a.m. he received a call from the accused who told him that "he was in trouble. He had a blowout up at Cleveland and he wanted a couple of tires and tubes and to bring them to him" (R. 24, 25), so that he could return to the base (Ex. B). The witness complied with the request, taking two tires and tubes along with him. He found the accused a mile beyond Cleveland where they mounted one tire "on the car" and later mounted "the other wheel on the car" (R. 24). When asked "Whose car was that he put it on?" the witness replied: "I presumed it was his (the accused's). He used it." (R. 25). The tires belonged to "Air Corps Supply" (R. 24, 25) and the sub-depot commander testified that the tires on hand in the depot were to be issued only to government vehicles (R.9). No one could get tires without the knowledge of Mr. Reid, who was aircraft supervisor (R. 26), but he had no record of any kind to show that he had taken the tires from the sub-depot when he took them to Cleveland (R. 36). Reid did, however, report to a "Mr. Ham", chief clerk at the sub-depot (Ex. B), explained his proposed trip to help the accused in Cleveland, and received his approval (R. 36). The car in question was a green, 1937 Chevrolet, two door sedan (R. 25). The tires "were returned by Lt. Allen personally in about two or three days" (R. 26).

On cross-examination, Reid stated that, although he had signed a sworn statement on 18 May 1944 in which he said that these events occurred on 19 December 1943, this was incorrect and that "It was the fall of the year, somewhere in August or September" (R. 26-28, 36; Ex. B). Upon being recalled later, Reid testified that he had, since first testifying, found the trip ticket covering this occasion and that the date shown thereon was 27 September 1943 (R. 33). He explained the discrepancy between this date and the one he had given in his statement under oath on 18 May 1944 by saying that the investigating officer had told him he thought 19 December 1943 was the date when he (Reid) had told him he did not remember (R. 34).

Charge II and Specification.

Benjamin B. Gresham, a civilian employed by the government at the sub-depot at Greenville Army Air Field, testified that while he was on night duty hauling gasoline on the night of 15 February 1944, the accused asked him to perform certain work on his (the accused's) car. The accused's brother, also employed by the government and on duty as a truck driver at the time, helped in the work which consisted of taking off the cylinder head and making "quite a few adjustments" (R. 29, 31). The time consumed was three or four hours on both that and the succeeding night, and the men used government tools in doing the work. Major Orland O. Sisler, Supervisor of Maintenance at the Greenville Army Air Field and Sub-Depot

Commander prior to 14 February 1944 testified that he had, prior to that date, issued several verbal and written orders forbidding civilians from doing any personal work for officers during duty hours and these orders had not subsequently been rescinded insofar as he knew (R. 9). Each received his monthly pay check from the government and received no remuneration from the accused (R. 30, 31).

4. Although there is no reference to the accused's election in the original record it does appear in the record of the first revision proceedings on 19 July 1944 that, when the President announced "the defense counsel made no statement as to what the accused desired", defense counsel replied: "The accused desires to remain silent".

5. The testimony for the prosecution was set forth in greater length than is usual in order that the vague, indefinite and contradictory evidence of the witnesses as to the offenses alleged in Specifications 1 and 2 of Charge I would be readily apparent.

In order to support the finding of guilty as to the larceny of the ten gallons of gasoline alleged in Specification 1, it was incumbent upon the prosecution to prove, beyond reasonable doubt, that the accused did take the gasoline and carry it away with the intent to permanently deprive the United States of the same. All that is shown is that the accused filled a five-gallon, red can at the gasoline pump at the sub-depot of the Supply Base at Greenville Army Air Field and then, with the assistance of the attendant put some of it in "a truck" after which the can was refilled by the accused and taken by him to a warehouse where he had his office. Later he was seen by the attendant "when it looked like he might be pouring some gas" out of a red can into a 1937 Chevrolet. As to this, however, the attendant specifically said he "couldn't swear" and did not "know it as a fact". Later, the attendant was directed by the accused to take some high octane gas to the warehouse which he did. What became of the gas after delivery to the warehouse, the attendant did not know and it is nowhere shown.

The prosecution thus failed to establish beyond reasonable doubt the taking, the carrying away, or the intent to permanently deprive the rightful owner of the gas which he is accused of stealing. Mere speculation as to guilt is not equivalent to a reasonable deduction from circumstantial evidence clearly established and cannot support the finding as to Specification 1.

Specification 2 of Charge I is laid under Article of War 94, and alleges that the "accused did knowingly and willfully apply to his own use and benefit one automobile tire . . . property of the United States . . .".

"Misapplication is where such purpose is for the party's own use and benefit" and proof thereof is an essential element of the offense charged and must be shown to sustain a finding of guilty (Par. 150, i; MCM 1928, p. 184).

Again there is a paucity of testimony in the prosecution's case and there is no evidence from which it can reasonably be inferred that the accused did, at the time and under the circumstances alleged, knowingly and willfully apply government tires to his own use. It is nowhere apparent that the automobile driven by the accused at the time he was in trouble was his automobile, or, if it was, that he was not using it in the service of the government at that time. For all the record shows the green Chevrolet, two door sedan may have been an official car belonging to the United States and in government service. It is common knowledge that a great many green, two door Chevrolet sedans are in the military service as staff cars, and with no more evidence than appears in this record, it is just as reasonable to assume that the car in question was a government car as it was for the court to find, as a fact, and from such uncertain proof, that it was a private vehicle being used for the accused's own use or benefit. The Air Corps supervisor, who received the call for assistance from the accused, apparently took the tires to him without question, and without making any official record of taking them from Air Corps supply stock and he also received the approval of the Chief Clerk before taking the tires to the accused. These facts seem to indicate that the situation justified assistance to the accused from the Supply Base, under the circumstances, and were so interpreted by those in charge of the tires. It is noted that there was no investigation of the matter until almost eight months after it occurred, and then only in connection with six other purported offenses, four of which were later deleted from the charge sheet. In the proof offered in support of this Specification, there is as much vagueness and contradiction as in that adduced in proof of the first, and it cannot be said that the material element of misapplication within the meaning of Article of War 94 has been shown beyond reasonable doubt. The Specification of Charge II alleges that the accused wrongfully permitted Benjamin G. (sic) Gresham and John Rae Allen, two civilian employees of the United States, to work on the repair of his personal automobile during their duty hours. Although there is sufficient evidence to show that Gresham (whose middle initial is "B" according to the testimony) did the work as alleged, there is no mention of John Rae Allen at any place in the evidence. It was shown that a "brother" of the accused "worked with" Gresham and was "on duty too" but this is not sufficient to connect John Rae Allen, or the "brother" of the accused, with the specific allegations contained in the Specification. The record of trial is, therefore, legally insufficient to support the finding of guilt on this Specification insofar as the accused's employment of John Rae Allen is concerned but legally sufficient to support the finding as to the wrongful employment of Gresham. Such conduct is to the prejudice of good order and military discipline and constitutes a violation of Article of War 96.

6. The reviewing authority on 29 July 1944 again returned the record of trial for revision and also a reconsideration of the sentence imposed. Upon reconsideration in revision proceedings on 2 August 1944 the court adhered to the original sentence.

7. Records of the War Department disclose that the accused was born in Clinton, Kentucky, and is 32 years and 4 months of age. He was graduated from High School in 1929 after which he engaged in farming for himself. He served as mess officer in a C.C.C. establishment for a period of one year. On 16 October 1940 he enlisted in the Army and on from 1 February 1941 to 16 September 1942 served as a photostat operator and printer with the 4th Air Force. Thereafter he attended an Air Forces Officer Candidate School at Miami Beach, Florida and on 9 December 1942 was commissioned a second lieutenant, Army of the United States and assigned for duty with Headquarters, 2nd A.S.A.C., Fort Worth, Texas. On 21 October 1943 he was promoted to first lieutenant. He is not married.

8. The court was legally constituted. Except as noted 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 insufficient to sustain the findings of guilty of Specifications 1 and 2 of Charge I and of Charge I, and is legally sufficient to sustain only so much of the findings of guilty of the Specification of Charge II, and of Charge II as find that the accused did, at the time and place and under the circumstances alleged, wrongfully permit Benjamin B. Gresham, a civilian employed by the United States, to work upon the repair of the accused's personal automobile and is legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

William H. Lambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, 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 First Lieutenant Zera W. Allen (0-565618), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to sustain the findings of guilty of Specifications 1 and 2 of Charge I, and of Charge I, and is legally sufficient to sustain only so much of the findings of guilty of the Specification of Charge II and of Charge II as find that the accused did, at the time and place and under the circumstances alleged, wrongfully permit Benjamin B. Gresham, a civilian employed by the United States to work upon the repair of the accused's personal automobile, and is legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the findings of guilty of Specifications 1 and 2 of Charge I, and of Charge I, be disapproved and that only so much of the findings of guilty of the Specification of Charge II, and of Charge II, be approved as find that the accused did, at the time and place and under the circumstances alleged, wrongfully permit Benjamin B. Gresham, a civilian employed by the United States, to work upon the repairs of the accused's personal automobile. The record of trial shows that the reviewing authority returned the record to the court for reconsideration of the sentence of dismissal imposed because of its severity but that the court adhered to the sentence. I recommend that the sentence be confirmed but, because of the expressed opinion of the reviewing authority and the disapprovals herein recommended, that it be commuted to a reprimand, and that the sentence, as thus modified, be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record 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

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but commuted to reprimand. G.C.M.O. 582, 25 Oct 1944)

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

SPJGN
CM 261510

25 AUG 1944

UNITED STATES	)	IX CORPS
v.	)	Trial by G.C.M., convened at Fort McPherson, Georgia, 5 August 1944. Dishonorable discharge and confinement for thirty (30) years. Penitentiary.
Private CLARENCE E. ROBERSON (20443941), 812th Tank Destroyer Battalion.	)	

REVIEW by the BOARD OF REVIEW
LIPSCOMB, SYKES and GOLDEN, Judge Advocates

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

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

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

Specification: In that Private Clarence E. Roberson, Company "B", 812th Tank Destroyer Battalion, did, without proper leave, absent himself from his organization at Fort Jackson, South Carolina, from about 1 July 1944 to about 18 July 1944.

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

Specification 1: In that Private Clarence E. Roberson, Company "B", 812th Tank Destroyer Battalion, did, in DeKalb County, Georgia, on or near Dogwood Road, on or about 12 July 1944, with intent to commit a felony, to wit, murder, commit an assault upon Private William McArthur, 4478th Service Command Unit, Fort McPherson,

Georgia, by willfully and feloniously striking the said Private William McArthur and cutting and stabbing him, the said Private William McArthur, in the back, in the chest, and in the neck with a knife.

Specification 2: In that Private Clarence E. Roberson, Company "B", 812th Tank Destroyer Battalion, did, in DeKalb County, Georgia, on or near Dogwood Road, on or about 12 July 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of one Private William McArthur, 4478th Service Command Unit, Fort McPherson, Georgia, a 1939 convertible Ford coupe, value of about five hundred dollars ($500.00), and from the person of said Private William McArthur United States currency of a value of about sixty dollars ($60.00), both being the property of said Private William McArthur.

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 a period of thirty years. 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 shows that the accused absented himself without leave from his organization at Fort Jackson, South Carolina, on 1 July 1944 and that he was returned to military control on 18 July 1944 after apprehension by civil authorities on 16 July 1944 (R. 50, 109, 150; Pros. Ex. 2).

At about 1100 o'clock on 12 July 1944 near Warrenton, Georgia, Private William H. McArthur, who was returning to Fort McPherson, Georgia, in his 1939 model Ford coupe, picked up the accused, who was "hitch-hiking" (R. 9). The accused directed McArthur over "Dogwood Road" in DeKalb County, Georgia, as a "short-cut" to Atlanta and after proceeding a short distance thereon suddenly stabbed McArthur over the heart with a knife (R. 10-12). McArthur jumped out of the car and attempted to run away but was pursued by the accused who, after overtaking him when he fell, again slashed him in the neck and dragged him about 25 yards into the brush where he beat and cut him unmercifully after robbing him of his wallet containing about $80, his driver's license, his title certificate to the car and his social security card (R. 14, 18, 19). Returning to the car, the accused started

to leave in it but noticing that McArthur had managed to get back to the road, he drove the car to McArthur and again dragged him into the brush where he stabbed him (McArthur) in the back, again in the neck and cruelly beat and kicked him before leaving him apparently for dead a second time and driving off in the car (R. 25, 26, 28).

McArthur, bleeding profusely from his wounds, miraculously crawled back to the road where he was shortly found by several civilians who were driving by. The county authorities and medical assistance were summoned and he at first was hospitalized at Emory Hospital, Atlanta, Georgia, in a most serious condition (R. 43-45). Thereafter he was transferred to the Station Hospital, Fort McPherson, Georgia, where treatment and his excellent physical stamina prevented his death (R. 151-154). According to competent medical testimony both the neck and chest wounds could have caused death and appeared to have been made by a sharp instrument (R. 155-161).

The accused was apprehended by civilian authorities on 16 July 1944 while driving McArthur's car, which had a value of $500 according to stipulated testimony, and had in his possession McArthur's wallet containing $60 in money, the driver's license, title certificate and social security card above mentioned, all of which were identified and admitted into evidence (R. 53, 59, 66-67; Pros. Exs. 3-7, 9). The accused after being apprised of his right to speak or remain silent voluntarily returned to the scene of the crime where he re-enacted the crime and thereafter executed a sworn confession which fully corroborates McArthur's testimony and was admitted into evidence over the objection of the defense counsel (R. 63-87, 111-116, 90-110; Pros. Ex. 8). The accused, taking the stand for the limited purpose of testifying concerning the manner in which the confession was secured, testified that he had not been warned of his constitutional rights and had been threatened with physical injury which caused him to give the confession (R. 120-128). This testimony was refuted by several witnesses (Id. next supra).

Although no issue of the accused's mental status was raised, it is considered not inappropriate to mention that attached to the record of trial is a report of a medical board appointed pursuant to AR 600-500. It shows that the accused at all material times involved was able to distinguish right from wrong, to adhere to the right and to intelligently cooperate in his defense (App. "B").

4. The accused, after explanation of his rights as a witness, testified that, during the twenty-four hours immediately preceding his entrance into McArthur's car, he had drunk almost two quarts of whiskey without eating, that he told McArthur that he, the accused, was "AWOL" and that he

feared McArthur, who was an "MP", would turn him in and that these reasons motivated his acts rather than any felonious intent (R. 170, 172-173, 179). The remainder of his testimony clearly and concisely substantiates that of his victim in all material matters (R. 177-189).

An officer, a physician, testified in response to a hypothetical question that a person consuming about four pints of whiskey within twenty-four hours without food would be in a stupor and unable to form any intent whatsoever (R. 193-194).

5. The Specification, Charge I, alleges that the accused without proper leave absented himself from his organization at Fort Jackson, South Carolina, from about 1 July 1944 to about 18 July 1944. The elements of the offense of absence without leave, which is violative of Article of War 61, and the proof required for conviction thereof, according to applicable authority, are as follows:

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

The prosecution's evidence, consisting of the morning report of the accused's organization showing the unauthorized absence as alleged, fully establishes his commission of the alleged offense which in effect was also admitted by him in his own testimony. The evidence, therefore, beyond a reasonable doubt amply warrants the court's findings of guilty of Charge I and its Specification.

6. Specification 1, Charge II, alleges that the accused at a designated time and place with intent to commit a felony, to wit, murder, committed an assault upon Private William H. McArthur "by willfully and feloniously striking" the said victim "and cutting and stabbing him" in the back, in the chest, and in the neck with a knife. The offense alleged is that of attempt to murder which is violative of Article of War 93 and is defined as "an assault aggravated by the concurrence of a specific intent to murder" (MCM., 1928, 149b).

The prosecution's evidence conclusively shows that the accused deliberately committed a brutal assault upon his victim who was likewise his benefactor. A dangerous weapon, a knife, was repeatedly used and grievous wounds were inflicted from which a weaker person would have succumbed. The attack was repeated, accompanied by blows and kicks and the victim was dragged into the brush some twenty-five yards from a lonely

road and twice left for dead. The nature of the weapon used, the ferocity of the assaults and the attempted disposition of the intended victim's body, impel the conclusion that the accused was intent upon murder. The accused, after apprehension, voluntarily re-enacted the crime upon its scene and likewise voluntarily executed a sworn confession thereof. His testimony that the confession was extorted from him was refuted by numerous witnesses and is wholly unworthy of belief. Furthermore, the corpus delicti of the crime was fully established by an abundance of other evidence which was also substantiated by his own testimony. Consequently, even if the confession had been improperly secured, no error injuriously affecting his substantial rights was committed by its admission into evidence. The clear and detailed recitation of the entire episode by the accused in his own testimony conclusively shows that he was not so drunk on the occasion in question that he did not know what he was doing. All of the evidence, therefore, beyond a reasonable doubt establishes the accused's guilt of the offense as alleged and amply supports the court's findings of guilty of Charge II and the first Specification thereunder.

7. Specification 2, Charge II, alleges that the accused at a designated time and place "by force and violence and by putting him in fear, feloniously" took, stole and carried away his named victim's Ford coupe, valued at $500, and $60 in money. The offense alleged is that of robbery which is violative of Article of War 95 and is defined as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will by violence or intimidation. (Clark)" (MCM, 1928, par. 149f).

The prosecution's evidence conclusively shows that the accused during his brutal assault took from his victim a wallet containing at least $60 in money and various instruments of identification and that he thereafter left his victim near death and departed in his victim's car. Several days later he was apprehended in the same automobile and the wallet, containing the money and the identifying instruments, was found upon his person. This the accused admits in his own testimony while paradoxically urging as a defense that the personal property was given to him by his victim as he was pleading for his life. Such asserted defense is spurious. All the evidence, therefore, shows his guilt of the offense as alleged and amply supports the court's findings of guilty of Charge II and the second Specification thereunder.

8. The accused is about 25 years of age. He was inducted at Atlanta, Georgia, on 24 February 1941. His record shows no prior service except in the National Guard in which he was enlisted on 12 January 1941.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence.

(On Leave), Judge Advocate.

Lessuelus S. Sykes, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

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

SPJGH
CM 261581

18 SEP 1944

UNITED STATES v. First Lieutenant JAMES THOMAS BENN (0-685515), Air Corps.	CARIBBEAN WING AIR TRANSPORT COMMAND Trial by G.C.M., convened at Morrison Field, West Palm Beach, Florida, 10 June 1944. Dismissal and total forfeitures.

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 Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant James Thomas Benn, Test Unit, Detachment #27, Headquarters Air Transport Command, Army Air Base, Station #9, Caribbean Wing, Air Transport Command, 36th Street Airport, Miami, Florida, did, at or near Coral Gables, Florida, on or about 12 May 1944, with intent to commit a felony, viz, rape, commit an assault upon Helen Grace Dallas by willfully and feloniously putting his hand over her mouth and by tearing her clothing while forcibly restraining her body.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to pay a fine of $1,000 and to be confined at hard labor for five years. The reviewing authority approved only so much of the findings of guilty of the Charge and Specification as involves a finding of guilty of wrongfully and unlawfully committing an assault and battery upon the person of Helen Grace Dallas, at the time and place alleged in violation of the 96th Article of War, 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.

Classification

CONFIDENTIAL

3. Evidence for the prosecution is substantially as follows:

Mrs. Helen Grace Dallas, an employee of the Miami Air Depot since 4 May 1944, testified that on 8 May 1944 she had obtained permission to leave the depot early in order to go to town and see about obtaining her car from storage. She boarded a bus and sat beside the accused. He began to talk about a poem he had found on a piece of paper on the seat and asked her if she understood the stanza. When she replied she did not accused asked her for a piece of paper and said he would try and scan them. She wrote down the lines as he read them, then accused made corrections, and a general conversation ensued. The envelope on which the notations were made was received in evidence as Exhibit 1 (R. 8). Accused said he had continued the study of psychology even while in the service and intended to master the subject (R. 9). During the conversation Mrs. Dallas mentioned that her car was in storage at her mother-in-law's.

On Wednesday, 10 May 1944, accused called Mrs. Dallas on the phone and inquired if she had obtained the car. She replied she had not as her mother-in-law did not want her to have it and that she had that day cabled her husband asking his permission to use it. The accused advised her to wait and made suggestions as to how she should handle her mother-in-law and said he would like to discuss the matter with her. She said she did not "go out" and that she had to go to the post office that night to mail some packages. He suggested meeting her at the post office and later having dinner as he thought he could help her. She agreed and met him at the post office at 7:30. They had dinner, and later went to the Biscayne Bar for cocktails and further discussion. After a couple of cocktails he hailed a cab and took her home around 10:30 (R. 9, 10).

On Thursday, 11 May 1944, accused again telephoned Mrs. Dallas and said he had some thoughts about her problem which might interest her. She replied she did not go out and did not wish to see him any more. He asked if she were afraid of him and she replied she was not afraid of anybody. He then said that he had some friends, a lieutenant colonel and a major, and their wives, and if it were all right he would try and arrange for the six of them to go out together at which time he and she could discuss her problem further. He said he would call again on Friday (R. 10). Accused did telephone on Friday and said he had made arrangements with his friends. One couple lived in Coral Gables and all were to meet there. He identified his friends only as a major and his wife, and a lieutenant colonel and his wife, no names being mentioned (R. 11). She had previously mentioned meeting the accused to Mary O'Hara who worked in the same office with her and Miss O'Hara, with Mrs. Dallas' consent, had listened in on this conversation on Friday, 12 May, by putting her ear close to the receiver (R. 11). Mrs. Dallas finally agreed to go with accused to his friend's home the following night.

Accused called for Mrs. Dallas in a cab on the night of 13 May and they first went to the San Juan Restaurant where they remained until about 10 p.m., drinking two cocktails during that time. While at the San Juan accused telephoned once explaining he had to call the base as he was still supposed to be on duty (R. 11). Leaving the San Juan Restaurant they proceeded by cab to the Antilla Hotel. The accused entered the hotel and returned saying his friends were not there but had proceeded to the Drum Restaurant. They proceeded to the Drum Restaurant and had a cocktail. Accused left her for a short time and returned saying his friends had been there but had departed. They then returned in the same cab to the Antilla Hotel. Accused went into the hotel and returned announcing that his friends were there. It was raining hard so accused directed the cab driver to go to the side entrance so she would not get wet (R. 12). They entered the hotel from the side entrance, walked up a flight of steps and down a hall to the door of a room which was lighted inside. Accused opened the door and they entered.

Mrs. Dallas saw a note in large handwriting on a table in the room which read "Waited for you two hours; be back shortly. Bill". Just then the lights in the room went out. Accused assured her his friends would be in shortly, and raised the venetian blinds to show her that the street lights were out and that he had not turned the lights off. She started for the door and accused caught hold of her dress in front and tore it. She told him if he did not release her she would scream, and when he replied she would not dare she did scream. The telephone rang, and holding his hand over her mouth accused answered and said, "Everything is all right" (R. 13). He then threw her across the bed as she tried to leave the room. She got off on the opposite side of the bed and accused told her to keep her voice down, that he was not going to do anything to her, and if he wanted women he could buy them. He threw her across the bed and the phone rang again. This second time he put his knees in her stomach and held his hand over her mouth. She screamed and tried to get up, and then started crying. He unfastened his belt and said he only wanted his body close to hers. She tried to push him away, but he had his hand over her mouth, his head against her, his knees in her stomach, and held her feet with his legs. He held her so firmly that she could not get up and could not yell. He tried to take her hand and have her touch him, but she told him she did not want to, that she did not want anything to do with him and that he should let her go (R. 14). She tried to bite him but never could (R. 22). Accused had an emission, and after that told her to get herself in order as she was a "wreck" (R. 36).

In trying to kick accused Mrs. Dallas broke her shoe at the heel. When the accused caught her clothing as she started for the door he tore her dress and tore her panties completely across the front. Also when she had tried to get to the door accused had taken her ring off her finger and had

told her she had better do as he wanted if she wished to see her ring again. She received two or three "skins" on her leg and fingernail scratches in the groin, and a bruise on the back of her neck during her struggles (R. 15). The dress, slip, panties and shoe with broken heel worn by Mrs. Dallas on the night in question were received in evidence as exhibits (R. 16-18; Exs. 2-5). Mrs. Dallas testified that some of the semen from the emission came through her dress onto the slip, and spotted the center of the slip at the front and back. The slip was clean when she went into the room (R. 17).

After accused let her up Mrs. Dallas gathered her things together while the accused took the note signed "Bill" into the bathroom and destroyed it (R. 18). Mrs. Dallas then walked to the hall and down the stairs to the side entrance. Accused went to the front entrance where he had the cab waiting and drove around to the side entrance and picked her up. He tried to kiss her in the cab but she pushed him away. They started toward her home but she asked to be taken downtown, her purpose being to complain to the police (R. 24). However accused had the driver go to her home, and asked the driver to stop on the street that led to her apartment. He got out of the cab and started to escort her in, but refused to go more than part of the way. She asked for her ring and he refused to give it up, so she would have some reason to see him again. She threatened to yell for help, and he told her she would not dare to. She then called for her landlord by name, whereupon accused said, "Here, take your g.d. ring" and gave it to her (R. 19). Her mother and 17 year old brother were asleep when she entered the house. She went to the bathroom, bathed and wrapped up her clothes so she might take them with her next morning. Because her mother suffered from spasmodic asthma and was very nervous she did not report the incident to her. She arrived at her office the next morning early, and not having a key could not get in. She sat down outside and began to cry, and was heard by another girl inside who came out to her.

Mrs. Dallas said she was 24 years of age, five feet seven inches tall and weighs 127 pounds. She is married to a naval officer now overseas (R. 23).

Cross-examination

On cross-examination Mrs. Dallas testified that it was the second time she attempted to leave that accused caught at her dress and raised it. He did not try to pull her pants down. He answered the telephone when it rang, said he would be down shortly, then hung up the receiver and threw her across the bed. When she started out of the door the third time, he caught her and tore her pants. He answered the phone the second time while standing up, but kept his hand over her mouth and thereafter threw her on the bed

again (R. 32). The third time the phone rang he was on top of her, with his knees in her stomach. He held her with his feet, threw his head against hers and put his hand over her mouth (R. 33). She didn't know what position her clothes were in during this latter part of the struggle. She tried to bite accused on the shoulder, but could not as he was lying on her. A scar or bruise on her right leg was received while horseback riding the Sunday before this Saturday night (R. 34).

After they left the room accused walked with her down the stairs to the side entrance, then he went to the front and had the cab driven to the side entrance, where he picked her up. She waited at the side entrance perhaps two minutes (R. 37).

On examination by the court the witness stated accused did not have a key to the hotel room, and she did not look to see if a key was on the inside of the door. She knew accused was taking her ring off, and tried to bend her finger, but he had hold of her hand. She did not look to see if the room showed signs of occupancy, and she did not become suspicious of accused's intentions until the lights went off (R. 40).

Major Clarence R. Becker, M.C., examined Mrs. Dallas on the morning of 13 May 1944. He found two superficial scratch marks, and several small contusions on the right thigh, one small black and blue spot on the left thigh, two very small bruises on the upper and lower lip, a small scratch on her little finger and ring finger of the left hand, and scratches on the front of the left leg and ankle, and a reddened area at the base of her neck. She stated she had received the scratch on the left ankle while horseback riding about two weeks prior (R. 42).

On cross-examination and examination by the court Major Becker stated that it was possible that some of these bruises could have been made at least six days before the examination. It was not very probable that the bruise on the left thigh was less than 24 hours old. It was also possible that some of these bruises and abrasions could have resulted from horseback riding. They could as easily be 24 hours old as 48 or 72 hours old (R. 43). He did not notice any difference, so far as the time element was concerned, between the bruise acquired in horseback riding and the others, as all were equally tender (R. 44) and the bruise caused by horseback riding did not look different from the others (R. 45). The bruise on the groin was red and those on the legs were black and blue. The latter were in regions where by reason of circulation a discoloration would have appeared within twelve hours (R. 44).

Captain Theodore E. Weichselbaum, a qualified biochemist and pathologist testified that on 15 May 1944 he examined the slip and pants

introduced as Exhibits 3 and 4. He found no evidence of semen on the pants (R. 47). On the slip he found two discolorations about the size of a quarter on the front and back (R. 46, 48) and a spot that resembled blood. This spot reacted positively when tested for human blood. He cut out the material containing the spots and tested it but no spermatozoa could be found (R. 46). Detecting the presence of spermatozoa is the only positive test to determine whether suspected discolorations are semen (R. 46). He had been able in other cases to find spermatozoa in semen stains as old as 15 days. The absence of spermatozoa, however, was not conclusive proof that the stains were not semen. So far as he could find the stains were not semen, but the tests were not conclusive (R. 47).

Mary O'Hara, who worked in the same office as did Mrs. Dallas, testified that she frequently answered the telephone in the office. On Friday, 12 May 1944, someone called for Mrs. Dallas. This same voice had called for Mrs. Dallas several times before, and she recognized it as the accused's voice, having heard him speak in person since he commenced telephoning Mrs. Dallas. She asked Mrs. Dallas' permission to listen in on the conversation, and heard accused ask Mrs. Dallas if she were going out with him that night. She did not say she would, and accused told her "they were going to some friends home, a major and a lieutenant colonel and their wives" (R. 50). She listened to only part of the conversation, but also heard him ask Mrs. Dallas if she were afraid of him to which she replied she never saw anyone of whom she was afraid (R. 52).

William M. Singreen testified that he was day room clerk for the Antilla Hotel and that at about 7 o'clock on the evening of 12 May he received a telephone call from accused who first asked for Mr. Storm, a discharged employee of the hotel. He then requested a reservation for a double room for himself and wife. One or two minutes before 11 o'clock accused, in the presence of the witness, registered with the night clerk who had relieved witness at 11 o'clock. A photostatic copy of the registration card signed by accused was received in evidence (R. 54; Ex. 6). Charles F. Rigl, the room clerk who relieved Mr. Singreen testified that after registering accused he called a bellboy to show him to room 214, but accused said, "never mind, I won't go up now; I'll take the key and come back within an hour" (R. 56). Later a cab driver came in and asked him to call accused, and when he stated he did not know if accused was there the driver said he had brought him to the hotel. He called the room and accused said he would be down in a few minutes. Thereafter he again called the room at the request of the driver and accused said he would be down in a minute. Accused came down and he and the driver went out the front door (R. 57).

On cross-examination he said that he only placed two calls to accused's room, and that no other call could have been made to accused's

room without his knowledge as he took care of all calls on the switchboard. About ten minutes elapsed between the two calls he made to accused's room at the request of the cab driver, the first of which was made at about 1 o'clock (R. 57). He also testified that almost all of the hotel's rooms were occupied that night (R. 58).

On examination by the court the witness said it was possible for one to go down the side stairs and leave the hotel without being seen by him (R. 58).

Alvin Edwin Titus, a cab driver in Miami, Florida, testified by deposition that in the early part of the evening of 13 May he picked up accused and a lady at the San Juan Restaurant and drove them to the Antilla Hotel in Coral Gables, Florida. The accused went into the hotel for a "very short period" of time, then returned to the cab and instructed witness to drive them to the Drum Restaurant. Accused and his companion went into the Drum Restaurant and stayed ten or fifteen minutes. He then drove them back to the Antilla Hotel. It was raining hard and a car was parked at the front entrance, so he drove to the side entrance and accused and the lady left the cab and entered the hotel. The accused asked him to return for him at about 12 o'clock.

The cab driver returned to the hotel at five minutes to 12, entered, and asked the clerk to call accused. When accused answered the clerk gave him the phone and he told accused his cab was waiting. Accused replied he would be down shortly. The cab driver had the clerk call accused about 20 minutes later and after the conversation the clerk told him that the accused would be down immediately. When witness talked to accused over the phone on the first call accused talked in a natural tone of voice, and no peculiar noises were heard. After the second call which was made by the clerk the accused came down to the lobby, talked to the clerk, and then followed witness to the cab, where he instructed witness to drive to the west entrance to pick up the lady. She was standing under the awning at the side entrance. He noticed nothing unusual about her clothes, she was not crying, and did not appear to have been crying. When he asked directions the lady gave him her address. Before they reached this address the lady asked that he take her downtown. The accused said it was too late and too stormy, and that nothing would be open. The conversation concerning their destination subsided and he drove to the address first given.

Accused's companion requested the driver not to stop in front of the house, so he drove about 20 feet beyond where they both got out of the cab and walked toward the house. The accused returned in a very short time and he drove him to the Battle Creek Hotel. On the drive to accused's hotel the accused remarked, "That was a hell of a deal" and a general conversation ensued from which he gathered that the lady had not "let on until they got in

the room that she was a married woman". On the drive from the Antilla Hotel to the lady's home he heard the sound of kissing on the back seat (Ex. 7, pp. 1-9).

On cross-examination Titus said that there had been no unpleasantness between accused and his lady companion at any time during the evening while he was with them. If she had been crying during that time he would have noticed it. He generally notices prospective fares from night clubs particularly to be sure that they are not going to be sick. The first ride to the hotel was to enable accused to look for someone, and he got the impression accused was looking for only one person. The only unusual incident occurring during the entire night was that the accused seemed to feel disgusted. "He felt as though he had been made a fool of. Taken for a ride". (Ex. 7, pp. 10-14).

4. For the defense:

The accused after having his rights as a witness explained elected to testify under oath. He testified that while on the air base bus at the time of his first meeting with Mrs. Dallas she took a seat beside him and offered him part of her newspaper. In a short time she found a poem in her part of the paper and they discussed it. A general conversation ensued about her husband who was an officer in the Navy, her trouble with her mother-in-law over getting the car, and similar personal matters. At his request she gave him her telephone number, but told him to call between 12:30 and 1 o'clock as she was the only one in the office at that time.

Two or three days later he called and asked her to meet him that evening and she agreed to meet him at the post office between 7:30 and 8 p.m. They met as arranged, had dinner at Childs Restaurant, then went to the Biscayne Bar for drinks. At the bar she became unusually friendly, discussed her love for her husband and her trouble with her mother-in-law. After five or six drinks they "got around to talking about generalities and got to the point about going to a hotel room and she said she wouldn't mind at all". They left the bar, but waited from 15 to 30 minutes for a cab and she then thought it was too late to go to a hotel, but that they could go the next night. He was to phone her the next day to make arrangements for their meeting.

He called the next day about noon and she told him to call for her at her home that evening in a cab since it was raining and she thought the rain would continue. He did call for her that evening and they went first to the San Juan Restaurant where they had some drinks. While there he telephoned the Antilla Hotel and asked for Mr. Storm who had not required

him to register as man and wife on his previous visits to the hotel. Mr. Storm was not in so he talked apparently to Mr. Singreen, but does not remember whether or not he told him the room was for him and his wife. While at the San Juan Restaurant Mrs. Dallas asked to see his ring, and wanted to wear it. She took off her ring and told him to keep it and give it back to her later. Mrs. Dallas was worried about going through a hotel lobby to a room, but he told her he would get in touch with Mr. Storm who would not require her to sign or ask any questions. They left the San Juan Restaurant, procured a cab and drove to the Antilla Hotel. He entered the hotel and inquired for Mr. Storm, who was not in. He then registered for a room with Mr. Rigl, telling him he had a young lady with him but did not want to register her as his wife. Mr. Rigl told him that was his business. He asked for the key to the room and told Mr. Rigl he would be back later. He returned to the cab and at Mrs. Dallas' suggestion they went to the Drum Restaurant where they each had a cocktail and thereafter they returned to the Antilla Hotel. Mrs. Dallas was still worried about passing through the lobby and he told her of a side entrance, so they went there. The side door was locked so he went through the front entrance and admitted her. They walked up a flight of stairs to the room. The door was not locked and he did not take the key out of his pocket. They sat on the bed a short while and then the lights went out. This caused no difficulty, for they had gone to the room by agreement, and while they had not discussed what they would do it was more or less understood. She leaned across the bed and a general conversation ensued for awhile during which she "thought out loud" and stated that she was doing wrong and wanted to go home. He agreed to take her home and she readied herself to leave. Before leaving two phone calls came from the room clerk to tell them their cab was waiting. They went to the side entrance the same way they had come in, then he went through the lobby, got the cab driver, and drove around and picked up Mrs. Dallas. About the time they reached her home she wanted to go downtown and stay with some friends so her mother would not know she had been out so late. He told her it was too late to find her friends at the Biscayne Bar, and she said, "I guess so", and he then directed the driver to continue to her home. He accompanied her from the cab almost to her home. He requested that she return his ring and she did so. He returned to the cab and was driven to his hotel (R. 63-65).

On cross-examination the accused testified that he had never talked to Mrs. Dallas about taking her to the home of a major or lieutenant colonel in Coral Gables (R. 66). It was drizzling rain when they arrived at the Antilla Hotel the second time but the reason they drove to the side entrance was because Mrs. Dallas did not want to be seen entering the hotel (R. 67). He did not mean to infer that nothing happened in the hotel room while they were there, as he did fondle and kiss her. However he did not attempt to have intercourse with her though that was the purpose for which he went there (R. 67). He probably told the cab driver, after escorting Mrs. Dallas home, that "that was a hell of a deal" but does not think he told him that Mrs. Dallas had not let on she was married until they got in the

hotel room, as he did know she was married (R. 69). He never did remove Mrs. Dallas' ring without her consent. He told the cab driver to come back to the hotel because Mrs. Dallas told him on the way to the hotel she thought she should go home early (R. 70).

On examination by the court the accused testified that he had never told Mrs. Dallas he was interested in psychology. She had told him that her husband had told his mother they had been married three years when he found he was going overseas, before which the mother-in-law knew nothing of the marriage. Her mother-in-law would have nothing to do with her, so accused advised her to go to her mother-in-law and thrash out the difficulty (R. 71).

Major John M. Tillman, accused's commanding officer, testified that accused's work was highly scientific. He was a most intelligent individual and had devised a method of celestial navigation that had completely revolutionized the whole system of navigation. His method had already been accepted by the Army Air Forces and the Navy. The results of his work meant the saving of millions of dollars to the Government. He was definitely a stable person and his loss to the service would be tremendous (R. 74).

5. Discussion:

As approved by the reviewing authority, the accused was found guilty of assault and battery. Such offenses are lesser included offenses of assault with intent to commit rape where, as here, the specification contains allegations which demonstrate that both an assault and a battery are charged (CM 239839, Harrison, 25 B.R. 273).

To warrant the confirmation of the sentence the evidence must show beyond a reasonable doubt that the accused is guilty of these offenses. "The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt" (MCM, 1928, par. 78a). Accused's conviction rests solely upon the testimony of Mrs. Dallas and the condition of her person and clothing after the alleged assault. In view of the fact that the President is the confirming authority in this case, the Board is entitled to weigh the evidence. Accordingly, we must examine the complainant's testimony carefully to determine if the court properly accorded credence to it.

Mrs. Dallas testified that three telephone calls came to the hotel room while she and accused were there. The cab driver deposed that he had the room called twice. The hotel room clerk on duty said only two calls were made to the room and that all calls going to the room would

have gone through the switchboard operated by him. The accused testified that only two calls, both concerning the cab, came to the room. Both the cab driver and room clerk were witnesses for the prosecution. Their testimony seriously questions the accuracy of Mrs. Dallas' testimony that three calls were made to the room, the first of which came after screaming on her part because of accused's conduct toward her.

According to Mrs. Dallas when the first telephone call came, after screams on her part, the accused answered the phone and at the same time stifled her outcries by holding his hand over her mouth. The second time the phone rang the accused was standing up when he answered it, but again silenced her by holding his hand over her mouth. The third time the phone rang the accused was on top of her, but held her head with his head, had his knees in her stomach, one hand over her mouth, held her legs with his feet, and answered the phone with the other hand, during all of which she was struggling to free herself and making outcries. It is difficult in the extreme to understand how accused could have answered the phone and at the same time have suppressed Mrs. Dallas as she alleges, particularly since Mr. Titus, the cab driver, a witness for the prosecution, said that at the time he talked to accused over the phone accused talked in a perfectly normal manner and he heard no unusual noises of any sort.

The testimony of the medical officer, who examined Mrs. Dallas the morning after the alleged assault, concerning the scratches, bruises and abrasions on her body, all of which were apparently rather minor is inconclusive. On cross-examination this officer testified that it was possible that these bruises could have been made at least six days before the examination. It was not very probable that the bruise on the left thigh was less than 24 hours old. The injuries were recent and could as easily be 24 hours old as 48 or 72 hours old. They could have been acquired by falling or from horseback riding. He did not notice any difference, as far as the time element was concerned, between the bruise Mrs. Dallas said she acquired some days before and the other bruises, as they did not look different and one was as tender as the other.

Mrs. Dallas testified that accused had an emission during the latter part of their struggles and that the semen went through her dress onto the slip she was wearing, spotting it in the front and back in the center. No evidence of semen was found on the panties worn by Mrs. Dallas. It would seem that evidence of semen would have been on the panties if it had soaked through from the front of the slip to the back in the area which it is alleged to have penetrated.

Mrs. Dallas claims that after his emission accused did not further interfere with her movements. Had she been abused as she alleges the natural thing for her to have done would have been to seek immediate assistance in

the hotel. Instead she left by the back stairs with accused and waited alone at the side entrance some two or three minutes while accused had the cab driven to the side entrance. The cab driver noticed nothing unusual in her appearance or demeanor and she did not appear to have been crying when she entered the cab. No unpleasantness occurred between accused and Mrs. Dallas during the entire time the driver was with them, but on the contrary during the drive from the hotel to her home he heard the sound of kissing on the back seat. At her request he drove about 20 feet beyond her house to stop, and accused left with her to escort her to her home. He was gone "a very short while". Mrs. Dallas testified that as she and accused walked from the cab to her home accused refused to return her ring and she called for Mr. Russell, her landlord. The cab driver was close enough to have heard such an outcry, had it been made. He did not testify that he heard any such outcry, but on the contrary said that the couple walked together from his cab without any apparent unpleasantness existing between them.

The rayon silk panties worn by Mrs. Dallas were received in evidence and were torn completely across the front. She claimed they were torn by accused when he grabbed her as she started out of the door the third time. These panties were reinforced around the edges and were supported only by an elastic band in the back. The defense counsel's contention that these panties, because of the tensile strength of the material of which they were made and the weakness of their support, would have slipped down rather than tear is not without merit.

Mrs. Dallas also said she tried to bite the accused, but could not as he was lying on her. Such proximity should have aided her efforts in this endeavor rather than hindered them.

The discrepancies noted in Mrs. Dallas' testimony on material facts, and her conduct following the alleged assault, which was most inconsistent with that to be expected of a woman recently assaulted, cast serious doubt on the worth of her entire testimony. Indeed the testimony of Mr. Rigl, the hotel clerk, and to a greater extent the testimony of Mr. Titus, the cab driver, both prosecution witnesses, corroborates the accused's version and belies Mrs. Dallas' version of accused's conduct with her on the night in question.

The Board of Review is therefore of the opinion that the evidence is not sufficient to establish the guilt of the accused beyond a reasonable doubt.

6. 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 as approved by the reviewing authority.

Thomas H. Tapp, Judge Advocate.

(Sick in Hospital), Judge Advocate.

Robert E. Trevethan, Judge Advocate.

SPJGH
CM 261581 1st Ind.

War Department, ASF, J.A.G.O., JAN 1 1945

TO: Commanding Officer, Caribbean Wing, Air Transport Command, Comeau Building, West Palm Beach, Florida.

1. In the case of First Lieutenant James Thomas Benn (0-685515), 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 as approved by the reviewing authority, 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 50½, 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 261581).

Myron C. Cramer

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.

SPJGK
CM 261626

(295)

3 OCT 1944

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Chatham Field, Georgia, 3 August 1944. Dismissal, total forfeitures and confinement for two (2) years and six (6) months.
Second Lieutenant BENJAMIN J. PICONE (0-708053), Air Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Benjamin J. Picone, Air Corps, Section E, 114th Army Air Forces Base Unit, did, without proper leave, absent himself from his organization at Army Air Base, Chatham Army Air Field, Savannah, Georgia, from about 19 June 1944 to about 28 June 1944.

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

Specification: In that Second Lieutenant Benjamin J. Picone, * * *, did, at Chatham Field, Georgia, on or about 12 July 1944, with intent to defraud, feloniously forge an indorsement on a certain check in the following words and figures, to wit:

WAR FINANCE ATLANTA, GA., 3,168,017
TREASURER OF THE UNITED STATES
15-51 JUN 30 1944
SEAL PAY $*****214. DOLLARS AND 72 CTS $****214.72
To the
Order of ** William M. Horlock**
Vo. No. 293032

Object for which drawn:

United States Army
U S A T. Richards U S A
U.S.A. Finance Officer
210,275

KNOW YOUR ENDORSER-REQUIRE IDENTIFICATION

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by indorsing on the back thereof the words, "William M. Horlock, 2nd Lt. A.C., O-65368 Section E", which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification 1: In that Second Lieutenant Benjamin J. Picone, * * *, did, at Savannah, Georgia, on or about 14 June 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Hotel Whitney Company, Savannah, Georgia, a certain check, in words and figures as follows, to wit:

114th Base Unit
Chatham Field, Ga.

Scranton, Pa., June 14 1944 No. ____

South Side Bank and Trust Co., Scranton, Pa.

Pay to the order of Cash ----------$15.00

Fifteen and no/100 ----------DOLLARS -----

COUNTER CHECK

/s/ Benjamin J. Picone

2nd Lt., AC O-708053

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and by means thereof, did fraudulently obtain from the Hotel Whitney Company the sum of $15.00, he the said Second Lieutenant Benjamin J. Picone, then well knowing that he did not have and not intending that he should have sufficient funds in the South Side Bank and Trust Company, Scranton, Pennsylvania, for the payment of said check.

Specification 2: In that Second Lieutenant Benjamin J. Picone, * * *. did, at Savannah, Georgia, on or about 26 June 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Hotel Whitney Company, Savannah, Georgia, a certain check, in words and figures as follows, to wit:

TO South Side Bank and Trust Co.
Name of Bank

Name of Branch — CUSTOMER'S CHECK

Scranton, Pa.
Bank Address (City and State) — Date June 26, 1944

Pay to the Order of Cash ---------- $15.00

Fifteen and 00/100 - DOLLARS

I hereby represent that the amount drawn for in this check is on deposit to my credit in the above named institution free from any claims and I hereby guarantee payment of this check and agree not to stop payment of same. If for any reason this check is not paid when properly presented, and is placed in the hands of an Attorney for collection, I hereby agree that $10.00 and 10 per cent may be added for Attorney's fees and such other costs as the court may allow.

In payment of _____ Sign here /s/ Benjamin J. Picone
Address Chatham Field
Telephone 3-9631

and by means thereof, did fraudulently obtain from the Hotel Whitney Company the sum of $15.00, he the said Second Lieutenant Benjamin J. Picone, then well knowing that he did not have and not intending that he should have sufficient funds in the South Side Bank and Trust Company, Scranton, Pennsylvania, for the payment of said check.

Specification 3: In that Second Lieutenant Benjamin J. Picone, * * *, did, at Savannah, Georgia, on or about 24 June 1944 with intent to defraud, wrongfully and unlawfully make and utter to the Moyle Trunk & Bag Company, Savannah, Georgia, a certain check in words and figures as follows, to wit:

Scranton, Pa. June 24, 1944 No.

SOUTH SIDE BANK AND TRUST CO. Scranton, Pa.

Pay to the Order of Cash ---------- $20.00

Twenty and 00/100 - - - - - - - - - - - - - - - DOLLARS

114th Base Unit
Chatham Field, Ga.

/s/ Benjamin J. Picone
O-708053 2nd Lieutenant, AC

and by means thereof, did fraudulently obtain from the Moyle Trunk & Bag Co. merchandise of the value of about $20.00, the the said Second Lieutenant Benjamin J. Picone, then well knowing that he did not have and not intending that he should have sufficient funds in the South Side Bank and Trust Company, Scranton, Pennsylvania, for the payment of said check.

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

Specification: In that Second Lieutenant Benjamin J. Picone, * * *, did, without proper leave absent himself from his organization at Army Air Base, Chatham Field, Georgia, from about 14 July 1944 to about 15 July 1944.

ADDITIONAL CHARGE IV: Violation of the 69th Article of War.

Specification: In that Second Lieutenant Benjamin J. Picone, * * *, having been duly placed in confinement in the guardhouse, Chatham Field, Georgia, on or about 12 July 1944, did, at Chatham Field, Georgia, on or about 14 July 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years and six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Consideration of the various charges and specifications chronologically will permit a clearer presentation of the issues involved.

a. Charge I and its Specification - absence without leave, in violation of Article of War 61.

Extract copy of Morning Report of Section "E" Trainee, 114th Army Air Forces Base Unit (Bomb (H)), Army Air Base, Chatham Field, Georgia, for 26 June 1944, showing the absence of accused without leave as of 19 June was offered as Exhibit 1 by the prosecution. Return to duty on 28 June was established by extract copy of the Morning Report of that organization for 29 June 1944, made a part of the same exhibit.

b. Additional Charge II and its specifications - issuance of worthless checks in violation of Article of War 95.

Between 14 June 1944 and 26 June 1944, accused issued three checks, drawn on the South Side Bank and Trust Company, Scranton, Pennsylvania, payable to "cash", two for $15 and one for $20. All three, it was stipulated, were dishonored by the drawee bank when presented for payment, because of insufficient funds (R. 22,23,25; Pros. Exs. 4,5, and 6). The two checks for $15 were accepted by the Hotel Whitney in Savannah, Georgia, on 14 and 26 June, respectively, the first possibly in payment of a hotel bill. It was the recollection of the night clerk who received the check from accused that the entire amount was paid to accused in cash. The hotel paid the entire amount of the second check to accused in cash (R. 20-23). Between the dates of their issuance on 24 June 1944, the third check, that for $20, was given by accused to the Moyle Trunk & Bag Company, Savannah, Georgia, in payment of a lady's suitcase. A few days after this purchase accused returned to the trunk store to inquire of the manager whether the check had been returned, as, after further consideration, accused "didn't believe he would have enough money". Accused promised to contact the manager each day, but had never reappeared (R. 24,25).

c. Additional Charge I and its specification - forgery of check in violation of Article of War 93.

On 11 July 1944 accused sought information from the cashier at the post exchange, Mrs. Dorothy Rice, concerning the cashing of personal and Government checks, and was advised that the limit on the former type was $15, without any limit on Government checks (R. 17). The following day accused returned with a Government check for $214.72, which he requested the cashier to cash. Upon being advised to endorse the check with his name, rank and serial number, accused proceeded to write on the back of the check the name of the payee, "William M. Harlock", adding "2nd Lt.

A.C. O-65368 Section E". Before cashing the check the cashier asked accused for his identification card, which he was unable to produce. The cashier, who had noticed that the payee of the check was the post exchange officer, then stated that she would take the check to that officer. Before she was able to point out accused to Lieutenant Horlock, accused had left (R. 17-19). The check had been issued to Lieutenant Horlock for his June "salary" and had not been seen by him since 2 July 1944. Lieutenant Horlock had at no time authorized accused or any one else to endorse the check (R. 19,20, Ex. 3).

d. Additional Charge IV and its specification - escape from confinement in violation of Article of War 69.

Additional Charge III and its specification - absence without leave, in violation of Article of War 61.

It was stipulated that if Colonel Conrad F. Necrason, Deputy Base Commander of Chatham Field, was present he would testify that he was acting commander of the base on 12 July in the absence of the commander and ordered accused's confinement (R. 12). At about 1700 of that day, pursuant to this order, accused was placed in confinement by the prison officer in a pyramidal tent, inclosed in a padlocked stockade, seven feet high, made of wire, which incloses the guardhouse as well (R. 13). The corporal of the guard saw accused at four o'clock of the afternoon of 14 July. The following morning at six o'clock when he went to accused's tent with food, accused was gone and a pillow and a shaving kit, arranged to resemble the body and head of a man, were found on his cot under a blanket (R. 15,16). No authority to leave had been granted accused (R. 14). It appears from accused's statement, hereinafter more fully discussed, that he was apprehended by the police on the afternoon of 15 July (Ex. 7). Accused's absence without leave from 14 July to 15 July was established by extracts from the morning report for 15 and 16 July, the testimony of the prison officer and the corporal of the guard, and accused's statement to the investigating officer (R. 14,15,16; Ex. 2,7).

e. Accused's statement to the investigating officer.

There was properly admitted in evidence a statement by accused, voluntarily made to Major Kenneth R. Benjamin on 19 July 1944, after an explanation of his rights (R. 25-27, Ex. 7). Accused enlisted as an aviation cadet 4 June 1942 and was eventually commissioned on 15 January 1944. Several days before a bombing crew of which accused was a member was due to leave Chatham Field for a staging area accused was sent to a regional hospital at Hunter Field. During his confinement this crew went overseas. Upon accused's return to Chatham Field about 29 May he was assigned to the pool. On 17 or 18 June accused visited Savannah and spent the evenings there, returning to the base in the afternoons. Feeling sure that he had

not been assigned to a crew he did not report to the orderly room or the mail room. Upon "walking into the orderly room" on 28 June, accused learned that he had been reported absent without leave for nine days and was restricted to the base. Accused had written several checks in Savannah that were returned because of insufficient funds but had notified the payees that he would "refund the money" as soon as possible. On or about 1 or 2 July he found a Government check payable to William H. Horlock in a latrine on the base. Ten or eleven days thereafter when accused learned at the post exchange, where he intended to cash a personal check for a sufficient amount to pay the dishonored checks, that he would not be able to cash a personal check for more than $15, a "sudden crazy impulse seized me and I produced the check I had found, writing Lieutenant Horlock's name and a fake serial number on it". As soon as accused realized what he had done, he asked for the check's return, but the cashier took it to the office. Thereupon accused left the building. Later accused was identified by the cashier at the Office of the Provost Marshal and was locked up in a tent "in enclosures". Never having been locked up before "an intense fear" came upon accused. This condition plus a great desire to see his fiancee caused accused to escape. Accused's intention to return voluntarily to the post was prevented by his apprehension by the police on 15 July (Ex. 7).

f. Evidence for the defense.

After an explanation of his rights, accused elected to testify in his own behalf, restricting his testimony to the first absence without leave and the issuance of the three worthless checks. Accused was keenly disappointed over the departure of his crew while he was ill. Pending assignment to a new crew, accused had had nothing to do for several weeks. Because of this fact and the further fact that he "had been going with a young lady steady in town" whom he planned to marry, accused slept in town for about a week (R. 34). He had made arrangements with the gunner of his crew to notify him of any new assignment to a crew, but without accused's knowledge this gunner had left on a furlough on the first day on which accused was "marked AWOL" (R.34). Accused returned to the base almost every afternoon, but, relying on the gunner to keep him posted, did not consider it necessary to report to the orderly room, nor did he check the bulletin board as instructed (R. 34,36,37).

The account with the Scranton Bank was accused's first checking account. Under an "E" allotment to the bank deposits of $100 each were made in the bank in April, May, June and July. Due to accused's loss by accident or theft of his wallet and check book while he was in the hospital at Hunter Field, accused "didn't have track" of his account and "could not

know whether there were not sufficient funds in the bank", but thought there was a sufficient amount to "cover" the three checks. Accused did not know "until the 27th that there were insufficient funds in the bank" but notified both parties who had cashed checks for him that he would make them good. He could not comply with his promise because of his restriction to the post and because of his not having received "any pay that month". He was also awaiting the receipt by the bank of the "next Class E allotment". On 11 July accused called the bank at Scranton and ascertained that he had a balance of $85. He thereupon wrote his personal check for that amount, which he hoped to cash, with the intention of turning over the proceeds to his fiance for the payment by her of the persons who had previously cashed checks for him (R. 35,37,38).

Mrs. Ruth Davies, a director of music in one of the public schools of Scranton, Pennsylvania, had known accused for 14 years and had had charge of his music while he was at school. Accused, an expert musician at the age of seven, had had his musical education fostered by the Kiwanis Club, and, in witness' opinion, had developed into an able violinist. During accused's childhood, accused's father required him to practice for three or four hours at a time and would chastise him if he failed to do so. Accused would become depressed and would stay overnight at the homes of friends of his age without notifying his mother of his whereabouts (R. 28,29,31). Witness noticed a marked change in accused between January 1944 and the time of the trial. He had lost much weight, his "eyes had a much more meaningful expression, his face had become drawn, he didn't seem to realize what he was saying and had no reason for things he had done" (R. 31).

Captain Joe E. Freed, a qualified psychiatrist at Hunter Field, whose report of 14 July 1944 was offered by the defense as its Exhibit "A", reached the conclusions that accused was a "borderline psycopath", was not insane, was able to distinguish right from wrong and adhere to the right, and should be held responsible for his actions. Miss Helen Matthews, a psychologist, with experience in psychiatry (R. 38), was permitted to remain in the court room throughout the trial at the request of the defense (R. 12). She concurred in Captain Freed's conclusions that accused was not insane and that he understood the difference between right and wrong, but, contrary to his views, was of the opinion that at times accused could not adhere to the right (R. 40,41, 44,45). This mental state, in witness' opinion, was due to an inherent lack of control or will power, which deprives accused of the ability "to have the control to do the things that ordinary people would have" (R. 42). This condition cannot be acquired, but is "born in" and as "a part of" an individual (R. 42). Witness believed that incarceration of the accused would bring on a mental breakdown (R. 42), but he would not be a menace to society if returned to civil life because there would not be the restraint and control found in Army life (R. 42,46), and he would probably "go back into music which is something he wants to do, which offers him change and satisfaction"(R. 46).

4. Accused's first absence without leave was clearly established. Accused's admission that he remained away from the camp at night, failed to report to the orderly room, and did not examine the bulletin board, destroys any possible defense that may lie in accused's contention that he returned to the base almost every afternoon. There was no evidence to corroborate accused's statement and the court was justified in relying on the official entries, contained in the morning report.

5. Accused's breach of confinement and second absence without leave are undisputed. No comment as to these offenses is necessary.

6. Accused's indorsement of the check issued to William M. Horlock, by resort to forgery is both proved by competent evidence and admitted by accused. That accused was not successful in obtaining the proceeds of the check does not affect his guilt. It is clear that he presented the check for payment after forging Lieutenant Horlock's name. The Manual for Courts-Martial, 1928, page 176, lays down the following principle:

> "The false writing must be made or altered with intent to defraud or injure another. It is immaterial, however, that anyone be actually defrauded or injured, or that no further step be made toward carrying out the intent to defraud than the making of the false writing."

7. There is equally no question that accused issued and received value for the three checks described in Specifications 1, 2 and 3 of Additional Charge II, and that these checks were dishonored for want of sufficient funds. Accused denied any fraudulent intent or knowledge of the depleted status of his account. Accused admitted his lack of information concerning his standing with the bank, but it was only on 27 June, the day after he had issued the third of the three checks that he contends that he learned through means not explained that there were insufficient funds in the bank. He thereupon advised the payee of the second check (issued on 24 June to Moyle Trunk & Bag Company) that "after figuring the matter over he didn't believe he would have enough money". Representatives of the Hotel Whitney denied that he had made any similar statement to them. It is obvious that on 27 June accused was very doubtful about his ability to pay the checks, and that, admitting the loss of the check book, he made no effort to ascertain the status of his simple account before issuing the three checks. The record is devoid of any effort on accused's part to make good the checks after his discovery on 27 June or at any time up to and including the trial. It is true that accused was restricted to the post, but this did not prevent his access to the telephone, as best demonstrated by his admitted telephone call to Scranton on 11 July, at which time he learned that as a result of the deposit of his allotment in July there was then a balance of $85 to his credit. Had accused been in good faith, it would have been a simple matter for him to have transmitted this information to his Savannah creditors and to have notified them to resubmit their checks. Not only did accused fail to

take any such steps, but on the following day he endeavored, by resort to forgery, to cash a check which he knew did not belong to him and which he had been carrying around for approximately nine days. The facts and circumstances, particularly his failure up to the time of the trial to take care of his obligations, compel the inference that accused was aware of the status of his account when the checks were issued, and that he issued them with intent to defraud.

The three specifications of Additional Charge II 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 (CM 202601, Sperti, 6 B.R. 171). Inasmuch as accused actually received present value for each of the three worthless checks which he issued, his derelictions clearly make him amenable to the punishment prescribed by Article of War 95.

8. The mental responsibility of accused was put at issue. The psychologist, Miss Matthews, testified that, although the accused was not insane either at the time the offenses were committed or at the time of trial, and although he could distinguish between right and wrong he was not able, because of inherent lack of control and emotional instability to adhere to the right or to restrain his actions. This was in contradiction of the statement of the psychiatrist, Captain Freed, who concluded, after an examination, that the accused was able to distinguish right from wrong and adhere to the right. The court's finding of guilty was a determination of all the disputed issues before it. Upon all the evidence it was within the province of the court to find that at the time of his offenses, the accused was mentally capable of distinguishing between right and wrong and of adhering to the right (CM NATO 2047, par. 395(36) Bull, JAG, June 1944). The Board of Review concurs in this conclusion.

9. Prior to trial the accused had addressed a request to Major John W. Ball asking him to act as his defense counsel. This had been indorsed to the commanding officer of Chatham Field and the request had been refused because of Major Ball's pressing duties. No appeal was taken from this refusal, nor does it appear that the accused was advised of the proper appellate procedure. At the commencement of the trial the accused stated that he was not satisfied with his appointed counsel. A rather lengthy colloquy ensued between the law member and the regularly appointed defense counsel, during which the accused was advised of his rights to request additional counsel, was asked several times whether he was satisfied with the appointed counsel, whether he desired to request additional counsel, and whether he objected to proceeding to trial at that time. The accused, during this time, did not indicate that he desired to appeal from the determination of the Base commander, refusing to detail Major Ball, but on the contrary asserted

that he understood his rights, did not wish to request additional counsel, was satisfied with the appointed counsel, and was satisfied to go to trial at that time. The right to military counsel of the accused's choice is dependent upon the availability of such counsel. It is not contended that this discretion was abused or that the Base commander's superior officer would have reversed or overruled the determination so made. One of the defense counsel was a lawyer and the defense appears to have been ably presented. Under all of the above circumstances it cannot be said that the substantial rights of the accused were prejudiced.

10. In view of the testimony that had been adduced, the court properly overruled defense counsel's motion for a finding of not guilty of Specification 3 of Additional Charge II.

11. War Department records show that accused is 21-1/12 years of age. He enlisted as an aviation cadet on 4 June 1942, and was commissioned a second lieutenant, Air Corps, on 15 January 1944. In civil life accused had been a musician with a Federal orchestra for approximately one and one-half years. Testimony offered at the trial was to the effect that he had been a violinist since his early childhood. Accused is a high school graduate.

12. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 violation of the 95th Article of War and authorized upon conviction of violation of the 61st, 69th and 93rd Articles of War.

Guy E. Eaton, Judge Advocate.

Earle Stephen, Judge Advocate.

Norman Hayes, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 17 - 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 Benjamin J. Picone (0-708053), 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. Accused's first absence without leave for nine days, during which he issued three worthless checks that have not yet been paid, was followed shortly by his forgery of an indorsement on a Government check. Having been placed in confinement he escaped and remained absent without leave for approximately a day until apprehended. I recommend that the sentence be confirmed and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Consideration has been given to seven letters attesting to accused's good character and excellence as a musician, and to five newspaper clippings and programs, pertaining to his activities as a musician, attached to the record of trial; a letter from Honorable James J. Davis, United States Senator from Pennsylvania, inclosing a copy of a letter to him from Mr. J. J. Owens; a letter from accused's mother, addressed "To Whom It May Concern"; and an unsigned copy of a report by Miss Helen Matthews, a psychologist, who testified in his behalf at the trial of accused; and a letter from accused's father, to which are attached two letters from accused and various newspaper clippings. All letters and clippings accompany this 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

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

7 Incls.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Sen. Davis, w/incl.
Incl.5-Ltr. fr. accused's mother.
Incl.6-Ltr. fr. Miss Helen Matthews.
Incl.7-Ltr. fr. accused's father w/incls.

(Sentence confirmed. G.C.M.O. 621, 15 Nov 1944)

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

SPJGQ
CM 261739

-1 SEP 1944

UNITED STATES v. Privates CLARENCE MITCHELL (33224371), and JOE E. DAWSON (38151156), both of 480th Amphibian Truck Company.	HAWAIIAN DEPARTMENT Trial by G.C.M., convened at APO 958, 23 May 1944. Mitchell: Dishonorable discharge and confinement for six (6) years. Dawson: Dishonorable discharge and confinement for ten (10) years. Each: Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

1. The Board of Review has examined the record of the common trial in the case of the two soldiers named above.

2. The record of trial is legally sufficient to support the respective findings of guilty made against Private Clarence Mitchell and the sentence assessed against him as approved by the reviewing authority. It is likewise legally sufficient to support the findings of guilty of Charges I and II and their Specifications made against Private Joe E. Dawson and the sentence assessed against him as approved by the reviewing authority. The only question requiring consideration is whether the record is legally sufficient to support the findings of guilty of Charge III and its Specification as regards Private Dawson.

3. The only offense alleged in the Specification of Charge III against Private Dawson is that of uttering a forged military pass, the charging part of the Specification being that he

> "did ***, with intent to defraud, knowingly and wrongfully utter as true and genuine a certain organization pass in words and figures as follows: 'APO 952 JOE E. DAWSON, 38151156, PVT has permission to be absent from his duties and station from 0800, April 3, 1944 until 2130, April 4, 1944. SAUL GORDAN Co. or Btry. Comdr.', which said organization pass was, as he, the said Private Joe E. Dawson, then well knew, falsely made and forged."

The purported pass in question was introduced in evidence without objection (R. 53; Ex. G) and evidence was adduced which is legally sufficient to show beyond reasonable doubt that it was forged by the accused, Private Dawson (R. 15, 52, 53, 96; Exs. C, D). There is, however, no evidence of record showing or tending to show that the accused ever presented, offered, or exhibited this pass to anyone at any time, or that he ever represented, either by words or actions, that the same was genuine. It was merely discovered and picked up by a civilian policeman and a member of the military police at the scene of a fight in which the accused (Dawson) had been engaged (R. 98).

> "To utter, as used in a statute against forgery and counterfeiting, means to offer, whether accepted or not, a forged instrument, with the representation, by words or actions, that the same is genuine" (Black's Law Dictionary, 3rd ed., page 1793).

The uttering of a forged instrument is a separate and distinct offense from that of forgery itself (MCM, 1928, par. 149j). The evidence of record is legally insufficient to establish the accused's guilt of the offense of uttering the forged pass.

4. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge III and its Specification as made against Private Joe E. Dawson but legally sufficient to support all other findings of guilty made against him and Private Clarence Mitchell, respectively, and the respective sentences assessed against them as approved by the reviewing authority.

William H. Lambrecht, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

SPJGQ
CM 261739

1st Ind.

5 - SEP 1944

War Department, J.A.G.O., - To the Commanding General, U. S. Army Forces in Pacific Ocean Areas, A.P.O. 958, c/o Postmaster, San Francisco, California.

1. In the case of Privates Clarence Mitchell (33224371) and Joe E. Dawson (38151156), both of 480th Amphibian Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specification as to accused Dawson but legally sufficient to support all other findings of guilty made against him and accused Mitchell, respectively, and the respective sentences assessed against them as approved by the reviewing authority, which holding is hereby approved. Upon disapproval of the findings of guilty of Charge III and its Specification as to accused Dawson you will have authority to order execution of the sentences.

2. Since each of the accused stands convicted of a felony, viz, assault with intent to do bodily harm with a dangerous weapon, it is recommended that a Federal reformatory be designated as the place of confinement rather than a disciplinary barracks.

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 261739).

Myron C. Cramer

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

1 Incl.
Record of Trial.

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

SPJGN
CM 261810

5 SEP 1944

UNITED STATES v. Second Lieutenant COURTNEY S. KITCHEL (0-1324843), Infantry.	ARMY GROUND FORCES REPLACEMENT DEPOT NO 1 Trial by G.C.M., convened at Fort George G. Meade, Maryland, 14 August 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 Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Courtney S. Kitchel, Company D, 12th Replacement Battalion, 3rd Replacement Regiment (Inf), Army Ground Forces Replacement Depot No 1, did, at Fort George G. Meade, Maryland on or about 15 July 1944, with intent to deceive First Lieutenant James V. Yaukey, an officer whose official duty required him to make an investigation of the conduct of the said Lieutenant Kitchel, officially state to the said Lieutenant Yaukey that while a staff sergeant in the Army Air Forces stationed at Keesler Field, Mississippi, he had made a flight to Honolulu where the plane made a crash landing at Hickam Field and that he sustained a minor head injury which statement was known by the said Lieutenant Kitchel to be untrue in that he did not make said flight or sustain said injury in the manner stated.

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Courtney S. Kitchel, Company D, 12th Replacement Battalion, 3rd Replacement Regiment (Inf), Army Ground Forces Re-

placement Depot No 1, did, at New York City, New York, at the Yale Club, on or about 21 June 1944, knowingly, wrongfully, and without authority, publicly wear the American Theatre Ribbon, Asiatic Pacific Theatre Ribbon, Purple Heart Ribbon, Air Medal Ribbon with Silver Cluster, and American Defense Service Ribbon.

Specification 4: (Finding of not guilty).

He pleaded not guilty to the Charge and all Specifications thereunder and was found guilty of the Charge and Specifications 1 and 3 thereunder but not guilty of Specifications 2 and 4 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 Mr. Thomas J. Kehoe, Assistant National Service Director for the Disabled American Veterans became acquainted with the accused during the month of May, 1944. The accused had been introduced to Mr. Kehoe by another officer who stated that the accused had seen foreign service and was entitled to wear numerous theatre ribbons and decorations (R. 15-19). Mr. Kehoe was interested in a dinner being given by the Yale Club in New York City in honor of Lieutenant Ernest Childers and Sergeant Charles E. (Commando) Kelly, both of whom hold the Congressional Medal of Honor, and he secured from the accused's commanding officer permission for the accused to accompany him to New York City for such occasion which was attended by numerous dignitaries (R. 15-17). On this occasion the accused wore ribbons denoting his possession of the Air Medal with Silver Cluster, the Purple Heart, the Good Conduct Medal and his service before Pearl Harbor and in both the Pacific Theatre and American Theatre of operations. During the course of the evening the master of ceremonies, who by stipulated testimony stated that the accused was present on such occasion, called upon the accused for a short talk after Lieutenant Childers and Sergeant Kelly had spoken. None of the witnesses recalled exactly what the accused had stated. On this occasion his picture was taken in a group composed of Lieutenant Childers, "Commando" Kelly and other dignitaries and the picture which was identified and admitted into evidence shows the accused wearing the aforementioned decorations (R. 16-23; Pros. Exs. 4, 5).

Thereafter an investigation was instituted concerning the accused's unauthorized wearing of the decorations and on 15 July 1944 the accused was interrogated by First Lieutenant James V. Yaukey, an intelligence officer (R. 7-8). The accused was informed of his rights under the 24th Article of War and after considerable conversation with Lieutenant Yaukey executed a written statement which was a summarization of

the conversation excluding therefrom numerous "off record" statements (R. 8-9, 11-12, 37). This statement in material part is as follows:

"During the latter part of January 1943, while a Staff Sgt in the Army Air Forces stationed at Keesler Field, Mississippi, I made a flight to Honolulu. The plane I was in made a crash landing at Hickam Field and I had a minor head injury. After approximately six weeks a return flight was made to Keesler Field, Mississippi. On my return, Captain Maurice Greenbaum gave me 4 ribbons and told me that I was eligible to wear them. They were (1) American Theater (2) Pacific Theater (3) Purple Heart and (4) Air Medal which had a palm. None of these ribbons were ever worn from the time Captain Greenbaum gave them to me until 13 June 1944.

"While at Walter Reed General Hospital to meet a Disposition Board to have my limited service restriction removed, I visited at the home of Thomas J Kehoe, Asst National Service Officer of the Disabled American Veterans. I became quite well acquainted with Mr. Kehoe and made several contacts for him with patients at the General Hospital. I had explained the situation of the service ribbons to Mr Kehoe, stating that they had been given me but that I had no authorization to wear them. When Mr Kehoe picked me up to take me to a luncheon at the Touchdown Club in Washington on 13 June he requested I wear them for an impression.

"Mr. Kehoe later invited me to go to New York with him for the Lt Childers- Sgt Kelly reception and insisted I wear the ribbons. I had requested that I be kept in the background but eventually found myself in the front rows of group pictures which were published in New York papers. My conspicuous position in one of those pictures was due to my long time acquaintance with Mayor LaGuardia.

"On these two occasions related, I wore six ribbons: Good conduct ribbon to which I am entitled, the Defense ribbon which I procured myself and the 4 ribbons given me by Capt Greenbaum. These are the only occasions on which these ribbons have been worn."

According to stipulated evidence concerning the accused's military record it was shown that he had not made a flight either as a pilot or crew member to the Territory of Hawaii, that he had had no foreign service of any nature and that he had not been awarded any decorations or awards (Pros. Exs. 2, 3).

4. The accused, after explanation of his rights as a witness, elected to testify. Shortly before meeting Mr. Kehoe he had entered

Walter Reed Hospital in an effort to qualify for general duty and while there because of his experience as a physical training instructor he was placed in charge of physical training and corrective exercises for disabled men returned from overseas (R. 28). He became aware that he could better perform his duties if the men were under the impression that he had had combat service and consequently he permitted a rumor to such effect to spread (R. 28-29). He became acquainted with Mr. Kehoe and attended a dinner at the Touchdown Club, Washington, D. C. but did not wear any ribbons or decorations on that occasion (R. 29). He accepted Mr. Kehoe's invitation to attend the dinner at the Yale Club and had requested that he be permitted to remain in the background but at Mr. Kehoe's insistence he had worn the six decorations aforementioned in an effort to perform the functions for which he had been invited, namely, to act as a buffer between the public and Lieutenant Childers and Sergeant Kelly. His sole purpose in attending the dinner was to aid the disabled veterans and during the short talk he made on such occasion he made no claim to having had foreign service or combat duty of any kind (R. 29-34). When he signed the statement given to Lieutenant Yaukey he had not carefully read it and he did not know in exactly what capacity Lieutenant Yaukey was acting in taking the statement (R. 35). He admitted that he had never flown to Hawaii and that he had received no injury as a result of an airplane crash (R. 30).

5. Specifications 1 and 3 respectively allege that the accused at a designated time and place "with intent to deceive First Lieutenant James V. Yaukey, an officer whose official duties required him to make an official investigation of the conduct of the said Lieutenant Kitchel" officially stated to Lieutenant Yaukey that he (the accused) while a staff sergeant in the Army Air Forces stationed at Keesler Field, Mississippi, had made a flight to Honolulu where the plane made a crash landing at Hickam Field and that he sustained a minor head injury which statement was known by the accused to be untrue in that he did not make such flight or sustain said injury in the manner stated and that the accused at the Yale Club in New York City on 21 June 1944 knowingly, wrongfully and without authority publicly wore the American Theatre Ribbon, Asiatic Pacific Ribbon, Purple Heart Ribbon, Air Medal with Silver Cluster and American Defense ribbon. The offenses are charged in violation of Article of War 95. "Knowingly making a false official statement", is violative of Article of War 95 as is also any conduct or behavior in an official capacity which in dishonoring or disgracing the individual as an officer seriously compromises his character and standing as a gentleman (MCM 1928, 151).

The evidence for the prosecution conclusively shows that the accused on 21 June 1944 was the guest of Mr. Kehoe at a dinner at the Yale Club in New York City in honor of two holders of the Congressional Medal of Honor. On this occasion the accused wore six decorations wholly without authority of any kind. He permitted himself to be introduced as a hero of only slightly less stature than the two holders

of the Congressional Medal of Honor. He, while wearing the six decorations, permitted his picture to be taken with these two heros and other dignitaries. By these actions he represented to a large assembly of persons that he was entitled to wear the decorations and was entitled to be recognized as a veteran of overseas combat action. Such display is not only disgraceful but seriously compromises the accused's character both as an officer and a gentleman. The signed statement made by the accused to Lieutenant Yaukey in the first sentence thereof contains the statement that "while a staff sgt. in the Army Air Forces stationed at Keesler Field, Mississippi, I [the accused] made a flight to Honolulu. The plane I [the accused] was in made a crash landing at Hickam Field and I [the accused] had a minor head injury". Such statement was made in the course of an official investigation of the accused's unauthorized wearing of the aforementioned decorations. The statement was wholly false as is conclusively shown by the War Department records of the accused's service and by his own admissions in his testimony. The evidence, therefore, shows beyond a reasonable doubt that the accused committed the offenses as alleged in Specifications 1 and 3 and amply supports the court's findings of guilty of the Charge and Specifications 1 and 3 thereunder.

6. The accused is about 30 years old. The War Department records show that he has had prior enlisted service from 22 September 1942 to 6 September 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. He attended college for 5 years, graduating in 1940. For a short time before his induction he was employed by the Trojan Powder Company as a "Line Supervisor" at a final weekly salary of $62.50.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 1 and 3 thereunder and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 261810

1st Ind.

War Department, J.A.G.O., 21 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 Courtney S. Kitchel (0-1324843), Infantry.

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

The conduct of the accused in making a false, official statement in the course of an investigation reveals deliberate dishonesty and his unfitness for the responsibilities of an officer. His further act in publicly wearing valued military decorations to which he was not entitled not only violated the code of honor of the soldier but was an affront to all those who have won military decorations by service and sacrifice. The privilege of wearing decorations won at such a price must be zealously guarded. In addition to the offenses for which he was tried, the accused admitted that while at Walter Reed Hospital he fostered a rumor that he had had foreign service and had been awarded various military decorations. The accused by telling a deliberate falsehood and by false pretenses has so compromised his position as an officer and a gentleman as to render his retention in the service undesirable. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Consideration has been given to "Brief on Behalf of Accused" submitted by him through military channels.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Form of action.
Incl 4 - Brief on behalf of accused.

(Sentence confirmed. G.C.M.O. 568, 16 Oct 1944)

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

SPJGQ
CM 261815

- 7 SEP 1944

UNITED STATES v. First Lieutenant ALLEN D. REED (0-733725), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Ellington Field, Texas, 4 August 1944. Dismissal, total forfeitures.

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 96th Article of War.

Specification 1: Nolle prosequi by direction of appointing authority.

Specification 2: In that First Lieutenant Allen D. Reed, Air Corps, did, at or near Plaucheville, Louisiana, on or about 5 June 1944, wrongfully violate paragraph 1b, Army Air Forces Regulation 60-16A, by flying an Army aircraft of which he was the pilot closer than five hundred (500) feet to another aircraft in flight, when not in duly authorized formation and when not necessary to the performance of his mission.

CHARGE II: Nolle prosequi by direction of appointing authority.

Specification: Nolle prosequi by direction of appointing authority.

CHARGE III: Finding of not guilty.

Specifications 1, 2, 3, 4, 5: Findings of not guilty.

He pleaded not guilty to all of the Charges and Specifications on which he was arraigned. He was found not guilty of Charge III and its Specifications and guilty of Charge I and Specification 2 thereof. By direction of the convening authority an order of nolle prosequi was entered as to Specification 1 of Charge I and as to Charge II and its Specification. No evidence of any previous conviction was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence, remitted that portion thereof providing for confinement at hard labor and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of the only Specification and Charge of which the accused was found guilty may be summarized as follows: Accused, a member of the military service (R.8) was at the time of the occurrence complained of a First Lieutenant, rated as a pilot, and stationed at Ellington Field, Texas.

On 5 June 1944 accused was the pilot of an A-28 military airplane carrying a co-pilot, a navigation instructor, three navigation students, and a radio operator (R. 32). The plane was one of eleven similar planes sent on the same mission at the same time (Pros. Ex. 2, R. 8-9). The mission was primarily for the instruction of the student navigators aboard the planes, and was known as Mission 3 for Dead Reckoning (Pros. Ex. 1, R. 6). The planes were not to be flown in formation. Each plane flew individually so that the students could take turns acting in the various navigation posts in each plane (R. 33). Included in the same flight and mission was a similar plane piloted by Second Lieutenant Richard I. Harris, hereinafter referred to as "the Harris plane."

About 1230 that day, the plane piloted by the accused flew over Woodville, Mississippi, and entered the last leg of its journey across Louisiana (R. 50). The Harris plane was seen about one-half mile to a mile ahead and flying the same altitude and course (R-35). The accused's plane overtook the Harris plane and flew within a distance estimated at 10 to 100 feet from it (R. 50, 66, 140, 145).

The two ships for an interval of a minute or two flew almost parallel and within one hundred feet of each other at the same altitude. Following this, the plane on the right (ie. the Harris plane) passed under the plane flown by the accused and came up on the left side thereof. The ships changed positions from right to left several times, alternating in passing underneath one another. The last time any of the witnesses saw the ship flown by Lieutenant Harris it was on the left of their plane, and the maneuvers between the two planes had lasted eight to ten minutes. During this time, the ships were bobbing and weaving, sometimes being as close together as twelve feet from wing-tip to wing-tip and at other times being considerably farther apart. During this same time the plane flown by the accused gained and lost altitude, but the general trend on the

altimeter was up, and just prior to the accident it registered 9600 feet. At the same time, the air-speed fluctuated from 120 to 180 miles per hour and the compass headings changed perceptibly four or five times, so that it was almost impossible for the students to navigate or plot an average course.

When last seen, the plane of Lieutenant Harris was to the left, slightly ahead and within one hundred feet of the plane flown by the accused. Shortly thereafter, the plane of which the accused was the pilot, which appeared at that moment to be in straight and level flight, was involved in a collision with the Harris plane which threw the occupants of the accused's plane upward and forward, following which the ship lost altitude for a time, but then straightened out (R. 33-40, 49-52, 66-69, 140-143, 145-147). The Harris plane crashed to the earth below and all five of its occupants were killed (Pros. Ex. 3 to 26, incl.). The ship of which the accused was the pilot proceeded back to Ellington Field, Texas, and landed safely.

Captain Steen, Director of Flying, Navigation School, Ellington Field, Texas, testified that on Navigation Mission 3, which is a standard problem, no formation flying was authorized, and that if one plane should overtake another in flight at the same altitude and air-speed that AAF Regulation 60-16A would require the overtaking plane, by giving way to the right, to give the right-of-way to the plane overtaken.

4. Evidence for the defense: Second Lieutenant Charles M. Krouse, the co-pilot in the ship flown by the accused, was occupying the co-pilot's seat out of Woodville, Mississippi. There was only one set of controls in the ship. About four to six minutes after leaving Woodville he saw a plane on a similar course and directly ahead. The accused kept on course and pulled even with the other ship, which was about seven hundred fifty feet away on the right. At that time, accused handed Krouse the Flight Annex Plan and asked him to find out who was the pilot of the other ship, and while Krouse was reading the Annex he ceased to watch the other plane. By the time he looked up, the other ship had turned and was coming closer and was two to three hundred feet ahead of the plane flown by accused. About this time, the other ship went under the plane of which Krouse was an occupant and got on its left side. Krouse then again referred to the Annex, and during that time the other ship evidently crossed over above them and got back on the right side. On the first maneuver the accused cut the throttles back to keep from over-running the other ship. After flying some time on their right, Lieutenant Harris again flew his ship back under them and came up on the left, slightly ahead and about one hundred feet away. Without warning, Lieutenant Harris made a right level turn in a 45° bank in front of and into the path of their ship, and the accused immediately cut the throttle, pushed the wheel forward to go down, and skidded his plane to the left to avoid the other ship. By this time, and as Lieutenant Harris started

to cross over the ship flown by the accused, Harris tightened his turn and pulled his tail down. Just at that moment the right wing of the accused's ship came up and made contact with the left rudder assembly, both vertical and horizontal stabilizers, of Lieutenant Harris' ship. Lieutenant Krouse saw the impact but immediately thereafter lost sight of the other plane.

During this time the accused maintained his course, altitude, and airspeed and never changed the throttle settings, except the two times above mentioned. The accused did not engage in formation flying and never maneuvered his ship to "play" with Harris (R. 106-108).

Major Howard F. Weeks, Operations Officer, and Captain Charles A. Steen, Director of Flying, Navigation School, Ellington Field, Texas, both testified that they had known the accused for approximately a year and a half; that his efficiency rating was excellent. During this entire time, he had done his work well as a pilot and was a flight commander, chosen on the basis of experience and dependability (R. 133-135).

The accused, after proper explanation as to his rights as a witness, elected to remain silent.

5. In rebuttal, Lieutenant L. R. Brower, who was a student navigator and a passenger in the plane piloted by the accused, testified that Lieutenant Harris' ship went under his plane once from right to left; that later he saw it on the right, and assumed it had gone over his plane; and that later it was back on the left and again he assumed it had gone over his plane. He could see straight ahead, below him, and almost 90° to both right and left. Just prior to the accident the ship flown by accused was flying straight and level, and the other ship which had previously been to the left and about two hundred feet away did not cross over in front of accused's plane, nor did it cross over below him. During the ten minutes prior to the accident, the ship flown by the accused had changed its course several degrees on two or three occasions (R. 140-143).

6. The accused having been found not guilty of the serious charge of manslaughter of the five occupants of the Harris plane, our discussion will be confined entirely to the findings of guilty of Charge I and its Specification 2, wherein it is averred in substance that the accused violated Par. 1b of AAF Regulation 60-16A by flying an airplane closer than 500 feet to another airplane when not in a duly authorized formation and when not necessary to the performance of his mission.

Par. 1b of AAF Regulation 60-16A of 15 April 1944 provides as follows:

> "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 the wingspan of the largest aircraft concerned."

Five witnesses, all occupants of the plane flown by accused, testified that he overtook the Harris plane in flight and came within a distance estimated from 10 to 100 feet of that plane. The only evidence to the contrary was the testimony of the co-pilot of accused's plane to the effect that the accused's plane was not flown within 500 feet of the Harris plane, but that the latter after accused's plane was about alongside suddenly turned in toward accused's plane and caused the collision. His testimony was not convincing in the face of the testimony of numerous disinterested witnesses to the contrary, particularly that of the navigation student who was watching the instruments prior to the collision and observed that the accused's plane varied in direction, elevation and speed to such an extent that he could not perform his duties and left his seat to complain about it. The findings of guilty are therefore amply supported by convincing evidence and we find no justifiable reason for disturbing them.

7. War Department records show the accused to be 25 years of age, born in Bradford, Pennsylvania, on 2 March 1919. He graduated from Bradford High School in 1937, was employed as a laborer, salesman, and electrician's helper for one and a half years, and enlisted in the service 9 February 1939. He served in Company B, 9th Infantry, until 7 April 1942, at which time he was appointed an aviation cadet. On 3 December 1942 upon completion of his cadet training he was commissioned a Second Lieutenant, Air Corps. He was assigned and served as a pilot with the Navigation School for 19 months. He is credited with 1500 hours of flying time. He was promoted to First Lieutenant 17 November 1943. He is married.

8. The court was legally constituted and had jurisdiction of the person and of 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 and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

William H. Gambrell, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 2 - 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 First Lieutenant Allen D. Reed (0-733725), Air Corps, Ellington Field, Texas.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence as approved by the reviewing authority. Accused was found guilty of violation of paragraph 1b, AAF Regulation 60-16A by flying a military aircraft closer than 500 feet to another when not in duly authorized formation and when not necessary to his mission. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

3. Consideration has been given to the attached memorandum from General H. H. Arnold, Commanding General of the United States Army Air Forces, dated 22 September 1944. He recommends that the sentence of dismissal and total forfeitures be confirmed and ordered executed. I concur in that recommendation.

4. Consideration has also been given to the attached letter from the accused's father, addressed to the President, dated 17 August 1944.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. for sig. S/W.
Incl.3-Form of action.
Incl.4-Memo. fr. Gen. H.H. Arnold dated 22 Sept. 44.
Incl.5-Ltr. fr. accused's father dated 17 Aug. 44.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 622, 15 Nov 1944)

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

SPJGV
CM 261863

5 SEP 1944

UNITED STATES	FIRST AIR FORCE
v.	Trial by G.C.M., convened at Seymour Johnson Field, North Carolina, 5 August 1944. Dismissal.
Second Lieutenant RAYMOND H. GRANT (0-815684), 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 Charges and Specifications:

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

Specification: In that Second Lieutenant Raymond H. Grant, Air Corps, Section G, 123rd Army Air Forces Base Unit (Fighter), did, at Seymour Johnson Field, North Carolina, on or about 30 June 1944, with intent to deceive Major Lester J. Johnsen, Air Corps, officially state to the said Major Lester J. Johnsen, that he had turned in all of his flying equipment, except a gabardine summer flying suit, to the Air Corps Supply, which statement was known by the said Second Lieutenant Raymond H. Grant, to be untrue in that he had not turned in his flying equipment.

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

Specification: In that Second Lieutenant Raymond H. Grant, * * *, having received a lawful order from Major Lester

J. Johnsen, Air Corps, to turn in all of his flying equipment, the said Major Lester J. Johnsen being in the execution of his office, did, at Seymour Johnson Field, North Carolina, on or about 30 June 1944, fail to obey the same.

He pleaded not guilty to and was found guilty of both Charges and their respective Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, remitted the forfeitures and forwarded the record of trial for action under Article of War 48, but recommended that the execution of the sentence of dismissal be suspended.

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

On or about 15 May 1944 accused was observed by Major Lester J. Johnsen, Director of Flying, Seymour Johnson Field, North Carolina, wearing a gabardine summer flying suit. Major Johnsen knew that accused had previously been re-evaluated as a pilot and taken off flying status. He asked accused if he had turned in his flying equipment and accused replied "No". Major Johnsen then instructed him to turn it in because he was no longer a pilot. On 1 June Major Johnsen again asked accused if he had turned in his flying equipment, and receiving a negative answer, again instructed him to turn the equipment in. On 30 June Major Johnsen called accused by telephone and inquired if he had turned his flying equipment in. Accused replied he had turned in everything except his gabardine flying suit which was at the laundry. At Major Johnsen's request he enumerated the articles he had turned in and said they had been turned in to some sergeant at the "Air Corps Supply" whose name he did not remember (R. 6, 7). First Lieutenant Ralph M. Scott, accused's commanding officer, was present in Major Johnsen's office at the time of this telephone conversation between the major and accused and listened in over an extension phone (R. 7). Major Johnsen then sent Lieutenant Wright to inspect accused's quarters to see if any flying equipment was there. Upon receiving Lieutenant Wright's report on what he found in accused's quarters Major Johnsen had accused and Lieutenant Scott accompany him to accused's quarters (R. 8). There they found flying equipment issued to all pilots (R. 11). Included in the items found in accused's room were a first aid kit from a P-47 airplane, summer leather flying jacket, flying boots with flying trousers, helmet, old type summer flying suit, old type winter flying jacket, summer flying gloves and a parachute (R. 22). Accused was entitled to have this

type of property prior but not subsequent to his being evaluated as a pilot (R. 22). When asked by Major Johnsen why he had said over the phone that he had turned his equipment in accused contended that what he had told the major was that he had talked with a sergeant about turning it in (R. 9, 19). When later questioned by Major Johnsen after they had returned to Lieutenant Scott's office accused admitted he had lied over the phone because he did not want another argument as Captain Roderick had "chewed him out" about something half an hour previous to the major's call (R. 8, 19).

Immediately after listening in on the telephone conversation between Major Johnsen and accused, Lieutenant Scott went to his office where he saw the accused. Accused told him he had just talked with Major Johnsen and asked Lieutenant Scott if he thought Major Johnsen was coming over. He said Major Johnsen had told him to turn in his flying equipment and he thought he had better do it before the major came over. However Major Johnsen arrived before accused had left Lieutenant Scott's office (R. 18).

4. For the defense.

Accused after having his rights as a witness explained elected to make an unsworn statement to the court. He admitted "I feel personally that these charges are in essence true. I did make a false official statement only in the sense that I used it to gain time to rectify the mistake I had made". The accused expressed the opinion that the charges resulted from prejudice against him because he had been re-evaluated as a pilot due to his dislike of the P-47 airplane. Major Johnsen after inquiring on two occasions if he had turned in his flying equipment then suggested that he had better do it. Due to the press of duties he had not accomplished his intention to do so. On 30 June just prior to his telephone conversation with Major Johnsen he had received "a very nice verbal attack" from Captain Roderick because he had exercised a discretion in a certain matter which he had handled as he thought Lieutenant Scott would have liked to have it handled. He was still pretty well excited when Major Johnsen called and made the statement to him concerning the equipment because he intended as soon as the conversation ended to get the equipment and turn it in. He had called for transportation to go get the equipment, but Major Johnsen arrived before he could leave (R. 24, 25).

5. The evidence shows that on or about 15 May Major Lester J. Johnsen, Director of Flying, Seymour Johnson Field, North Carolina, ordered accused to turn in his flying equipment, Major Johnsen knowing that accused had previously been re-evaluated as a pilot and was no longer on flying status. On 1 June 1944 Major Johnsen inquired of accused if he had turned in his equipment and receiving a negative answer again ordered accused to do so. On 30 June Major Johnsen called accused over the telephone and inquired if he had turned the equipment in and accused replied he had. Inspection of accused's quarters revealed that the flying equipment had not in fact been turned in by accused, who subsequently admitted the falsity of his statement to Major Johnsen.

6. War Department records show that accused is 24 years of age and a high school graduate. Prior to entering military service he worked for the Rochester Ordnance District as an inspector from January to June 1942, and for Rome Supply Depot, War Department, as junior storekeeper from June 1942 to January 1943. He was a member of the New York National Guard 1934-1937. He was appointed air cadet, Army of the United States, 1 February 1943, and after completing the prescribed Flying Training Command Course, Craig Field, Selma, Alabama, was appointed second lieutenant, Army of the United States, 3 November 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 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 the 96th Article of War and mandatory upon conviction of a violation of the 95th Article of War.

Thomas N. Tappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevithan, Judge Advocate.

SPJGV
CM 261863

1st Ind.

War Department, J.A.G.O., 27 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 Raymond H. Crant (0-815684), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but that the 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

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

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

(Sentence as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 589, 25 Oct 1944)

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

SPJGK
CM 261879

(329)

21 OCT 1944

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER
v.	Camp Blanding, Florida.
Second Lieutenant FRANK D. WATT (0-1825294), Infantry.	Trial by G.C.M., convened at Camp Blanding, Florida, 11 August 1944. Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that Second Lieutenant Frank D. Watt, Company "A", 203rd Infantry Training Battalion, 63rd Infantry Training Regiment, Camp Blanding, Florida, did, without proper leave, absent himself from his station at Camp Blanding, Florida, from about 30 June 1944 to about 6 July 1944.

Specification 2: In that Second Lieutenant Frank D. Watt, * * *, did, at Camp Blanding, Florida, on or about 1200, 16 July 1944, fail to repair at the fixed time to the properly appointed place of assembly for duty.

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

Specification: In that Second Lieutenant Frank D. Watt, * * *, was at Camp Blanding, Florida, on or about 15 July 1944, found drunk while on duty as Company Duty Officer of Company "A", 203rd Infantry Training Battalion.

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

Specification 1: In that Second Lieutenant Frank D. Watt, * * *, was, at Camp Blanding, Florida, on or about 16 July 1944, in the orderly room of Company "A", 203rd Infantry Training Battalion, in the presence of certain enlisted men, namely, Technician fifth grade Gordon N. Horton, Private Eugene Carr, and Private Warren F. Beeler, all of Company "A", 203rd Infantry Training Battalion, drunk while in uniform.

Specification 2: In that Second Lieutenant Frank D. Watt, * * *, did, at Columbus, Georgia on or about 23 June 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Columbus Bank and Trust Company, Columbus, Georgia, a certain check in words and figures as follows, to wit:

23 June 1944

BANK Commercial National Bank
(write name of your bank on this line)

CITY AND STATE Muskogee, Okla.

PAY TO
ORDER OF Cash $25.00

Twenty five dollars and no cents DOLLARS

For value received I claim 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.

NO F.D. Watt
10 Co 1st S.T.R. 01825294

and by means thereof, did fraudulently obtain from the Columbus Bank and Trust Company, Columbus, Georgia the sum of twenty-five dollars ($25.00) lawful money of the United States, he the said Second Lieutenant Frank D. Watt, then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank, Muskogee, Oklahoma for the payment of said check.

Note: Specifications 3 to 6 inclusive are identical in form with Specification 2, but allege that the accused on different dates issued four checks of $20.00 each at Jacksonville, Florida, to the Hotel Seminole and thereby fraudulently obtained cash of equal amount as follows:

Specification	Amount	Date
3	$20.00	3 July 1944
4	20.00	3 July 1944
5	20.00	5 July 1944
6	20.00	5 July 1944

He pleaded not guilty to and was found guilty of all the Charges and Specifications. No evidence was introduced of any previous conviction. 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.

During the occurrences hereinafter related the accused was in the military service of the United States in the grade of a second lieutenant, Infantry (R. 9,12,23).

a. Specification 1 of Charge I (absence without leave).

On 27 June 1944, by Special Orders No. 154 dated 27 June 1944, of Headquarters, The Infantry School, Fort Benning, Georgia, the accused was ordered to proceed from that station to Camp Blanding, Florida (Pros. Ex. 1). He departed from Fort Benning to Camp Blanding on 28 June 1944 (Pros. Ex. 2) and arrived at Camp Blanding, 287 miles away, on 6 July 1944 (R. 54, Pros. Exs. 2,3). The travel time between the two points is one day. No permission was granted the accused to delay en route (R. 12).

b. Specification 2 of Charge I (failure to repair at time fixed to proper place).

On 14 July 1944 at Camp Blanding, 1st Lieutenant L. S. Austin, the commanding officer of the accused's organization, ordered the accused and the other officers of that organization to attend a company formation at 1200, 16 July 1944. The formation was held at the time specified but the accused was not present (R. 13,21,22).

c. Charge II and its specification (drunk on duty).

The accused was appointed Company Duty Officer for the week end of 15-16 July 1944 (R. 13, Pros. Ex. 5), and as such he was required during that time to be available in case of emergency (Pros. Ex. 4). About midnight of 15 July 1944 accused was seen at Kingsley Hall (apparently on the post) under the influence of liquor and incapable of performing any duty (R. 26,30,35), but not in any way disorderly (R. 32,36). One witness was of the opinion that he was not drunk but was under the influence of liquor (R. 33). He staggered slightly when he walked and his eyes were glassy and bloodshot (R. 37).

d. Specification 1 of Charge III (drunk in uniform).

About 11:30 p.m. of 16 July 1944 the accused, in uniform, entered the orderly room of his organization holding a half empty bottle of liquor. He conversed with Private W. F. Beeler, who was there acting as Charge of Quarters, concerning the misconduct of his (accused's) wife in going off

with another soldier. Two other enlisted men were present (R. 39). Accused was under the influence of alcohol and walked unsteadily. He offered the soldier a drink from the bottle. Private Beeler walked with him to his quarters and left him there at midnight (R. 40). Accused at the time was not disheveled, nor unduly loud or boisterous and his speech was coherent (R. 41). The company commander of accused testified that he was disturbed by the commotion made by the accused in entering his quarters. He stated that the accused was "talking in a boisterous manner and making a commotion in the hut" and that in his opinion the accused was drunk (R. 13,14). Witness reported the matter to the Battalion Commander who sent for the accused and upon observing his condition told the accused that he was not fit to go on the contemplated bivouac nor to appear before the troops (R. 15).

e. Specifications 2 to 6 of Charge III (passing worthless checks).

It was shown by stipulation that on 23 June 1944 accused cashed a $25 check at the Columbus Bank and Trust Company, Columbus, Georgia. The check was drawn upon the Commercial National Bank of Muskogee, Oklahoma. On 3 August 1944 the accused paid the Columbus Bank and Trust Company $25 in payment of the check (Pros. Ex. 6). It was shown by the testimony of the assistant manager of the Hotel Seminole, Jacksonville, Florida, that the accused cashed four checks of $20.00 each at that hotel between 3 and 5 July 1944, all of which checks were returned by the bank upon which they were drawn, the Commercial National Bank of Muskogee, Oklahoma, because of insufficient funds on deposit (R. 45-47, Pros. Exs. 6,7,8,9,10). When demand for payment was made about 1 August the accused promptly reimbursed the hotel the full amount due on all of these checks (R. 46,47). The assistant manager did not know whether cash was given the accused in exchange for the checks but he assumed that it was from his knowledge of the usual procedure in such cases (R. 45,52).

Although not made the basis of any charge it was also shown that on 1 July 1944, Second Lieutenant Martin V. Wilzaven cashed a $20 check at the Hotel Seminole, Jacksonville, Florida. The accused was the maker and Lieutenant Wilzaven the payee and the Commercial National Bank of Muskogee, Oklahoma, the drawee of the check (Pros. Ex. 11). This check was also returned for insufficient funds by the drawee bank. It has not been redeemed by the accused and no demand has been made upon accused for payment (R. 48). Lieutenant Wilzaven testified that at the request of accused he endorsed the check and received from the Seminole Hotel the $20 proceeds thereof which were given by him to the accused (R. 52). He stated that he arranged to cash the check because he was a guest of the hotel at the time and the accused was not (R. 54).

By stipulation of record it was agreed that the accused's daily balance on deposit with the Commercial National Bank, Muskogee, Oklahoma, between 1 June 1944 and 31 July 1944 was accurately set forth in a copy of his account attached to the record (Pros. Ex. 6). It shows the following

pertinent balances:

June 1	-	$129.65
June 23	-	65.00
July 1 to 13	-	5.00
July 14	-	74.00
July 31	-	12.70

4. The accused was advised of his rights and elected to testify under oath (R. 55). He stated with reference to his bank account that he kept no check stubs and no account of his balance but relied upon his memory (R. 56). His monthly pay was deposited in the account on 1 June 1944 so he thought he had a balance at that time of about $130.00. He drew some checks before leaving Fort Benning reducing his balance to $60.00 (R.57). He had however forgotten about a check for $50 which he had sent to his mother in May of 1944 which cleared during June (R. 57-58). He admitted that he cashed the $25 check at the Columbus bank but claimed that he thought his balance then was $60.00 and that the check would reduce it to $35.00. He admitted that he issued the five checks of $20 each at Jacksonville (the basis of Specifications 2 to 6 inclusive of Charge III), but thought that with a deposit of $70.00, which he made on 13 July, his balance would be sufficient to cover these checks (R. 59). At the time he actually cashed the checks (3 and 5 July) he knew that his balance was insufficient to meet them (R. 77). When he was advised that the checks were dishonored he immediately redeemed them (R. 59).

On the night of 15 July 1944 he was Company Duty Officer and went to Kingsley Hall and drank five or six bottles of beer and nothing else (R. 63, 65).

On Sunday, 16 July 1944, he arose about 11 o'clock and attended the company formation about noon. He was not with the platoon to which he had been assigned but stood at the front of the first platoon. He was new to the company and did not know the men (R. 66).

That afternoon and evening he had three drinks of whiskey in his hut (R. 68) and at least three more at the officers' club,followed by six bottles of beer (R. 69). About 11 o'clock he went toward his hut with a partially filled bottle of whiskey in his hand, stopped in the orderly room and conversed with the Charge of Quarters, a corporal (R. 70). He told the corporal of his domestic troubles and offered him a drink (R. 71). He then went to his hut. The corporal walked with him because he was going in the same direction. He had full control of his faculties at the time. He did not stagger or stumble, nor was he disorderly (R. 70).

He admitted that he was "AWOL" at Jacksonville, Florida, when en route from Fort Benning to Camp Blanding. His wife had told him on the telephone

that she was going to divorce him for some other man and as a result he had "an argument" with himself which lasted "five days" (R. 81).

Corporal E. W. Baird, Jr. and Sergeant N. G. Doughtie testified that they were members of the same organization as the accused and on 16 July 1944 saw the accused in front of the first platoon at a company formation formed for the purpose of inspecting equipment after noon of that day (R. 83, 88). It was brought out on cross-examination that this formation took place after "chow" and that at 12 o'clock, before "chow", the company held a formation and the witnesses could not recall seeing the accused present at the first formation (R. 89).

First Lieutenant L. S. Austin, a witness for the prosecution, was called as a witness for the defense. He testified he was the accused's company commander and that the accused, although working under a mental strain, was a satisfactory instructor and had done very excellent work with the men of his organization (R. 94).

5. The court recalled Lieutenant Austin and he reiterated that the accused was not present at the company formation held at 12 o'clock 16 July 1944 (R. 95-96).

6. With reference to Charge I it was clearly shown by the evidence for the prosecution and admitted by the accused that accused was absent without leave from his station at Camp Blanding, Florida, from about 30 June to 6 July 1944 as averred in Specification 1. It was during this period that the accused had the five-day "argument" with himself. The evidence also shows beyond any reasonable doubt that accused failed to attend the company formation at 12 o'clock on 16 July 1944, as alleged in Specification 2. The company commander was positive of accused's absence at this formation. The witnesses called by the defense evidently confused the formation referred to in the specification with a subsequent one held on that day and their testimony is of no probative value upon the issue.

With reference to Charge II it was established by the evidence and admitted by the accused that he was Company Duty Officer during the night of 15 July 1944 and therefore was on "duty" and was required to be available in case of an emergency. He admitted that he drank five or six bottles of beer. The officers who were called as witnesses for the prosecution, while they appeared reluctant to testify, stated that the accused on the night of 15 July 1944 was under the influence of liquor; that he staggered slightly when he walked, and that his eyes were "glassy and bloodshot". This evidence is amply sufficient to support the finding that accused was drunk on duty within the meaning of that term (M.C.M., 1928, par. 145, p. 160) and in violation of Article of War 85 (CM 230201, Eubanks, B.R. 17, p. 311).

With reference to Charge III and its specifications, all laid under the 95th Article of War, the evidence clearly established that the accused was

drunk in uniform 16 July 1944 in the presence of enlisted men as averred in Specification 1. His intoxicated condition, while not disorderly, was sufficient to attract the attention of his commanding officer and to cause his battalion commander to order him to remain in his quarters.

Obviously the accused was drunk in uniform in the presence of enlisted men. Such conduct was, of course, prejudicial to good order and military discipline, but the evidence does not show that accused was grossly drunk or that he was conspicuously disorderly within the meaning of Article of War 95. The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge III as involves a finding of guilty of that specification in violation of Article of War 96 (CM 237279, Jones, B.R. 23, p. 253).

With reference to Specification 2 of Charge III the finding of guilty cannot be sustained. The evidence shows that at the time the accused issued the $25 check at Columbus, Georgia, his account showed a balance of $65.00. There is no evidence of record that this check was ever presented for payment to the drawee bank, or that it was returned for insufficient funds. The facts dealing with this specification were shown entirely by stipulation (Pros. Ex.6). It recites that on one date the accused cashed the check for $25 and on a later date he paid $25 "in payment" of the check. Such evidence is not sufficient to sustain the finding of guilty of this specification. As to the remaining specifications, the accused admitted that he issued the four $20 checks therein described in exchange for cash and that when he did so he knew that he did not have sufficient funds on deposit with the drawee bank with which to pay them.

Two of the checks were cashed on 3 July and two on 5 July 1944. It was also shown that on 1 July he cashed an additional check for $20.00. His bank account shows that accused's credit balance from 1 July to 13 July was $5.00, so that even if the $50.00 check accused claimed to have sent his mother and which he stated had been overlooked by him had not been charged against his account, his credit balance still would have been insufficient to meet the checks here involved. The Board of Review is of the opinion that under all the evidence the court was warranted in finding that the accused issued the checks with the intent to defraud - an offense in violation of Article of War 95. In justice to the accused it should be noted that when demand was made upon him about one month after the original transaction, he made full and prompt payment of all the checks.

7. War Department records show the accused to be 36 years of age, white, and married. (Record of trial indicates that he has been recently divorced.) He attended high school but did not graduate. For six years he was employed as a serviceman by the Southern California Gas Company, for four years he operated his own automobile body and fender repair shop, and for one year he worked for the Douglas Aircraft Corporation as a metal former. His widowed mother

is dependent upon him. He was inducted into the service on 16 March 1941 and served as an enlisted man in tank destroyer organizations until he was commissioned a second lieutenant, Army of the United States, at the Tank Destroyer School, Camp Hood, Texas, on 7 May 1943.

8. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge III, legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge III as involves a finding of guilty of that specification in violation of Article of War 96, legally sufficient to support the finding of guilty of Charges I and II and their specifications, legally sufficient to support the findings of guilty of Specifications 3 to 6, both inclusive, of Charge III and of Charge III, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Articles of War 85 and 95 and authorized upon conviction of a violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.
28 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 Second Lieutenant Frank D. Watt (0-1825294), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge III, legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge III as involves a finding of guilty of that specification in viclation of Article of War 96, legally sufficient to support the findings of guilty of Charges I and II and their specifications, legally sufficient to support the findings of guilty of Specifications 3 to 6, both inclusive, of Charge III and of Charge III, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the finding of guilty of Specification 2 of Charge III be disapproved, that only so much of the finding of guilty of Specification 1 of Charge III as involves a finding of guilty of that specification in violation of Article of War 96 be approved, that the sentence be confirmed but that the forfeitures be remitted, and that the sentence, as thus modified, be carried into execution.

3. Consideration has been given to a letter from Mrs. Harriet E. Watt, mother of the accused, addressed to the President, which is attached to the record of trial.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. mother of accused to the Pres.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. G.C.M.O. 646, 12 Dec 1944)

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

SPJGN
CM 261897

22 SEP 1944

UNITED STATES v. Second Lieutenant PAULINE A. OCHS (L-117198), Women's Army Corps, Reception Detachment, Third Women's Army Corps Training Center, Fort Oglethorpe, Georgia.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Oglethorpe, Georgia, 4 and 11 August 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR 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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Pauline A. Ochs, Women's Army Corps, Reception Detachment, Third Women's Army Corps Training Center, Fort Oglethorpe, Georgia, did, at Fort Oglethorpe, Georgia, on or about June 1944, wrongfully and unlawfully occupy with one Sergeant Marsh R. Smith, a married enlisted man not her husband, the quarters of said Sergeant Smith.

Specification 2: In that Second Lieutenant Pauline A. Ochs, Women's Army Corps, Reception Detachment, Third Women's Army Corps Training Center, Fort Oglethorpe, Georgia,

CONFIDENTIAL

> did, at Fort Oglethorpe, Georgia, on or about 6 July 1944, wrongfully and unlawfully occupy with one Sergeant Marsh R. Smith, a married enlisted man not her husband, the quarters of said Sergeant Smith.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

The accused pleaded not guilty to the Charge and all Specifications thereunder and was found not guilty of Specifications 3 and 4 but guilty of the Charge and Specifications 1 and 2 thereunder. She was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of the Charge as involved a finding of guilty of a violation of Article of War 96, approved the sentence but recommended "that the execution thereof be suspended", and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, a second lieutenant in the Women's Army Corps, had under her command and direction, for approximately four months, a Sergeant Marsh R. Smith whom she knew to be married and the father of a child (R. 9, 31, 33; Pros. Ex. A, p.1). The quarters which he and his family occupied were "on the old staff line" at Fort Oglethorpe (R. 33). They contained "two bedrooms upstairs, one in the front and one in the back, and a room between" (R. 36).

During the period of their service together the accused visited Sergeant Smith at his quarters five or six times (R. 32; Pros. Ex. A, p.4). On one of these occasions she was introduced to his wife; on the others Mrs. Smith was at her home in "Kansas City", and the accused and Sergeant Smith were alone together (R. 32, 35; Pros. Ex. A, p.4). Two of the unchaperoned visits by the accused were on successive nights and each lasted from between "seven and eight o'clock in the evening" until the following morning (R. 13, 32, 35; Pros. Ex. C). Both times she removed her tie, shirt, and skirt, but she and the Sergeant occupied different bedrooms (R. 13, 36; Pros. Ex. C). The reason for these overnight visits was stated by Sergeant Smith as follows:

> "We had had a few drinks; it was late. We had to be up early in the morning. I suggested she stay there, and I could awaken her in the morning" (R. 36).

Both the statement of the accused and the testimony of Sergeant Smith

asserted that there was no misconduct of any kind between them (R. 36; Pros. Ex. A, p.5).

Sergeant Smith was in love with the accused (Pros. Ex. A, p.5). He "tried several times to kiss" her, but she always discouraged him. No indecent advances were made by him (R. 36-37). He requested her to marry him and offered to divorce his wife. The accused "told him he was ridiculous" (Pros. Ex. A, p.5). About three weeks prior to 6 July 1944, after she had informed him that she "was not going to see him again", he "irreverently" told her that "he felt like ending it all" (Pros. Ex. C).

At approximately 6:00 p.m. on 6 July 1944 he met the accused at the Southern Railway Station in Chattanooga, Tennessee. They returned to Fort Oglethorpe in a troop convoy. At the gate, after he had taken her bag, they temporarily separated (R. 34; Pros. Ex. A, p.1). About 7:30 p.m. she joined him at his quarters and they "had a few drinks together". The liquor was taken from "her bag" (R. 33-34; Pros. Ex. C).

After a short discussion concerning their duties, he asked her for a series of dates but she refused. He repeated his protestations of love. She replied that "it was propinquity" (Pros. Ex. A, p.2). About 9:30 p.m., according to his testimony, he "passed out" and remembered nothing of the events which followed (R. 33, 37-38).

At midnight, according to the statement of the accused, Sergeant Smith was still attempting to "make /her/ see things from his point of view". When she remained "adamant about everything" he threatened to kill himself (Pros. Ex. A, p.3). She did not believe him to be serious and merely laughed. After insisting "that he was not fooling", he rose to his feet, seized a rope, and dashed out the front door, declaring "that he was going to hang himself". Throwing the rope over the limb of a tree and tying the other end around his neck, "he jumped off". The accused sought to loosen the noose but the knot was too tight. She rushed back to the house, obtained a penknife which she kept in her pocketbook, and finally cut the rope. Since he "did not seem to be breathing", she gave him artificial respiration for "at least" twenty minutes. At the end of that period he began to moan and to strike out with his arms and legs. She then left him and called for an ambulance over the telephone. When it arrived, she accompanied Sergeant Smith to the hospital (Pros. Ex. A, pp. 3-4). After his recovery, he was on 17 July 1944 reduced to the grade of private (R. 31).

4. Two character witnesses were called on behalf of the accused. One stated that her reputation was "above reproach" and the other that she "conducts herself properly" (R. 38-41). It was stipulated that three

other witnesses were present who would testify to the same effect (R. 41).

Captain Jessie D. Read, of the Medical Corps, the "acting assistant Chief of obstetrics and gynecology", was called to the stand for the purpose of proving that the accused was still a virgin. Both his oral testimony and a certificate prepared by him were excluded from the record. The certificate states as follows:

> "This day, 27 July 1944, I examined 2nd Lt. Pauline A. Ochs, W.A.C., ASN L-117198, and the following are my findings, diagnosis, and opinion.
>
> Pelvic Examination: The Introitus is virginal. There is an intact cribiform hymen with three small opening which can each be dilated to about 0.4 cm., one anteriorly and two laterally. A bimanual vaginal examination could not be done either with one finger in the vagina or with the usual two finger technique. Since it was not possible to visualize the cervix even with a virginal speculum, no cervical smears were taken. There was no evidence of infection of the urethra or Skeenes glands, however, a smear and culture were taken."

The Law Member rejected this proffered evidence on the ground that the accused was "not charged with specific acts of immorality" (R. 41-43).

The accused, after her rights relative to testifying or remaining silent had been explained to her, testified that she was twenty-six years of age, unmarried, and had been a member of the Women's Army Corps for about sixteen months. She enlisted in April 1943 and served three months as an enlisted woman before being admitted to an officers' candidate school. Her entire service has been at Fort Oglethorpe, Georgia, where she had known Sergeant Smith about four or five months. Her duties consisted in

> "* * * making out schedules, for driving the people down and getting the recruits in. It was up to /Sergeant Smith/ to see that the trucks were taken care of and inspected and such minor matters" (R. 44).

She first went to Sergeant Smith's quarters at Mrs. Smith's invitation. Thereafter she was there about four or five times. On the occasions of her spending the night there she occupied a room by herself and nothing of an improper character occurred. She admitted that Sergeant Smith had made love to her but she had rejected his advances. On 6 July 1944, after returning from a leave she had gone to Sergeant Smith's quarters because:

"He wanted to see me that night. He had something to discuss with me. I had left him in charge, and never having held a position of responsibility, he said he would like to talk things over with me. He expected to be shipped out soon. He was in charge of transportation when I was on leave and wanted to discuss what had gone on. I asked him to wait until the next day, and he wanted to see me that night, as he also had a personal matter to discuss, so I went to his quarters" (R. 46).

Her description of the events which followed corroborated her previous statement of 10 July 1944. She denied that the nights spent by her at Sergeant Smith's quarters were consecutive, stating that she had stayed there on 8 and 15 June 1944. She admitted that she had been "very indiscreet" in visiting Sergeant Smith's quarters (R. 43-47).

5. Specifications 1 and 2 allege that the accused did in June 1944, and on 6 July 1944, respectively, "wrongfully and unlawfully occupy with one Sergeant Marsh R. Smith, a married enlisted man not her husband, the quarters of said Sergeant Smith". The two offenses are alleged as violations of Article of War 95. The court found the accused guilty of both Specifications as charged.

In order to determine the true meaning of the above Specifications and the legal significance of alleging them as violations of Article of War 95, we must examine not only the language of the Specifications but the language of the Article and the judicial and historical meaning attributed thereto. Article of War 95 provides that:

"Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

The Manual for Courts-Martial explains that the conduct contemplated in Article of War 95 is such conduct as involves,

"* * * action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position

> as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms" (MCM, 1928, par. 151).

In view of the private character of the offenses alleged we are only concerned with the conduct of an officer in a private capacity. Furthermore, since the accused is a member of the Women's Army Corps we are also concerned with her legal responsibility as a female officer under Article of War 95. The fact that Article of War 95 refers to the conduct of an officer and a gentleman and does not refer to the conduct of an officer and a lady poses no real problem. Article of War 95 was not designed to be descriptive of the gender of the individual officers responsible thereunder but to establish for the Army a standard of conduct requiring the dismissal of any officer who dishonors or disgraces himself either in an individual or in an official capacity. It necessarily follows, since the above Specifications are alleged under Article of War 95, that they were intended to import dishonor and disgrace.

Independent, however, of such legal implications the language of the Specification impels the conclusion that the accused has been charged with sexual immorality. The Staff Judge Advocate recognized this in his statement to the Reviewing Authority that,

> "The gist of the offense here charged under Article of War 95 is the presumption of improper relations between accused and the enlisted man. This presumption is rebutted by the certificate of the medical officer that the accused did not engage in intercourse with the enlisted man, nor with any other person, leaving only the wrongful occupying of quarters, in violation of Article of War 96."

The Reviewing Authority in approving only so much of the Specifications and the Charge as involves findings of guilty in violation of Article of War 96 acted upon the advice of his Staff Judge Advocate. He thus clarified the issue involved and recognized the theory of the case as understood by the defense.

To contend that a Specification which charges a woman with wrongfully and unlawfully occupying quarters with a man, "<u>not her husband</u>", merely alleges a social or military impropriety and does not implicitly allege sexual immorality is to withdraw from the world into a legal vacuum, to think only in terms of Utopian morality, and to ignore the normal experiences of life. The law has never assumed such a blind attitude. It has always recognized that the sins which are

committed in secrecy may be inferred from circumstances - that proof of adultery may be established by evidence that a man and woman jointly occupied a room (XV B.R. 357). Historically the word "occupy" as used in the present Specification has been employed to mean "cohabit" and even "to have sexual intercourse with" (Webster's New International Dictionary, 2nd Ed., p. 1684). The conclusion is inescapable that the pleadings in question charged the accused with sexual immorality. This being true, the accused was legally entitled to defend her chastity and honor by competent evidence which, if admitted, would have conclusively shown the falsity of the real gravamen of the accusation against her. The ruling of the Law Member in excluding from the court's consideration the testimony of a medical officer that the accused was a virgin deprived her of her only real defense and prejudiced her fundamental rights.

Although the reviewing authority, in an effort to correct the error in excluding the proffered testimony, approved only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of the 96th Article of War and recommended that the execution of the sentence be suspended, his action did not purge the record of the error committed. The accused is entitled not merely to mercy but to legal justice. The reviewing authority disapproved only the court's finding that the accused had violated Article of War 95. His action did not, however, change the nature of the Specifications nor disapprove the court's findings of guilty thereof. He did not restore to the accused her right to present in a fair and impartial trial the only evidence which could exonorate her from the gravemen of the offense alleged. He did not change the fact that the court was deprived of an opportunity to evaluate in a fair and impartial manner the evidence which it was legally entitled to hear; nor did he restore to the accused her right to have the court impose a sentence based upon such an evaluation (M.C.M., 1928, par. 80a). Obviously, such a procedure runs "* * * afoul of the basic standard of fairness which is involved in the constitutional concept of the due process of law * * *" (U.S. ex rel, Innis v. Hiatt, C.C.C. 3, 15 March 1944, Nos. 8455, 8536). The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

6. The records of the War Department show that the accused is 26 years of age; that she enrolled in the Women's Army Auxiliary Corps on 10 April 1943; that she was accepted as an officer candidate and thereafter commissioned a temporary second lieutenant in the Army of the United States on 18 September 1943; that prior to entering the military service she had completed high school and a one year business

course in commercial studies; and that she had been employed as a secretary for seven years.

7. The court was legally constituted. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert O. Lemon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 261897

1st Ind.

War Department, J.A.G.O., 12 OCT 1944 To the Commanding General, Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Second Lieutenant Pauline A. Ochs (L-117198), Women's Army Corps, I concur in the foregoing opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated therein I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p.216), the record of trial is returned for your action upon the findings and sentence, and for such further action 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 261897).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGQ
CM 261917

7 SEP 1944

U N I T E D S T A T E S	)	106TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Atterbury, Indiana, 18 July 1944. Dishonorable discharge, total forfeitures and confinement for eight (8) years. Disciplinary Barracks.
Private ALFONSO M. BARONE (32829366), Company K, 423d Infantry.	)	

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HOLDING by 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.

2. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 1 thereof, the Additional Charge and its Specification, and the sentence as approved by the reviewing authority. The only question requiring consideration is whether it is legally sufficient to support the finding of guilty of Specification 2 of Charge II.

3. Specification 2 of Charge II is as follows:

> "In that Private Alfonso M. Barone, Company K, 423rd Infantry, did, at Camp Atterbury, Indiana, on or about 1 June 1944, have in his possession an enlisted man's pass which was unauthorized and falsely made."

The accused is not thereby charged with having made the false and unauthorized pass, but only with having it in his possession, and there is no allegation that this possession was wrongful or with wrongful or fraudulent intent, nor are any other words used in the Specification which characterize the possession of the pass in question as either illegal or wrongful. It is not per se unlawful or wrongful to possess a forged or false pass. A variety of factual situations readily present themselves to mind where such possession would be perfectly legal and proper. In order to constitute an offense under the provisions of Title 18, Sec. 132, U.S.C. 1940 ed., possession of a false, forged, or altered pass must be accompanied by a "wrongful or fraudulent intent". Likewise, in order to constitute an of-

fense cognizable under the Articles of War such possession must be with wrongful or fraudulent intent, or be attended by other circumstances making it wrongful or illegal. The Specification under discussion, in order to have been sufficient to allege an offense, should have used appropriate language, branding the possession by the accused of the false and unauthorized pass as wrongful or illegal or should have alleged facts from which the wrongful or illegal nature of the possession would be apparent. In CM 187548 (1929), a Specification which merely alleged that the accused "did * * * attempt to take and carry away one automobile, * * * the property of (name of owner)" was held legally insufficient to support a finding of guilty and the sentence. The following digest of that opinion appearing in Dig. Op. J.A.G.D., 1912-1940, Sec. 451 (44) is particularly appropriate to the Specification under discussion.

> "That a specification must exclude every reasonable hypothesis of innocence—must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted as true, the accused cannot be innocent—may be regarded as the settled law of this office as it is the settled law of the land. It is manifest that this specification does not fulfill this requirement. It is devoid of words showing that the act was done unlawfully or constituted any disorder, neglect, crime, or offense. That the accused attempted to take the car with authority of the owner or had rented the car or had been ordered to remove the car is entirely consistent with the language thereof."

The Specification under discussion fails to allege an offense and is therefore legally insufficient to support the findings of guilty made thereon.

4. 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 all remaining findings of guilty and the sentence as approved by the reviewing authority.

William H. Gambrell, Judge Advocate.

Herbert F. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 23 SEP 1944 - To the Commanding General, 106th Infantry Division, Camp Atterbury, Indiana.

1. In the case of Private Alfonso M. Barone (32829366), Company K, 423d Infantry, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that the finding of guilty of Specification 2 of Charge II be disapproved. Upon compliance with this recommendation, and under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

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

(CM 261917).

Myron C. Cramer

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

1 Incl.
Record of trial

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

SPJGQ
CM 261954

8 SEP 1944

UNITED STATES v. First Lieutenant HUGH N. ALLGOOD (0-474426), Corps of Military Police, Attached, Unassigned, Provost Marshal General's School Staff and Faculty, Fort Custer, Michigan.	SIXTH SERVICE COMMAND Trial by G.C.M., convened at Fort Sheridan, Illinois, 24 and 25 July 1944. Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant Hugh N. Allgood, Corps of Military Police, did, at Fort Custer, Michigan, on or about 17 April 1944, with intent to deceive Major Walter Hoyle, Corps of Military Police, Assistant Post Inspector of Fort Custer, Michigan, who was then and there conducting an official investigation, officially state that he had not borrowed money from Technician Fourth Grade Jonathan L. Oaks and Private William A. Witt, both enlisted men of the Provost Marshal General's School Detachment, which statement was known by the said First Lieutenant Hugh N. Allgood to be untrue, in that the said First Lieutenant Hugh N. Allgood had in fact borrowed the sums of $10.00 and $5.00, United States currency, from the said Technician Fourth Grade Jonathan L. Oaks on or about 25 and 26 March 1944, respectively and the sum of $10.00, United States currency from Private William A. Witt on or about 7 April 1944.

Specification 2: In that First Lieutenant Hugh N. Allgood, Corps of Military Police, did, at Fort Custer, Michigan, on or about 17 April 1944, with intent to deceive Major Walter Hoyle, Corps of Military Police, Assistant Post Inspector, Fort Custer, Michigan, who was then and there conducting an official investigation, officially state to the said Major Walter Hoyle, that he had not asked any enlisted men to testify falsely concerning any matter, which statement was known by the said First Lieutenant Hugh N. Allgood to be untrue, in that the said First Lieutenant Hugh N. Allgood had previously asked Technician Fourth Grade Jonathan L. Oaks and Private Henry C. Bowden, both enlisted men of the Provost Marshal General's School Detachment, to testify falsely before the said Major Walter Hoyle concerning the full payment of obligations, which he, the said First Lieutenant Hugh N. Allgood then owed to the said enlisted men.

Specification 3: In that First Lieutenant Hugh N. Allgood, Corps of Military Police, did, at Fort Custer, Michigan, on or about 14 April 1944, wrongfully attempt to induce Private Henry C. Bowden, Provost Marshal General's School Detachment, to testify falsely before Major Walter Hoyle, Corps of Military Police, Assistant Post Inspector, Fort Custer, Michigan, who was conducting an official investigation, that he, the said First Lieutenant Hugh N. Allgood had paid the said Private Henry C. Bowden for a watch, which he, the said First Lieutenant Hugh N. Allgood had purchased from the said Private Henry C. Bowden, when in fact, he, the said First Lieutenant Hugh N. Allgood had not paid the said Private Henry C. Bowden for the said watch.

Specification 4: In that First Lieutenant Hugh N. Allgood, Corps of Military Police, did, at Fort Custer, Michigan, on or about 14 April 1944, attempt to induce Technician Fourth Grade Jonathan L. Oaks, Provost Marshal General's School Detachment, to testify falsely before Major Walter Hoyle, Corps of Military Police, Assistant Post Inspector, Fort Custer, Michigan, who was conducting an official investigation, that he, the said First Lieutenant Hugh N. Allgood had repaid to the said Technician Fourth Grade Jonathan L. Oaks, a loan of about $10.00 in United States currency, when in fact, he, the said First Lieutenant Hugh N. Allgood had not repaid the same.

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

Specification 1: In that First Lieutenant Hugh N. Allgood, Corps of Military Police, did, at Fort Custer, Michigan,

on or about 25 March, 1944, wrongfully borrow from Technician Fourth Grade Jonathan L. Oaks, Provost Marshal General's School Detachment, an enlisted man, the sum of $10.00, in United States currency.

Specification 2: In that First Lieutenant Hugh N. Allgood, Corps of Military Police, did, at Fort Custer, Michigan, on or about 26 March 1944, wrongfully borrow from Technician Fourth Grade Jonathan L. Oaks, Provost Marshal General's School Detachment, an enlisted man, the sum of $5.00, in United States currency.

Specification 3: In that First Lieutenant Hugh N. Allgood, Corps of Military Police, did, at Fort Custer, Michigan, on or about 7 April 1944, wrongfully borrow from Private William A. Witt, Provost Marshal General's School Detachment, an enlisted man, the sum of $10.00, in United States currency.

Specification 4: In that First Lieutenant Hugh N. Allgood, Corps of Military Police, having received a partial payment of his pay due for the month of March 1944, in the sum of $100.00 from Captain W. E. Schumm, Finance Officer, at Fort Custer, Michigan, on or about 15 March 1944, and having been directed by Second Lieutenant Grace L. Mueller, Women's Army Corps, Assistant Personnel Officer, Provost Marshal General's School, Fort Custer, Michigan, to notify the Finance Officer at Fort Bragg, North Carolina of the receipt of said partial payment, did, between 15 March 1944 and 31 March 1944 fail and neglect to so notify the Finance Officer at Fort Bragg, North Carolina of said partial payment, as a result of which the said First Lieutenant Hugh N. Allgood wrongfully obtained from the Finance Officer at Fort Bragg, North Carolina, the full amount of his pay and allowances for the month of March 1944, in the sum of $373.40, without any deduction of the said partial payment therefrom.

He pleaded not guilty to and was found guilty of all Specifications and Charges. No evidence of any previous conviction was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused was, during the months of March and April 1944, a First Lieutenant, Corps of Military Police, attached to the Provost Marshal General's School, Fort Custer, Michigan (R. 10, 21, 55; Pros. Ex. 2).

Charge II, Specification 4.

On 15 March 1944 the accused made application for and received a partial payment of $100 on account of pay due him. The voucher therefor was prepared in the Personnel Office at Fort Custer on that date and was signed by the accused in the presence of Second Lieutenant Grace L. Mueller, W.A.C., Assistant Personnel Officer. She twice advised him that it was his responsibility to notify his home station at Fort Bragg, North Carolina, of the receipt by him of the partial payment, and that it should be deducted from pay owing to him for the month of March 1944. He stated that he understood the matter (R. 48, 49).

A photostatic copy of Voucher 48749, pertaining to the partial payment of $100 in cash to the accused by Captain W. E. Schumm, FD, Finance Officer at Fort Custer, Michigan, on 15 March 1944, properly certified as a true copy by the custodian thereof, was admitted in evidence (R. 46; Pros. Ex. 2).

Second Lieutenant Mueller, after qualifying as an expert opinion witness, stated that, in her opinion, the signature of the accused appearing on the receipt portion of the voucher is the signature of the accused (R. 50).

It was established by the deposition of First Lieutenant John S. Myers, Assistant Chief, Disbursing Branch of the Finance Office, Fort Bragg, North Carolina, that no official notice was received at that post from the accused between 15 and 31 March 1944 as to the receipt by him of the partial payment of $100 of his pay for the month of March 1944. However, that office did receive from him on 23 April 1944 an official authorization to deduct the amount from his pay and such deduction was made on accused's pay voucher for April 1944 (R. 52; Pros. Ex. 3).

It was further established by the introduction in evidence of a duly authenticated photostatic copy of the accused's pay and allowance voucher for March 1944 that, on 31 March 1944, the accused received from Captain I. H. McNeil, FD, Finance Officer at Fort Bragg, North Carolina, the sum of $373.40, being the full amount of his pay and allowance for that month without deduction therefrom of the partial cash payment of $100.00 made to him at Fort Custer, Michigan (R. 52, Pros. Ex. 3).

Charge II, Specification 3.

Private William A. Witt, who was the orderly of the barracks where the accused was quartered in Fort Custer, Michigan, had a conversation with the accused on 7 April 1944. The accused had a watch which he was attempting to sell and which he offered to Witt for $10.00. Witt did not want the watch but having $10.00 which he "would let him have for a few days" he tendered it, and the accused accepted

the money. The accused gave no reason for wanting the money, nor was anything said regarding the return of the money, but Witt "expected to get the money back" on "next pay day" (R. 22-24).

Charge II, Specifications 1 and 2.

On 25 March 1944, T/4 Jonathan L. Oaks, Mess Sergeant, Co. B, Provost Marshal General's School (R. 10, 19) received word that the accused wished to see him, and after reporting to him engaged in conversation with him in which the accused stated that he was in a card game and would like to borrow $10.00 from the Sergeant. When asked whether he could let him have that amount, the Sergeant replied that he did not have the money but could borrow it. This he did and gave the accused a $10.00 bill when the latter came into the mess hall at supper time of the same day (R. 11, 12).

On the next day (26 March), the accused met Sergeant Oaks in the mess hall at about 11 o'clock and inquired whether he had any more money, explaining that "the boys had taken (him) in a card game again. I want to borrow $10.00". The Sergeant told the accused that he had only $5.00 which he then loaned to the accused (R. 13).

Charge I and the Specifications.

In March and April of 1944, Major Walter Hoyle, now stationed in the Provost Marshal General's Office in Washington, D.C., was the Assistant Post Inspector at Fort Custer, and during the latter month, had been directed by the Commanding Officer of the post to investigate purported derelictions of the accused (R. 54, 55).

Private Henry Bowden, a member of the First Provisional Training Battalion, 1671st S. U., Fort Custer, Michigan, first met the accused around the latter part of March 1944 in the mess hall of the PMG detachment. Having learned that Bowden had a watch for sale, the accused approached him, and inquired about it. Bowden produced the watch and informed the accused that the price was $15.00. The accused agreed to take the watch but said he could not pay Bowden for "a couple of days." The accused offered Bowden a check for the amount which was refused and it was agreed that Bowden should wait to be paid for a couple of days. Bowden did not see the accused for about a week and then he came to Bowden and explained that the reason for non-payment was the accused's failure to receive a money order for which he had been waiting. Bowden then told him "Well, I've got to have the money," and that he would give him until seven o'clock that night (a Saturday) to pay $10 and if he received that amount he "would let the rest ride for a couple of days" (R. 29-31).

During the morning of 14 April 1944 the accused had a conversation with Sergeant Oaks in the storeroom of Mess Hall 2308 during

which he told Oaks that he (the accused) had just heard that an investigation was being carried on and that if Oaks was asked whether the accused owed him any money he was to state that the $15.00 owed by the accused to Oaks was for a special food consideration and that this amount had already been repaid to the Sergeant (R. 14,15). Although the accused had been extended special food privileges, no reimbursement thereof was required to be made by the accused to Oaks, and it had no connection with the loan in question (R. 19, 20).

Sometime in April (date not shown) Private Bowden received word that he was to testify before Major Hoyle (R. 33). On the day before he appeared before the investigating officer, the accused told him to state to the officer that a couple days after the sale the accused had paid in full for the watch which he had purchased from Bowden (R. 31, 38-40). At no time did the accused urge Bowden to tell the truth (R. 38-40).

Oaks appeared before Major Hoyle on the afternoon of the same day when accused had discussed the investigation with him, and refused to give the false testimony requested by the accused as Oaks had not, prior to his appearance before Major Hoyle, received payment of any part of the money (R. 15). Privates Witt and Bowden also were interviewed by Major Hoyle 14 April 1944 and their testimony in the proceeding was transcribed (R. 59, 60).

On 17 April 1944 Major Hoyle interrogated the accused in the Major's office. At that time the accused was advised that the proceeding on that day was a continuation of the investigation previously held on 30 March and 12 April 1944 involving purported misconduct on the accused's part (R. 56). In the proceedings on 12 April 1944, Major Hoyle had asked the accused whether he was familiar with his rights under Article of War 24 and upon the accused requesting that the article be read to him again, Major Hoyle read it to him and asked the accused whether he was, at that time, fully familiar with his rights thereunder, to which the accused replied that he was. The accused was reminded, in the proceedings of 17 April 1944, that the provisions of Article of War 24 still applied (R. 56). Major Hoyle then handed the accused written statements of sworn testimony given before Major Hoyle by Sergeant Oaks and Privates Witt and Bowden, and the accused was asked whether each of the statements was true. The accused answered that each of the statements was false (R. 57-60). He expressly denied borrowing any money from Sergeant Oaks or ever asking him to testify falsely (R. 59). He expressly stated that the allegations as to his receiving the loan of $10.00 from Private Witt was false (R. 59); and he specifically denied the purchase of any watch from Private Bowden, the partial payment thereon of $10.00, the balance due of $5.00 or that he had asked Bowden to tell the investigating officer that the full purchase price had been paid to him about three days after the sale (R. 60).

While the accused was then waiting for the stenographer to type his testimony in Major Hoyle's office, the accused stated that he had changed his mind and wanted to tell the entire truth, whereupon he told Major Hoyle that what the enlisted men had testified was true and that he (the accused) had testified falsely (R. 60, 61), although he still maintained that he did not owe Bowden a balance of $5.00 on the watch (R. 61, 63-65).

Sergeant Oaks testified that it was not until 28 April 1944 that he received repayment of his loan to the accused, recalling specifically that it was on a Friday, just prior to payday (R. 13, 18, 19). The money owing to Private Witt by the accused was repaid to him through Captain Louis Speed a few days after Witt had testified in the investigation conducted by Major Hoyle (R. 25, 26). Private Bowden was paid the final balance of $5.00 owing to him by the accused around the last of April 1944 (R. 34).

4. The defense first introduced in evidence a certificate dated 21 April 1944, signed by T/4 Jonathan L. Oaks, and showing receipt by him, from Captain Louis P. Speed, of the $15.00 owing to Oaks from the accused (R. 70, Def. Ex. A).

Thereafter, the accused, having had his rights explained to him, elected to be sworn and testified as follows:

In civilian life he was employed by the Federal government in the Division of Disbursements of the Treasury Department for a period of 16 years (R. 72). He was a member of the National Guard for 10 years. He entered upon active duty as a Second Lieutenant, Adjutant General's Department on 1 June 1942 (R. 72). He is married and has four children, ranging in age from 3½ to 16 years (R. 72, 73). He admitted talking with Private Bowden prior to Major Hoyle's investigation and asking him whether he had any reason to report the accused to the inspector for investigation, telling him to tell the truth with respect to the purchase of the watch and that the watch had been paid for (R. 73). He insisted that he had paid the full purchase price of $15.00 to Bowden prior to the investigation (R. 74). He also stated that he had paid the balance of $5.00 claimed by Bowden to be still owing on 21 April 1944 "so as not to be bothered with it" and "perhaps just to close the incident." To that extent, the accused claimed that he made an overpayment of $5.00 on the transaction (R. 89).

He further testified that he had not told Sergeant Oaks prior to the investigation that it was unfortunate that the obligation which he owed had not been paid and that Oaks should remember that the $15.00 was not for any special food privileges in case he (Oaks) was called to testify before the inspector concerning the transaction (R. 74). The accused repaid the obligation he owed Oaks in the amount of $15.00 on 21 April 1944 (R. 75).

He admitted borrowing $10.00 from Private Witt but stated he had also repaid this loan (R. 75).

He, however, emphatically denied attempting to induce either Sergeant Oaks or Private Bowden to testify falsely in the investigation proceedings (R. 75, 76).

He also admitted stating to Major Hoyle on 17 April 1944, after the stenographer had commenced typing the testimony he had already given, that he "desired to change (his) story" and admitted that the statements of the enlisted men were true "in part," the exception being to Private Bowden's statement that $5.00 was still owing. This the accused denied, maintaining that Bowden had received the full purchase price of $15.00 for the watch (R. 75).

He acknowledged the receipt of $100.00 as a partial payment of his pay at Fort Custer on 15 March 1944 and admitted that he had been instructed by Second Lieutenant Grace Mueller that it was his responsibility to notify the Finance Office at Fort Bragg, North Carolina, that he had received said partial payment (R. 76). He stated that, although he knew it was an official matter and required an official communication from him (R. 83), he endeavored to comply with the instruction by writing two personal letters to First Lieutenant John S. Myers, Assistant Chief of the Disbursing Branch, Finance Office, Fort Bragg, North Carolina, a personal friend, one of which letters was addressed to his home (R. 85). In the first letter accused requested that the deduction of the partial payment should be made from his March pay voucher (R. 77). No reply was received to this letter although it bore the return address of the accused (R. 77, 89). Lieutenant Myers stated that he never received it (R. 85). When the accused received a notice from his bank in Fort Bragg, North Carolina, that he had received the full amount of pay without the deduction, he again wrote to Lieutenant Myers. This was prior to the investigation of his affairs (R. 78-88). This letter requested that the deduction should be made from the accused's April pay voucher (Def. Ex. B). In answer to this letter, Lieutenant Myers wrote a personal letter to the accused advising him that it was necessary for him to officially notify the Finance Office at Fort Bragg to make the deduction before it could be made (R. 79, Def. Ex. B). However, the deduction was actually made from the accused's April pay voucher. The finance officer at Fort Bragg had received notification on 17 April 1944 from the Finance Office at Fort Custer regarding the deduction (Def. Ex. B).

5. Unfortunately, the minor offenses of borrowing money from enlisted men became the cause of serious misconduct involving grave moral turpitude on the part of the accused when he attempted to suborn witnesses in official investigations regarding the lesser offenses.

Borrowing money from enlisted men is a strictly military offense, and involves no infraction, in terms, of any law, Article of War, or Army Regulation, but is deemed an act to the prejudice of good order and military discipline only under the customs of the service. However, in civil and military courts alike any tampering with the fair, honest, and impartial administration of justice is a grievous offense, whether it be by perjury, false swearing or the subornation of others to do so.

It is conceded that the testimony sought from the enlisted men, if given, would not have been perjury within the meaning of Article of War 93, but only false swearing, an offense denounced by Article of War 96, and that the term "subornation" within its strict, legal meaning, is not a legally accurate designation of the offenses with which the accused stands charged in this regard. But the word "subornation" does convey accurately the common understanding of the offenses alleged, and the accused's conduct, if he persuaded others to give false testimony in an official investigation, was certainly unbecoming an officer and a gentleman whatever legal designation may be given to the offenses which he tried to induce the others to commit.

The evidence is clear that, when confronted with the written and sworn statements of Sergeant Oaks and Private Bowden, the accused designated as false the testimony of both to the effect that he had urged them to give false testimony before the investigating officer. This the accused admitted. According to the officer conducting the investigation, the accused, while his testimony was being transcribed, then stated that he had changed his mind and wanted to tell the entire truth; whereupon, he said that the statements of the enlisted men were true and that he had testified falsely. He did, however, insist that he did not owe Bowden a balance of $5.00 upon the purchase price of the watch. In all other respects he admitted that the statements made by Oaks and Bowden were true.

At the trial, the accused, under oath, admitted only that he had told the investigating officer he wanted to change his "story", whereupon he had said the statements of the enlisted men "were true in part...." Efforts were also made by the defense, on cross examination, to place a different interpretation upon dmaaging statements which the enlisted men testified had been made to them by the accused.

The clear and convincing evidence given by the enlisted men, supported, as it is, by the voluntary statement made by the accused to the investigating officer, supports the conclusion that the enlisted men spoke the truth regarding the subornation and that the accused testified falsely when he said their statements were untrue.

Insofar, therefore, as Specifications 3 and 4 of Charge I are concerned, nothing further need be said. The attempts to induce

the enlisted men to give false testimony in an official investigation was dishonorable conduct unbecoming an officer and a gentleman and constituted violations of Article of War 95.

However, with regard to Specifications 1 and 2 of Charge I, alleging official false statements, it will be observed that, after the accused had testified falsely, he had a change of heart and expressed a desire to tell the truth, whereupon he recanted and admitted that his testimony had been untrue. The question arising upon this state of the matter is whether he thereby purged himself of the effect which his false testimony would otherwise have had.

Both the false statements of the accused and his later admission of their falsity occurred at the same session of the investigation and were separated by a short period of time. But it cannot be contended, in the light of all the evidence, that the accused misunderstood the issues being investigated or that he was confused in meeting them, nor does it appear that he misunderstood any of the questions or their import, and made an honest mistake in answering any of them. He was shown the written statements of both enlisted men and these statements contained full and complete details of the facts and circumstances surrounding the transactions between them and the accused and the manner in which he had induced them to swear falsely in the investigation. Throughout his examination the accused expressly, intentionally and deliberately maintained that these statements were false. It was only after the stenographer started to transcribe his testimony and the investigating officer had told him, that he was greatly disturbed by the wide variance between the accused's testimony and the unequivocal statements of the enlisted men that the accused changed his testimony and "kind of threw up his hands and said 'Well, all right! I just like to tell the whole truth.'"

Since the crime of perjury requires a willful and corrupt intent, the resultant issue is susceptible of a showing, by facts and circumstances, that a false statement was due to an honest mistake, misunderstanding, incompleteness, or, by the weight of authority, absolvatory recklessness (48 C.J. 830). Such issues may properly become questions of fact for the jury and in the exercise of its right to weigh the evidence the Board has done so in this case and finds no such exculpatory matters to excuse the accused's conduct.

"Whatever the explanation that may be given for the contrary, it must now be laid down as a recognized principle, consistently with the decision of the United States Supreme Court (U.S. v. Norris, 300 U.S. 564, 81 L. Ed. 808) that the crime of perjury is complete when a deliberate, material, false statement is made, and that nothing thereafter done can alter the situation. * * * The foregoing principle must be regarded as controlling in the instant case where the initially-given, false statement was so obviously deliberate, willful and corrupt as to foreclose any consideration of accused's subsequent retraction. The conclusion is compelling that he cannot escape the consequences of that false statement" (CM NATO 154; Bull. JAG Jan. 1944, Sec. 451 (53)).

What is thus said of perjury applies with equal force and logic to false swearing in an official investigation (See also: CM 231445 , Teixeira, 18 B.R. 197 and CM 244159, Camp).

The record is, therefore, deemed legally sufficient to support the findings as to Specification 1 and 2 of Charge I.

It is admitted by the accused that he failed to give official notice to the Finance Officer of the station to which his pay voucher had been submitted of the fact that the accused had received a partial payment at another station of the amount of pay due him for the month of March 1944 in time to have the deduction made from his March pay. This notice he had been specifically instructed to give.

According to the accused, he endeavored to comply with these instructions by writing a personal letter during the month of March to a friend who was the Assistant Chief of the Disbursing Branch of the Finance Office to which the notice was to be sent. The letter was addressed to this officer's home, but was never received by him, and the letter was never returned to the accused though it bore his return address. Again, in April, and prior to the investigation of the accused's affairs, he wrote to the same officer making the request that the partial payment be deducted from his next pay voucher and this letter was received and answered with directions to send an official request to the Finance Office. Thereupon the accused sent an official request to the proper finance office under date of 23 April 1944. Meanwhile, however, the finance officer who had made the partial payment had notified the Finance Office in question and it is admitted that the deduction was made from the accused's April pay voucher. Upon these facts rests the determination of the question whether the accused is guilty of an offense under Article of War 96.

Under the regulations it is the responsibility of officers "to submit War Department Form No. 336 (Pay and Allowance Account) for pay and allowances due them, certified by themselves, to disbursing officers of the Finance Department for payment" (AR 35-1300, par. 1). In compliance therewith, the accused did submit his voucher for the month of March to the Finance Officer at Fort Bragg, North Carolina, his regular, duty station. Under the provisions of paragraph 7 of the same regulation, partial payments may be made under certain conditions therein named and the accused obtained the partial payment of $100 thereunder from the Finance Office at Fort Custer, Michigan. In Section b (1) (a) of said paragraph 7, reference is made to above mentioned Pay and Allowance Account (commonly known as the "pay voucher") in providing that such partial payment shall be made upon such voucher bearing the notation "Partial Payment..... $100.00" on the second line of item (7) of said form, and in Section b. (1) (b) it is further provided that:

"Deductions will be entered on the next pay account as

a debit immediately above item (11), as follows:

'Example: Due U.S. P/P $100.00 paid.....19..."
(underscoring supplied)

It is thus apparent that, under the regulations, it was the responsibility of the accused to make the notation in the manner and form indicated upon submission of his April voucher. The record is silent as to whether this was done as the April pay voucher is not in evidence, nor is there any evidence as to whether the accused placed such a notation on the April voucher when he submitted it. The inference is strong that he did not do so for the reason that it was not until 7 April 1944 that he received notice from his bank in Fort Bragg (to which his pay checks were evidently sent for deposit) of the failure to deduct the $100.00 from the March pay check. It was then that he again wrote to Lieutenant Myers repeating his former request and upon receipt of directions to make an official request to the Finance Officer at Fort Bragg he did so on 23 April 1944.

The accused may have been lax and, perhaps, remiss in failing to promptly heed the instructions given to him when he received his partial payment although such instructions did not include directions to give an "official" notification to the finance office involved. True, the accused testified that he had many years of experience in civilian life in the disbursement division of the Treasury Department and possibly common sense should have led him to believe that only an official communication was proper under the circumstances; but it may well be that the accused believed that communication directly with his personal friend, who was Assistant Chief of the Disbursing Branch in the Finance Office at Fort Bragg, would receive personal attention and more promptly accomplish the transaction than formal notification to the office.

Much of the testimony on this issue was supplied by depositions of Lieutenant Myers, the personal friend of the accused, one of which was introduced as evidence by the prosecution, the other by the defense. It cannot be said beyond reasonable doubt that the accused did not send the first letter which he claims he addressed to Lieutenant Myers. If he did so, the Board is of the opinion that he made a timely effort to accomplish the deduction, however irregular the method pursued. There is no doubt whatever that he did write a second letter to Lieutenant Myers, requesting the deduction and finally gave official notice on 23 April 1944. The deduction was made on the April pay check and this is all that was contemplated by the Army regulation above cited.

The Board of Review is therefore of the opinion that the record is legally insufficient to sustain the findings of guilt as to Specification 4 of Charge II.

There is, however, no reasonable doubt of the accused's guilt of the offenses charged in Specifications 1, 2 and 3 of Charge II. Sergeant Oaks and Private Witt gave direct and credible testimony of the loans, and Major Hoyle heard voluntary admission of the accused from which no other conclusion than guilt can be implied. In his testimony under oath, the accused admitted that he had told Major Hoyle that the statements of the enlisted men were true "in part" but failed to satisfactorily explain which parts were true and which false, and therefore did little to effectively rebut the import of the testimony adduced by the prosecution.

6. Records of the War Department disclose that the accused was born in Walton County, Georgia, and is 38 years and 7 months of age. After graduation from the grammar school of Jersey, Georgia, in 1920, he continued for 2½ years in high school, but was not graduated. He served in the National Guard for a period of 10 years. He was employed in the disbursing office of the Bureau of Veteran's Administration and the Treasury Department from 1923 until his induction in 1940. He was released upon a Certificate of Service on 19 November 1941 but was recalled to active duty on 1 March 1942. On 26 May 1942 he was commissioned as a second lieutenant and assigned to the Adjutant General's Department, postal division, at Camp Davis, North Carolina. On 24 November 1942, he was relieved of assignment to this department and was assigned to the Corps of Military Police. On 1 January 1944 he was promoted to first lieutenant. He is married and has three children.

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 insufficient to support the finding of guilty of Specification 4, Charge II, but is legally sufficient to support the findings as to all other Specifications and the Charges and to support the sentence and warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

William H. Gamble, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 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 First Lieutenant Hugh N. Allgood (0-474426), 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 findings of guilty of Specification 4, Charge II, but is legally sufficient to support the findings as to all other Specifications and the Charges and to support the sentence and 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 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. sig. of S/W.
3 - Form of action.

(Finding of guilty of Specification 4 of Charge II disapproved. Sentence confirmed. G.C.M.O. 610, 9 Nov 1944)

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

SPJGV
CM 261962

18 SEP 1944

UNITED STATES	FOURTH AIR FORCE
v.	Trial by G.C.M., convened at Ephrata Army Air Base, Ephrata, Washington, 4 August 1944. Dismissal.
Second Lieutenant MARVIN B. DIXON (0-756512), 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 Second Lieutenant Marvin B. Dixon, Squadron T, 430th Army Air Force Base Unit, did at or near Soap Lake, Washington, on or about 23 June 1944 violate paragraph 16, a (1) (a) of Army Air Force Regulation Number 60-16 dated 6 March 1944, by wrongfully operating an Army Airplane over an obstruction at an altitude of less than one thousand (1,000) feet.

Specification 2: (Finding of not guilty).

The accused pleaded guilty to Specification 1, not guilty to Specification 2, and guilty to the Charge. He was found guilty of Specification 1, not guilty of Specification 2 and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed

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

3. In view of the accused's acquittal of Specification 2 of the Charge, only the evidence presented in support of Specification 1 of the Charge will be summarized in this opinion. The prosecution introduced evidence demonstrating that, pursuant to Operations Order No. 84, Ephrata Army Air Base, Ephrata, Washington, 23 June 1944, accused, Flight Officer Finley and Lieutenants Finley and Fisher, accompanied by First Lieutenant William M. Bechtold as instructor, flew from Ephrata Army Air Base at approximately 2000 hours on 23 June 1944 to engage in a camera gunnery mission (R. 10-12; Pros. Ex. 1). The plane flown by accused on this mission was a silver P-39 type of Army aircraft while his companions and the instructor flew planes painted olive drab (R. 13, 16). Accused's plane bore the number 15 painted on its nose and the tail number 2-4321 on its vertical stabilizers (R. 13). When the planes broke formation northeasterly of Soap Lake at an altitude of about 5000 feet to fire camera gunnery at each other, accused flew off in pursuit of Flight Officer Finley's plane. Around 2110 hours the instructor, Lieutenant Bechtold, lost sight of the planes flown by accused and Flight Officer Finley. Thereafter accused and Flight Officer Finley failed to repair to the appointed place of rendezvous over Soap Lake after completion of the exercises and when their companions returned to the base around 2130 they found accused had already landed (R. 14-16).

Between 2115 and 2130 that same evening, Major Edward M. Nollmeyer and his wife, Second Lieutenant William S. Leidy and his wife, and accused's wife were seated on the lawn of Read's Soap Lake Motel, a hostelry in the vicinity of Soap Lake where these individuals were living (R. 28, 44, 45, 49). They saw a silver P-39 plane fly from the east toward the motel at an altitude below the level of the tops of a line of telephone poles located across the street from the motel. As it approached the pilot elevated the plane to clear one of the telephone poles and then dropped the nose of the plane as it skimmed over the motel at a speed of some 300 miles an hour (R. 28, 29, 32-34, 42, 44-47, 49-52). These telephone poles were about 40 feet high and as the plane passed over the motel it was flying some 30 to 35 feet above the ground (R. 33, 43, 52). Major Nollmeyer observed that the last two digits of the tail number of the plane were 21 or 29 (R. 32). Lieutenant Leidy observed that the plane bore number 15 on its nose (R. 51). Later that evening when Lieutenant Leidy asked accused if he had buzzed the motel, accused laughed, refused to answer the question directly but did state that his plane was a "good 300 feet up"; that it "was never below 250 feet at any time" (R. 47, 53).

It is provided by Army Air Forces Regulation Number 60-16, paragraph 16a (1) (a), dated 6 March 1944, that except during take-off and landing aircraft will not be operated over any building, house, boat, vehicle, or other obstructions to flight, below an altitude of 1,000 feet (R. 10).

After accused had been properly warned of his rights he gave two voluntary statements to Major Herbert W. Davis, the investigating officer, reciting in them that on 23 June 1944, around 2115 or 2130 hours he piloted a P-39 type aircraft, No. 15, over Soap Lake; that as he approached Read's Soap Lake Motel he put the plane in a power dive and passed over the motel at an altitude of between 500 and 600 feet; that his reason for so doing was to inform his wife that he was flying late so that she would not worry about him (R. 58-60; Pros. Exs. 9, 10).

4. The defense offered no evidence and the accused elected to remain silent.

5. The evidence conclusively shows that accused on 23 June 1944 flagrantly violated that portion of the Army Air Forces Regulations which establishes 1,000 feet as the minimum altitude at which Army aircraft are to be operated over buildings or obstructions to flight, by operating a military airplane over Read's Soap Lake Motel at an altitude between 30 and 40 feet. That such an offense is a violation of Article of War 96 is so well settled that no citation of authority is necessary.

6. The accused is 27 years of age. He served in the California National Guard from 3 March 1936 until 12 June 1937, and in the United States Marine Corps from 18 June 1937 until 19 June 1941. From November 1941 until September 1942 accused was employed as a mechanic in aircraft manufacturing concerns. He was appointed aviation cadet, Army Air Corps, in November 1942, and on 1 October 1943 he was commissioned a second lieutenant.

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, 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 M. Tabby, Judge Advocate.

Sick in Hospital, Judge Advocate.

Robert C. Swisher, Judge Advocate.

SPJGV
CM 261962

1st Ind.

War Department, J.A.G.O., 12 OCT 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 Second Lieutenant Marvin B. Dixon (0-756512), 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.

3. The accused intentionally flew an Army airplane over a hotel at an altitude of some 30 to 40 feet above the ground contrary to Army Air Forces Regulations requiring such flight to be at an altitude of not less than 1000 feet. He was sentenced to dismissal. There is attached to the record a Memorandum for The Judge Advocate General dated 7 October 1944, from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, in which General Giles 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 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 - Memo of Gen Giles, 7 Oct 44.
Incl 3 - Dft ltr for sig S/W.
Incl 4 - Form of action.

(Sentence confirmed but commuted to forfeiture of $75 per month for twelve months. G.C.M.O. 588, 25 Oct 1944)

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

SPJGK
CM 261964

23 SEP 1944

UNITED STATES	)	SAN FRANCISCO PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Fort Mason, California, 24 July 1944. Dismissal, total forfeitures and confinement for one (1) year and six (6) months.
	)	
Second Lieutenant WILLIAM J. BROPHY (0-1062335), Transportation Corps.	)	

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

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

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

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

Specification: In that Second Lieutenant William J. Brophy, Transportation Corps, Transportation Corps Officers Replacement Pool did, without proper leave, absent himself from his station at Fort Mason, California from about 3 May 1944 to about 24 May 1944.

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

Specification 1: In that Second Lieutenant William J. Brophy, * * *, being indebted to Warren P. Wright in the sum of $5.00 for room rent, which amount became due and payable on or about 15 April 1944, did, at San Francisco, California, from about 15 April 1944 to about 19 June 1944, dishonorably fail and neglect to pay said debt.

Specification 2: (Nolle prosequi entered by direction of the appointing authority).

Specification 3: In that Second Lieutenant William J. Brophy, Transportation Corps, Transportation Corps Officers Replacement Pool, being indebted to Joseph T. Ford in the sum of $10.00 for money loaned, which amount became due and payable on or about 15 February 1944, did, at San Francisco, California, from about 15 February 1944, to about 19 June 1944, dishonorably

fail and neglect to pay said debt.

Specification 4: (Nolle prosequi entered by direction of the appointing authority).

Specification 5: In that Second Lieutenant William J. Brophy, Transportation Corps, Transportation Corps Officers Replacement Pool, being indebted to Second Lieutenant Angelo J. Lazzara in the sum of $16.00 for money loaned, which amount became due and payable on or about 2 March 1944, did, at San Francisco, California, from about 2 March 1944, to about 19 June 1944, dishonorably fail and neglect to pay said debt.

Specification 6: In that Second Lieutenant William J. Brophy, Transportation Corps, Transportation Corps Officers Replacement Pool, being indebted to Second Lieutenant Robert C. Sanders in the sum of $70.00 for money loaned, which amount became due and payable on or about 13 May 1944, did, at San Francisco, California, from about 13 May 1944, to about 19 June 1944, dishonorably fail and neglect to pay said debt.

Specification 7: (Disapproved by the reviewing authority).

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

Specification: In that Second Lieutenant William J. Brophy, Transportation Corps, Transportation Corps Officers Replacement Pool, did, at Harmon General Hospital, Longview, Texas, on or about 1 May 1944, feloniously take, steal, and carry away about $25.00, lawful money of the United States, the property of Second Lieutenant W. W. Holmes.

Accused pleaded guilty to Charge I and its Specification; guilty to Specifications 1,2,3,5 and 6 of Charge II and to Charge II, later changing his plea to not guilty to Specification 2; not guilty to Specifications 4 and 7 of Charge II; and not guilty to Charge III and its Specification. By direction of the appointing authority a nolle prosequi was entered with respect to Specifications 2 and 4 of Charge II. Accused was found guilty of all other specifications and guilty of all the charges. No evidence was introduced of any previous convictions. 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 four years. The reviewing authority disapproved the finding of guilty of Specification 7 of Charge II, approved the sentence, reduced the period of confinement to one year and six months, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

a. Charge I.

Over objection there was admitted in evidence Extract Copy of Morning Report of San Francisco Port of Embarkation containing entries of 13 May 1944 "From sick Harmon GH Longview Texas to AWOL eff 3 May 1944", and entry of 24 May 1944 "From AWOL to duty 0800" (R. 11-12, Ex. I). Also admitted, without objection, were certified true copies of teletype message to Harmon General Hospital inquiring date of accused's departure therefrom (Ex. II), reply thereto advising date of departure to be 3 May 1944 (Ex. III), and a special order of the hospital ordering accused to proceed on or about 1 May 1944 to the San Francisco Port of Embarkation (R. 12-13, Ex. IV).

b. Charge II, Specifications 1,3,5 and 6.

Mr. Warren P. Wright, stated that he had known the accused since late in February 1944, at which time he rented the front rooms of his house to the accused and to Lieutenants Clark and Broyard for a sum of money per month divided equally among them (R. 14,15). On 15 May 1944, the three lieutenants moved to a downstairs apartment creating a difference of rent of $5.00, which remained unpaid at the termination of the tenancy, at which time the accused was not present nor did he then or later pay the $5.00, although it was owed by him. In a subsequent conversation with Mr. Wright at Letterman Hospital, the accused acknowledged the debt and said he hoped to pay it before he left the hospital (R. 17).

Mr. Joseph T. Ford, Yardmaster, Fort Mason, California, knew the accused for three days during the middle of February 1944. At the close of the third day, a Saturday, Mr. Ford told the accused that there were a lot of sights to see in the town; that he should "take in" the town. The accused replied that he would like to but happened to be broke. Mr. Ford then gave him $10.00. The accused said he expected a check from home in a few days and he would see that Mr. Ford was repaid (R. 18). Mr. Ford did not see the accused again nor was the $10 repaid. The sum was not solicited but voluntarily offered. The conversation concerning repayment arose after the money had been given (R. 19,20).

Second Lieutenant Angelo J. Lazzara met the accused during February of 1944 and a short time later loaned him $5.00. The accused said he intended to repay with his March pay check. The payment was not made (R. 21). Additional sums of $10 and $1 were solicited and loaned. The last $1 was loaned on 8 March 1944. Repayment was to have been made from a check the accused expected from home. None of the sums was repaid (R.22,23).

The deposition of Second Lieutenant Robert C. Sanders disclosed that he knew the accused for about five months (R. 24) and over a two-weeks period in April 1944 loaned to the accused, in all, $70.00. While at Letterman Hospital, the accused stated that he was getting a loan from the Red Cross. However, he was transferred to Harmon General Hospital before the money was received (R. 25). A letter from Lieutenant Sanders requesting payment was not answered by the accused (R. 25). When the first of the $70 was loaned, the accused "was completely broke", but promised, when he received a check from an undisclosed outside source, to repay the money. Two days later, another portion of the $70 was requested, at which time it was agreed that repayment would be made from the accused's regular Government check (R. 26). Objection was made to the deposition, and sustained, in that it lacked signature or verification (R. 27). However, the defense stipulated that "***if the witness were asked those questions, he would make the answers appearing in the paper***" (Referring to the deposition (R.28)).

c. Charge III.

At the Harmon General Hospital, accused occupied a bed adjacent to Second Lieutenant Walter W. Holmes (R. 38). On the evening of 2 May, Lieutenant Holmes hung his trousers, containing a wallet with $25 therein, over the back of a chair between their two beds (R. 40). The next morning the chair was pulled right up to accused's bed. On the evening of 3 May, Lieutenant Holmes found the $25 missing from the bill fold (R. 41-42). In a statement given during an investigation conducted by Captain Peter D. Hanssen, Inspector General's Department, the accused, after being warned of his rights, stated that he took the money (R. 45). Captain Hanssen read such testimony given by accused at the investigation from the stenographic transcript thereof, without objection, but without the transcript being authenticated or identified by the stenographer.

Evidence for the accused.

The accused borrowed $5 from Second Lieutenant Delbert F. Bettencourt on 31 March 1944 and repaid it next day (R. 52,53). While at Fort McDowell the latter part of May or early June, Second Lieutenant James F. Anderson found that the accused was in need of funds and offered to lend him $5.00. The accused accepted the loan and later repaid it without any trouble (R. 54).

The defense expressly disclaimed any plea of insanity but, as an "extenuating circumstance" and "*** for the further illumination of the court***", offered in evidence the following: Exhibit "A", Abstract of Clinical Record, Station Dispensary, Fort Mason; Exhibit "B", Abstract of Clinical Record, Station Hospital, San Francisco Port of Embarkation; and Exhibit "C", Abstract of Clinical Record, Harmon General Hospital. All contain the same diagnosis of accused, namely, psychoneurosis, anxiety

state. Exhibit "C" also shows date of admission to be 16 April 1944 and date of discharge 3 May 1944.

The accused, after being properly advised of his rights, testified that he was born in Brooklyn. He is 26 years of age. Both of his parents were dead and his step-mother is his closest relative (R. 61-62). He was a clerk in civilian life, employed by the American Express Travel Bureau (R. 62) and the Julius Kaiser Company (R. 72). He volunteered for the draft and enlisted in the regular Army in July 1941 (R. 63). He reported at Fort Amador, Panama Canal Zone, in August, remaining there two years. He worked up to Technical Sergeant, went to Officer Candidate School in August 1943, being commissioned at Camp Davis in November 1943 (R. 63). During that period and while in civilian life he would borrow occasionally, but always repaid. He was never sued for debt (R. 64). After being commissioned he was stationed at Camp Haan for two months in the Replacement Pool, where he borrowed occasionally but always repaid (R. 64-65). His next station was Fort Mason, where he acted as an officer courier (R. 65). While at Fort Mason he drank to excess and had been drinking when he borrowed from Mr. Ford and Lieutenant Lazzara. During the period he stated, "I was in a sort of a state of depression *** I had to go out and mingle with a crowd. Doing that, I spent a lot of money. It seemed to give me temporary relief from the state of mind I was in, so I continued to do it". In his own mind he could not be satisfied or contented, but did not know what started it. Later, knowing he owed so much money, he did not know how he would get around to paying it, but took no steps to correct the condition. He bought a bottle of iodine to commit suicide, but figured something was wrong with him and turned in at the Fort Mason dispensary early in April (R. 65-67). His examination at the dispensary extended over a period of nine days. Thereafter he went to Letterman General Hospital where he stayed a week and then to the Harmon General Hospital where he remained two weeks (R. 68). Before he left the Harmon General Hospital, he found that he had spent his money, so in desperation he took the money from Lieutenant Holmes for his trip to San Francisco, expecting to return it. He told no one that he took the money (R. 70). After his return to Fort McDowell he was permitted to draw only $80 of his pay, which he used to pay his mess bill, Bachelor Officers' Quarters dues, and used the rest for daily articles and occasional bowling (R. 72).

On cross-examination, accused testified that he accepted the money from Mr. Ford as a loan, intending to repay it, but had never made any effort to do so (R. 73). He was advised by the doctor at Harmon General Hospital to stop drinking, but has drunk since then (R. 74).

4. a. Accused pleaded guilty to absence without leave. While the first entry in the morning report is hearsay, since obviously not within the knowledge of the officer making it, its admission did not constitute prejudicial error in view of the accused's plea and other competent evidence in the record.

b. Failure to pay debts amounts to dishonorable conduct in violation of the 95th Article of War where it is accompanied by such circumstances as fraud, deceit, specific promises to pay, or a fraudulent design to evade payment. The evidence introduced established that the accused in a manner not clearly shown became indebted on 15 May 1944 in the sum of $5.00 as a balance due for room rent to Warren P. Wright. There was nothing fraudulent involved in the creation of the obligation. When Mr. Wright called upon the accused at the hospital the accused frankly admitted the indebtedness and stated that he "hoped to pay it before" he left the hospital. There was therefore no conduct on the accused's part with reference to this obligation that could be characterized as dishonorable. So too, as to the obligation of $10.00 to Joseph T. Ford, the basis of Specification 3. Mr. Ford in reality made the accused a gift of the $10.00 and the accused voluntarily promised to repay him and to consider the gift as a loan. He failed to repay it but there is no evidence that he evaded payment or practiced any fraud or deceit upon Mr. Ford at any time. True it is that his plea of guilty admits that his failure to repay was dishonorable, but the facts do not support that conclusion. In fairness and justice to the accused his plea should not preclude the possibility that he was not fully advised regarding, or did not understand, the definition of the term "dishonorable" with regard to the failure to pay obligations. For these reasons the findings of guilty of Specifications 1 and 3 of Charge II should not be sustained.

With reference however to his obligations to Lieutenants A. J. Lazzara of $16 and R. C. Sanders of $70, the fact appears in the record that he did make false promises of repayment out of his expected pay checks and also out of other imaginary checks. This, coupled with his various promises to pay, his failure to pay, and his plea of guilty of dishonorable intentions is sufficient to sustain the findings of guilty of Specifications 5 and 6 of Charge II.

The prosecution established the corpus delicti of the larceny of $25 by the deposition of Lieutenant Holmes. It then called as a witness, Captain Hanssen, who had conducted an investigation at which the statement of the accused had been taken. Without proper foundation being laid, but without objection by the defense, Captain Hanssen said, "With the court's permission I'd like to read from the transcription of the stenographic notes". He then proceeded to read a question and answer statement that contained a confession by accused of the theft. This was irregular, but the irregularity was rendered harmless by the specific admission of guilt made by the accused in his sworn testimony on the stand.

5. War Department records show that accused is 26 years of age, and has a high school education. He served from 7 May 1941 to 10 November 1943 as an enlisted man, attaining the rank of technical sergeant. Upon graduation from Officer Candidate School he was commissioned a second lieutenant, Army of the United States, 11 November 1943. He is single.

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. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specifications 1 and 3 of Charge II, legally sufficient to support the findings of guilty of the charges and the remaining specifications approved by the reviewing authority, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorituzed upon conviction of violation of the 61st and 93rd Articles of War.

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 William J. Brophy (0-1062335), Transportation 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 Specification 1 and Specification 3 of Charge II, legally sufficient to support the findings of guilty of Charge I and its Specification (absence without leave for 21 days), Specifications 5 and 6 of Charge II and Charge II (dishonorable failure to repay money borrowed from fellow officers), Charge III and its Specification (larceny of $25.00 from a fellow officer), and legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the findings of guilty of Specifications 1 and 3 of Charge II be disapproved, 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.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Findings of guilty of Specifications 1 and 3 of Charge II disapproved. Sentence as approved by reviewing authority confirmed. G.C.M.O. 594, 28 Oct 1944)

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

SPJGN
CM 261994

5 SEP 1944

UNITED STATES	)	GUADALCANAL ISLAND COMMAND
v.	)	Trial by G.C.M., convened at Headquarters V Island Command, APO #709, 29 July 1944. Dismissal and total forfeitures.
First Lieutenant JAMES C. CUNNINGHAM (0-1589780), Transportation 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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant James C. Cunningham, Transportation Corps, 457th Amphibian Truck Company, did, at APO 709, on or about 15 March 1944, wrongfully and unlawfully sell one quart of intoxicating liquor for the sum of $30.00 to Technician Fourth Grade Frank A. Busta, 457th Amphibian Truck Company, which intoxicating liquor had been distributed to him through the Black Locker Fund.

Specification 2: In that 1st Lieutenant James C. Cunningham, Transportation Corps, 457th Amphibian Truck Company, did, at APO 709, on or about 15 May 1944, wrongfully and unlawfully sell two quarts of intoxicating liquor for the sum of $40.00 to Private Joseph R. Soroken, 457th

Amphibian Truck Company, which intoxicating liquor had been distributed to him through the Black Locker Fund.

Specification 3: In that 1st Lieutenant James C. Cunningham, Transportation Corps, 457th Amphibian Truck Company, did, at APO 709 on or about 30 May 1944, wrongfully give to Private Joseph R. Soroken, 457th Amphibian Truck Company, the sum of $20.00 to keep on the condition that the said Private Joseph R. Soroken would keep quiet about 1st Lieutenant James C. Cunningham selling intoxicating liquor (whiskey) to Private Joseph R. Soroken and to tell higher authorities if asked that 1st Lieutenant James C. Cunningham had given him the intoxicating liquor voluntarily.

Specification 4: In that 1st Lieutenant James C. Cunningham, Transportation Corps, 457th Amphibian Truck Company, did, at APO 709, on or about 28 May 1944, with intent to deceive 1st Lieutenant John J. Cairns, officially state to the said 1st Lieutenant John J. Cairns, that he, Lieutenant Cunningham, had not sold any whiskey to Private Joseph R. Soroken, which statement was known by the said 1st Lieutenant James C. Cunningham to be false.

He pleaded guilty to and was found guilty of the Charge and all Specifications thereunder. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 15 March 1944 at APO 709 the accused sold a quart of liquor to Technician Fourth Grade Frank A. Busta for the sum of $30 (R. 5-6). On 15 May 1944, the accused sold two quarts of liquor to Private Joseph R. Soroken for an agreed price of $40, receiving $20 thereof in cash and Soroken's agreement to pay $20 on his next pay day (R. 7). Shortly thereafter, the accused saw Soroken and returned to him the $20 and told him not to mention that he, Soroken, had paid for the whiskey, and to say that the accused had given him the whiskey in the event he was ever questioned about it. Soroken, when interrogated by another officer concerning the transaction, admitted the purchase and delivered to such officer the $20 which had been returned to him by the accused (R. 7-8).

The accused's company commander, on or about 28 May 1944 had

Private Soroken brought into the orderly room for disciplinary action because of drunkenness and inquired of him where he had secured the intoxicating beverage. Later on the same day the company commander asked the accused whether he had sold Private Soroken any liquor and was told by the accused that he had not (R. 8-9). The investigating officer, after advising the accused of his rights under the 24th Article of War, secured a voluntary sworn statement from the accused in which he admitted selling the liquor to both of the aforementioned enlisted men and that such liquor was "Black Locker Liquor" (R. 10; Pros. Ex. A). The investigating officer also identified the $20 which had been turned over to him by Private Soroken and the money was admitted into evidence (R. 10; Pros. Ex. B).

The court took judicial notice of the fact that "the Black Locker fund mentioned in Specifications 1 and 2 is under the authority of V Island Command and Higher Headquarters, whereby liquor is made available to officers at low prices, and that such liquor is not to be sold to enlisted men" (R. 15).

4. The evidence for the defense shows that the organization's inspecting officer and technical advisor, the accused's company commander, his company's executive officer, and his company's operations officer all rated the accused as "excellent" for military efficiency and ascribed to him an excellent character stating that the accused had made a commendable record in the operation of his "shop" (R. 11-14).

The accused, after explanation of his rights as a witness, testified as follows, without cross-examination:

> "Gentlemen, I have committed the offenses for which I am being tried. I admit that I have made a mistake, and I am sorry for it. I believe very strongly, however, that I have been of value to the Service, and that I have performed my duty well as an officer. I beg of the court to consider this, and to believe me when I say that I could still be a good officer, and a gentleman as well, if I am given another chance. That's all I have to say" (R. 15).

5. Specifications 1 and 2, respectively, allege that on 15 March 1944 the accused wrongfully and unlawfully sold one quart of intoxicating liquor for the sum of $30 to Technician Fourth Grade Frank A. Busta and that on or about 15 May 1944, he similarly sold two quarts of intoxicating liquor for the sum of $40 to Private Joseph R. Soroken, which liquor in both instances had been distributed to him through the "Black Locker Fund". Specifications

3 and 4, respectively, allege that the accused, on or about 30 May 1944 wrongfully gave to Private Joseph R. Soroken the sum of $20, on the condition that the said Private Soroken would keep quiet about the accused's selling intoxicating liquor to Private Soroken and would tell higher authorities, if asked, that the accused had given him, Private Soroken, the intoxicating liquor voluntarily, and that the accused on 28 May 1944, with intent to deceive his named company commander officially stated that he, the accused, had not sold any whiskey to Private Soroken, which statement was known by the accused to be false. The four Specifications are laid under Article of War 96. "Disobedience of standing orders" is violative of Article of War 96 as are also all disorders and neglects which are prejudicial to good order and military discipline in which category the selling of intoxicating liquor to enlisted men in violation of standing orders, the attempted inducement of an enlisted man to make false statements, and the making of false statements themselves, all clearly fall (MCM, 1928, par. 152a).

The evidence for the prosecution conclusively shows that on two occasions the accused sold intoxicating liquor to two different enlisted men at exorbitant prices. The liquor which was sold was "Black Locker Liquor" which had been furnished to the accused at reduced prices for his own consumption and which was not to be re-sold by him to enlisted personnel. The accused in his statement to the investigating officer and by his plea of guilty has admitted these two offenses. The testimony of Private Soroken conclusively shows that the accused returned to Private Soroken his initial payment of $20 of the purchase price of the whiskey sold to him on condition that Private Soroken, if asked about the transaction, would say that the accused had given him the liquor and had not sold it. The accused by his plea of guilty has also admitted this offense. The accused's company commander definitely testified that the accused when interrogated by him in the performance of his military duty, investigation of the drunkenness of Private Soroken, stated that he had not sold Private Soroken any whiskey, which statement of necessity was known by the accused to be false in as much as the sale had been consummated about two weeks previously by the delivery of the whiskey to Private Soroken and the acceptance from him of $20 as a partial payment thereon. The accused by his plea of guilty has also admitted this offense. The evidence therefore establishes beyond a reasonable doubt the accused's guilt of the offenses as alleged and amply supports the court's findings of guilty of the Charge and all Specifications thereunder.

6. The accused is about 22 years of age. The records of the Office of The Adjutant General show that he has had enlisted service from 4 June 1941 until 2 April 1943 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty

since the latter date. He was promoted to first lieutenant on 7 February 1944. He attended high school for four years but did not graduate. Except for part-time employment while attending high school his only employment was with a "riding Academy" as a riding instructor for a short time at a salary of $50 per month.

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 of the Charge and all Specifications thereunder and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Goldin, Judge Advocate.

SPJGN
CM 261994

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 First Lieutenant James C. Cunningham (0-1589780), 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 sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures imposed be remitted and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 654, 16 Dec 1944)

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

SPJGQ
CM 262001

15 SEP 1944

UNITED STATES	FOURTH SERVICE COMMAND
v.	Trial by G.C.M., convened at Fort Oglethorpe, Georgia, on 9 August 1944 and continued until 16 August 1944. Dismissal.
Second Lieutenant VELMA G. NETTLES (L-402953), Women's Army Corps, 20th Regiment, Third WAC Training Center	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Velma G. Nettles, Women's Army Corps, was, while en route from Birmingham, Alabama, to Chattanooga, Tennessee, on or about 23 July 1944, in a public place, to wit, on a railroad train of the Southern Railway line, drunk and disorderly while in uniform.

Specification 2: In that Second Lieutenant Velma G. Nettles, Women's Army Corps, was, at Chattanooga, Tennessee, on or about 23 July 1944, found nude in a hotel room in the Read House, in the City of Chattanooga, Tennessee, with an enlisted man not her husband, to wit, Private Kendrick Paine.

Specification 3: In that Second Lieutenant Velma G. Nettles, Women's Army Corps, was at Chattanooga, Tennessee, on or about 23 July 1944 wrongfully drinking whiskey with Private Kendrick Paine, an enlisted man not her husband in a hotel room in the Read House, in the City of Chattanooga, Tennessee.

She pleaded not guilty to and was found guilty of all of the Charges and Specifications. No evidence of any previous conviction was introduced. She 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 introduced by the prosecution shows that the accused at the time of the occurrence hereinafter related was in the military service of the United States (R. 7), and on 23 July 1944 she boarded a train at Birmingham, Alabama, for Chattanooga, Tennessee. During the trip an enlisted man, Private Kendrick Paine, sat down beside her. A sailor and an enlisted WAC sat on the seat directly in front of her and facing her. About twenty minutes after the soldier and sailor, who were strangers to the accused, sat down, accused offered them a drink of whisky from a bottle that she removed from her bag. She and the two men thereupon consumed the contents of the bottle in the presence of others in a crowded car. She became drunk and disorderly. She placed her head on Paine's shoulder and he placed his on hers. She sat in a position with one foot up on the heater along the side of the car, her knee up in the window, and legs spread apart, so that an enlisted WAC, who sat beside a sailor opposite her, "could see everything she had". She yelled out of the window at two stations to the people on the platform, telling the people at Valley Head "that they had a nice station" (R. 8, 9). She smelled of alcohol and was intoxicated (R. 10, 13, 19). Paine got off at Chattanooga with accused and carried her bag to a cab. They made an appointment to meet at 2000 at the Read House (R. 10, Pros. Ex. 1). Accused rode in the cab to Fort Oglethorpe and back again, and was observed by several witnesses to be in an intoxicated condition (R. 19). As a result, she was placed under surveillance by the military authorities. The cab took her to the Read House where she was met by Paine. The two entered the hotel and went to a bedroom engaged by Paine (R. 20, Pros. Ex. 1). At 2230 two male and two female members of the military police knocked on the door of Paine's room. After a wait of three or four minutes, they were admitted by Paine who was dressed only in a pair of trousers. The accused was seen nude coming out of the bathroom adjoining the room. She was pushed back into the bathroom and told to get her clothes on. Her clothes were lying on a table at the foot of one of the twin beds in the room. The clothes were handed to her through the bathroom door. There was a partially filled bottle of whiskey on the dresser and two glasses. The bed was rumpled. Accused smelt strongly of alcohol and stumbled while getting into a car (R. 22, 25, 29). Paine testified by deposition that he and the accused had several drinks together in the room where they were together for about three hours, and that during that time she appeared in his presence in the nude (Pros. Ex. 1).

4. Accused elected to take the stand as a witness in her own behalf and testified under oath substantially as follows: She has been in the

service since 23 February 1943 and served six months in England, returning to this country in March 1944 to attend an Officer Candidate School. She went to Birmingham, Alabama, on 22 July 1944, and just before she got on the train to return (on 23 July 1944) she had a bottle and a half of beer. She did not shout out of the window in a drunken or boisterous manner. Private Paine and a sailor sat with her and an enlisted woman. She (accused) had about half of a half-pint of whisky in her utility bag and gave it to Private Paine and the sailor and she had two small drinks with them. She did not lay her head on Private Paine's shoulder. She was not under the influence of intoxicants when she went out to Fort Oglethorpe. She remained at the post for fifteen minutes before returning to Chattanooga. She had an appointment with Lieutenant H. Moore of the United States Navy and was to meet him about eleven o'clock at the Read House. When she arrived there about eight-thirty, she met Private Paine and talked with him in the lobby of the hotel. About nine-thirty he suggested that she go up to his room and take a shower, so she went up with him and after he left her, she smoked a cigarette and took a drink from a bottle which was in the room. She got sick, was nauseated, and went into the bathroom. She took a shower and just as she finished, she heard people in the room. She thought she was alone all the time she was in Private Paine's room. When the military police told her to do so, she put on her clothes and came out of the bathroom. She did not drink any whisky with Private Paine in his room nor undress in front of him (R. 32-42).

On cross-examination she testified that she was never married to Private Paine. She was in his room only for an hour. She denied she had arranged to meet Private Paine. Her appointment with Lieutenant Moore was for eleven o'clock. She did not take a shower at the post because she wanted to use the same taxi to return to Chattanooga and save half the fare (R. 42-53).

5. In rebuttal it was shown that the bath towels in the bathroom were all freshly laundered and on the racks when the military police entered the room, that the soap was all wrapped in paper coverings, and there was no water in the tub (R. 56, 57).

6. Accused, a female officer, is charged under three Specifications with violating the 95th Article of War, which reads:

> "Conduct Unbecoming an Officer and Gentleman.--Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." (App. 1, p. 224, M.C.M. 1928)

The evidence for the prosecution, although emphatically denied by the accused, is clearly convincing that she was drunk and disorderly in a public place in uniform at the time and place averred in Specification 1; that at the time and place averred in Specification 2 she was found nude in a bathroom, which was a component part of a hotel room

in the Read House, with an enlisted man who was not her husband and where she had been drinking with the enlisted man as averred in Specification 3. The weight of the evidence supports the findings of fact averred in the Specifications. The testimony of the six disinterested witnesses considerably outweighed the denial of the accused.

While there was no direct evidence that the accused was in uniform during the occurrence on the railway train, such fact may reasonably be inferred from the surrounding circumstances: That she was in the military service; that Army Regulations required that she be in uniform while appearing in public; that she was recognized as a lieutenant upon her arrival at Fort Oglethorpe; and that some of her articles of wearing apparel were described in various parts of the record as "G. I." underwear, a shirt, a blouse, and a utility bag--all articles answering the description of parts of a uniform.

Notwithstanding that the findings of fact as averred in the three Specifications have been legally supported by the evidence, do they constitute violations of the 95th Article of War?

With reference to Specification 1, it has been consistently held by The Judge Advocate General that the conduct of an officer in uniform, who is drunk and disorderly in public, is conduct "unbecoming an officer and a gentleman" and violates the 95th Article of War (CM 230222, 17 BR 331). For the first time, however, we are asked to determine whether the provisions of the 95th Article of War apply to a female officer, who naturally cannot be properly described as a "gentleman". It seems likely that the remote possibility of a female becoming an officer in the military forces of the United States did not occur to the minds of Congress when the Article in question was framed and adopted. However, we believe that as it applies to "any officer", the phrase "unbecoming...a gentleman" merely defines the conduct and not the person. In other words, if the conduct of any officer is such that it has been, or will be, considered to be unbecoming an officer and a gentleman, then any officer, whether it be male or female, who violates that standard of conduct, may be convicted of violating the Article. The conduct described in the case under discussion has, as stated, been frequently held to be conduct "unbecoming an officer and a gentleman." As the accused, an officer, has been convicted of such conduct, the same penalty should apply. The fact that she is a woman certainly should not lower the standards of conduct expected and required of officers. Conversely, as she is subjected to the same rules, regulations, and laws as male officers, the standards of conduct may not be raised above those existing and applicable to males without congressional authority. It follows, in view of the above reasoning, that the conviction of this Specification is legally valid and sustained by the record.

With reference to Specification 2 of the Charge it was clearly shown that accused spent several hours in a hotel room with Private Paine during which time she disrobed and appeared before him in the nude. When the military police were admitted to the room she was

observed in the bathroom adjoining and part of the room "standing by the door without any clothes on" (R. 22). One witness said that she was coming out of the bathroom in the nude into the bedroom where Private Paine was and had been for some time. She was, therefore, as averred in the Specification, "found nude in a hotel room * * * with an enlisted man not her husband" at the time and place set forth therein. To knowingly and consciously appear nude before one of the opposite sex is, according to the commonly accepted standards of this day, indecent and immodest, and, when coupled with the surrounding circumstances shown by the evidence in this case, is conduct lacking gentility and proof that accused is morally unfit to be an officer to or to be considered the counterpart of a gentleman—namely, a lady. Applying to her the test set forth in the Manual for Courts-Martial, par. 151, page 186, "This article (95) contemplates such conduct by an officer or cadet, which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness", the Board is convinced that the evidence shows beyond any reasonable doubt that this officer was properly and legally convicted of conduct unbecoming an officer and should suffer the penalty of dismissal as mandatorily prescribed by the 95th Article of War.

On the occasion in question, when the military police entered the hotel room and found the accused nude in company with Private Paine, who was entirely unclothed except for a pair of trousers which he was then buttoning, they discovered a bottle of whisky and two glasses on the dresser.

By deposition Paine testified that he and the accused had several drinks while they were in the room together for a period of about three hours. The accused stated that, after Paine had gone to the room with her, he left and thereafter she took a drink while alone. When taken into custody by the military police shortly after the episode in the hotel room the accused smelled strongly of alcohol and stumbled as she got into a car. Thus, the weight of the evidence compels the conclusion beyond reasonable doubt that she did drink liquor with Paine under such shameful and disgraceful circumstances that the act was clearly a violation of Article of War 95.

The allegation of this additional offense does not constitute an unnecessary multiplication of charges arising out of the same circumstances. While the evident impropriety and indecency alleged in Specification 2 coexisted with the drinking alleged in the Specification 3, and although each may be said to be an aggravation of the other, each is nevertheless a separate and distinct offense of sufficient gravity, under all the circumstances, to warrant prosecution for both.

For the reasons set forth the finding of guilty of Specification 3 is held proper.

7. War Department records show the accused to be 36 years of age, having been born 30 January 1908, in Alabama. Her permanent address is

Linden, Alabama. She graduated from high school and was employed for 12 years as bookkeeper, stenographer and secretary by various persons and firms in Birmingham, Alabama. She enlisted in the WAC 2 February 1943 and, upon completion of her basic training, served overseas in ETO as a secretary of Chief of Section of the Visitors' Bureau in London for six months. She subsequently attended OCS, and on 17 June 1944 was commissioned a second lieutenant, WAC.

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

William H. Bamberger, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

(Resigned)

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

SPJGV
CM 262158

13 SEP 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Lake Charles, Louisiana, 12 August 1944. Dismissal.
Second Lieutenant WILLARD CAMPBELL (O-805006), 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 Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Willard Campbell, Squadron S, Lake Charles Replacement Training Unit (Medium Bombardment), did without proper leave absent himself from his organization at Lake Charles Army Air Field, Lake Charles, Louisiana, from about 5 July 1944 and did remain so absent until apprehended at Lake Charles, Louisiana, on or about 19 July 1944.

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

3. The evidence for the prosecution shows that accused, an Army Air Forces pilot, absented himself without leave from his organization and station at Lake Charles, Louisiana, 5 July 1944 (R. 6-7; Ex. 1) and remained absent without leave until 19 July 1944 when he was apprehended by military police at the Charleston Hotel, Lake Charles, Louisiana, where he was a registered guest (R. 8-11; Ex. 2).

4. After being fully informed of his rights as a witness, accused elected to make a sworn statement in which he said in substance, that he had been in the military service twenty-seven months. He entered the service at the age of 18 while still in school. He had never held a position or been employed. He had about 500 hours flying time in B-26's and was in the last stages of his training. He married about three months before entering the service and until a month before he absented himself without leave his wife had lived with him in Lake Charles. About this time he and his wife had a quarrel resulting in their separation, and she went home. Prior to their separation his wife had not been well because of her pregnancy, and after her return home he learned through his family that she was seriously ill and in danger of losing her baby. This news upset him and he became very nervous. His flying was erratic, he couldn't eat and then started drinking. He was out of his mind and didn't realize what he was doing when he absented himself from 5 July to 19 July 1944, until it was too late to do anything about it. On cross-examination accused admitted that he had not consulted anyone in authority about his domestic difficulties or obtaining emergency leave to see his wife. He had gone out with another woman on two occasions during the period of his unauthorized absence (R. 17-19).

Accused was considered by his co-pilot, Second Lieutenant Harold W. Egman, and Corporal Lovelace Kitchen, a member of accused's crew, to be a good pilot, very dependable, possessed a high sense of responsibility toward his duties, was a hard worker, and was respected (R. 15-16).

5. The evidence, including accused's own testimony and pleas of guilty, clearly establishes the commission of the offense charged and fully sustains the findings of the court.

6. Accused is 20 years of age and married. After finishing high school he enlisted in the Air Force Enlisted Reserve as an aviation cadet 7 May 1942. He successfully completed the advanced course in two-engine flying at Blytheville Army Air Field, Blytheville, Arkansas, 30 June 1943, was commissioned second lieutenant, Air-Reserve, and ordered to active duty the same date.

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, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Thomas N. Jaffy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGV
C.M 262158

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 Willard Campbell (0-805006), 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. In view of accused's youth, his previous good record, and valuable training as a pilot, I recommend that the sentence be confirmed, but that the execution thereof be suspended during good behavior.

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 580, 25 Oct 1944)

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

SPJGK
CM 262189

28 SEP 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Army Air Field, Alexandria, Louisiana, 2 August 1944. Dismissal and total forfeitures.
Second Lieutenant JAMES W. AMIDEI (0-757643), Air Corps.	

OPINION of the BOARD OF REIVEW
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: Violation of the 61st Article of War.

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

Specification 2: In that Second Lieutenant James W. Amidei, 221st Army Air Forces Base Unit, Combat Crew Detachment, did without proper leave, absent himself from his station at Army Air Field, Alexandria, Louisiana, from about 14 June 1944 to about 26 June 1944.

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

Specification 1: In that Second Lieutenant James W. Amidei, Combat Crew Detachment, 221st Army Air Forces Base Unit, did, at Alexandria, Louisiana, on or about 10 June 1944, with intent to deceive and injure, wrongfully and unlawfully make and utter to the LaSalle Cafe, Alexandria, Louisiana, a certain check in words and figures as follows, to-wit:

Dalhart, Texas, June 10 1944 No._____

FIRST NATIONAL BANK IN DALHART
88-2172

TO Cash or order $25.00

Twenty-five x no/100 DOLLARS

/s/ James W. Amidei
2nd Lt. A.C. 0-757643

and by means thereof did fraudulently obtain from said LaSalle Cafe, cash in the amount of twenty-five dollars ($25.00), he, the said Second Lieutenant James W. Amidei, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank in Dalhart, Dalhart, Texas, for the payment of said check.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: Same form as Specification 1 but alleging check dated 12 June 1944 for $25 uttered to Weiss and Goldring at Alexandria, Louisiana, and that $25 was thereby fraudulently obtained by the accused.

He pleaded guilty to Specification 2 of the Charge and the Charge. He pleaded not guilty to Specification 1 of the Charge and to the Additional Charge and all of its Specifications. He was found not guilty of Specifications 2 and 3 of the Additional Charge and guilty of the Charge and its Specifications and of Additional Charge and Specifications 1 and 4 thereof. Evidence was introduced of a previous conviction for absence without leave for a period of 18 days adjudged on 15 April 1944 for which the accused was sentenced to forfeit $50 per month for twelve months. In the instant case 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 disapproved the findings of guilty of Specification 1 of the Charge, approved only so much of the sentence as provides for dismissal from the service and forfeiture of all pay and allowances due or to become due and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

a. The evidence for the prosecution showed that the accused was during the occurrences hereinafter related in the military service as a second lieutenant, Air Corps, stationed at Army Air Field, Alexandria, Louisiana (R. 8). On 15 June 1944 the commanding officer, Major F. J. Moore, was unable to locate the accused at the field and organized and instituted a search for the accused which proved unsuccessful (R. 9). It was stipulated that if certain witnesses were called they would testify that they apprehended the accused on 26 June 1944 in Dallas, Texas, at which time he was dressed in the uniform of a second lieutenant and stated that he had left his organization at Alexandria on 14 June 1944. Accused was returned to his station on 26 June 1944 (Ex. 2).

b. It was stipulated that if Mr. Ed Phillon were called as a witness he would testify that he was the owner and manager of the LaSalle Cafe, Alexandria, Louisiana, and on or about 10 June 1944 accused requested him to cash a $25 check. This check was drawn on the First National Bank of Dalhart, Texas, dated 10 June 1944, in the sum of $25, signed by the accused and was cashed by the witness for the accused. When presented for payment upon the bank on which it was drawn, it was returned unpaid marked "INSF" (Ex. 3).

c. Morris J. Weiss, president of Weiss and Goldring, Alexandria, Louisiana, testified that on or about 12 June 1944, an unidentified officer presented to him at his place of business, a check in the sum of $25 drawn on the First National Bank of Dalhart, Dalhart, Texas, dated 12 June 1944, signed by the accused, which he accepted and gave in exchange the sum of $25. The check was returned by the bank in which he deposited it and charged to his account. Shortly thereafter the check was made good by Flight Officer Donald A. Neuman. Mr. Weiss was positive, however, that it was not Flight Officer Neuman who originally presented the check to him (R. 21-23).

The deposition of Charles C. Wood, president of the First National Bank of Dalhart, Dalhart, Texas, was offered and received without objection (R. 37; Ex. 4). According to the testimony contained therein, the accused had maintained an account with that bank since February 1944. On 1 June 1944 his balance was $5. On 10 June 1944 his balance was $135 but during that day two checks in the sum of $25 each were paid, leaving a balance at the end of the day of $85 which condition continued to 12 June 1944. Between 12 June and 17 June 1944 the accused's account was depleted by the presentment of three other checks in the sum of $25 each leaving a balance of $10. The two checks of $25 each, cashed by LaSalle Cafe and Weiss and Goldring were presented to the drawee bank for payment between the 17th and 24th of June 1944 and were returned unpaid because of insufficient funds in the accused's account. Accused had no arrangement with the bank whereby it would honor any of his overdrafts (Ex. 4).

4. The accused having been advised of his rights elected to testify (R. 40). He stated that on 14 June 1944 he left the Army Air Field, Alexandria, Louisiana, without authority for the purpose of getting married. He went to Dallas, Texas and remained there until 26 June 1944 when he was "picked up" by the military authorities. He had intended to return to his station on that date but was unable to do so because of illness (R. 43).

With reference to Specifications 1 and 4 of the Additional Charge the accused testified that he kept no accurate account of his balance with the First National Bank in Dalhart but relied upon his memory. During the month of May 1944 his balance was very low, and he knowingly drew several

checks upon it which overdrew the account (R. 44-45). He made a deposit to cover this overdraft but again overdrew the account in early June. On 8 June 1944 he made a deposit of $130. During the first week in June he had been drinking very heavily and while intoxicated he issued three checks in the sum of $25 each which, when he sobered up, he did not remember issuing (R. 47-49). He made it a practice to prepare and retain on his person a number of checks to be used in the event he became so drunk he was unable to write checks (R. 58-59).

He admitted that he cashed the check for $25 at the LaSalle Cafe on 10 June 1944 which is the basis of Specification 1 of the Additional Charge. He claimed that he thought at that time that his balance at the bank was $110. He did not take into consideration, however, the three checks written by him when he was intoxicated, which checks depleted his balance to the point where it was not sufficient to meet the $25 check cashed at the LaSalle Cafe (R. 51-52).

He admitted that he issued the $25 check made the basis of Specification 4 of the Additional Charge, but claimed that he gave this check to Flight Officer Donald A. Neuman, as part of a loan totaling $75 that he made to Flight Officer Neuman. He received no benefit from the issuance of this check. At the time he gave the check to Flight Officer Neuman he thought he had a balance at the bank upon which it was drawn of $85. He denied that he cashed the check at Weiss and Goldring (R. 53). The check was returned unpaid because again he did not remember about the three checks that he had issued when he was intoxicated which had depleted his balance (R. 58).

Flight Officer Donald A. Neuman testified that the $25 check made the basis of Specification 4 of the Additional Charge was given to him on the late afternoon of 12 June 1944 by the accused as part of a loan of $75. He thereupon took the check to Weiss and Goldring's place of business and cashed it. He did not turn over to the accused any part of the proceeds of the check (R. 70-72). He also corroborated the accused that when the accused started out on a spree he would write out two or three checks in advance to be used if necessary because he was not able when intoxicated to write his signature legibly (R. 77-78). At the time witness cashed the check through Mr. Weiss, he signed the accused's name on the back of the check and showed Mr. Weiss the accused's AGO card (R. 72). He could not explain how the accused's crew number got on the check. He himself did not know the accused's crew number (R. 73). Witness himself was away on leave in June and upon his return with accused he learned that the accused thought that he owed him only $75, when, in fact, he owed him $125. The reason for the difference was that the accused did not remember $50 that he had loaned the witness in early June (R. 76-77).

5. The evidence for the prosecution, the testimony of the accused and the plea of guilty, clearly established the accused's absence without leave

from his station at Army Air Field, Alexandria, Louisiana, from 14 June 1944 to 26 June 1944 as averred in Specification 2 of the Charge.

The evidence for the prosecution and the testimony of the accused also clearly established that the accused did, on the dates and at the place averred in Specifications 1 and 4 of the Additional Charge, issue the two checks of $25 each described therein. The Specifications, however, averred that the accused issued them with intent to deceive and, by means of the checks, fraudulently obtained cash in exchange for them.

The defense of accused is that he believed he had sufficient funds on deposit to meet the checks. He based the mistaken belief upon his forgetfulness of issuing three checks while he was drunk. This novel defense was rejected by the court, and properly so for the reason that even if it is accepted as true that he could not recall negotiating checks while drunk, he admitted that he made the checks out in full at a time when he was in full possession of his faculties. His practice, if true, of making out checks as a preliminary to going on "a spree" and then unconsciously using them while drunk was undoubtedly unusual and an extremely careless one. He also admitted that when sober he deliberately issued checks during the month of May which overdrew his account. The evidence therefore convincingly shows that he knew that there were not sufficient funds of his on deposit with the bank when he issued the two checks under discussion. He was apparently taking the chance that either the bank would honor the checks without sufficient funds on hand or that he could, as he had done in the past, make a deposit before the checks were presented. His manner of conducting his bank account and issuance of checks while grossly careless, did not clearly show any intent to defraud. There was no evidence of record whether he made good the LaSalle check of $25, but the record does show that he made all of the other checks good within a reasonable time which indicates that his purpose was to obtain a temporary credit and not to defraud. The record therefore does not support that part of the findings of either Specification. The evidence shows beyond a reasonable doubt the wrongful failure of accused to maintain a sufficient bank balance to meet the checks described in Specifications 1 and 4 of the Additional Charge, and the Additional Charge, an offense in violation of Article of War 96.

To constitute an offense under the 96th Article of War it is not necessary in a worthless check case to allege or prove intent to defraud, nor that the maker of the worthless check obtained anything of value in exchange for the check. Discredit is brought upon the service when a check issued by one in military service is dishonored for insufficient funds, (CM 249006, Vergara and authorities cited therein). It discourages the holder of the checks from extending similar credit to other Army personnel. In other words it discredits the service. Therefore the accused's act in issuing these checks when he knew that there were not sufficient funds on deposit to meet them was wrongful and as both checks, showing on their face that they were issued by an officer, were put in circulation and were returned dishonored for the reasons stated discredit was brought upon the service. Such constitutes a

violation of the 96th Article of War. If the accused's story is believed that he gave the check to Neuman as a loan, nevertheless he intended that Neuman should cash it and thereby obtain $25 for it. However, this story did not ring true. Mr. Weiss was positive that it was not Neuman who cashed the check. The person who cashed it supplied the accused's crew number which was not known to Neuman. The same person signed the accused's name on the back of the check. A comparison of signatures supports the court's findings that it was the accused himself who obtained the money.

6. The War Department records show the accused to be 29 years of age and single. (The record of trial shows he married in June 1944). He graduated from high school and attended a business college of bookkeeping and accounting for 1½ years. For four years prior to entering the service he managed a restaurant in Chicago for his father. He enlisted in the service (Coast Artillery) in March 1941. On 1 October 1942 he became an aviation cadet and was commissioned second lieutenant, Air Corps, 23 October 1943 at AAF Bombardier School, Victorville, California.

7. The court was legally constituted and had jurisdiction over the accused and the offense. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the finding of guilty of Specification 2 of Charge I and of Charge I, legally sufficient to support only so much of the finding of guilty of Specifications 1 and 4 of the Additional Charge as involves findings that accused wrongfully failed to maintain a sufficient bank balance to meet the checks therein described, in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96.

Irving G. Zon, Judge Advocate.

Earle Stephens, Judge Advocate.

Hermann Mayer, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 3 - 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 James W. Amidei (O-757643), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of Specification 2 of Charge I (Absence without leave 12 days) and of Charge I, and only so much of the finding of guilty of Specifications 1 and 4 of the Additional Charge as involves findings that accused wrongfully failed to maintain a sufficient bank balance to meet the checks therein described, in violation of Article of War 96; and legally sufficient to support the sentence and to warrant confirmation thereof. The record of trial discloses that the accused was convicted in April 1944 by a general court-martial of absence without leave of 18 days in violation of Article of War 61. In that case the approved sentence imposed a forfeiture of pay of $50 per month for 12 months. Accused's repeated misconduct shows that he has no proper appreciation of his duties and responsibilities as a commissioned officer. 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 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 as approved by reviewing authority confirmed. Forfeitures remitted. G.C.M.O. 599, 3 Nov 1944)

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TITLE

DATE	BORROWER'S NAME	EXT.